
Give Me Your Tired, Your Poor, and Your Country
Shoppers: Reevaluating the Firm Resettlement
Requirement in U.S. Asylum Law after *Maharaj v.*
Gonzales

I. INTRODUCTION

The United States has always been a place of refuge for people fleeing persecution or seeking protection. As Lady Liberty raises her torch to the world, the words inscribed on the statue ring out as an explicit invitation to the “huddled masses,” “wretched refuse,” “homeless,” and “tempest-tossed” of other nations.¹ Each year the United States provides homes to tens of thousands who fear or face persecution, accepting a higher number of refugees than all other countries combined.² A refugee is someone who cannot stay in, or return to, their original country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]”³ Those living outside the

1. EMMA LAZARUS, THE POEMS OF EMMA LAZARUS IN TWO VOLUMES: VOL. I. NARRATIVE, LYRIC, AND DRAMATIC 202–03 (Cambridge, The Riverside Press 1889), *available at* <http://www.hti.umich.edu/cgi/t/text/text-idx?c=amverse;cc=amverse;rgn=div2;view=text;idno=BAL7876.0001.001;node=BAL7876.0001.001%3A34.3>.

THE NEW COLOSSUS.
NOT like the brazen giant of Greek fame,
With conquering limbs astride from land to land;
Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glow world-wide welcome; her mild eyes command
The air-bridged harbor that twin cities frame.
“Keep, ancient lands, your storied pomp!” cries she
With silent lips. “Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door!”

2. U.S. DEP’T OF STATE, U.S. DEP’T OF HOMELAND SEC., U.S. DEP’T OF HEALTH AND HUMAN SERV., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2006: REPORT TO THE CONGRESS 2, 54 (2006), *available at* <http://www.state.gov/documents/organization/52475.pdf>.

3. 8 U.S.C. § 1101(a)(42)(A) (2000).

United States may apply for “refugee” status while those in the United States or at a port of entry may apply for “asylum.”⁴

Even so, a limited number of spots are granted to refugees and asylees each year. This number is set by the U.S. President, who consults with Congress, and may be modified in cases of emergency. In 2005, the admissions ceiling for refugees was set at seventy thousand persons.⁵

According to U.S. immigration law, an alien may not obtain asylum in the United States if that person was firmly resettled in a third country before entering the United States.⁶ Thus, courts are faced with the task of determining whether or not a person was “firmly resettled,” and the outcome has not always been consistent.⁷ Some courts find resettlement only where there has been a direct offer of permanent residency, while other courts are willing to consider the totality of circumstances—family ties, legal rights, and intent to stay—in determining whether resettlement has occurred.

A recent Ninth Circuit trend makes it easier for asylum seekers to gain legal status in the United States and encourages country shopping⁸—an activity adverse to asylum’s purpose and one that may create an undue burden on the U.S. economy. To be true to the statutory text and still honor the purpose of asylum, courts should return to the totality of circumstances standard for determining resettlement but give first priority and most weight to the existence of an offer.

Section II of this Note will briefly describe the history of the resettlement doctrine and outline the conflict between circuit courts. Section III presents the case of *Maharaj v. Gonzales*,⁹ in which a family sought asylum in the United States after spending four years in Canada. Using this 2006 Ninth Circuit case as a backdrop, section IV evaluates current interpretations of the firm resettlement requirement and its implication for future cases. The conclusion section summarizes the main

4. U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES, 2005 I (May 2006) [hereinafter ANNUAL FLOW REPORT].

5. *Id.* at 2.

6. Debbie M. Schell, Annotation, *When Has Alien Firmly Resettled in Another Country so as to Mitigate Against or Preclude Grant of Asylum in the United States*, 189 A.L.R. Fed. 231, at 231 (2003).

7. *See, e.g.*, *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006) (using totality of circumstances approach and finding insufficient evidence of firm resettlement); *Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004) (using formal offer approach and finding no firm resettlement in Senegal based solely on a lengthy stay); *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001) (finding that government documents approving asylum application—without a formal offer—were not sufficient evidence to establish firm resettlement); *Mussie v. INS*, 172 F.3d 329 (4th Cir. 1999) (finding firm resettlement based on alien’s plentiful opportunities and comfortable circumstances in Germany even when no offer of permanent residency existed).

8. *See infra* note 139.

9. 450 F.3d 961 (9th Cir. 2006).

arguments and emphasizes the importance of a clear standard for determining firm resettlement.

II. BACKGROUND

A. *History of the Firm Resettlement Doctrine*

The doctrine of firm resettlement has its roots in the 1951 Convention Relating to the Status of Refugees, which established an international framework for protecting asylum seekers.¹⁰ In its definition of a refugee, the convention excludes any “person who is 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 nationality of that country”¹¹ and any person who “has acquired a new nationality, and enjoys the protection of the country of his new nationality[.]”¹² Although the central purpose of the 1951 convention was to shield “persons deprived of the rights and protections that national citizenship ordinarily affords,” the above provisions indicate that persons who have the rights and protections that citizenship affords do not need protection in another country.¹³

The obligations outlined in the 1951 convention were formally implemented with the passage of the Refugee Act of 1980.¹⁴ This act codified asylum law and marked the first time that aliens who were physically present in the United States could legalize their presence by applying for asylum.¹⁵

1. *Pre-1990 application*

The first Supreme Court case to address firm resettlement was *Rosenberg v. Yee Chien Woo*.¹⁶ But before 1990, an alien’s resettlement in another country was only one factor to be considered in evaluating an asylum claim.¹⁷ Courts that did look at resettlement deemed it reasonable

10. See Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT’L L. REV. 47, 49 (2004).

11. Convention Relating to the Status of Refugees art. I(E), Apr. 22, 1954, 189 U.N.T.S. 150.

12. Convention Relating to the Status of Refugees art. I(C)(3), Apr. 22, 1954, 189 U.N.T.S. 150.

13. Sloane, *supra* note 10 at 49.

14. *Id.* at 53.

15. Kathryn A. Ditrack Heebner, *Protecting the Truly Persecuted: Restructuring the Flawed Asylum System*, 39 U.S.F. L. Rev. 549, 552 (2005).

16. 402 U.S. 49 (1971).

17. *Maharaj v. Gonzales*, 450 F.3d 961, 968 (9th Cir. 2006).

to rely on length of stay “and other attendant circumstances” to determine whether resettlement had occurred.¹⁸ The aliens in *Chinese American* were found to be firmly resettled in Hong Kong because their asylum applications were filed about twenty years after their original flight from communist China.¹⁹ The court made no inquiry “whether the government of Hong Kong had extended to the aliens an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”²⁰

Similarly, in *Farbakhsh v. INS*, the Eighth Circuit denied asylum to an Iranian alien based on a variety of circumstantial factors.²¹ The alien was found firmly resettled in Spain based on the fact that he lived there more than four years without fear, intended to remain in Spain, and had two younger siblings who lived there.²² The court made “no explicit mention of the formal issuance of an offer of permanent resettlement”²³

2. Regulatory and statutory changes

On October 1, 1990, federal regulations made resettlement in another country a mandatory basis for denying asylum.²⁴ The text directed that “[a]n immigration judge or asylum officer shall not grant asylum to any applicant who . . . [h]as been firmly resettled” before arriving in the United States.²⁵ Firm resettlement is defined as “enter[ing] into another country with, or while in that country receiv[ing], an offer of permanent resident status, citizenship, or some other type of permanent resettlement”²⁶

An alien found to be firmly resettled can overcome the bar to asylum through one of two exceptions: First, an alien can show “[t]hat his or her entry into that [third] country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country.”²⁷ Second, an alien can show

18. See *Chinese Am. Civic Counsel v. Att’y Gen.*, 566 F.2d 321, 329 (D.C. Cir. 1977).

19. *Id.* at 326.

20. *Abdille v. Ashcroft*, 242 F.3d 477, 485 (3d Cir. 2001) (criticizing the analysis used in *Chinese American*).

21. 20 F.3d 877 (8th Cir. 1994).

22. *Abdille*, 242 F.3d at 485.

23. *Id.*

24. *Maharaj v. Gonzales*, 450 F.3d 961, 968 (9th Cir. 2006). See 8 C.F.R. § 208.13(c)(2)(i)(B) (2006); 8 C.F.R. § 208.15 (2006).

25. 8 C.F.R. § 208.13(c)(2)(i)(B).

26. 8 C.F.R. § 208.15.

27. 8 C.F.R. § 208.15(a).

“[t]hat the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled.”²⁸ The Code of Federal Regulations provides a list of factors to consider in determining if a refugee’s residence has been strictly restricted including type of housing, employment, country conditions, and right of entry.²⁹

The new regulations deemphasized the question of whether a refugee remains in flight, and instead focused the inquiry of firm resettlement on whether there was an actual offer of permanent resettlement.³⁰ The government bears the initial burden of showing that the firm resettlement bar applies, and then the burden shifts to the alien to show that he or she was not firmly resettled.³¹ Ultimately, the firm resettlement bar was codified as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.³²

B. Circuit Court Split

Although firm resettlement became a bar to asylum in 1990, the U.S. Circuit Courts remain split on what type of showing supports the finding of “firm resettlement” and how to interpret § 208.15 of the Code of Federal Regulations.³³ Some circuits find firm resettlement only where there is direct evidence of a concrete offer of permanent residency from another country,³⁴ using other factors only “if they rise to a sufficient level of clarity and force[.]”³⁵ Other circuits take a broader view and argue that firm resettlement can be proved by a totality of circumstances including length of stay in country, receipt of benefits, family ties, property connections, and offer of permanent resident status (which is extremely important).³⁶

28. 8 C.F.R. § 208.15(b).

29. *Id.*

30. Sloane, *supra* note 10 at 57.

31. Maharaj v. Gonzales, 450 F.3d 961, 972 (9th Cir. 2006).

32. 8 U.S.C.A § 1158(b)(2)(A)(vi) (West 2007).

33. *Maharaj*, 450 F.3d at 973.

34. *See, e.g.*, Ali v. Ashcroft, 394 F.3d 780 (9th Cir. 2005) (finding no firm resettlement because no formal offer of residency was given); Diallo v. Ashcroft, 381 F.3d 687 (7th Cir. 2004) (using formal offer approach and finding no firm resettlement in Senegal based solely on a lengthy stay); Abdille v. Ashcroft, 242 F.3d 477 (3d Cir. 2001) (finding that government documents approving asylum application—without a formal offer—were not sufficient evidence to establish firm resettlement).

35. *Maharaj*, 450 F.3d at 973–74.

36. *See, e.g.*, Mussie v. INS, 172 F.3d 329 (4th Cir. 2006) (finding firm resettlement based on alien’s plentiful opportunities and comfortable circumstances in Germany even when no offer of permanent residency existed); Sall v. Gonzales, 437 F.3d 229 (2d Cir. 2006) (directing lower court to consider non-offer based factors in evaluating firm resettlement).

In spite of the differing approaches, the circuits generally agree on several points: first, “the government bears the initial burden of showing an offer of [firm resettlement] . . . such that the firm resettlement bar applies and the burden shifts to the alien to rebut it;”³⁷ second, “the threshold showing of an offer can be made by direct, or indirect, evidence” (circuits differ on the weight each is given);³⁸ and third, the government’s direct evidence may include “a grant of asylum, a residence permit, and travel documents.”³⁹

1. Offer approach

The Third, Seventh, and Ninth Circuits have adopted an offer-based test for determining firm resettlement.⁴⁰ These Circuits focus on the plain language of 8 C.F.R. § 208.15—the existence *vel non* of “an offer of permanent resident status, citizenship, or some other type of permanent resettlement”⁴¹ Under this approach, non-offer-based evidence may only be used if it is of sufficient force “to infer that the third country officially sanctions the alien’s indefinite presence” and if “direct evidence of a formal offer is unobtainable”⁴² The type of direct evidence that may support a finding of firm resettlement includes a grant of asylum, a residence permit, and travel documents.⁴³

*Abdille v. Ashcroft*⁴⁴ has been dubbed “the leading case that takes an offer-based approach.”⁴⁵ Where an alien fled Somalia and stayed in South Africa for two years before coming to the United States, the court in *Abdille* had insufficient evidence of an offer to decide if the alien had firmly resettled.⁴⁶ The court used the language and structure of 8 C.F.R. §208.15 as a guide, stating that the “firm resettlement analysis [centers] on the question whether a third country issued to the alien an offer of some type of official status permitting the alien to reside in that country

37. *Maharaj*, 450 F.3d at 972.

38. *Id.*

39. *Id.*

40. *See, e.g.*, *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005) (finding no firm resettlement because no formal offer of residency was given); *Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004) (using formal offer approach and finding no firm resettlement in Senegal based solely on a lengthy stay); *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001) (finding that government documents approving asylum application—without a formal offer—were not sufficient evidence to establish firm resettlement).

41. 8 C.F.R. § 208.15 (2006).

42. *Maharaj*, 450 F.3d at 976.

43. *Id.* at 972.

44. 242 F.3d 477 (3d Cir. 2001).

45. *Maharaj*, 450 F.3d at 973.

46. Schell, *supra* note 6, at 256.

on a permanent basis.”⁴⁷ Even though the court had government documents that approved Abdille’s asylum application in South Africa, his refugee status expired after two years, at which time he would be subject to prosecution without further action on his part.⁴⁸ Even though Abdille’s asylum in South Africa seemed temporary, the case was remanded to determine whether an offer existed.⁴⁹

Other subsequent cases have also employed the offer-based approach. In *Diallo v. Ashcroft*, the court asserted that “[t]he primary and initial consideration [in determining firm resettlement], therefore, is a simple one—whether or not the intermediary country has made some sort of offer of permanent resettlement.”⁵⁰ The Seventh Circuit emphasized that other circumstantial factors come into play only “when the applicant seeks to demonstrate that she falls into one of the two exceptions.”⁵¹ The focus remained the same in the Ninth Circuit case of *Ali v. Ashcroft* where an alien who was not offered permanent residency was not firmly resettled within the meaning of the statute.⁵² It was irrelevant that the alien lived and worked in Ethiopia for five years before applying for asylum in the United States.

2. *Totality of circumstances approach*

The Second and Fourth Circuits are among those that follow a more broad approach for determining firm resettlement, focusing on the totality of the alien’s circumstances.⁵³ In general, this approach developed from decisions under the pre-1990 regime.⁵⁴

In *Sall v. Gonzales*, the court found that four years of residency in Senegal was insufficient evidence that the alien had firmly resettled in Senegal after being forced to leave Mauritania.⁵⁵ The Second Circuit directed the lower court to consider on remand

whether Sall intended to settle in Senegal when he arrived there, whether he had family ties there, whether he had business or property

47. *Abdille*, 242 F.3d at 485.

48. *Id.* at 488.

49. *Id.* at 489–90.

50. 381 F.3d 687, 693 (7th Cir. 2004).

51. *Id.*

52. 394 F.3d 780, 791 (9th Cir. 2005).

53. *See, e.g., Mussie v. U.S. I.N.S.*, 172 F.3d 329 (4th Cir. 2006); *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006).

54. *See Maharaj v. Gonzales*, 450 F.3d 961, 973 (9th Cir. 2006) (describing the totality of circumstances approach).

55. *Sall*, 437 F.3d at 229.

connections that connote permanence, and whether he enjoyed the legal rights—such as the right to work and to enter and leave the country at will—that permanently settled persons can expect to have.⁵⁶

The *Sall* Court gave two reasons for preferring the broader conception of firm resettlement: First, foreign statutes differ from U.S. immigration provisions and may not be comparable. Second, it is important to preserve asylum for the truly desperate refugees.⁵⁷

Factors such as length of stay in the country, educational opportunities, government assistance, employment, and travel documents were considered more relevant to the firm resettlement inquiry than a formal offer in *Mussie v. INS*⁵⁸ In *Mussie*, the court held that asylum was rightly denied because the alien applied for and received asylum in Germany. This award of asylum constituted sufficient evidence of an offer of some type of permanent resettlement even though the record did not indicate whether she ever attained permanent resident status.

III. FIRM RESETTLEMENT EXPLORED IN *MAHARAJ V. GONZALES*

A. *Facts of the Case*

The Maharaj family—an Indo-Fijian family of four (husband, wife, and two children)—lived in Fiji until November 1987, when their local government was overthrown.⁵⁹ Up to that time, Mr. Maharaj worked as a bus driver and helped transport voters to polling stations during Fiji's national elections.⁶⁰ Maharaj's bus displayed propaganda for the winning party (which was subsequently overthrown). This display led to acts of violence directed at the Maharaj family.⁶¹ Among other things, the husband was tied up and received death threats, the wife was publicly humiliated and raped at gunpoint, the family's residence was burned down, they were restricted in practicing Hinduism, and they were denied service by the police and the hospital.⁶² This severe persecution made it necessary for them to leave their native country.⁶³

To seek refuge, the Maharaj family fled to Canada, where the

56. *Id.* at 235.

57. *Maharaj*, 450 F.3d at 974.

58. 172 F.3d at 329.

59. *Maharaj*, 450 F.3d at 964–65.

60. *Id.* at 964.

61. *Id.* at 965.

62. *Id.*

63. *Id.* at 964–65.

husband's sister lived.⁶⁴ They settled in Edmonton and applied for asylum in Canada.⁶⁵ The family lived in Canada nearly four years, during which time they had a child, sent their children to public schools, received free health care, were granted work authorization, enjoyed employment, and worshipped freely at a Hindu Temple.⁶⁶

In March 1991, the family entered the United States because they were dissatisfied with their employment opportunities and wanted to improve their economic situation.⁶⁷ Although the Maharajs had begun the process of applying for refugee status in Canada, they left before authorities reviewed their case or offered permanent residency.⁶⁸ The Maharaj family entered the United States as visitors but overstayed their six-month allowance, which made them deportable.⁶⁹

The Maharajs then requested asylum in the United States,⁷⁰ but the immigration judge assigned to their case declared them ineligible, applying a rebuttable presumption of firm resettlement.⁷¹ The Board of Immigration Appeals affirmed the decision, and the Ninth Circuit denied petition for review.⁷²

During a rehearing *en banc*, the Ninth Circuit granted Maharaj's petition for asylum.⁷³ The court concluded there was not enough evidence to show that Maharaj was "firmly resettled" in Canada, and therefore, he was not barred from seeking asylum in the United States within the meaning of the law.⁷⁴ The case was remanded to the Board of Immigration Appeals for a reevaluation of whether Maharaj's rights in Canada amounted to "an offer of permanent residence, citizenship, or some other type of permanent resettlement" and whether Maharaj still faced a risk of returning to Fiji.⁷⁵

64. *Id.*

65. *Id.*

66. *Id.* at 963, 979.

67. *Id.* at 965. Sunita Maharaj testified that the family "wanted to . . . have more money and build ourself [sic]. So, that's the time when we thought we don't [sic] like Canada." *Id.*

68. *Id.* at 979.

69. *Id.* at 965.

70. *Id.* at 966.

71. *Id.* at 963.

72. *Id.*

73. *Id.*

74. *Id.* at 978.

75. *Id.*

B. Ninth Circuit Reasoning

The court in *Maharaj* used the formal offer approach to resettlement and concluded that firm resettlement is not just about the length of stay in a country.⁷⁶ In coming to this conclusion, the court analyzed prior Ninth Circuit cases that addressed the issue of the mandatory bar to asylum, focusing specifically on the decisions in *Cheo v. INS*,⁷⁷ *Camposeco-Montejo v. Ashcroft*,⁷⁸ and *Ali v. Ashcroft*.⁷⁹

In *Cheo*, Cambodian nationals who lived for three years undisturbed in Malaysia were found to be firmly resettled and ineligible for asylum in the United States.⁸⁰ The court held that “a duration of residence in a third country sufficient to support an inference of permanent resettlement . . . shifts the burden of proving absence of firm resettlement to the applicant.”⁸¹ Because the Cambodians in *Cheo* did not offer any contrary evidence, their lengthy and safe stay in Malaysia was sufficient to bar an asylum claim.⁸²

The *Cheo* holding was clarified six years later in *Camposeco-Montejo*, where a Guatemalan citizen fled to Mexico before seeking refuge in the United States.⁸³ Although he lived in Mexico for sixteen years, the young man was not found firmly resettled because his freedom was severely restricted while in that intermediate country.⁸⁴ He was not allowed to leave a single municipality, could not attend Mexican schools, and was threatened with repatriation.⁸⁵ Thus, a lengthy stay in a third country does not necessarily qualify as firm resettlement if the person does not enjoy expected freedoms of a permanent resident.⁸⁶

The Ninth Circuit’s most recent decision in *Ali* provided further clarification when the court concluded that firm resettlement requires an actual offer of permanent resident status, not just an offer of temporary residency.⁸⁷ The *Ali* Family, although permitted to stay in Ethiopia, could not work or go to school. The Court distinguished *Ali* (where Somalians resided five years in Ethiopia) from *Cheo* (where Cambodians

76. *Id.* at 975.

77. 162 F.3d 1227 (9th Cir. 1998).

78. 384 F.3d 814 (9th Cir. 2004).

79. 394 F.3d 780 (9th Cir. 2005).

80. *Cheo*, 162 F.3d at 1227.

81. *Id.* at 1229.

82. *Maharaj v. Gonzales*, 450 F.3d 961, 969 (9th Cir. 2006).

83. *Id.* at 970.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 971.

resided three years in Malaysia) because in the former case there was evidence that no offer had been received, and in the latter situation there was no evidence.⁸⁸

Although many courts rely on some type of *Cheo* analysis when examining firm resettlement, the Ninth Circuit in *Maharaj* chose not to apply a presumption of firm resettlement simply because Maharaj had lived in Canada for a long time. Unlike *Cheo* where there was *no* evidence about the alien's legal status, in *Maharaj*, there *was* evidence, but no information about what Maharaj's work permit and pending application meant.⁸⁹ They were not willing to assume that "living, working, and applying for some type of refugee or asylum status amounts to a formal offer of resettlement"⁹⁰

In deciding this case, the Ninth Circuit pointed to other circuits that have addressed the issue of firm resettlement. The court rejected the "totality of circumstances" approach and aligned itself with the Third and Seventh Circuits in favoring the offer-based approach, which requires the existence *vel non* of "an offer of permanent resident status, citizenship, or some other type of permanent resettlement."⁹¹ The court justified its adoption of the offer-based approach using several textual arguments.

First, the Court looked at the semantic structure of the statute regarding firm resettlement and noted the sequence for the firm resettlement inquiry: first, you ask if there is an offer.⁹² "An alien is considered to be firmly resettled if . . . [the alien] received an offer of permanent resident status, citizenship, or some other type of permanent resettlement."⁹³ Only after an offer is found is it appropriate to move to the two exceptions under (a) and (b)—where residence in a third country was only a necessary part of flight or where the person's rights were severely restricted.⁹⁴ And only when the exceptions come into play should a court "consider factors such as the length of time spent in the country, housing, and the type and extent of the refugee's employment."⁹⁵ There is no language in the statute about preserving asylum, regardless of whether a formal offer of resettlement in another country was received.⁹⁶ If there is no offer, then the two exceptions do not even apply. Circumstances are not part of the preliminary inquiry

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 973.

92. *Id.* at 975.

93. 8 C.F.R. § 208.15.

94. *Maharaj*, 450 F.3d at 975.

95. *Id.*

96. *Id.*

about an offer unless direct evidence is unavailable. Even then, the evidence must be of sufficient force to show that “the third country officially sanctions the alien’s indefinite presence.”⁹⁷

Second, the court highlighted the statutory language and asserted that firm resettlement is coextensive with receipt of an offer of permanent resettlement.⁹⁸ The statute requires “an offer of” one of three things: “permanent resident status, citizenship, or some other type of permanent resettlement.”⁹⁹ The court rejected the idea that an alien could have an offer of permanent residence *or* some other type of permanent resettlement. It pointed out the absurdity that if permanent residence could be obtained “without an offer through long-term residence, employment, [etc.], an alien could never obtain ‘some other type of permanent resettlement’”¹⁰⁰

Finally, the court expressed its concern that firm resettlement be broadened beyond its plain focus.¹⁰¹ It points out that § 208.15 was adopted at the same time that firm resettlement became a bar to asylum, implying that what might bar someone from gaining asylum should be construed narrowly.¹⁰² Thus, the court interpreted § 208.15 narrowly to reaffirm that the government bears the initial burden of proving a formal offer of firm resettlement by direct evidence; surrogate evidence may suffice only if it is of sufficient force.¹⁰³

The *Maharaj* decision was based on two main premises: 1) there was insufficient evidence that Maharaj received and rejected an offer of permanent resettlement, and 2) the possibility of an offer is not the same thing as an offer.¹⁰⁴ The mere fact that Maharaj worked and lived in Canada was not an offer, and not to be considered unless the asylum seeker was trying to prove they fit within one of the exceptions or direct evidence was unavailable.¹⁰⁵ Justice Rymer noted that one can be allowed to work and receive benefits without having an offer of resettlement, but the record was undeveloped.¹⁰⁶ In the end, it did not matter that Canada had a superb asylum program similar to the United States;¹⁰⁷ the court wanted direct evidence that Maharaj received an offer

97. *Id.* at 976.

98. *Id.*

99. 8 C.F.R. § 208.15.

100. *Maharaj*, 450 F.3d at 975.

101. *Id.*

102. *Id.*

103. *Id.* at 975–76.

104. *Id.* at 977.

105. *See* 8 C.F.R. § 208.15.

106. *Maharaj*, 450 F.3d at 978.

107. *Id.* at 979.

of resettlement from Canada, which was not possible because Maharaj left the country before it was offered to him.¹⁰⁸

IV. ANALYSIS

A. *The Nature of Asylum Appeals to Aliens*

Asylum is unique from other forms of immigration and has been described as “one of the easiest ways for unqualified aliens to achieve legal status in the United States under the guise of protection from persecution.”¹⁰⁹ Whereas most immigrants to the United States have to wait for extended periods of time to just acquire a visa and then meet other time requirements to achieve legal permanent resident status, asylum seekers can come to the United States illegally, become a legal permanent resident within one year, and eventually be granted citizenship. Aliens may apply for asylum proactively within one year of their arrival in the United States, or they may apply for asylum defensively to prevent their removal by the U.S. government.¹¹⁰

Asylum is an appealing option to aliens for two main reasons. First, there is a low burden of proof. A refugee must have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]”¹¹¹ But, when it comes to proving this fear of persecution, an alien’s own testimony can be sufficient.¹¹² Second, aliens can apply for asylum “irrespective of such alien’s [illegal] status” in the United States.¹¹³ Thus, asylum is the only option that allows them to remain in the United States without hiding from authorities.

In spite of the ease with which asylum can be acquired, asylum can also be denied on statutory grounds or as a matter of discretion.¹¹⁴ The six mandatory bars to asylum suggest that certain classes of aliens are undesirable to have in the United States. In addition to keeping out aliens who (1) have firmly resettled in a third country, the law does not grant asylum to aliens who (2) persecute any person because of their race, religion, nationality, or opinion, (3) have a criminal conviction, (4) commit a serious nonpolitical crime, (5) pose a possible danger to U.S.

108. *Id.* at 977.

109. Heebner, *supra* note 15 at 566.

110. *See* 8 U.S.C. § 1158 (2000).

111. 8 U.S.C. § 1101(a)(42)(A)(2000).

112. 8 U.S.C.A. § 1158(b)(1)(B)(ii) (West 2007).

113. 8 U.S.C. § 1158(a)(1).

114. RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 8:10 (2d ed. 2003).

security, or (6) are involved in terrorist activities/organizations.¹¹⁵ With the exception of firm resettlement, all the bars to asylum relate to crimes or national security. Although firm resettlement “does not reflect a societal judgment about the moral fitness of an asylum applicant’s character[.]”¹¹⁶ it seems likely that firm resettlement is included with the other bars because it rises to the same level of importance. Otherwise, firm resettlement could have continued to function as a factor instead of being applied as a bar to asylum.

B. Protection of the U.S. Immigration System Justifies a Test for Firm Resettlement That Includes Non-Offer Based Factors

Even though the number of refugees and asylees admitted to the United States has decreased in recent years,¹¹⁷ a comparison of most asylum seekers’ original countries with the wait lengths for immigrant visas in those countries suggests that asylum may be used as a backdoor way to get legalized presence in the United States. This note does not purport that Maharaj applied for asylum in the United States merely as a way to circumvent immigration laws. However, potential abuse of U.S. asylum law is all the more reason for courts to adopt a test for firm resettlement that considers the totality of an alien’s circumstances in addition to looking for an offer.

A research analyst from Georgetown University has noted the possible “link between visa policy and refugee and asylum issues.”¹¹⁸ Supporting this proposition is the fact that the United States has implemented “stricter visa regulations on citizens of countries that produce large numbers of asylum seekers.”¹¹⁹ But as a court in the United Kingdom suggested, “[w]hy require visas from certain countries (and in particular those from which most bogus asylum seekers are found to come) unless visa nationals can be prevented from reaching our shores? [An alien’s] very arrival here [at a port of entry] otherwise entitles them to apply for asylum and thus defeats the visa regime.”¹²⁰

Recent data suggests that asylum may be used as a backdoor way to get legalized presence in the United States. Numbers shows that the

115. 8 U.S.C.A § 1158(b)(2)(A).

116. Sloane, *supra* note 10 at 47.

117. In 2004, 27,169 persons were granted asylum; in 2005, 25,257 persons were granted asylum. ANNUAL FLOW REPORT, *supra* note 4, at 4.

118. Bryan Paul Christian, *Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management*, 14 GEO. IMMIGR. L.J. 215, 223 (1999).

119. Jennifer Hyndman & James McLean, *Settling Like a State: Acehnese Refugees in Vancouver*, 19 J. REFUGEE STUD. 345, 348 (2006).

120. *Regina v. Immigration Officer at Prague Airport*, 17 INT’L J. REFUGEE L. 217 (2005).

“leading countries of origin for persons granted asylum are China (21 percent), Columbia (13 percent), [and] Haiti (12 percent).”¹²¹ Interestingly, China is one of only five categories for the issuance of immigrant visas. (The government has created categories—based on demand and region—for the allotment of visas).¹²² According to the United States Visa Bulletin for January 2007, in China’s category, the wait for a family-based visa is backed up as far as June 22, 1995 (11.5 years), and the earliest priority date for processing is March 15, 2002.¹²³ For all other countries (which would include Haiti and Columbia), the wait for a family-based visa is backed up as far as January 8, 1996 (11 years) with an earliest priority date for processing of March 15, 2002.¹²⁴ While some claim that asylum is “a far more difficult way of entering or remaining in the United States than other forms of relief available to immigrants,”¹²⁵ it appears that a person who desires to come to the United States might speed up their immigration process by applying for asylum instead of a visa.

For example, a Chinese national who meets the necessary standard of proof can be granted asylum almost immediately whereas that same person (if applying from China) would have to wait at least four years to receive a family-based visa—and that is assuming they have a family member living in the United States that is a U.S. citizen.

A standard for firm resettlement that looks at circumstances in addition to looking for a *vel non* offer will help ensure that persecuted persons who have opportunities to settle and find protection in third-party countries do not use U.S. asylum as a convenient way to get legal presence in the United States. Admittedly, the discretion that would accompany an evaluation of non-offer based factors creates an additional hurdle for those seeking asylum. Some have even said that the definition or application of firm resettlement has become “not a bar to asylum for otherwise qualified refugees, but an additional *criterion* for refugee status.”¹²⁶ But that additional hurdle may prevent applicants from using asylum as a shortcut to citizenship.

121. ANNUAL FLOW REPORT, *supra* note 4, at 4.

122. These categories are China, India, Mexico, Philippines, and All others. See U.S. Dep’t of State, Bureau of Consular Affairs, *Visa Bulletin for Jan. 2007*, No. 101, Vol. VIII, VISA BULLETIN (2007), http://travel.state.gov/visa/frvi/bulletin/bulletin_3100.html#.

123. U.S. Dep’t of State, Bureau of Consular Affairs, *Visa Bulletin for Jan. 2007*, No. 101, Vol. VIII, VISA BULLETIN (2007), http://travel.state.gov/visa/frvi/bulletin/bulletin_3100.html#.

124. *Id.*

125. Peter Schey, *U.S. Immigration Policies and the War on Terrorism*, 19 L.A. LAWYER 12 (Sept. 2006).

126. Sloane, *supra* note 10 at 48.

C. Firm Resettlement Interpretations

Before 1996, the court generally disqualified aliens from seeking asylum if they had resettled in another country prior to arriving in the United States;¹²⁷ however in a large percentage of cases heard after 1996, when an alien seeking asylum had resettled in another country before arriving in the United States, courts have been slow to disqualify aliens, and only do so if there is a firm offer (regardless of the alien's circumstances in the intermediate country).¹²⁸

Some commentators have claimed that there is no binding precedent or elaborative authority on what constitutes firm resettlement,¹²⁹ yet one Supreme Court case does discuss firm resettlement.¹³⁰ In *Yee Chien Woo*, the court identified the term “firmly resettled” as being closely related to the central theme of refugee legislation—creating a haven for the world's homeless.¹³¹ Although the opinion was written before the 1990 regulations were passed, its guidance should not be ignored because it remains the only Supreme Court case to discuss firm resettlement and the opinion has not been overturned. Speaking about the Fair Share Refugee Act, the court noted that Congress

never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives. Nor could Congress have intended to make refugees in flight from persecution compete with all of the world's resettled refugees . . . Such an interpretation would subvert the lofty goals embodied in the whole pattern of our refugee legislation.¹³²

The determination of firm resettlement should include an evaluation not only of whether there was an offer, but also an evaluation of how long an alien waited to apply after originally fleeing persecution, and what intent an alien had to permanently stay in a third country. In *Yee*

127. See, e.g., *Assfaw v. INS*, 48 F.3d 1215 (4th Cir. 1995); *Abdalla v. INS*, 43 F.3d 1397 (10th Cir. 1994); *Farbakhsh v. INS*, 20 F.3d 877 (8th Cir. 1994); *Barou-Barukoff v. INS*, 983 F.2d 1075 (9th Cir. 1993).

128. See, e.g., *Sultani v. Gonzales*, 455 F.3d 878 (8th Cir. 2006); *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005); *Mushka v. INS*, 149 Fed. Appx. 28 (2d Cir. 2005); *Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004); *Mohammed v. Ashcroft*, 78 Fed. Appx. 264 (4th Cir. 2003).

129. Matthew J. Fery, Note, *Determining Better Standards for Firm Resettlement, Judicial Discretion, and Immigration Administrative Practice: Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004), 31 U. DAYTON L. REV. 505, 511–12 (2006).

130. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971); See *Maharaj v. Gonzales*, 450 F.3d 961, 982 (9th Cir. 2006).

131. *Yee Chien Woo*, 402 U.S. at 55.

132. *Id.* at 56.

Chien Woo—the only Supreme Court case to discuss firm resettlement—the court emphasized that an alien’s presence in the United States must be proximate to their original flight.¹³³ If a main purpose of asylum is to help the persecuted find a safe haven, there is seldom a reason to grant asylum to a person like Maharaj, who has found safety or refuge in another country. “A lengthy, peaceful stay creates a presumption of firm resettlement.”¹³⁴

The Ninth Circuit analysis used in *Maharaj v. Gonzales* makes it easier for refugees to enter the United States and could lead to country shopping if aliens know they can come to the United States as an asylee and receive government benefits, so long as they received no offer of residency in another country. The Maharaj family had begun the process of acquiring asylum in Canada and chose not to wait until their file was processed and a final decision made.¹³⁵ They preferred to come to the United States because Canada did not offer the job opportunities they wanted.

D. The Purpose of Asylum Law Does Not Cover Country Shopping

Throughout the *Maharaj* case, the court claims to hold to the “plain language” of the statute.¹³⁶ At the same time, the Ninth Circuit acknowledges that the statutory language is vague—it does not define “offer” or “other type of permanent resettlement.”¹³⁷ Because of this ambiguity, the court relies on a legal dictionary definition for offer and decided to let the latter definition evolve on a case by case basis.¹³⁸ In giving priority to the text, the court rejected the policy argument about country shopping, even though it acknowledged the dissent’s concern that the *Maharaj* analysis “will open the door to rampant country shopping, a result that our immigration laws have long sought to avoid.”¹³⁹

Country shopping, which can essentially be defined as “hunt[ing] through [the] market [of different countries’ asylum programs] in search of the best buy,”¹⁴⁰ undermines the purpose of asylum and may create an

133. *Id.* at 57.

134. RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 8:10 (2d Ed. 2003).

135. *Maharaj v. Gonzales*, 450 F.3d 961, 977 (9th Cir. 2006).

136. *Id.* at 976.

137. *Id.*

138. *Id.*

139. *Id.* at 988.

140. MERRIAM WEBSTER ONLINE DICTIONARY, *Shopping*, (2007), <http://www.m-w.com/dictionary/Shopping>. See also Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 606 (2000).

undue burden on the U.S. economy. Even though some evidence shows that “immigrants use fewer public benefits than they pay in taxes,”¹⁴¹ the argument is often made that “illegal immigrants significantly drain both state and national economies.”¹⁴² In fact, some states spend tens of millions of dollars to educate undocumented immigrant children.¹⁴³ Additionally, “the annual cost of providing undocumented immigrants with medical care is \$1.45 billion” according to government officials.¹⁴⁴ A 1992 study showed that high payments under certain welfare programs is “a significant predictor of immigrant settlement patterns.”¹⁴⁵ If monetary payments and benefits like food stamps, public schooling, and hospital care “are superior to those of the emigration state, they are an incentive to immigration no matter which state the immigrant settles in.”¹⁴⁶

Commentators involved with international migration to the United States have suggested two goals that any asylum system should accomplish.¹⁴⁷ First, asylum should protect the persecuted or seriously endangered.¹⁴⁸ Second, asylum should deter abuse of the privileges and resources afforded to U.S. residents.¹⁴⁹ The broad conception of the firm resettlement bar helps to protect the truly desperate and to exclude from asylum’s protection those that have been offered protection elsewhere.¹⁵⁰

As noted by the dissent, the *Maharaj* decision ignores the history and purpose of having a firm resettlement bar in the first place.¹⁵¹ Persons who have the rights and protections that citizenship affords do not need protection in another country.¹⁵² Furthermore, most advanced Western nations limit asylum seekers in choosing their country of asylum application by “adopt[ing] the principle in their asylum laws that the first

141. Karen M. Longacher, *Losing the Forest for the Trees: How Current Immigration Proposals Overlook Crucial Issues*, 11 TEMP. INT’L & COMP. L.J. 429, 443 (1997).

142. Cindy Chang, *Health Care for Undocumented Immigrant Children: Special Members of an Underclass*, 83 WASH. U. L.Q. 1271, 1284 (2005).

143. *Id.*

144. *Id.* at 1271–72.

145. F. H. Buckley, *The Political Economy of Immigration Policies*, 16 INT’L REV. L. & ECON. 81, 89 (1996).

146. *Id.* But see Karen M. Longacher, *Losing the Forest for the Trees: How Current Immigration Proposals Overlook Crucial Issues*, 11 TEMP. INT’L & COMP. L.J. 429, 446 (1997) (hesitating to recognize “a strong correlation between the right to free public benefits and a corresponding incentive to immigrate” without further evidence).

147. Martin & Schoenholtz, *supra* note 140 at 589.

148. *Id.*

149. *Id.*

150. See *Maharaj v. Gonzales*, 450 F.3d 961, 974 (9th Cir. 2006) (reciting reasons why some courts have followed the totality of circumstances approach to find firm resettlement).

151. *Id.* at 980.

152. Sloane, *supra* note 10 at 49.

safe haven country to which a refugee flees should be the one in which he or she seeks asylum.”¹⁵³

Looking at how laws have evolved after *Maharaj* gives insight to the purpose for the firm resettlement bar. As of December 2004, aliens can only apply for asylum in either Canada or the United States, but not both countries.¹⁵⁴ This directive, which was part of an agreement between the two countries, recognized that both Canada and the United States have good systems for protecting refugees, and provided that “aliens arriving in the United States from Canada at a land border port-of-entry shall be returned to Canada to seek protection under Canadian immigration law.”¹⁵⁵ Under current law, *Maharaj* would not have been allowed to seek asylum in the United States after having applied for asylum in Canada. But such behavior, which was permitted under the offer-based test adopted by the Ninth Circuit, may still persist when the intermediate country is one other than Canada. Thus, it would be helpful in carrying out the purpose of asylum to look at factors besides just an offer; otherwise, asylum seekers could apply for asylum in other countries and electively choose to leave—looking for greener pastures.

E. Proposition for a New Standard

Some scholars claim that an evaluation of a refugee’s circumstances “modif[ies] and marginalize[s]” the paramount question of firm resettlement.¹⁵⁶ However, a test for firm resettlement that looks only for a formal offer and does not take into account an alien’s intent, length of stay in an intervening country, and proximity of application to flight overlooks the purpose of the firm resettlement bar. It is also problematic because many countries have immigration systems that do not mirror that used in the United States.

Opponents of the totality of circumstances test have expressed the concern that such a test wastes judicial resources, puts an undue burden on the applicant, and gives judges too much leeway—leading to inconsistent results.¹⁵⁷ While too much discretion for judges could lead to inconsistent results, too little discretion makes it easy for the asylum system to be abused. Admittedly, a totality of circumstances test would require more effort in gathering circumstantial evidence. Even so, such a

153. Martin & Schoenholtz, *supra* note 140 at 606.

154. See Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, U.S.-Can., Dec. 5, 2002, <http://www.state.gov/s/l/38616.htm>.

155. *Maharaj v. Gonzales*, 450 F.3d 961, 977 n. 11 (9th Cir. 2006).

156. Sloane, *supra* note 10 at 60.

157. *Id.* at 63–64.

process of fact-finding is necessarily part of an offer-based test as well. The role of judges is to evaluate the facts of individual cases (which are never the same). It would make little difference in the overall burden on judges if, in addition to looking for an offer of resettlement, judges were guided to consider other specific circumstances or factors. This would lead to more consistent results in asylum law than would simply letting the definition of firm resettlement evolve over time, which is what the majority in *Maharaj* suggested doing.¹⁵⁸

A possible reason why many courts are turning to an offer-based test for determining resettlement is that it simplifies the question of firm resettlement. Judges want “helpful and comprehensive standards that [they] can use in their consideration of whether a petition for asylum can be granted or not.”¹⁵⁹ However, a strictly offer-based evaluation is not necessarily comprehensive. In some cases, such as *Maharaj*’s, looking only at concrete offers of residency neglects evidence that might otherwise bar an asylum seeker. It seems unlikely that Congress would knowingly admit to the United States as a legal permanent resident one who had lived in another country safely and peacefully for four years, received benefits in a third country, but “want[s] to see what the United States looks like,” “likes this place much better than Canada,” or desires to “have more money and build [themselves].”¹⁶⁰

To be true to the statutory text and still honor the purpose of asylum, courts should adopt the totality of circumstances approach for determining resettlement with the change that a formal offer be the first factor considered and given most weight. In this way, courts are to look first for an offer but must also consider circumstances. The existence or absence of a formal offer should not be dispositive but should merely be the starting point to determining if the alien is deserving of asylum protection.

V. CONCLUSION

Although more than fifteen years have passed since firm resettlement became a bar to asylum, circuit courts are still split on how to determine whether firm resettlement has occurred. While the Ninth Circuit in *Maharaj v. Gonzales* joined others in adopting an offer-based approach to firm resettlement, such a narrow test may allow aliens to enter the United States who do not need protection but rather want a shortcut to citizenship. Asylum is a unique area of immigration law that can be

158. *Maharaj*, 450 F.3d at 976.

159. *Fery*, *supra* note 129, at 506.

160. *Maharaj*, 450 F.3d at 979.

subject to abuse. To protect the purposes of asylum and deter country shopping, courts need a clear and comprehensive standard for determining resettlement that looks not only for a *vel non* offer but also considers factors such as proximity to flight, intent to remain in a third country, and family ties. Even though this will increase the burden of proof for asylum applicants, it will help the United States continue to carry out its policy of receiving the tired and poor with no where else to turn.

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