

Federal Court



Cour fédérale

Date: 20131118

Docket: IMM-96-13

Citation: 2013 FC 1152

Ottawa, Ontario, November 18, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

RASHID HARED BARUD

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr Rashid Hared Barud fled Somalia in 1995 and relocated to South Africa where he obtained refugee status in 2011. Mr Barud later applied for permanent residence in Canada, but an immigration officer dismissed his application because he had failed to show “no reasonable prospect, within a reasonable period, of a durable solution in a country other than Canada” (s

139(d), *Immigration and Refugee Protection Regulations* [IRPR], SC 2001, c 27 – see Annex). The officer found that Mr Barud had a durable solution available to him in South Africa.

[2] Mr Barud argues that the officer erred by applying an incorrect definition of “durable solution” and by unreasonably concluding that he did not meet that definition. He asks me to overturn the officer’s decision and order another officer to reconsider his application for permanent residence.

[3] I can find no basis for overturning the officer’s decision and must, therefore, dismiss this application for judicial review. In my view, there is no precise definition of “durable solution”. The question, then, is whether the officer reasonably concluded that Mr Barud had a durable solution in South Africa. Based on the evidence, I cannot find that the officer’s conclusion was unreasonable.

[4] There are two issues:

1. Did the officer apply the wrong definition of “durable solution”?
2. Did the officer unreasonably conclude that Mr Barud failed to show that he had no prospect of a durable solution in South Africa?

II. The Officer’s Decision

[5] The officer reviewed Mr Barud’s personal circumstances, noting that since 2011 he has worked in a Somali grocery shop in Port Elizabeth, South Africa. However, while he was not

personally harmed, there were “lots of troubles for Somali people” there. Mr Barud and his wife constantly felt afraid.

[6] However, the officer found that Mr Barud and his wife had not been subjected to xenophobic violence. They feared being victims of crime, but crime is commonplace in South Africa. Their circumstances were no different from those of other residents.

[7] Based on documentary evidence about the situation in South Africa, the officer noted the following:

- The South African government has taken steps to deal with xenophobic violence, particularly by recognizing international instruments on human rights;
- A UN Special Rapporteur reported that South Africa had taken measures to address xenophobic attacks, although further improvements were needed;
- According to the Consortium for Refugees and Migrants in South Africa (CORMSA), persons with refugee status in South Africa have most of the rights of citizens except the right to vote; it is equivalent to permanent resident status in Canada; and
- The United Nations High Commissioner for Refugees (UNHCR) offers numerous services to refugees in South Africa.

[8] In the decision letter to Mr Barud, the officer stated that he did not qualify for permanent residence because he had not shown that there was no reasonable prospect of a durable solution in South Africa, given that he had successfully resettled there and, essentially, had been granted rights akin to citizenship. The officer acknowledged that Mr Barud had been a victim of crime, but found that he had not experienced the kind of repeated attacks that would be consistent with xenophobic violence. Like other residents of South Africa, Mr Barud had been exposed to generalized crime.

III. Did the officer apply the wrong definition of “durable solution”?

[9] Mr Barud argues that the officer wrongly relied on South Africa’s efforts to address xenophobic violence as sufficient to conclude that a durable solution was available to him there. He contends that efforts to provide protection do not necessarily result in a durable solution – the real question is whether the country in question can actually deliver protection.

[10] Mr Barud contends that the concept of a durable solution is an international norm and, therefore, should be reviewed on a standard of correctness in order to foster consistency across jurisdictions (as in *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324).

[11] I am not satisfied that “durable solution” is an international norm that should be reviewed on a correctness standard. Mr Barud has pointed me to documents showing that one of the larger goals of the Refugee Convention, as interpreted by the UNHCR, is to achieve a permanent or durable solution for refugee claimants. On that basis, he maintains that the concept of a durable solution is

an international legal norm.

[12] I disagree. While the overall goal of the Refugee Convention may be to provide lasting protection to genuine asylum seekers, it does not follow that the term “durable solution” in the IRPR incorporates an international legal norm. It is not equivalent to the definition of a refugee, or the grounds for exclusion from refugee status (as in *Febles*, above), both of which are rooted in the Refugee Convention itself. In my view, consideration of whether an applicant has a reasonable prospect of a durable solution in a country other than Canada requires an assessment of the person’s personal circumstances and the conditions in the person’s country of residence (*Mushimiyimana v Canada (Minister of Citizenship and Immigration)* 2010 FC 1124, at para 21). It is a question of mixed fact and law that should attract a reasonableness standard of review. The real issue before me, therefore, is whether the officer unreasonably concluded that Mr Barud had a reasonable prospect of a durable solution in South Africa.

IV. Did the officer unreasonably conclude that Mr Barud failed to show that he had no reasonable prospect of a durable solution in South Africa?

[13] Mr Barud argues that the officer failed to recognize that he was exposed to violence based on his Somali nationality and refugee status in South Africa. According to Mr Barud, the officer wrongly concluded that, like other residents of South Africa, he was exposed to generalized criminal violence.

[14] In his written materials before the officer, Mr Barud maintained that he was targeted by gangs and the police, and was discriminated against on the basis of his status as a Somali refugee. State protection was not available to persons in his circumstances. Accordingly, he did not report crimes against him to the police. Further, Mr Barud contends that the evidence before the officer indicated only a willingness, not an ability, to protect him. Therefore, even if the burden fell on him to show an absence of protection, the evidence on which the officer relied did not show that state protection was available.

[15] In my view, the officer's decision was not unreasonable. The question was whether Mr Barud had a reasonable prospect of a durable solution in South Africa within a reasonable period of time. Given that forward-looking standard, it was open to the officer to cite state efforts to improve the treatment of foreigners. The officer reasonably concluded, based on the status Mr Barud enjoyed in South Africa and the documentary evidence relating to country conditions, that Mr Barud had a reasonable prospect of a durable solution there, notwithstanding that he had been a victim of crime in the past.

[16] The standard for a durable solution differs from the test for state protection. In the latter case, the question is whether the claimant will face a well-founded fear of persecution on return to his or her country of origin, given the state's resources and willingness to protect the person. In the case of a "durable solution", the state's plans and intentions, as compared to its existing capacity and desire, is far more relevant. Here, the officer properly considered the evolving situation in South Africa for foreign nationals.

[17] Accordingly, I cannot conclude that the officer's decision was unreasonable. It represented a defensible outcome based on the facts and the law.

V. Conclusion and Disposition

[18] The officer's conclusion that Mr Barud had a reasonable prospect of a durable solution in South Africa was not unreasonable. I must, therefore, dismiss this application for judicial review.

[19] Mr Barud proposed the following questions for certification:

1. Is the standard of review for legal interpretation of the concept of durable solution found in *Immigration and Refugee Protection Regulation* 139(1)(d) correctness or reasonableness?
2. Does a durable solution in a country other than Canada for an applicant for permanent residence to Canada who claims to be in need of refugee protection require that the country manifest both a willingness and an ability to protect the applicant?
3. Is the existence of risk from generalized criminality relevant to a determination of a durable solution in a country other than Canada for an applicant for permanent residence to Canada who claims to be in need of refugee protection?

[20] In my view, these questions should not be stated. Question 1 raises an issue that has been settled in the case law (*eg, Mushimiyimana*, above). Similarly, regarding Question 2, the cases make clear that the applicant's personal circumstances and the prevailing conditions must be assessed. This obviously includes the state's ability and willingness to protect its residents. With respect to Question 3, the existence of generalized crime was merely one of the factors cited by the officer here. Even if it were to be decided that the officer wrongly took that factor into account, the officer's conclusion that Mr Barud had a durable solution in South Africa would likely stand. The answer to the proposed question would, therefore, not be dispositive of this application. Accordingly, none of the proposed questions raises a matter of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No questions of general importance are stated.

"James W. O'Reilly"

Judge

Annex

Immigration and Refugee Protection Regulations, SC 2001, c 27

Règlement sur l'immigration et la protection des réfugiés, LC 2001, ch 27

General requirements

Exigences générales

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

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 :

...

[...]

(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

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 :

(i) voluntary repatriation or resettlement in their country of nationality or habitual residence, or

(i) soit le rapatriement volontaire ou la réinstallation dans le pays dont il a la nationalité ou dans lequel il avait sa résidence habituelle,

(ii) resettlement or an offer of resettlement in another country;

(ii) soit la réinstallation ou une offre de réinstallation dans un autre pays;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-96-13

STYLE OF CAUSE: RASHID HARED BARUD v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: OCTOBER 15, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: NOVEMBER 18, 2013

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