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How *Bromfield v. Mukasey* Correctly Applied U.S. Immigration Law in a Victory for Civil Rights and a Scathing Rebuke of Jamaica's Pervasive Homophobia

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NOTES

How *Bromfield v. Mukasey* Correctly Applied U.S. Immigration Law in a Victory for Civil Rights and a Scathing Rebuke of Jamaica's Pervasive Homophobia

Michael D. Ford*

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Boom Bye Bye by Buju Banton

Boom, bye bye, in a faggot's head
Rude boys don't promote nasty men
They have to die

Boom, bye bye, in a faggot's head
Rude boys don't promote nasty men
They have to die.

Two men hitch up and are rubbing up
And are laying down in bed
Hug up one another and feeling up legs
Send for the automatic and the Uzi instead
Shoot them, don't come if we shoot them. . .

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Here comes the DJ named Buju Banton
Come to straighten your talk
Because I say this is not a bargain
I say this is not a deal
Guy comes near us then his skin must peel
Burn him up bad like an old tyre wheel.¹

I. INTRODUCTION

While most Americans may view Jamaica as a laid-back beach destination for tropical family vacations and collegiate spring-break and the source of peaceful Reggae music made famous by Bob Marley, modern Jamaican music openly and unabashedly advocates ruthless violence towards homosexuals.² "Boom Bye Bye," onomatopoeic words describing the sound of gun shots,³ has been one of Jamaica's most popular songs in recent history; its singer, Buju Banton, a Grammy-nominated artist, broke Bob Marley's record of most number one singles in a year on the Jamaican music charts.⁴ Unfortunately, the deep-rooted homophobia ensconced in the widely popular songs accurately reflects societal attitudes toward gays and lesbians in Jamaica.⁵ Human rights groups routinely confer upon the island nation the title of "most homophobic place on earth."⁶ Encouraged by their government's fervent defense of and justifications for its strict anti-sodomy laws, Jamaicans have openly and publicly attacked, mutilated, and even killed men and women suspected of being gay, often with or in front of police officers.⁷ The precarious and dangerous situation faced by Jamaican homosexuals has led many to flee to the United States in hopes of never having to go back.⁸

This casenote will first describe the legal framework for aliens

1. BUJU BANTON, *Boom Bye Bye* (Shang Records 1992) (single release); see Rebecca Schleifer, *Hated to Death: Homophobia, Violence and Jamaica's HIV/AIDS Epidemic*, 16 Human Rights Watch 6(b), 75 (1964) (Rebecca Schleifer, trans.).

2. Christopher Thompson, *Curbing Homophobia in Reggae*, TIME, Aug. 7, 2007, available at <http://www.time.com/time/arts/article/0,8599,1650585,00.html>.

3. Schleifer, *supra* note 1, at 75 n.261.

4. Thompson, *supra* note 2.

5. Tim Padgett, *The Most Homophobic Place on Earth?*, TIME, Apr. 12, 2006, available at <http://www.time.com/time/world/article/0,8599,1182991,00.html> ("Jamaica's major political parties have passed some of the world's toughest anti-sodomy laws and regularly incorporate homophobic music in their campaigns.").

6. *Id.*

7. See ANDREW REDING, WORLD POLICY REPORTS: SEXUAL ORIENTATION AND HUMAN RIGHTS IN THE AMERICAS, 81 (2003); see also Schleifer, *supra* note 1, at 18-25.

8. See generally *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1085 (9th Cir. 2005) (alien fled to the United States and overstayed his visa because he could not live "a

attempting to avoid being sent back to their oppressive home countries, followed by a discussion of the relevant case law and underlying jurisprudence of immigration cases involving homosexuals. An analysis of the latest case involving a gay Jamaican alien will be next, with a final comment on its lasting significance.

II. NON-CITIZENS AND THEIR OPTIONS TO AVOID DEPORTATION

In general, non-citizens caught living in the United States illegally have three legal bases upon which to rely in avoiding deportation to their home countries. First, one can apply for asylum. To qualify for asylum, the applicant must show that he or she is a refugee, defined in 8 U.S.C. § 1101(a)(42)(A) as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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*.⁹

Second, one can mount a claim for withholding of removal by establishing that his or her "life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁰ Pursuant to 8 C.F.R. § 1208.16(b), there are two statutory bases upon which withholding of removal can be granted:

(1) *Past threat to life or freedom*. (i) If the applicant is determined to have *suffered past persecution* in the proposed country of removal on account of race, religion, nationality, *membership in a particular social group*, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim.¹¹

(2) *Future threat to life or freedom*. An applicant who has not suffered past persecution may demonstrate that his or

gay life openly in Mexico" because of how he would be treated if his sexuality were known).

9. 8 U.S.C. § 1101(a)(42)(A) (2009) (emphasis added).

10. 8 C.F.R. § 1208.16(b) (2009); *see also* 8 U.S.C. § 1231(b)(3)(A) (2009).

11. 8 C.F.R. § 1208.16(b)(1)(i) (2009) (emphasis added).

her life or freedom would be threatened in the future in a country if he or she can establish that *it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country*. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

- (i) The applicant establishes that in that country there is a *pattern or practice of persecution of a group of persons similarly situated to the applicant* on account of race, religion, nationality, membership in a particular social group, or political opinion; and
- (ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.¹²

Third, an alien can obtain withholding of removal relief under the United Nations' Convention Against Torture ("CAT"). He or she must establish "that it is more likely than not that he or she would be tortured if removed to the proposed country of removal"¹³—the highest burden of proof.¹⁴

In assessing *whether it is more likely than not that an applicant would be tortured in the proposed country of removal*, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

- (i) *Evidence of past torture* inflicted upon the applicant;
- (ii) Evidence that the applicant could relocate to a part

12. 8 C.F.R. § 1208.16(b)(2)(i)-(ii) (2009) (emphasis added).

13. 8 C.F.R. § 1208.16(c)(2) (2009).

14. See *Huang v. U.S. Att'y Gen.*, 429 F.3d 1002, 1011 (11th Cir. 2005) (explaining that an applicant who is unable to meet the standard for asylum is also unable to meet the more stringent standard for withholding of removal).

of the country of removal where he or she is not likely to be tortured;

(iii) *Evidence of gross, flagrant or mass violations of human rights within the country of removal*, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.¹⁵

A successful CAT claim requires a showing of certain torture; the statutory definition of “torture” requires government involvement, either directly or indirectly:

Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is *inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.¹⁶

A. *Impediments to Asylum Eligibility*

A frequent impediment to an alien’s eligibility for asylum, withholding of removal, or CAT relief occurs when the applicant has been convicted of a crime in the United States. An alien who is convicted of an aggravated felony at any time after admission is deportable and thus ineligible for asylum.¹⁷ Further, when an alien has been convicted of a “particularly serious” crime and is a danger to the community of the United States, he or she is statutorily unable to apply for withholding of removal.¹⁸ According to the statute, the definition of a “particularly serious” crime is one in which the alien is sentenced to at least five years imprisonment; nevertheless, the Attorney General has discretion in determining whether a felony is particularly serious, notwithstanding the length of the sentence imposed.¹⁹

A final obstacle to a successful asylum, withholding of removal, or CAT claim centers on the definition of “persecution.”

15. 8 C.F.R. § 1208.16(c)(3)(i)-(iv) (2009) (emphasis added).

16. 8 C.F.R. § 1208.18(a)(1) (2009) (emphasis added).

17. 8 U.S.C. § 1227(a)(2)(A)(iii) (2009).

18. 8 U.S.C. § 1231(b)(3)(B)(ii) (2009).

19. 8 U.S.C. § 1231(b)(3)(B) (2009).

As will be discussed in the next section, many claims fail because the evidence of an alien's past abuse does not rise to the level of "persecution" to satisfy the statutory requirements. Persecution has been described as "an 'extreme concept' requiring 'more than a few isolated incidents of verbal harassment or intimidation' and that '[m]ere harassment does not amount to persecution.'"²⁰

B. The History of Homosexual Immigration Law

In general, the history of homosexual immigration law traces back to 1994, when then-Attorney General Janet Reno ordered that a Board of Immigration Appeals ("BIA") decision from 1990 be designated as precedent in all future related matters.²¹ The case, *In re Toboso-Alfonso*,²² established sexual orientation as a protected "particular social group" in which aliens living in the United States could claim membership to establish successful asylum, withholding of removal, and CAT claims.²³ By validating and affirming the principles behind the case, Reno's actions broadened the significance of the BIA's decision upholding gay and lesbian civil rights.²⁴ However, in the years following the Attorney General's mandate, homosexual foreigners attempting to avoid deportation were met with considerable difficulties as courts across the country began to shape gay asylum case law dominated by a strict, rigid standard and underscored by a conservative, arguably homophobic, jurisprudence.²⁵ Most claims for asylum, withholding of removal, or relief under the CAT failed unless applicants successfully showed a well-founded fear of persecution by their home country's government based on actual prior instances of abuse or torture by government officials.²⁶ As this paper will explore, the second prong of the removal statute, as well as the corresponding section of the CAT statute, each create an avenue

20. *Tavera Lara v. U.S. Att'y Gen.*, 188 F. App'x 848, 857 (11th Cir. 2006) (quoting *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005)).

21. See Att'y Gen. Order No. 1895-94 (June 19, 1994), available at 1994 WL 16515318.

22. 20 I. & N. Dec. 819 (BIA 1990).

23. See, e.g., *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1094 (9th Cir. 2000) (noting that the BIA's decision in *Toboso-Alfonso* helped determine that sexual orientation and sexual identity can be the basis for establishing a "particular social group" for asylum purposes).

24. See David Johnston, *Ruling Backs Homosexuals on Asylum*, N.Y. TIMES, June 17, 1994, at A12.

25. See Holland & Knight LLP, *Summary of GLBTHIV Asylum Cases*, AILA Annual Conference on Immigration Law, June 14, 2007.

26. See, e.g., *Tavera Lara v. U.S. Att'y Gen.*, 188 F. App'x 848 (11th Cir. 2006).

for relief based on a showing of a pattern or practice of persecution of a particular social group in the country of proposed removal and have largely been ignored.

III. *BROMFIELD V. MUKASEY*

Fortunately, in what will be celebrated as the next great legal victory protecting the rights of gays and lesbians, the Court of Appeals for the Ninth Circuit recently announced a decision that sets forth a rational and appropriate precedent and gives effect to the second prong of the removal statute, significantly easing the plight of Jamaican and other gay and lesbian immigrants seeking to avoid being sent back to their oppressively discriminatory home countries. Damion Nathaniel Bromfield moved to the United States as a legal permanent resident in 1993 at the age of fifteen.²⁷ Four years later, he “came out” as a gay man.²⁸ Although he made two short trips to Jamaica prior to coming out to visit his family, he has never been in his home country as an “out” homosexual.²⁹ Later, Bromfield pleaded guilty to misdemeanor sexual abuse in the third degree and felony contributing to the sexual delinquency of a minor.³⁰ The government placed him in removal proceedings for having been convicted of an aggravated felony.³¹

Consequently, the immigration judge (“IJ”) found Bromfield ineligible for asylum as a result of his convictions but permitted him to apply for withholding of removal and relief under CAT by declining to find the crimes to be “particularly serious.”³² Bromfield subsequently testified³³ that as a gay man he would be beaten and killed if removed to Jamaica, relying on articles he read about violence against homosexuals and fear that his father told his extended family his sexual orientation.³⁴ Moreover, Bromfield submitted the 2005 U.S. State Department Country Report for Jamaica (“Country Report”) in support of his claim.³⁵

27. *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See 8 U.S.C. §1231(b)(3)(B)(ii) (2009) (alien statutorily ineligible for withholding of removal if, “having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States”).

33. The appellate court accepted Bromfield’s testimony as true because the BIA did not make an adverse credibility determination. See, e.g., *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004).

34. *Bromfield*, 543 F.3d at 1074.

35. *Id.*

This report detailed the widespread violence against homosexuals committed by both private individuals and public officials.³⁶ Additionally, the report noted that Jamaican laws criminalize homosexual conduct, with prison sentences up to ten years, and that the prime minister recently reaffirmed the laws, refusing to be pressured into changing them.³⁷ Nevertheless, the IJ denied Bromfield's claims on the merits, concluding that he had not carried his burden and was not entitled to either form of relief.³⁸ The BIA dismissed Bromfield's pro se appeal, affirming the IJ's conclusion that Bromfield failed to sustain the high burden of proof applicable to withholding of removal or relief under CAT.³⁹ Determining it had jurisdiction to consider Bromfield's petition for review of the BIA's order, the Ninth Circuit Court of Appeals first held, with respect to the withholding of removal claim, that the IJ erred in failing to find that there exists a pattern or practice of persecution of gay men in Jamaica, and second, that the IJ applied the wrong legal standard in evaluating Bromfield's CAT claim.⁴⁰

Unlike previous cases where homosexual aliens' claims for asylum, withholding of removal, or relief under CAT were decided based on a showing of past instances of individualized abuse and torture, the Ninth Circuit granted relief for a Jamaican national who had never been personally victimized because of his homosexuality; instead, the court gave effect to the alternate statutory basis allowing an alien to prove a general pattern or practice of persecution in his or her home country to mount a successful claim. The court in *Bromfield* sided with a felon immigrant who established that because of the social climate in Jamaica and the government's treatment of homosexuals, "all gay men are at risk."⁴¹ The court reaffirmed an entirely valid and appropriate means of claiming asylum, withholding of removal, or CAT relief that had been ignored in the prior case law involving aliens attempting to avoid deportation to homophobic countries. This significant legal accomplishment encouraging homosexuals as a protected minority under the law also serves as a stinging condemnation of the treatment of gays and lesbians in Jamaica: Damion Bromfield never even stepped foot in his native Jamaica

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1079.

41. *Id.*

as a gay man, yet he has avoided deportation based solely on the island country's severe and widespread ill treatment of homosexuals.

IV. PERSPECTIVE ON PRIOR CASES

In general, for a homosexual alien to mount a successful asylum claim, apply for withholding of removal, or petition for CAT relief, he or she must detail a well-founded fear of persecution or torture based firmly on the existence of prior physical abuse because of his or her religion, race, or membership in a particular social group.⁴² The groundbreaking case that established sexual orientation as a "particular social group" eligible for relief was *In re Toboso-Alfonso*.⁴³ Fidel Toboso-Alfonso was a forty-year-old homosexual Cuban native placed in removal proceedings in 1985 after being convicted for possession of cocaine.⁴⁴ The IJ ultimately concluded that Toboso-Alfonso was statutorily eligible for asylum and withholding of deportation as a member of a particular social group who fears persecution by the Cuban government.⁴⁵ The IJ relied on the Immigration and Nationality Act, Section 243(h)(1),⁴⁶ which stated that an alien who seeks withholding of deportation from any country must show that his "life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group, or political opinion."⁴⁷ The IJ granted the Cuban's withholding of deportation claim, finding his testimony concerning his treatment as a homosexual in Cuba established prior persecution and a well-founded fear of continued persecution if forced to return.⁴⁸ By rejecting the Immigration and Naturalization Service's argument on appeal that such a conclusion "would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well,"⁴⁹ the BIA truly affirmed a landmark, foresighted decision that has become part of the gradual movement for gay and lesbian

42. 8 U.S.C. § 1101(a)(42)(A) (2009).

43. 20 I. & N. Dec. 819 (BIA 1990).

44. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 820 (BIA 1990).

45. *Id.*

46. This statute has since been renamed and subsumed by 8 C.F.R. § 1208(b) (2009) (the removal statute).

47. *In re Toboso-Alfonso*, 20 I. & N. Dec. at 820.

48. *Id.* at 822.

49. *Id.*

civil rights.⁵⁰

A. *Individual Persecution Based on Homosexuality*

Nevertheless, following Attorney General Janet Reno's mandate affirming the precedential value of *In re Toboso-Alfonso*, courts generally sided with Latin American aliens only upon a showing of past individual persecution targeted against them because of their homosexuality either at the hands of or acquiesced by the government.⁵¹ The alternative basis for relief—establishing a pattern or practice of persecution in the home country⁵² or evidence of gross violations of human rights⁵³—was largely ignored in practice by immigration judges. For example, the United States Court of Appeals for the Third Circuit, in *Maldonado v. U.S. Attorney General*,⁵⁴ vacated and remanded an order of the BIA affirming the order of an IJ denying an Argentinean alien's application for asylum, withholding of removal, and protection under the CAT. The alien testified that over a period of several years, "police arrested him and beat him on at least twenty separate occasions as he left gay discos late at night."⁵⁵ Beating Maldonado with a stick, the officers would threaten him with statements such as "you faggots deserve to die" and "you need a hot iron bar stuck up your ass."⁵⁶ Further, the alien testified that the police were unwilling to protect him during an assault by private citizens who punched him, kicked him, and urinated on him in the street.⁵⁷ The IJ denied Maldonado's claim after concluding that the abuse suffered at the hands of the police were on account of his "social preferences (a desire to go to gay discos and leave early in the morning), rather than his membership in a particular social group (gay men in Argentina)."⁵⁸ Nevertheless, the Third Circuit concluded that the mistreatment Maldonado suffered at the hands of the police rose to the level of persecution⁵⁹ and that

50. The INS' main argument, as well as the dissent's, relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state criminal sodomy laws after concluding they do not violate the fundamental rights of homosexuals), which was explicitly overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003).

51. See 8 C.F.R. § 1208.16(b)(1) (2009) and 8 C.F.R. § 1208.16(c)(3)(i) (2009).

52. 8 C.F.R. § 1208.16(b)(2) (2009).

53. 8 C.F.R. § 1208.16(c)(3)(iii) (2009).

54. 188 F. App'x 101 (3d Cir. 2006).

55. *Id.* at 103.

56. *Id.*

57. *Id.* at 103 n.3.

58. *Id.* at 102.

59. *Id.* at 104 (citing *Voci v. Gonzales*, 409 F.3d 607, 615-16 (3d Cir. 2005) (noting

just because he was targeted by the police only while engaged in an elective activity, he was in fact persecuted on account of his sexuality.⁶⁰ The court further supported its holding with reports from human rights organizations, newspaper stories, magazine articles and a State Department Country Report detailing the culture of anti-homosexual prejudice in Argentina.⁶¹ Overall, the court found that the alien's multiple instances of serious physical abuse at the hands of the police because of his homosexuality, supplemented by his home country's discriminatory attitude toward gays, constituted a well-founded fear of future persecution sufficient for an asylum claim.⁶²

Similarly, in *Morett v. Gonzales*,⁶³ the United States Court of Appeals for the Second Circuit granted a Venezuelan's petition for review after holding that the alien's sexual assault, harassment, and extortion by several police officers on account of his sexual orientation were severe and rose to the level of persecution required for asylum.⁶⁴ This ruling provided an important distinction, with the appellate court disagreeing with the IJ's finding that the occasions of mistreatment Morett suffered were isolated criminal incidents⁶⁵ and concluding that in the aggregate, the alien was a victim of government persecution based on his sexuality.⁶⁶ The court further noted that Morett substantially corroborated his claim with reports from the State Department, the Immigration and Refugee Board of Canada, and the Human Rights Watch to indicate a pattern and practice of abuse by the police against homosexuals in Venezuela.⁶⁷

Another example of a Latin American alien with whom the court ultimately sided is Jose Patricio Boer-Sedano, whose petition for review of a BIA decision denying his application for asy-

that "multiple [incidents] inflicted on the same respondent on multiple occasions are more likely to give rise to a finding of persecution").

60. *Id.* (citing *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (rejecting government's argument that petitioner's fear of future persecution "would not be on account of his *status* as a homosexual, but rather on account of him committing future homosexual acts") (emphasis in original)).

61. *Id.*

62. *Id.* at 105.

63. 190 F. App'x 47 (2d Cir. 2006).

64. *Id.* at 47-48.

65. *Id.*

66. See *Poradisova v. Gonzales*, 420 F.3d 70, 79-80 (2d Cir. 2005) (in assessing whether or not a petitioner has suffered persecution, the different instances of mistreatment suffered by him or her should be considered cumulatively, and not in isolation) (citing *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998)).

67. *Morett*, 190 F. App'x at 49.

lum, withholding of removal, and protection under the CAT was granted in *Boer-Sedano v. Gonzales*.⁶⁸ The Ninth Circuit ultimately held that the Mexican national's past abuse constituted persecution, rendering him statutorily eligible for asylum and withholding of removal.⁶⁹ Boer-Sedano's asylum claim centered on his interactions with a "high-ranking police officer" who stopped him and two other men one night, telling them they were being held "for being gay."⁷⁰ Over the next three months, the same police officer stopped Boer-Sedano on nine separate occasions; each time, the officer ordered him into his police car, drove to a dark location, and forced Boer-Sedano to perform oral sex on him.⁷¹ Each instance included a physical beating by the officer as well.⁷² In what the court found to be compelling evidence that the policeman's actions were motivated by the alien's homosexuality, the officer warned him that "if he killed [him] and threw [his] body somewhere no one would ask about [him], . . . because . . . [he] was a gay person" and the officer would not be committing murder, but simply "cleaning up society."⁷³ The court held there can be no doubt that the nine sex acts that Boer-Sedano was forced to perform rose to the level of persecution.⁷⁴ While the IJ faulted the alien for not reporting the persecution he suffered to the police, the Ninth Circuit did not consider this to be a dispositive issue (as Boer-Sedano was reasonably fearful of the high ranking police officer's power and influence) and thus granted the alien's petition.⁷⁵ The court also relied on *Baballah v. Ashcroft*,⁷⁶ which held that "when the government is responsible for persecution, the [state actor] prong of our asylum inquiry is satisfied without further analysis. As a result, no inquiry into whether a petitioner reported the persecution to police is necessary."⁷⁷

Clearly, a pattern had emerged concerning Latin American homosexual aliens seeking asylum, withholding of removal, and relief under the CAT. Those who brought forth evidence of substantial past harm at the hands of policeman and other state

68. 418 F.3d 1082 (9th Cir. 2005).

69. *Id.* at 1092.

70. *Id.* at 1086.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1088.

75. *Id.*

76. 367 F.3d 1067 (9th. Cir. 2004).

77. *Id.* at 1078.

actors were generally successful in their claims,⁷⁸ as were applicants who established their government's acquiescence to persecution by private individuals.⁷⁹

B. Lack of Individual Persecution or Prior Physical Abuse

In contrast, Latin American aliens whose claims for asylum, withholding of removal, or relief under the CAT do not establish past individual persecution by public government officials have been summarily rejected. For example, in *Salkeld v. Gonzales*,⁸⁰ the United States Court of Appeals for the Eighth Circuit denied a Peruvian alien's petition for review of the BIA's affirmation of an IJ's denial of asylum, withholding of removal, or relief under the CAT.⁸¹ Although there was evidence of some "alarming instances of violence" towards homosexuals in Peru, the court concluded they were relatively sporadic events and emphasized that the alien himself was never physically abused.⁸² Of note is the fact that Salkeld never disclosed his sexuality to anyone while residing in Peru and did not socialize in homosexual circles during his short return visits to his home country.⁸³ Damion Bromfield, by comparison, never came out as a gay man in his home country either.⁸⁴ The court affirmed the IJ's conclusions that Salkeld failed to demonstrate either that he suffered past persecution

78. See *Pozos v. Gonzales*, 141 F. App'x 629, 630-32 (9th Cir. 2005) (granting Mexican citizen's petition for review and holding that the harm the alien suffered at the hands of a policeman—including being raped, repeatedly beaten, and forced to work as a prostitute—clearly rose to the level of persecution inflicted on account of his perceived homosexuality).

79. See *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 784-85 (9th Cir. 2004) (granting transgendered alien from El Salvador's petition for review after finding that the alien's past kidnapping, rape, and beatings by private actors, coupled with the government's willful blindness and acquiescence to the torture, constituted past persecution rendering alien eligible for protection under the CAT and withholding of removal); see also *Grijalva v. Gonzales*, 212 F. App'x 541, 542-51 (6th Cir. 2007) (vacating BIA's decision denying Guatemalan alien's claims for withholding of removal and protection under the CAT by holding that deliberate disregard by police of persecution of homosexuals qualified as acquiescence after the alien was gang raped by soldiers and further supplemented his claim with a report from the World Policy Institute that "Guatemala would be one of the most difficult places for a homosexual to survive.").

80. 420 F.3d 804 (8th Cir. 2005).

81. *Id.* at 806.

82. *Id.* at 809.

83. *Id.* at 807.

84. *Bromfield v. Mukasey*, 543 F. 3d 1071, 1073 (9th Cir. 2008). The parallels between prior case law and the *Bromfield* case will be discussed further in the Analysis section of this note.

because of his status or that he held a well-founded fear of future persecution.⁸⁵ Recognizing the “extremely deferential”⁸⁶ standard of review, the Eighth Circuit held that the BIA’s decision that Salkeld failed to demonstrate a clear probability of persecution based on his homosexuality was supported by substantial evidence.⁸⁷ In addition, the Ninth Circuit recently denied a Peruvian alien’s petition for review of an order of the BIA affirming the denial of his application for asylum, withholding of removal, and protection under the CAT.⁸⁸

Further, the Eleventh Circuit of the U.S. Court of Appeals has taken a particularly strict and rigid stance towards Latin American aliens seeking to avoid deportation. In *Tavera Lara v. U.S. Att’y Gen.*,⁸⁹ the court denied a Columbian citizen’s petition for review of an order denying her claims for asylum, withholding of removal, and protection under the CAT by concluding that substantial evidence supported the IJ’s denial of relief.⁹⁰ The alien received numerous threatening phone calls concerning her status as a lesbian⁹¹ and several handwritten notes with “vulgarity and threats” saying she “was a dirty lesbian” who “was expendable” and “had no right to have children.”⁹² Newspaper clippings about social cleansing and homosexuals accompanied the notes; when Tavera Lara approached the police, they mocked her and laughed about the letters.⁹³ The court concluded that these instances of abuse did not rise to the level of persecution because it is “an ‘extreme concept’ requiring ‘more than a few isolated incidents of verbal harassment or intimidation’ and that ‘[m]ere harassment does not amount to persecution.’”⁹⁴ Moreover, regardless of the evidence of discrimination and violence against certain groups of

85. *Salkeld*, 420 F.3d at 808.

86. *Id.* at 809.

87. *Id.* (citing *Zakirov v. Ashcroft*, 384 F.3d 541 (8th Cir. 2004), the court noted that persecution is an extreme concept and much of the harassment and intimidation of which Salkeld complained, while serious, did not rise to the level of persecution).

88. *Adriazola Casas v. Mukasey*, 280 F. App’x 622, 623 (9th Cir. 2008) (holding that alien failed to establish well-founded fear of future persecution warranting asylum or eligibility for withholding of removal or protection under the CAT because threats, harassment, and a rock throwing incident not clearly motivated by alien’s sexual orientation were insufficient to rise to level of persecution).

89. 188 F. App’x 848 (11th Cir. 2006).

90. *Id.* at 859.

91. *Id.* at 850.

92. *Id.* at 851.

93. *Id.*

94. *Id.* at 857 (quoting *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005)).

homosexuals in Colombia, the court upheld the IJ's finding that Tavera Lara failed to meet the fear of future persecution requirement for relief.⁹⁵

One year later, in *Paredes v. U.S. Attorney General*,⁹⁶ the Eleventh Circuit held that an alien from Venezuela would not be singled out for future persecution based on his sexual orientation if he returned home and thus denied his petition for review of the BIA's denial of his applications for asylum and withholding of removal.⁹⁷ The court recognized that the IJ had implicitly analyzed Paredes' claim under the pattern or practice standard,⁹⁸ concluding that the Venezuelan government had taken affirmative, albeit unsuccessful, steps toward protecting homosexual individuals.⁹⁹ The court placed particular emphasis on the fact that Paredes had never been subjected to past harm or mistreatment, much less persecution, on account of his sexual orientation.¹⁰⁰ This case highlights the difficulties an applicant for asylum faces in establishing a well-founded fear of future persecution in the absence of past personal abuse by a state actor. While crediting the Venezuelan government for attempting to combat discrimination against gays and lesbians, the court in this case gave no substantive weight to the evidence Paredes submitted that the court even acknowledged "establish[ed] that the police participated in arbitrary arrests of homosexual men and that there existed a culture of discrimination toward homosexuals. Although such discrimination is *reprehensible*, it does not rise to the level of persecution that would compel reversal of the IJ's decision."¹⁰¹

Further, in a particularly telling example of the difficulties homosexual aliens faced in attempting to avoid deportation, the U.S. Court of Appeals for the Third Circuit denied a Jamaican citizen's petition for review in *Forrester v. Attorney General*.¹⁰² The court ultimately concluded that the alien, a lesbian, failed to

95. *Id.* at 858.

96. 219 F. App'x 879 (11th Cir. 2007).

97. *Id.* at 888.

98. *Id.* at 886.

99. *Id.* at 887 (noting that (1) the Venezuelan Supreme Court ruled that health care for HIV-infected individuals had to be freely available from the government; (2) the government proposed a constitutional amendment to prohibit discrimination on the basis of sexual orientation, but it ultimately did not pass; and (3) the government banned employers from requiring employees to undergo blood tests prior to employment).

100. *Id.* at 883.

101. *Id.* at 887 (emphasis added).

102. 207 F. App'x 258 (3d Cir. 2006).

establish that it was more likely than not that she would be subjected to torture by, or with the consent of, government agents upon her return to Jamaica on account of her sexual orientation because she offered no evidence that she was tortured or arrested on any of her four visits to Jamaica, or that the Jamaican government would acquiesce to any mistreatment she might suffer on account of her homosexuality.¹⁰³ The IJ in this case had concluded that there was "almost a virtual certainty" that Forrester would suffer torture because of her sexual orientation if she were to return to Jamaica and that she had sufficiently established government acquiescence because "by virtue of [Jamaican] laws, she would be criminalized if she is encountered in any manner by police, even as a victim, due to her sexual orientation."¹⁰⁴ However, in reversing the IJ's determination that Forrester was entitled to CAT relief, the BIA, while acknowledging that the record contained evidence that "homosexuals in Jamaica experience discrimination, harassment, and violence," noted that there was no record evidence that the Jamaican government acquiesced to the torture of homosexuals.¹⁰⁵ The Third Circuit upheld the BIA's conclusion that notwithstanding Forrester's masculinity and lesbian status, she failed to offer any evidence that she was tortured or arrested while in Jamaica, and even assuming she would suffer some sort of violence based on her sexual orientation, there was no evidence the Jamaican government condoned such mistreatment.¹⁰⁶ This lack of prior physical abuse and government acquiescence of homosexual discrimination led the court to deny Forrester's petition for review.¹⁰⁷

Moreover, the Third Circuit has also refused to overturn decisions involving asylum claims from Jamaican aliens. In *Parker v. Ashcroft*,¹⁰⁸ the court conceded that there is considerable evidence that "virulent prejudice" against homosexuals exists in Jamaica with a culture of anti-homosexual violence that is deeply ingrained and reflected in popular songs that urge violence against gay men.¹⁰⁹ Yet, under the substantial evidence standard of review, the court upheld the BIA's reversal of the IJ's determination that Parker had a well-founded fear of persecution based

103. *Id.* at 261.

104. *Id.* at 260.

105. *Id.*

106. *Id.* at 261.

107. *Id.*

108. 112 F. App'x 860 (3d Cir. 2004).

109. *Id.* at 862.

on prior abuses on account of his homosexuality at the hands of a neighborhood gang that the police could not control.¹¹⁰ Overall, prior to *Bromfield*, even with clear evidence of widespread violence against homosexuals in Jamaica, courts were unwilling to grant aliens' claims for asylum, withholding of removal, or protection under the CAT in the absence of individualized prior physical abuse by government officials on account of one's sexual orientation.

V. ANALYSIS OF *BROMFIELD*

In *Bromfield*, after briefly establishing jurisdiction¹¹¹ and examining its scope and standard of review,¹¹² the Ninth Circuit analyzed the withholding of removal claim and the claim for relief under the CAT separately.

A. *Withholding of Removal Claim*

Primarily, in order for Bromfield to be eligible for withholding of removal, he must establish that he would more likely than not be persecuted on account of his sexual orientation if he were removed to Jamaica.¹¹³ According to the removal statute, the burden of proof is on the applicant to establish his or her life or freedom would be threatened in the proposed country of removal on account of, among other characteristics, his or her membership in

110. *Id.* at 861.

111. While the government argued that the court did not have jurisdiction over the petition for review because Bromfield was convicted of an aggravated felony, the court held that it did in fact have jurisdiction in cases where the IJ denies an alien's claim on the merits rather than relying on the felony conviction. *Bromfield v. Mukasey*, 543 F.3d 1071, 1074-75 (9th Cir. 2008); *see also* *Unuakhaulu v. Gonzales*, 416 F.3d 931, 933 (9th Cir. 2005) ("8 U.S.C. § 1252(a)(2)(C) divests us only of jurisdiction to review orders of removal that are actually based on a petitioner's prior aggravated felony conviction . . . [w]e . . . have jurisdiction to review the BIA's nondiscretionary denial of withholding, which was not predicated on [the petitioner's] aggravated felony.").

112. The court reviewed the IJ's factual findings under the "substantial evidence" standard, concluding that it will reverse the BIA if the evidence presented would compel a reasonable factfinder to reach a contrary conclusion. *Bromfield*, 543 F.3d at 1076. *But see* *Salkeld v. Gonzales*, 420 F.3d 804, 809 (8th Cir. 2005) (describing the substantial evidence standard as "extremely deferential") and *Parker*, 112 F. App'x at 862-63 (deciding against disturbing the BIA's decision under the "deferential standard of review" of the substantial evidence test).

113. 8 C.F.R. § 1208.16(b) (2009); *see also* 8 U.S.C. § 1231 (b)(3)(A) (2009) ("The Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

a “particular social group.”¹¹⁴ Homosexuals are members of a “particular social group” for purposes of asylum and withholding of removal.¹¹⁵ Absent evidence of past persecution, Bromfield can meet his burden under the statute’s second prong by establishing that there is a pattern or practice of persecution of a group of similarly-situated individuals and that his “inclusion in and identification with such group of persons [makes] it . . . more likely than not that his . . . life or freedom would be threatened” in Jamaica.¹¹⁶ Hence, Bromfield’s entire removal claim centers on proving that his status alone as a homosexual, although never personally subjecting him to abuse, would make him more likely than not persecuted if removed to his native country.

In the past, attempts at avoiding deportation through this method have proved futile. Most glaringly was in *Tavera Lara v. Attorney General*,¹¹⁷ where the court acknowledged reports that Colombian homosexuals had been both arbitrarily detained and killed by death squads,¹¹⁸ as well as documented social cleansing campaigns that targeted sexual minorities deemed “disposable.”¹¹⁹ Despite these acknowledgements, the court still denied the alien’s petition for asylum because she failed to meet the “well-founded fear of persecution” standard.¹²⁰ In direct contravention with the Ninth Circuit’s policy reasoning in *Bromfield*, the court in *Tavera Lara* concluded that “regardless of the evidence of discrimination and violence against certain groups of homosexuals in Colombia, the record does not compel reversal of the IJ’s finding that Tavera Lara fails to meet the subjective fear of harm requirement” for asylum or withholding of removal.¹²¹

Even in cases involving aliens from Jamaica, homosexuals have had considerable difficulty in winning asylum or withholding of removal absent any evidence of prior physical persecution.¹²²

114. 8 C.F.R. § 1208.16(b) (2009).

115. *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (citing *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1094 (9th Cir. 2000)).

116. 8 C.F.R. § 1208.16(b)(2)(ii) (2009).

117. 188 F. App’x 848 (11th Cir. 2006).

118. *Id.* at 853.

119. *Id.* at 854.

120. *Id.* at 858; see 8 U.S.C. § 1101(a)(42)(A) (2009) (describing the “well-founded fear of persecution” standard to be eligible for asylum).

121. *Tavera Lara*, 188 F. App’x at 858.

122. See *Forrester v. Att’y Gen.*, 207 F. App’x 258, 260 (affirming BIA’s conclusion that although homosexuals in Jamaica experience discrimination, harassment, and violence, there was no record evidence that the Jamaican government acquiesced to the torture of homosexuals, and “[a]bsent any clearly identifiable, commonly known facts or references to official documents, it was error for the Immigration Judge to

Nevertheless, the court in *Bromfield* recognized the adverse social climate for homosexuals in Jamaica, noting that the “most glaring” error in the IJ’s opinion was his interpretation of the State Department’s Country Report of the island nation.¹²³ The appellate court placed heavy emphasis on the Country Report’s findings. Concluding that “a culture of severe discrimination” against homosexuals exists in Jamaica, the Report recognized that “[t]here were numerous cases of violence against persons based on sexual orientation, including by police and vigilante groups,” such as mob attacks, stabbings, and targeted shootings.¹²⁴

The court next decided whether the evidence of violence against homosexuals cited in the Country Report was either mere “random” violence or targeted persecution. In the past, when determining whether an applicant for asylum has been persecuted, courts focused on individual instances of abuse targeted against the alien individually.¹²⁵ Instead, by relying on the removal statute’s second prong for relief,¹²⁶ the court concluded that the Country Report alone “makes clear that homosexuals are the victims of *targeted* violence on account of their orientation”¹²⁷ and therefore the IJ’s conclusion that the Country Report did not establish that homosexuals, as a group, are persecuted in Jamaica was not supported by substantial evidence.¹²⁸

Further, the court found additional evidence of persecution of homosexuals in Jamaica based on the country’s Offences Against the Person Act, which criminalizes homosexual conduct by prohibiting “‘acts of gross indecency’ (generally interpreted as any kind of physical intimacy) between men, in public or in private.”¹²⁹ The Country Report clearly pointed out this law is in fact enforced in practice, noting that “then-Prime Minister P.J. Patterson responded to criticism from the international community by stating that Jamaica would not be pressured into changing its anti-

take administrative notice and conclude that there was a de facto government policy of gay bashing throughout [Jamaica]).

123. *Bromfield v. Mukasey*, 543 F.3d 1071, 1076 (9th Cir. 2008).

124. *Id.*

125. *See* *Morett v. Gonzales*, 190 F. App’x 47, 48 (2d Cir. 2006) (“In assessing whether or not a petitioner has suffered persecution, the different instances of mistreatment suffered by him or her should be considered cumulatively, and not in isolation.”).

126. 8 C.F.R. § 1208.16(b)(2) (2009).

127. *Bromfield*, 543 F.3d at 1077 (emphasis in original).

128. *Id.*

129. *Id.*

homosexual laws.”¹³⁰ The court further stated that “[a]lthough legitimate criminal prosecution generally does not constitute persecution, prosecution motivated by a protected ground does.”¹³¹ Consequently, the court here held that because the prohibition of physical intimacy between men is directly related to a protected ground—membership in the particular social group of homosexual men—“prosecution under the law will *always* constitute persecution,”¹³² even though the statute criminalizes conduct and not sexual orientation *per se*.¹³³

Based solely on its review of the Country Report, the court ultimately concluded that “there exists in Jamaica a pattern or practice of persecution of gay men,”¹³⁴ which would make Bromfield eligible for asylum had he not been convicted of an aggravated felony.¹³⁵ Thus, because the IJ erred, the court remanded the case to the BIA so that it can determine whether Bromfield has met his burden of establishing that he will more likely than not be persecuted in light of the record evidence that there exists a pattern or practice of persecution of homosexuals in Jamaica.¹³⁶

Nevertheless, the court further denounced the IJ’s factual findings as clear error based on substantial evidence: “Although the IJ’s misinterpretation of the Country Report is a sufficient basis for remanding the case, it is not the only error that must be corrected on remand.”¹³⁷ The court recognized that the IJ’s misplaced reliance on the facts that Bromfield’s father, who has lived in the United States for over ten years, had not disowned him for being gay, and that Bromfield voluntarily visited Jamaica twice

130. *Id.*

131. *Id.*; see also *Karouni v. Gonzales*, 399 F.3d 1163, 1172-73 (9th Cir. 2005) (holding that evidence that homosexual acts were criminalized and actively punished in the proposed country of removal compelled the conclusion that petitioner had a well-founded fear of future persecution).

132. *Bromfield*, 543 F.3d at 1077 (emphasis added).

133. *Id.* (citing *Karouni*, 399 F.3d at 1173 (“[W]e see no appreciable difference between an individual . . . being persecuted for being a homosexual and being persecuted for engaging in homosexual acts. [Either way t]he persecution . . . qualifies as persecution on account of . . . membership in the particular social group of homosexuals.”)).

134. *Id.* at 1078.

135. See *Mgoian v. INS*, 184 F.3d 1029, 1035 (9th Cir. 1999) (“[I]f [an applicant] is able to show a ‘pattern or practice’ of persecution against a group of which he or she is a member, then he or she will be eligible for asylum.”) (internal citation omitted).

136. *Bromfield*, 543 F.3d at 1078.

137. *Id.*

before coming out as a gay man,¹³⁸ were indicative of the actions of many immigration judges across the country who demonstrate marked stereotyping of and homophobic assumptions about gays and lesbians.¹³⁹

While the court in this case deemed these facts irrelevant to a determination of whether Bromfield will be persecuted in Jamaica in the future,¹⁴⁰ courts in the past have noted with particular emphasis whether the applicant has visited his or her home country since moving to the United States. For example, in *Karouni v. Gonzales*, the court noted that “[i]n certain cases, a petitioner’s return to the country in which he or she fears persecution may undercut the petitioner’s claim that his or her fear is objectively well-founded,”¹⁴¹ yet according to the Ninth Circuit, “we have never held that the existence of return trips standing alone can rebut this presumption [of a well-founded fear of persecution].”¹⁴² However, the Eighth Circuit, in *Salkeld v. Gonzales*,¹⁴³ denied the alien’s petition for review after Salkeld did not reveal his sexual orientation status while living in Peru¹⁴⁴ and did not socialize in homosexual circles during his “short” return visits home.¹⁴⁵ Further, the Eleventh Circuit, in *Paredes v. U.S. Attorney General*¹⁴⁶ and *Tavera Lara v. U.S. Attorney General*,¹⁴⁷ denied claims to aliens seeking to avoid deportation to countries to where they had make subsequent return visits, deducing that the alien does not reasonably fear for his or her safety if he or she returns to a place that persecutes and targets homosexuals.¹⁴⁸

Unlike these previous cases, the *Bromfield* court was correct in finding irrelevant the fact that Bromfield had not returned to

138. *Id.*

139. *See Ali v. Mukasey*, 529 F.3d 478, 491 (2d Cir. 2008) (remanding BIA’s decision after concluding IJ’s comments in denying petitioner’s asylum claim “reflect an impermissible reliance on preconceived assumptions about homosexuality and homosexuals, as well as a disrespect for the petitioner.”); *see also* Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135, 144-47 (2006) (discussing an example of an Iranian who avoided deportation only after adopting a legal strategy that played to the assumptions of the judge).

140. *Bromfield*, 543 F.3d at 1078.

141. *See, e.g., Karouni v. Gonzales*, 399 F.3d 1163, 1175 (9th Cir. 2005).

142. *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9th Cir. 2005).

143. 420 F.3d 804 (8th Cir. 2005).

144. *Id.* at 808.

145. *Id.* at 807.

146. 219 F. App’x 879 (11th Cir. 2007).

147. 188 F. App’x 848 (11th Cir. 2006).

148. *Id.* at 858 (“It is not unreasonable to infer from a person’s return under the circumstances Tavera Lara described, that she does not fear for her safety.”).

Jamaica since moving to America: he has never been in a position to be persecuted on account of his sexual orientation, yet his withholding of removal claim relies on the second prong of the withholding statute, 8 C.F.R. § 1208.16(b)(2), that focuses on the proposed country of removal and not on the alien individually.¹⁴⁹ The court, by centering its decision on this statutory basis that has often been ignored by previous courts, legitimizes its broad conclusion that “[i]n light of the statute criminalizing homosexual conduct and the widespread, targeted violence against homosexuals, all gay men are at risk.”¹⁵⁰

B. Convention Against Torture Claim for Relief

Having concluded that all homosexuals are subjected to targeted violence in Jamaica, the court next tackled the issue of whether the government participates in the persecution or, at the very least, acquiesces to it; a successful Convention Against Torture (“CAT”)¹⁵¹ claim depends on whether the alien would more likely than not be tortured by or at the instigation or with the consent or acquiescence of a public official.¹⁵² The IJ rejected Bromfield’s CAT claim primarily because he had not demonstrated that he was at risk of harm from the Jamaican government.¹⁵³ The court here held that the IJ’s conclusion was an error of law: “Bromfield was not required to show that the government would torture him; he could satisfy his burden by showing that the government acquiesces in the torture of gay men.”¹⁵⁴ “‘Acquiescence’ requires only that public officials were aware of the torture but ‘remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it.’”¹⁵⁵

149. 8 C.F.R. § 1208.16(b)(2) (2009) (allowing an applicant who has not suffered past persecution to mount a successful claim for withholding of removal by establishing that a pattern or practice of persecution exists in the proposed country of removal).

150. *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008).

151. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 23 I.L.M. 1027, available at http://www.unhcr.ch/html/menu3/b/h_cat39.htm.

152. See 8 C.F.R. § 1208.16(c)(2) (2009) (describing the standard for a successful CAT claim); 8 C.F.R. § 1208.18(a)(1) (2009) (“Torture is defined as any act by which severe pain or suffering . . . is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”) (emphasis added).

153. *Bromfield*, 543 F.3d at 1079.

154. *Id.* (citing 8 C.F.R. § 1208.18(a)(1) (2009)).

155. *Id.* (quoting *Ornelas-Chaves v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006)).

Statutorily, the burden of proof is on the applicant for relief under the CAT to establish that it is more likely than not that he or she would be tortured if removed to the proposed country.¹⁵⁶ Absent evidence of past torture inflicted upon the applicant, an alien can establish a successful claim for relief under the alternate statutory prong by introducing evidence of “gross, flagrant or mass violations of human rights within the country of removal” and “other relevant information regarding conditions in the country.”¹⁵⁷

Relying solely on the Country Report, the *Bromfield* court held that the report “compels the conclusion that the Jamaican government not only acquiesces in the torture of gay men, but is *directly involved* in such torture.”¹⁵⁸ Citing the Jamaican law criminalizing homosexual conduct as an indicator of the government’s official stance toward gay men, the court placed further significance on the fact that police officers are both directly responsible for a portion of the abuses and indirectly at fault for not investigating complaints of human rights violations suffered by homosexuals.¹⁵⁹ Previous courts reviewing Jamaican aliens’ claims for asylum, withholding of removal, or CAT relief have declined to reach a bright-line conclusion about the island nation’s government. In *Forrester v. Attorney General*,¹⁶⁰ the court upheld the BIA’s determination that while the record contained evidence that “homosexuals in Jamaica experience discrimination, harassment, and violence,” there was no record evidence that the Jamaican government acquiesced to the torture of homosexuals.¹⁶¹ Further, in *Parker v. Ashcroft*,¹⁶² the court recognized “considerable evidence that virulent prejudice against homosexuals exists in Jamaica,” even noting a “culture of anti-homosexual violence that is deeply ingrained and reflected in popular songs that urge violence against gay men.”¹⁶³ Yet the court ultimately affirmed the BIA’s decision to deny Parker’s claim for asylum and withholding of removal based on the record evidence that students who engaged in gay violence have faced expulsion, government agencies have begun programs designed to educate people to respect

156. 8 C.F.R. § 1208.16(c)(2) (2009).

157. 8 C.F.R. § 1208.16(c)(3)(iii)-(iv) (2009).

158. *Bromfield*, 543 F.3d at 1079 (emphasis added).

159. *Id.*

160. 207 F. App’x 258 (3d Cir. 2006).

161. *Id.* at 260.

162. 112 F. App’x 860 (3d Cir. 2004).

163. *Id.* at 862.

citizens' rights, and a police detective's letter that indicated officials recognizing that anti-homosexual violence was unacceptable.¹⁶⁴ Thus, in the past, a deep climate of homophobia and violence against gay men alone had been insufficient to establish government "acquiescence."

Yet, in unequivocal wording, the court here remands Bromfield's case to the BIA to determine whether it is more likely than not that Bromfield will be tortured if removed to Jamaica, requiring the BIA to consider "all evidence relevant to the possibility of future torture," in light of the Jamaican government's acquiescence and involvement in the torture of homosexuals and the Country Report, "which establishes that gay men are victims of beatings, killings, and other forms of torture."¹⁶⁵ These critical, explicit conclusions about the social environment in Jamaica make clear what ultimate determination the court expected the BIA to make on remand.

VI. CONCLUSION

In *Bromfield*,¹⁶⁶ the U.S. Court of Appeals for the Ninth Circuit did more than merely grant an alien's petition for review and remand his case to the BIA to reconsider his claims for withholding of removal and relief under the CAT. Rather, in its reasoning and reliance on sound statutory authority, the court has loosened the constraints on homosexual aliens seeking to stay in the United States. Bromfield was a Jamaican citizen convicted of a sexual aggravated felony;¹⁶⁷ he had lived in the United States for over four years before coming out as a homosexual; and he had never even stepped foot in his home country as an "out" gay man.¹⁶⁸ Thus, he never personally experienced any abuse, torture, or persecution in Jamaica on account of his homosexuality. Ultimately, however, the facts relevant to this case ended up having little to do with Bromfield himself: this opinion is a striking condemnation of Jamaica and its treatment of homosexuals. Each of the court's conclusions and ultimate holdings are founded on evidence of violence against Jamaican gays and lesbians in general because of their sexual orientation. The far-reaching consequences of this decision will affect aliens who, no matter what personal persecu-

164. *Id.*

165. *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008).

166. 543 F.3d 1071 (9th Cir. 2008).

167. *Id.* at 1073-74.

168. *Id.* at 1073.

tion they have faced on account of their race, religion, political affiliation, or membership in a particular social group, can establish that the country of proposed removal persecutes members of the group to which they belong.

This case, binding precedent for cases arising in the western states comprising the Ninth Judicial Circuit and persuasive authority for the rest of the country, will undoubtedly be relied upon in the future by immigrants attempting to avoid deportation to oppressively homophobic nations, particularly in Jamaica and the rest of the Caribbean. No matter how the BIA decides Bromfield's case on remand, the court's mandate is clear: *Bromfield v. Mukasey* is a victory for the advancement of gay and lesbian civil liberties and a legitimization of equal rights for sexual minorities.