



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: [REDACTED]

Date of this notice: 6/7/2012

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:

Adkins-Blanch, Charles K.
Guendelsberger, John
Pauley, Roger

spignere

Falls Church, Virginia 22041

File: [REDACTED] Oakdale, Louisiana

Date: JUN - 7 2012

In re: [REDACTED]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Pro se

ON BEHALF OF DHS: Lorraine L. Griffin
Assistant Chief Counsel

APPLICATION: Deferral of removal

The applicant, a native and citizen of Jamaica, has timely appealed from an Immigration Judge's decision dated February 27, 2012, entered in withholding-only proceedings pursuant to 8 C.F.R. § 1208.2(c)(2). In his decision, the Immigration Judge found that removability was not at issue (I.J. at 1-2); and that the applicant had stipulated that his 2005 federal conviction for Conspiracy to Import Cocaine was presumptively a conviction for a particularly serious crime rendering the applicant ineligible for withholding of removal pursuant to section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), as well as for withholding of removal under the Convention Against Torture (I.J. at 9- 10). See *Matter of Y-L-, A-G-, R-S-R-*, 23 I&N Dec. 270, 273 (A.G. 2002); see also 8 C.F.R. §§ 1208.16(d)(2) and (3). Finally, the Immigration Judge found that the applicant had not met his burden of proof with regard to his application for deferral of removal under the Convention Against Torture. The applicant's appeal of the Immigration Judge's denial of his request for deferral of removal will be sustained.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. See 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in an appeal of an Immigration Judge's decision de novo. See 8 C.F.R. § 1003.1(d)(3)(ii).

On de novo review, we are persuaded by the applicant's appellate arguments that he established his eligibility for deferral of removal under the Convention Against Torture, if removed to Jamaica. See 8 C.F.R. § 1208.17; see also *Efe v. Ashcroft*, 293 F.3d 899, 907 n. 8 (5th Cir. 2002) (to obtain deferral of removal under the CAT, the applicant must prove his torture would be "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.").

Thus, "[protection from removal] under the Convention Against Torture requires a two part analysis-first, is it more likely than not that the alien will be tortured upon return to his homeland; and second, is there sufficient state action involved in that torture." See *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 350-51 (5th Cir. 2006). Therefore, to obtain protection under the Convention Against

Torture an applicant must show that it is more likely than not that he will be tortured in his home country at the hands of his government or that his government will acquiesce in the torture. A state actor only "acquiesces" in torture if "the public official, prior to the activity constituting torture, ha[s] awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7); see also *Hakim v. Holder*, 628 F.3d 151, 154-57 (5th Cir. 2010) (holding that "'acquiescence' is satisfied by a government's willful blindness of torturous activity"). The burden of proof is on the CAT applicant to prove by objective evidence that it is "more likely than not" that he or she will be tortured if removed. See *Chen v. Gonzales*, 470 F.3d 1131, 1139 (5th Cir. 2006) (quoting 8 C.F.R. § 208.16(c)(2)). On de novo review, we find the applicant has met that burden.

As urged by the applicant on appeal, the evidence in the record indicates that the situation in Jamaica involves more than isolated instances of discrimination or harassment based on homophobic societal attitudes in Jamaica. Specifically, we consider that the State Department's Bureau of Democracy, Human Rights, and Labor Report on Country Conditions in Jamaica for 2010 (Exh. 7), does not describe minor problems or isolated incidents of random violence, but rather, it makes clear that homosexuals in Jamaica are the victims of targeted violence by private and government officials on account of their sexual orientation.¹

We consider, however, the Immigration Judge (I.J. at 3-5) makes only a cursory reference to the evidence contained in the Country Report as well as the other evidence submitted by the applicant on the issue. The Immigration Judge's decision makes no mention of the pattern and practice of societal violence directed at homosexuals in Jamaica—a violence which is either directly or indirectly condoned by Jamaican government officials, either by their active participation in the torturous abuses, or by their wilful blindness or inaction to the activities of private individuals (I.J. at 3-4). Furthermore, in considering the Country Report, the Immigration Judge makes no mention of the Jamaican law criminalizing homosexual conduct—this law, known as the Offenses Against the Person Act, prohibits "'acts of gross indecency' (generally interpreted as any kind of physical intimacy) between men, in public or in private." In this regard, as the United States Court of Appeals for the Fifth Circuit, the jurisdiction wherein this case arises, has not had the opportunity to address the issue, we are persuaded by the analysis and findings of the Ninth Circuit in *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008). In that case, the court noted that the applicant "was not required to show that the [Jamaican] government would torture him; [but rather that] he could satisfy his burden

¹ The Country Report (Exh. 7) recognized that there were numerous cases of violence against persons based on sexual orientation, including by police and vigilante groups. These included "arbitrary detention, mob attacks, stabbings, harassment of gay and lesbian patients by hospital and prison staff, and targeted shootings of such persons." The Country Report further noted that the "[Jamaican] Police often did not investigate such incidents." The Country Report observed that the targeted violence against homosexuals in Jamaica, "created a climate of fear that prompted many gay persons to emigrate, while the gross indecency laws left those who remained vulnerable to extortion from neighbors who threatened to report them to the police unless they were paid off." The problem is so pervasive that human rights NGOs and Jamaican government entities described the brutality against homosexuals as "widespread."

by showing that the [Jamaican] government acquiesces in torture of gay men.” *Id.* at 1079 (citing 8 C.F.R. § 1208.18(a)(1)). “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. See *Demiraj v. Holder*, 631 F.3d 194, 200 (5th Cir. 2011) (A public official acquiesces to torture if, “prior to the activity constituting torture, [the official] ha[s] awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity.”) and citing *Hakim v. Holder*, 628 F.3d 151, 154-57 (5th Cir. 2010) (holding that “ ‘acquiescence’ is satisfied by a government’s willful blindness of torturous activity”). See 8 C.F.R. § 1208.18(a)(7).

As was also found by the *Bromfield* court, “the record here compels the conclusion that the Jamaican government not only acquiesces in the torture of gay men, but is directly involved in such torture.” See *Bromfield v. Mukasey*, *supra*, at 1079. The court’s conclusion that as “[t]he Jamaican government criminalizes homosexual conduct, making it punishable by up to ten years in prison,” and that “[t]his is an indicator of the Jamaican government’s position toward gay men, as is the fact that the police generally do not investigate complaints of human rights abuses suffered by gay men,” similarly applies to the record in the case before us. See *id.* Moreover, the *Bromfield* court cited to the Country Report which “further indicates that police officers and prison wardens are directly responsible for a portion of these abuses.” *Id.*

Consequently, in view of the foregoing, we find the record supports finding that the applicant has met his burden that it is more likely than not that he will be tortured if removed to Jamaica, so as to warrant a grant of his request for deferral of removal under the Convention Against Torture. See 8 C.F.R. § 1208.17(a).

Accordingly, the applicant’s appeal of the Immigration Judge’s denial of his request for deferral of removal will be sustained.

ORDER: The appeal is sustained.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).


FOR THE BOARD