IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARCIA FORRESTER, Petitioner,	:	
v.	:	CIVIL ACTION
JOHN ASHCROFT, ATTORNEY GENERAL, et al., Respondents.	:	NO. 04-2712

MEMORANDUM & ORDER

YOHN, J. February ____, 2005

Petitioner Marcia Forrester, an alien, filed this habeas action under 28 U.S.C. § 2241(c)(3). She claims that she was denied due process of law when the Board of Immigration Appeals ("the Board") denied her request to withhold removal from the United States pursuant to the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 et seq. ("INA") and withhold or defer removal pursuant to Article III of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. 100-20 (1988), 23 I.L.M. 1027 (1984) ("CAT")[1].

I. FACTUAL BACKGROUND

Marcia Forrester, a Jamaican citizen, was admitted to the United States as a lawful permanent resident in 1992. (Order of the Board, Pet. for Writ of Habeas Corpus Ex. B ("Board Order") at 1). She is a lesbian. (*Id* at 2.) In July 2003, Forrester was convicted of attempted sale

[1]For a historical overview of the CAT Treaty see *Zubeda v. Ashcroft*, 333 F.3d 463, 471 (3d Cir. 2003).

of a controlled substance in the third degree.[2] *(Id*. at 1.) Forrester concedes that this is an aggravated felony as defined in § 237 of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii). (Pet. For Writ. of Habeas Corpus at 11.) Forrester was convicted for transporting small amounts of cocaine for a drug dealer. (Board Order at 1.) She delivered cocaine thirteen times and was paid $10 for each delivery. (*Id*.) Forrester is currently in custody at the York County Prison in York, Pennsylvania. (Pet. for Writ of Habeas Corpus. at ¶ 10.)

Following her conviction, the Immigration and Nationalization Service ("INS")[3] commenced removal proceedings against Forrester pursuant to the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), which provides for removal of aggravated felons. In response, Forrester sought (1) withholding of removal under 8 U.S.C. § 1231(b)(2)(A) and (2) withholding or deferral of removal pursuant to CAT and its implementing regulations. *(Id*. at ¶ 12.) She argued that she would be persecuted and tortured in Jamaica because she is a lesbian. (*Id*.) At the hearing, Forrester submitted documentation describing intolerance toward homosexuals in Jamaica. (*Id*. Ex. C.) She also testified that during one visit to Jamaica she was forced to flee from local citizens after they discovered her engaging in a sexual act with another woman and began pelting them with stones. (Oral Decision of the IJ, Pet. for Writ of Habeas Corpus Ex. A ("IJ's Decision") at 8.) Forrester testified that she did not seek protection from the Jamaican police because they might "harm [her] for being gay." *(Id*.)

---

[2]Forrester was convicted pursuant to New York Penal law § 110/220.39. (Board Order at 1.)

[3]As of March 1, 2003, the INS ceased to exist as an independent agency and has been incorporated into the Department of Homeland Security ("DHS"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 451, 471, 116 Stat. 2135 (2002).

The IJ denied Forrester's application for withholding of removal on February 2, 2004, holding that she was statutorily ineligible to seek such relief because her drug conviction was a "particularly serious crime" pursuant to INA § 241(b)(3)(B)(ii), 8 U.S.C. 1231(b)(3)(B)(ii). (Board Order at 2.) The IJ deferred Forrester's removal in accordance with CAT, finding that she would "more likely than not be tortured" if she returned to Jamaica. (*Id*.)

On appeal, the Board reversed the IJ's grant of deferral on June 1, 2004, finding that Forrester "failed to meet her burden of proof." (*Id*. at 3.) The Board upheld the IJ's decision to deny withholding of removal. *(Id*.)

On June 18, 2004, Forrester filed a motion for emergency stay of removal. On June 22, this court enjoined the government from deporting Forrester and directed her to petition for a writ of habeas corpus. She filed her petition on July 12 to which the government filed a response and she a reply.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This court has jurisdiction to consider Forrester's petition pursuant to 28 U.S.C. § 2241(c).[4]

In criminal alien habeas removal proceedings, a district court's review of administrative immigration decisions is limited. Under *Bakhtriger v. Elwood*, 360 F.3d 414, 424 (3d Cir. 2004),

[4]In *INS v. St. Cyr*, the Supreme Court held that neither the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") nor the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") repealed the district courts' jurisdiction to review aliens' habeas petitions under § 2241(c). 533 U.S. 289 (2001).

courts must confine the scope of their review "to questions of constitutional and statutory law." This "include[s] issues of application of law to fact, where the facts are undisputed and not the subject of challenge." *Id*. at 420 (citing *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003)). Courts may not review immigration courts' factual findings, exercise of discretion, or the sufficiency of the evidence. *Id*. at 420.

Additionally, courts generally may only review the opinion of the Board because Congress has solely provided for review of "final orders of removal" and "there is no final order until the [Board] acts." *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001) (citing 8 U.S.C. § 1252(a)). Courts may only review the IJ's opinion where the Board "expressly adopts or defers to the findings of the IJ", *Kayembe v. Ashcroft*, 334 F.3d 231, 234 (3d Cir. 2003), or "summarily affirms the IJ's decision" without a written opinion. *Tarrawally v. Ashcroft*, 338 F.3d 180, 184 (3d Cir. 2003); *see also Dia v. Ashcroft*, 353 F.3d 228, 270 (3d Cir. 2003) (Stapleton, J., dissenting) (recognizing that "[e]very court of appeals that has engaged in judicial review of an IJ's decision has done so because the IJ's reasoning was expressly adopted by the [Board].") (citations omitted). Here, because the Board never "expressly adopted" or "deferred to" to any portion of the IJ's opinion, I will restrict my review to the Board's decision.

Finally, courts must review agency decisions with great deference when the agency is interpreting the statute or regulation that it is charged with administering. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865–66 (1984); *see also Abdulai*, 239 F.3d at 551 (noting that "'principles of Chevron deference are applicable' in the immigration context.") (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)).

B. Petitioner's Due Process Claim

Forrester claims that the standard that the Board applied to evaluate whether she was eligible for withholding of removal under the INA deprived her of due process of law. An alien facing removal is entitled to due process. *Chong v. Dist. Dir., INS*, 264 F.3d 378, 386 (3d Cir. 2001). Under § 241(b)(3)(A) of the INA, "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." 8 U.S.C. § 1231(b)(2)(A). This provision does not apply "if the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States."[5] *Id*. at § 1231(b)(3)(B)(ii). In *Chong*, the Third Circuit held that to comply with due process when deciding whether a criminal alien has committed a "particularly serious crime", the Board must make an "individualized determination," "rather than blindly following a categorical rule, i.e., that all drug convictions qualify as 'particularly serious crimes.'" *Id*. at 387 (quoting *Abdulai*, 239 F.3d at 549).

The Board relied on the standard set forth in *In re Y-L*, 23 I. & N. Dec. 270 (BIA Mar. 5, 2002), to determine that Forrester's offense was a "particularly serious crime." In *In re Y-L*, Attorney General Ashcroft overturned three Board decisions ordering withholding of removal for

[5]The statute provides that an alien sentenced to a term of imprisonment "of at least 5 years shall be considered to have committed a particularly serious crime." 8 U.S.C. § 1231(b)(3)(B). Where a court has sentenced an alien to less than five years, the Attorney General has "discretion to determine whether that alien has committed a 'particularly serious crime.'" *Chong v. Dist. Dir., INS*, 264 F.378, 387 (3d Cir. 2001).

aliens convicted of drug trafficking offenses.[6] *Id*. In the decision, the Attorney General states that "aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes' . . . ." *Id*. at 274. Nonetheless, he declined to conclude "that all drug trafficking offenses are per se particularly dangerous crimes." *Id*. at 276. In doing so, he cited *Chong* and observed that some "[c]ourts have indicated that the application of 'per se' determinations is legally questionable." *Id*. at 276 n.12. He also set forth the circumstances under which a drug trafficking offense would not constitute a "particularly serious crime":

> "[T]hey would need to include at a *minimum*: (1) a very small quantity of controlled substance; (2) a very modest amount of money paid for the drugs in the offending transaction; (3) merely peripheral involvement by the alien in the criminal activity, transaction, or conspiracy; (4) the absence of any violence or threat of violence, implicit or otherwise, associated with the offense; (5) the absence of any organized crime or terrorist organization involvement, direct or indirect, in relation to the offending activity; and (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles." Only if *all* of these criteria were demonstrated by an alien would it be appropriate to consider whether other, more unusual circumstances (e.g., the prospective distribution was solely for social purposes, rather than for profit) might justify departure from the default interpretation that drug trafficking felonies are 'particularly serious crimes.'"
>
> *Id*. at 276–77. (Emphasis in original).

Forrester contends that *In re Y-L* in effect creates an "absolute bar to withholding" for aliens convicted of drug trafficking crimes and thus violates *Chong*'s due process prohibition against "categorical rules." (Pet. for Writ of Habeas Corpus. at ¶ 18.) The court may consider Forrester's argument because it raises a pure question of constitutional law. *See Bakhtriger*, 360

---

[6]Although the government contends that the Board issued the opinion in *In re Y-L*, the Attorney General authored the opinion pursuant to 8 C.F.R. § 3.1(h), which provides that the Attorney General may review all Board decisions that "the Attorney General directs the Board to refer to him." *See In re Y-L*, 23 I. & N. Dec. 270 n.1. The regulation further provides that, "[i]n any case in which the Attorney General reviews the decision of the Board, the decision of the Attorney General shall be stated in writing and shall be transmitted to the Board for transmittal and service . . . ." 8 C.F.R. § 3.1(h)(2).

F.3d 424.

Although *In re Y-L* severely restricts aliens convicted of drug trafficking from invoking § 241(b)(3)(A), it does not impose an impermissible "categorical rule." The decision explicitly states that it does not mean to set forth a per se rule. *See In re Y-L*, 23 I. & N. Dec. at 276 ("I do not consider it necessary . . . to exclude entirely the possibility of the very rare case where an alien may be able to demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking crime as falling short of that standard."). Additionally, by citing *Chong*, the decision suggests that it intends to comply with the Third Circuit's due process requirements. *Id*. at 276 n.12. The only court that has addressed this issue has concluded that *In re Y-L* and *Chong* "can be read consistently with one another." *Ford v. Bureau of Immigration & Customs Enforcement's Interim Field Office Dir. for Det. & Removal for the Phila. Dist*., 294 F. Supp. 2d 655, 661 (M.D. Pa. 2003); *see also Reyes-Sanchez v. Ashcroft*, 261 F. Supp. 2d 276, 286 n.7 (observing that the rule in *In re Y-L* is properly viewed as a rebuttable presumption and not a per se rule).

Forrester alleges that the Attorney General's opinion is an attempt to "thwart . . . [*Chong*] and "take away the relief that Congress specifically intended for aliens." (Petitioner's Resp. Supp. Habeas Corpus Pet. at 7.) Forrester offers no evidence or law to support this contention. She argues that *In re Y-L*'s restrictive standard prevents the Board from "distinguishing the individual facts of the case." (*Id*.) Here, the Board applied *In re Y-L* and conducted a brief but convincing factual analysis, finding that Forrester's role in the cocaine delivery ring was not "peripheral" because she worked for a drug dealer, was paid for her work, and "successfully sold drugs to other people on at least 13 occasions." (Board Order at 2.) Thus, *In re Y-L*'s standard,

while restrictive, enables immigration courts to perform the "individualized determination" required by *Chong*. For these reasons, I conclude that the standard for "particularly serious crimes" set forth in *In re Y-L* does not violate Forrester's right to due process.

C. The Board's Application of *In re Y-L*

Forrester also argues that the Board erroneously applied *In re Y-L* to her case. (Petitioner's Resp. Supp. Habeas Corpus Pet. at 11.) However, the Board's determination that Forrester committed a "particularly serious crime" is a discretionary factual finding, which courts may not review after *Bakhtriger*. *See Chong*, 264 F.3d at 387 ("[W]here a court has sentenced an alien to less than five years for an aggravated felony, the statute grants the Attorney General *discretion* to determine whether that alien has committed a 'particularly serious crime.'") (interpreting 8 U.S.C. § 1231(b)(3)(B)) (emphasis added); *see also Dorremil v. United States*, No. 04-0493, 2004 U.S. Dist, LEXIS 13838 at *6 (E.D. Pa. July 2, 2004) ("Because the IJ's finding that petitioner had not been convicted of a particularly serious crime was discretionary, it is not subject to review by this Court."); *Reyes-Sanchez*, 261 F. Supp. 2d at 288 ("The [Board's] determination that Reyes-Sanchez did not establish 'extraordinary and compelling circumstances' warranting a deviation from the presumption that he was convicted of a 'particularly serious crime' is a factual, discretionary determination by the [Board].") Hence, this argument is beyond the court's scope of review.

D. The Board's Reversal of the IJ's Grant of Deferral

Forrester also contends that the Board wrongly overturned the IJ's grant of deferral under the CAT. Under the CAT, even if an alien is convicted of a "particularly serious crime", she may obtain deferral of removal if she shows that she is "more likely than not to be tortured" if

removed. 8 C.F.R. § 208.17(a). "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 committed or is suggested 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*."
> 8 C.F.R. § 208.18(a) (emphasis added).

"In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal," courts may consider (1) "[e]vidence of past torture", (2) "[e]vidence that the applicant could relocate to a part of the country . . . where he or she is not likely to be tortured", (3) "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal," and (4) "[o]ther relevant information regarding conditions in the country of removal." 8 C.F.R. § 208.16(c)(3). "The standard for relief . . . 'requires the alien to establish, by objective evidence' that he is entitled to relief." *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (quoting *In re J-E*, 23 I. & N. Dec. 291, 302 (BIA Mar. 22, 2002)).

The Board overturned the IJ's grant of deferral, holding that Forrester "failed to meet her burden of proof". (Board Order at 3.) Forrester contends that the Board erroneously reversed the IJ because substantial evidence in the record demonstrates that Forrester is "more likely than not to be tortured" if she returns to Jamaica. (Petitioner's Resp. Supp. Habeas Corpus Pet. at 15.) Under 8 C.F.R. § 1003.1(d)(3)(i), the Board may only review the IJ's findings of fact for clear error. *See Wang v. Ashcroft*, 368 F.3d 347, 349 (3d Cir. 2004). Here, the Board found clear error by the IJ. It determined that the IJ's finding that Forrester was "more likely than not to be tortured" was erroneous because it was error for the IJ to take administrative notice of "a de facto

government policy of gay bashing throughout the country with little or no legal consequences." (Board Order at 3.) The Board also found no evidence of past torture of petitioner and no evidence of any government acquiescence in torture of homosexuals. (Board Order at 2–3.)

Moreover, the court may not review the Board's finding that Forrester failed to establish the "more likely than not to be tortured" standard because this is an unreviewable factual determination.[7] *See Cadet v. Bulger*, 377 F.3d 1173, 1195 (11th Cir. 2004) ("[T]o the extent . . . Cadet's § 2241 petition challenges the administrative findings that his evidence failed to establish that he individually is more likely than not to be subjected to tortured if returned to Haiti, his challenge is largely factual in nature."); *Dorremil*, Dist. U.S. LEXIS 1338, *4 ("In arguing that the facts of his case indicate that he was 'more likely than not' to be tortured if returned to Haiti, petitioner asks this Court to conduct a review that has been specifically barred by *Bakhtriger*."); *Reyes-Sanchez*, 261 F. Supp. 2d at 292 ("The [Board's] factual determination that Reyes-Sanchez failed to demonstrate that it is more likely than not that he will be tortured if returned to the Dominican Republic is a discretionary decision, and is therefore not reviewable by this Court.").

---

[7]There is some disagreement about whether a determination that an alien has satisfied the "more likely than not to be tortured" standard is a question of application of law to fact or an unreviewable factual finding. *Compare Cadet*, 377 F.3d at 1195, *and Dorremil*, 2004 U.S. Dist. LEXIS 13838, at *4, *with Ford*, 294 F. Supp. 2d at 665 (holding that a district court has jurisdiction in habeas petition cases to review the Board's application of the "more likely than not" standard); *see also Bakhtriger*, 360 F.3d at 425 (declining to "delineate the precise boundaries between permitted review of legal questions and forbidden review of factual issues or matters of discretion"). This determination is most likely discretionary because the regulations do not provide a legal standard to apply when deciding whether an alien is "more likely than not to be tortured". See 8 C.F.R. § 208.16(c). Instead, the regulations describe the evidence that immigration courts may consider when making this determination. *Id*. at § 208.16(c)(3). In contrast, the regulations do provide a definition of "torture" for courts to apply. *Id*. at § 208.18.

In contrast, courts may review the Board's application of CAT's legal standard for "torture." *See Cadet*, 377 F.3d at 1192 ("Whether the conditions in Haitian prisons constitute torture is a mixed question of law and fact as we must apply CAT's legal definition of 'torture' to the facts of what happens in Haiti's prisons."). Thus, to the extent that Forrester's claim can be characterized as a challenge to the Board's application of CAT's "torture" standard, I will consider whether the Board misapplied the law. *See Bakhtriger*, 360 F.3d at 420.

Although the record contains disturbing depictions of violence toward homosexuals, there is no evidence that the Board misapplied the law. The Board found that Forrester "failed to provide any evidence of past torture." (Board Order at 3.) At the hearing, Forrester testified that during a visit to Jamaica she was forced to flee from citizens throwing rocks after they discovered her engaging in a sexual act with another woman. (IJ's Decision at 8.) However, giving her testimony full credibility, while this incident is undoubtedly an act of "intimidation . . . based on discrimination," it does not fall within the CAT definition of torture because there was no "consent or acquiescence of a public official." 8 C.F.R. § 208.18(a). Forrester testified that following this incident she did not call the police because she knew they would not offer protection and she feared that they would harm her "for being gay." (IJ's Decision at 8.) This testimony fails to show government "acquiescence" because "acquiescence" requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene . . . ." *In re J-E*, 23 I. & N. at 299 (interpreting 8 C.F.R. § 208.18(a)(7)). Forrester never suggests that the Jamaican police ever knew about the crowd that attacked her. Moreover, she never alleges that the police have ever actually harmed her. Thus, the Board correctly held that Forrester failed to provide any evidence

of past "torture."

The Board also found that "the record does not contain evidence that the government of Jamaica acquiesces to the torture of homosexuals." (Board Order 3.) The only evidence that Forrester supplied from the record is a collection of internet articles documenting intolerance toward homosexuals in Jamaican society. (*See* Pet. for Writ of Habeas Corpus. Ex. C.) The Board chose not to specifically address this evidence and concluded that it "was somewhat inadequate." (Board Order at 3.) Upon closer review, this evidence fails to show a policy of government "acquiescence" to "torture." Much of the evidence describes Jamaica's laws against homosexual intercourse, which is "punishable by ten years hard labor". (Tony Thompson, *Jamaican gays flee to save their lives*, The Observer, Oct. 20, 2002, *available at* http://www.guardian.co.uk/gayrights/story/0,12592,835687.00.html., Pet. For Writ of Habeas Corpus Ex. C.) Such discrimination does not constitute "torture" under the CAT because torture "does not include pain or suffering, arising from, inherent in or incidental to lawful sanctions." 8 C.F.R. § 208.18(a)(3). "Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law."[8] *Id*. Thus, any "suffering" that arises pursuant to Jamaica's anti-homosexual legislation is not "torture" under the CAT.

Forrester also alleges that the Board's opinion should be overturned because it mistakenly

---

[8]"The regulations provide that "lawful sanctions do not include sanctions that defeat the object and purpose of the [CAT] to prohibit torture." Forrester's evidence asserts that homosexuals convicted under Jamaica's "buggery laws" are punishable by ten years hard labor. Additionally, it makes reference to isolated attacks on homosexual prisoners by fellow inmates. These facts alone fail to show that Jamaica's laws against homosexual intercourse are designed to "defeat the purpose of the [CAT]." *See In re J-E*, 23 I. & N. Dec. 291, 293, 300 (BIA Mar. 22, 2002) (concluding that Haiti's practice of detaining deportees for an indeterminate period is a lawful sanction that does not defeat the purpose of the CAT even though prisoners are beaten and deprived of adequate food, water, medical care, and sanitation).

held that the IJ committed error when he took administrative notice to find "a defacto government policy of gay bashing throughout the country with little or no legal consequences."[9] (Board Order at 3.) This argument also must fail because under *Bakhtriger*, 360 F.3d at 424, courts may not review findings of fact (or, more accurately, a finding by the Board that no facts could be found on the record presented), and under *Abdulai*, 239 F.2d at 549, courts may only review the opinion of the Board. Additionally, courts must accord great deference to agency decisions to take or not to take administrative notice. *See Rivera-Cruz v. INS*, 948 F.2d 962, 966 (5th Cir. 1991) ("Because the taking of notice is committed to the broad discretion of the agency, we review the taking of administrative notice by the Board under the abuse of discretion standard.")

After reviewing the Board's opinion, I cannot conclude that it erred when it refused to grant deferral of removal under the CAT treaty.

III. CONCLUSION

For these reasons, I will deny Forrester's petition for writ of habeas corpus. An appropriate order follows.

[9]Administrative, or official notice, "allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise." *McLeod v. Immigration & Naturalization Serv.*, 802 F.2d 89, 93 n.4 (3d Cir. 1986) (citation omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARCIA FORRESTER, Petitioner,	:	
v.	:	CIVIL ACTION
JOHN ASHCROFT, ATTORNEY GENERAL, et al., Respondents.	:	NO. 04-2712

ORDER

AND NOW, this _____ day of February 2, 2004, upon consideration of Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2241 (Doc. # 4), the government's response thereto (Doc. #6), and defendant's reply (Doc. #7), IT IS HEREBY ORDERED that petition is DENIED with prejudice.

_____

William H. Yohn. Jr., J.