Kadri v. Mukasey: A Legal Blueprint for Extending Asylum to Homosexual Aliens Who Have Not Suffered Physical Persecution

I. OVERVIEW

Zulkifly Kadri, an Indonesian doctor, worked at a clinic and at a hospital in Jakarta, Indonesia.[1] He lost both jobs once rumors began spreading that he was gay.[2] Kadri worked at the clinic from 1997 to 1999 and at the hospital from 1992 to 2001.[3] First, in 1999, the owner of the clinic fired Kadri after hearing rumors that he was gay.[4] Then, in 2001, the hospital board summoned Kadri and questioned him about rumors alleging that he was gay.[5] Kadri refused to answer the board's questions and told the board that his sexual orientation was a private matter.[6] The following month, in a crowded hospital room, one of Kadri's regular clients screamed repeatedly at him, "Get out, faggot, and don't touch my son."[7] After this incident, more patients refused to have Kadri as their doctor.[8] The hospital board summoned Kadri and questioned him again.[9] Kadri refused to answer and told the board that his sexual orientation was unrelated to his job duties.[10] The hospital board asked Kadri to resign; he refused.[11] The board did not fire Kadri, but removed his patients from his

1. Kadri v. Mukasey, 543 F.3d 16, 18 (1st Cir. 2008).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 18-19.
11. *Id.* at 19.

care and did not assign him any new patients.[12] As a result, Kadri's income dropped to a base salary of about ten dollars per month.[13]

Kadri hired a lawyer and sued the hospital for discrimination.[14] During the lawsuit, the judge demanded to know if Kadri was gay.[15] Kadri felt that the judge was only interested in determining his sexual orientation and was not interested in the merits of his claim.[16] Feeling "torture[d] mentally" by the judge's inquisition, Kadri dropped his lawsuit against the hospital.[17]

Kadri entered the United States on a nonimmigrant visa and applied for asylum in 2002.[18] An Immigration Judge (IJ) granted Kadri asylum, finding that the hostility toward the gay community in Indonesia was so discriminatory and pervasive that it rose to the level of persecution and that Kadri had therefore met his burden of proving a well-founded fear of future persecution.[19] The Board of Immigration Appeals (BIA), in a two to one decision, reversed the IJ's decision, denied Kadri's asylum request, and entered an order of removal against Kadri.[20] The BIA held that the economic deprivation that Kadri experienced did not rise to the level of persecution.[21] Kadri appealed the BIA's decision up to the United States Court of Appeals for the First Circuit.[22] The First Circuit vacated the BIA's order of removal and remanded the case to the BIA.[23] Acknowledging homosexuals as a particular social group, the First Circuit *held* that the correct standard for evaluating whether economic suffering rises to the level of persecution is the *In re T-Z-* standard. *Kadri v. Mukasey*, 543 F.3d 16, 21-22 (1st Cir. 2008). This standard questions whether the asylum applicant has experienced "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life."[24]

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 19, 22.
21. *Id.* at 19-20.
22. *Id.* at 20.
23. *Id.* at 22.
24. *Id.* (emphasis removed) (quoting *In re* T-Z-, 24 I. & N. Dec. 163, 170-71 (B.I.A. 2007)).

II. BACKGROUND

A. General Asylum Law and Procedure

Under the Immigration and Nationality Act, the Attorney General has the discretion to grant an alien asylum if the alien is a refugee.[25] A refugee is any person who is outside of her home country 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 [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[26]

The applicant bears the burden of proof to establish that he or she is a refugee, and the applicant's testimony, if credible, may sustain this burden of proof without corroborating evidence.[27] Subject to a few exceptions, IJs have exclusive jurisdiction over asylum cases,[28] and the BIA has appellate jurisdiction over IJs' decisions in asylum proceedings pursuant to 8 C.F.R. § 1003.1(b).[29]

U.S. courts of appeals have the authority to review removal orders entered against asylum applicants.[30] The circuit courts review IJ and BIA factual findings under a highly deferential substantial evidence standard[31] and review IJ and BIA legal conclusions de novo.[32] The circuits must

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25. *See* 8 U.S.C.A. § 1158(b)(1)(A) (West 2008).
26. *Id.* § 1101(a)(42)(A).
27. 8 C.F.R. § 1208.13(a) (2008).
28. *See id.* § 1208.2(b).
29. *Id.* § 1003.1(b)(9).
30. *See* 8 U.S.C.A. § 1252(a)(1), (5).
31. *See, e.g.*, Bah v. Mukasey, 529 F.3d 99, 110 (2d Cir. 2008) (stating that the court reviews factual findings under the substantial evidence standard, "treating them as conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary") (citing 8 U.S.C. § 1252(b)(4)(B)) (quoting Manzur v. U.S. Dep't of Homeland Sec., 494 F.3d 281, 289 (2d Cir. 2007)) (internal quotes omitted); Nakimbugwe v. Gonzales, 475 F.3d 281, 283 (5th Cir. 2007) (per curiam) (stating that to reverse under the substantial evidence standard, evidence must not only support a contrary conclusion, but compel it); Cooke v. Mukasey, 538 F.3d 899, 904 (8th Cir. 2008) (stating that under the substantial deference standard, the court will not overturn the IJ's decision unless the petitioner demonstrates that "the evidence [is] so compelling that no reasonable fact finder could fail to find the requisite fear of persecution"); Fakhry v. Mukasey, 524 F.3d 1057, 1062 (9th Cir. 2008) (stating that when the court reviews factual findings, it applies the substantial evidence standard); Rivera v. Att'y Gen., 487 F.3d 815, 820 (11th Cir. 2007) ("[F]indings of fact made by administrative agencies, such as the BIA, may be reversed by this court only when the record compels a reversal; the mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings." (quoting Adefemi v. Ashcroft, 386 F.3d 1022, 1027 (11th Cir. 2004) (internal quotation marks omitted))).
32. *See, e.g.*, *Bah*, 529 F.3d at 110; *Nakimbugwe*, 475 F.3d at 283 (pure questions of law reviewed de novo); *Cooke*, 538 F.3d at 904 (questions of law considered de novo); *Fakhry*, 524

accord the BIA's legal conclusions *Chevron* deference.[33] Under *Chevron* deference, where a federal statute is silent or ambiguous with respect to a specific issue of law and an administrative agency has provided an interpretation, a court must defer to the agency's interpretation if it is a reasonable statutory construction.[34] However, a circuit court may remand the case for further proceedings if the IJ's or the BIA's reasons for its decision are legally insufficient or lack sufficient clarity.[35]

B. Homosexuals as a Particular Social Group

Prior to the decision in *Kadri*, the BIA and two circuits recognized that an asylum applicant's sexual orientation can serve as the basis for membership in a particular social group. In the BIA case *In re Toboso-Alfonso*, the applicant asserted that he was a homosexual and that he would be persecuted if he returned to his native country, Cuba.[36] The IJ concluded that Cuban authorities had persecuted the applicant based on his membership in a particular social group, homosexuals.[37] The BIA upheld the IJ's decision.[38]

Fifteen years later, the United States Court of Appeals for the Ninth Circuit recognized that homosexuals were a particular social group in *Karouni v. Gonzales*.[39] During the proceedings, the Attorney General conceded that homosexuals constituted a particular social group.[40] The Attorney General then argued that the future persecution, which the applicant feared, was not persecution based on the applicant's *status* as a homosexual, but rather was persecution based on the applicant's voluntary commission of future homosexual *sex acts* in his home

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F.3d at 1062 (questions of law reviewed de novo); *Rivera*, 487 F.3d at 820 (legal determinations reviewed de novo).

33. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (citing Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837, 843 (1984)) (explaining that circuit courts must accord the immigration agency's courts *Chevron* deference).

34. *See Chevron*, 467 U.S. at 840, 843-45.

35. Mihaylov v. Ashcroft, 379 F.3d 15, 21-24 (1st Cir. 2004) (remanding where the IJ failed to provide adequate reasons for rejecting the applicant's past persecution testimony); Chen v. U.S. Dep't of Justice, 132 F. App'x 908, 910 (2d Cir. 2005) (remanding where it was unclear whether the IJ considered corroborating documents submitted by the applicant); Diaz-Cano v. Gonzales, 233 F. App'x 706, 707-08 (9th Cir. 2007) (remanding where it was unclear whether the IJ had applied the correct legal standard for persecution); Feng Chai Yang v. Att'y Gen., 283 F. App'x 684, 685 (11th Cir. 2008) (vacating and remanding, instructing the BIA to clarify the internal inconsistencies in its opinion).

36. 20 I. & N. Dec. 819, 820 (B.I.A. 1990).

37. *Id.* at 822.

38. *See id.* at 822-23.

39. 399 F.3d 1163, 1172 (9th Cir. 2005).

40. *Id.* at 1171.

country, Lebanon.[41] The circuit recognized that the applicant faced a threat of persecution based on his past homosexual sex acts alone.[42] More importantly, the circuit rejected the Attorney General's semantic formalism and held that persecution, whether based on homosexual *sex acts* or homosexual *status*, qualifies as persecution based on membership in a particular social group, homosexuals.[43] The United States Court of Appeals for the Third Circuit has also recognized homosexuals as a particular social group,[44] and the United States Court of Appeals for the Eighth Circuit has assumed, without deciding, that homosexuals constitute a particular social group.[45]

Additionally, an applicant's *imputed* status as a homosexual can form the basis for a valid claim of persecution.[46] For example, in *Amanfi v. Ashcroft*, the applicant, who claimed to be a heterosexual, engaged in an act of same-sex intercourse in order to save his life.[47] Private actors and police officers believed that he was gay.[48] The private actors beat the applicant and turned him over to the Ghanian police.[49] The police arrested him and beat him in custody over a period of more than two months.[50] Throughout his asylum proceedings, the applicant claimed that he was not a homosexual and that he was persecuted due to his persecutors' mistaken belief about his sexual orientation.[51] The circuit held that even imputed membership in a social group, such as homosexuals, can form the basis for a valid claim of persecution.[52]

C. Standards of Economic Persecution

Persecution can be not only physical but also economic. The BIA has applied at least four different standards for determining when

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41. *Id.* at 1172.
42. *Id.*
43. *Id.* at 1173; *see also* Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185, 194-210 (2007-2008) (illustrating how the artificial distinction between homosexual sex acts and homosexual status leads to arbitrary and different outcomes in cases with analogous factual circumstances).
44. *See* Jean-Pierre v. Att'y Gen., 192 F. App'x 92, 95 (3d Cir. 2006) (citing Amanfi v. Ashcroft, 328 F.3d 719, 730 (3d Cir. 2003)); Maldonado v. Att'y Gen., 188 F. App'x 101, 104 (3d Cir. 2006).
45. Molathwa v. Ashcroft, 390 F.3d 551, 554 (8th Cir. 2004).
46. *See Amanfi*, 328 F.3d at 730.
47. *Id.* at 723.
48. *See id.*
49. *Id.*
50. *Id.*
51. *See id.* at 724, 727.
52. *Id.* at 730.

economic harm rises to the level of persecution.[53] In *Mirzoyan v. Gonzales*, the United States Court of Appeals for the Second Circuit identified three of those standards, acknowledging that the BIA has at various times embraced a "deliberate imposition of substantial economic disadvantage" (or *Kovac*[54]) standard, a "denial of an opportunity to earn a livelihood" (or *Dunat*[55]) standard, and a "threat to life or freedom" (or *Acosta*[56]) standard.[57]

The BIA responded to *Mirzoyan* by articulating another economic persecution standard.[58] In *In re T-Z-*, the BIA stated that the correct standard for economic persecution was whether the applicant faced a "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[59] The *In re T-Z-* standard tracks the "deliberate imposition of substantial economic disadvantage" language but substitutes the term "severe" for "substantial."[60] Moreover, the *In re T-Z-* standard incorporates and broadens the "threat to life or freedom" standard.[61] In addition, the BIA rejected the "denial of an opportunity to earn a livelihood" standard:[62]

> An applicant . . . need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution. . . . A particularly onerous fine, a large-scale confiscation of property, or a sweeping limitation of opportunities to continue to work in an established profession or business may amount to persecution even though the applicant could otherwise survive.[63]

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53. *See* Mirzoyan v. Gonzales, 457 F.3d 217, 221-22 (2d Cir. 2006) (noting that the BIA has not applied a single, consistent standard for economic persecution).

54. Kovac v. I.N.S., 407 F.2d 102, 107 (9th Cir. 1969).

55. Dunat v. Hurney, 297 F.2d 744, 746 (3d Cir. 1961), *superseded by statute*, Act of Oct. 3, 1965, sec. 11(f), Pub. L. No. 89-236, 79 Stat. 911, *as recognized in* Kovac v. I.N.S., 407 F.2d 102, 105-07 (9th Cir. 1969).

56. *In re* Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled in part by In re* Mogharrabi, 19 I.& N. Dec. 439, 439 (B.I.A. 1987).

57. *Mirzoyan*, 457 F.2d at 222; *see* Dunat v. Hurney, 297 F.2d 744, 746 (3d Cir. 1961); *Acosta*, 19 I. & N. Dec. at 211.

58. *See In re* T-Z-, 24 I. & N. Dec. 163, 170-71 (B.I.A. 2007).

59. *Id.* at 170-71, 176 (quoting *In re* Laipenieks, 18 I. & N. Dec. 433, 457 (B.I.A. 1983)).

60. *Id.* at 172-73.

61. *Id.* at 172. The BIA noted that the wording in H.R. REP. NO. 95-1452 (1978), "deprivation of liberty, food, housing, employment, or other essentials of life," "corresponds to the reference in *Acosta* to 'economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom.'" *In re* T-Z-, 24 I. & N. Dec. at 172 (quoting *Acosta*, 19 I. & N. Dec. at 222).

62. *Id.* at 173.

63. *Id.* at 173-74 (internal citations omitted).

Among the three examples, however, "a compulsory change in occupation is least likely to qualify as persecution by itself."[64] Moreover, the BIA noted that a combination of various economic harms may, in the aggregate, rise to the level of severity required for economic persecution.[65] For instance, the Third Circuit has concluded that in the aggregate, a fine of more than eighteen months' salary, blacklisting from government and most other legitimate forms of employment, the loss of health benefits, school tuition and food rations, and the confiscation of household furniture and appliances constituted severe economic disadvantage.[66]

Even after *In re T-Z-*, the line between persecution and extreme discrimination is still difficult to delineate and can be a mere matter of degree. For example, in *Beck v. Mukasey*, the applicants were members of a highly-stigmatized ethnic minority in Hungary.[67] One applicant had attended nursing school, while the other applicant had attended trade school to become an electrician.[68] Due to racial prejudice, neither applicant could find a job in their respective fields, and both applicants were forced to work menial farm labor jobs.[69] The Eighth Circuit reasoned that, although the applicants were relegated to low-level, menial jobs despite their advanced schooling, because private employment was still available, their economic hardship did not amount to economic persecution.[70] "An individual who earns a degree and finds work has no claim of economic persecution."[71] This dictum, however, is at odds with the *In re T-Z-* rule that "[a]n applicant . . . need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate [economic persecution]."[72]

III. THE COURT'S DECISION

In the noted case, the First Circuit acknowledged that sexual orientation can form the basis for an applicant's membership in a particular social group and held that the correct standard for evaluating

64. *Id.* at 174 (citing *Acosta*, 19 I. & N. Dec. at 234).
65. *Id.*
66. *Id.* at 174-75 (quoting Li v. Att'y Gen., 400 F.3d 157, 169 (3d Cir. 2005)).
67. 527 F.3d 737, 738 (8th Cir. 2008).
68. *Id.* at 739.
69. *See id.* at 739.
70. *Id.* at 741 (dictum). The court acknowledged that, because the applicants' petitions for asylum were untimely, the court lacked jurisdiction to review the BIA's ruling. *Id.* at 738-39.
71. *Id.* (dictum) (quoting Mitreva v. Gonzales, 417 F.3d 761, 764 (7th Cir. 2005)).
72. *In re* T-Z-, 24 I. & N. Dec. 163, 173 (B.I.A. 2007).

economic persecution was the *In re T-Z-* standard.[73] First, the court laid out the appropriate standards of review.[74] Second, the court noted that "persecution" is a flexible, protean term and it reiterated its rejection of the "threat to life or freedom" standard for persecution.[75] Third, the court recognized that homosexuals are a particular social group and that membership in that group can serve as the basis for persecution.[76] Fourth, the court observed that neither the IJ nor the BIA identified which standard for economic persecution it had applied.[77] The court held that the *In re T-Z-* standard was the correct standard for economic persecution and it instructed the administrative courts to apply the *In re T-Z-* standard to Kadri's case on remand.[78]

First, the court recognized the correct procedural standards of review.[79] The circuit court reviews factual findings of the BIA under the highly deferential substantial evidence standard.[80] The court reviews such findings for clear error.[81] If the BIA refuses asylum, the court will reverse the BIA's decision only if the evidence is "so compelling that no reasonable factfinder could fail to find [a well-founded] fear of persecution."[82] The court reviews the immigration court's legal conclusions de novo, according appropriate deference to the BIA's interpretations of its governing statute.[83] However, the court must remand a case for further proceedings if the BIA does not offer "legally sufficient reasons" for its decision or fails to sufficiently particularize or clarify its analysis.[84]

Second, the court reiterated its rejection of the "threat to life or freedom" standard for persecution.[85] The court observed that in the Immigration and Nationality Act, Congress did not define the term "persecution."[86] Instead, "persecution" remains a flexible and protean term, which can denote different shades of meaning and encompass

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73. *See* Kadri v. Mukasey, 543 F.3d 16, 21-22 (1st Cir. 2008).
74. *See id.* at 20.
75. *See id.* at 21 (citing Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005)).
76. *See id.*
77. *Id.* at 22.
78. *Id.* (citing Manzur v. U.S. Dep't of Homeland Sec., 494 F.3d 281, 295 (2d Cir. 2007)).
79. *See id.* at 20.
80. *Id.*
81. *Id.* (citing 8 C.F.R. § 1003.1(d)(3)(i) (West 2008)).
82. *Id.* (quoting I.N.S. v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992)).
83. *Id.* (citing Lin v. Mukasey, 521 F.3d 22, 26 (1st Cir. 2008)).
84. *Id.* at 21 (citing Mihaylov v. Ashcroft, 379 F.3d 15, 21 (1st Cir. 2004)).
85. *See id.*
86. *Id.* (citing Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005)).

different factual situations.[87] Persecution is more than mere discrimination, unpleasantness, harassment, or "basic suffering."[88] The court then alluded to its previous rejection of the "threat to life or freedom" standard for persecution: "mistreatment can constitute persecution even though it does not embody a direct and unremitting threat to life or freedom."[89]

Third, the court stated that "[s]exual orientation can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group."[90] In his asylum application, Kadri disclosed that he was a homosexual and he claimed that his membership in a particular social group—homosexuals—was the basis for the persecution against him.[91] The IJ found Kadri credible, and the BIA did not disturb the IJ's findings or the IJ's legal conclusion that sexual orientation may form the basis for inclusion in a particular social group.[92] Therefore, the IJ, BIA, and the First Circuit agreed that a homosexual asylum applicant is a member of a particular social group.[93]

Fourth, the First Circuit held that the *In re T-Z-* standard is the correct standard for analyzing allegations of economic persecution.[94] In his testimony before the IJ, Kadri described the two incidents of employment discrimination and the ineffective civil suit he brought against one of his former employers in Indonesia.[95] Kadri explained that, because the medical community in Indonesia was so small and insular, rumors about his sexuality and stories about his patients' and employers' actions would follow him to any medical job he applied for in Indonesia.[96] It would not have mattered if Kadri moved to a different part of Indonesia, he testified.[97] He would still have been harassed and discriminated against, because the stories and rumors would have followed him in the medical community.[98] Moreover, Kadri did not

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87. *See id.* (citing *Bocova*, 412 F.3d at 263); *Bocova*, 412 F.3d at 263 (stating that some "words are like chameleons" in that they may "have different shades of meaning depending upon the circumstances" (quoting United States v. Romain, 393 F.3d 63, 74 (1st Cir. 2004))).

88. *Kadri*, 343 F.3d at 21 (citing Sharari v. Gonzales, 407 F.3d 467, 475 (1st Cir. 2005)).

89. *Id.* (quoting *Bocova*, 412 F.3d at 263) (internal quotation marks omitted).

90. *Id.* (citing Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005)); Amanfi v. Ashcroft, 328 F.3d 719, 724 (3d Cir. 2003); Suzanne B. Goldberg, *Give Me Liberty or Give Me Death*, 26 CORNELL INT'L L.J. 605, 609-12 (1993)).

91. *Kadri*, 343 F.3d at 21.

92. *Id.*

93. *See id.*

94. *See id.* at 22.

95. *See id.* at 18-19.

96. *See id.* at 19.

97. *Id.*

98. *Id.*

attempt to open his own private practice due to the difficulties and barriers to opening a private practice in Indonesia.[99]

The IJ found that Kadri could no longer earn a living as a medical doctor in Indonesia and concluded that Kadri's situation amounted to economic persecution.[100] In contrast, the BIA noted that Kadri "was never physically injured, arrested, or imprisoned."[101] Thus, the BIA concluded, the mistreatments that Kadri suffered did not rise to the level of economic persecution.[102] The lone dissenting panel member on the BIA observed that the IJ failed to apply the correct standard for economic persecution.[103] The BIA dissenter would have remanded the case and instructed the IJ to apply the *Acosta* "threat to life or freedom" standard for economic persecution, though he noted that it was not entirely clear that the First Circuit had endorsed the *Acosta* standard.[104]

The First Circuit observed that neither the IJ nor the BIA majority articulated the standard for economic persecution that it had applied.[105] The First Circuit noted the inconsistency in its sister circuits' decisions and in the BIA's decisions regarding the correct standard to use for economic persecution.[106] Indeed, in *Mirzoyan v. Gonzales*, "the Second Circuit . . . remanded [the] case to the BIA to clarify the applicable standard, noting that the BIA has applied at least three different standards for economic persecution."[107] In response, the court reasoned, the BIA adopted the *In re T-Z-* standard.[108] The court held that the *In re T-Z-* standard is the correct standard to apply when evaluating asylum claims based on economic persecution.[109] The court then remanded Kadri's case to the administrative courts and instructed the IJ and BIA to apply the *In re T-Z-* standard to Kadri's claim.[110]

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99. *Id.*
100. *See id.* at 21.
101. *Id.* (summarizing BIA's decision).
102. *Id.*
103. *Id.* at 21-22.
104. *See id.* (citing *In re* Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985)). "[Persecution] could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom." *Acosta*, 19 I. & N. Dec. at 222 (internal citations omitted).
105. *Kadri*, 343 F.3d at 22.
106. *Id.* (citing Mirzoyan v. Gonzales, 457 F.3d 217, 222-23 (2d Cir. 2006) (per curiam)).
107. *Id.* (citing *Mirzoyan*, 457 F.3d at 222-23).
108. *Id.* (citing *In re* T-Z-, 24 I. & N. Dec. 163, 170-71 (B.I.A. 2007)).
109. *See id.*
110. *Id.*

IV. ANALYSIS

The First Circuit's decision in *Kadri* provides a blueprint for how homosexual aliens who have not suffered physical persecution can gain asylum. In the absence of physical persecution, the applicant must show deliberate and severe economic disadvantage or the deprivation of liberty or the essentials of life.[111] Although the issue of whether Kadri suffered past economic persecution was not properly before the court,[112] the aggregate rule in *In re T-Z-* suggests that Kadri had a valid claim.[113] After all, Kadri was fired from his medical job at the clinic, he was demoted by the hospital board and stripped of his patients, he was effectively blacklisted from employment in the Indonesian medical community, and an Indonesian government official—the Indonesian judge—tolerated and endorsed the sexual discrimination against him during Kadri's civil suit against the hospital.[114]

On the other hand, if Kadri had brought his appeal to the Eighth Circuit instead of the First Circuit, the outcome might have been very different. First, the BIA has recognized that, by itself, "a compulsory change in occupation is least likely to qualify as [economic] persecution."[115] Moreover, the Eighth Circuit has stated that being relegated to a low-paying job due to social prejudice, despite years of advanced training, does not qualify as economic persecution.[116] An individual who earns a degree and finds work—even if that work is low-level and menial—has no claim of economic persecution.[117] Kadri failed to establish that he could not find *any* work.[118] To the contrary, Kadri testified that the hospital allowed him to keep his job, even though it was now less prestigious, less rewarding, and lower-paying.[119] This suggests that homosexual asylum applicants need to forum shop, not only for circuits that have rejected the "homosexual sex acts versus homosexual

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111. *See id.*

112. *See id.* ("Based on his testimony and the evidence he submitted, Kadri may be able to sustain a claim for economic persecution. However, that is not the issue before us.").

113. *See In re T-Z-*, 24 I. & N. Dec. at 174-75 ("Various combinations of economic sanctions [can be] sufficiently severe to constitute past persecution.").

114. *Kadri*, 543 F.3d at 18-19.

115. *In re T-Z-*, 24 I. & N. Dec. at 174 (citing *In re* Acosta, 19 I. & N. Dec. 211, 234 (B.I.A. 1985)).

116. *See* Beck v. Mukasey, 527 F.3d 737, 741 (8th Cir. 2008) (dictum). The court acknowledged that, because the applicants' petitions for asylum were untimely, the court lacked jurisdiction to review the BIA's ruling. *Id.* at 738-39.

117. *See id.* at 741 (citing Mitreva v. Gonzales, 417 F.3d 761, 764 (7th Cir. 2005) (dictum)).

118. *See Kadri*, 543 F.3d at 18-19.

119. *See id.* at 19.

status" distinction,[120] but also for circuits that have embraced more favorable standards for economic persecution.[121]

Even after forum shopping, asylum applicants must emphasize the severity of the economic deprivations they have faced, for immigration courts are wary of allowing asylum to become a procedural tool for homosexual aliens to redress discriminatory practices which the laws in the applicant's home country simply do not reach. The asylum statutes, after all, were "designed as a filter, and the mesh would be too broad if every foreign victim of discrimination in his homeland were eligible for [U.S.] asylum."[122] The BIA's mechanism for assuring that asylum is not awarded to every foreign victim of discrimination is two-fold, asking: (1) has the government endorsed or tolerated the discrimination,[123] and (2) are the effects of the discrimination severe enough?[124] The *In re T-Z-* standard, which the First Circuit instructed the immigration courts to apply on remand, adds guidance to this analysis when economic persecution is involved.

Jason Ullman*

120. *See* Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185, 210 (2007-2008) (arguing that an important factor in "sexual-identity-based" asylum protection claims is which circuit court the applicant appears before).

121. *See, e.g.*, Vicente-Elias v. Mukasey, 532 F.3d 1086, 1088-89 (10th Cir. 2008) (noting that *In re T-Z-* added a "severe" version of the *Kovac* test to the "threat to life or freedom" test as an alternative way to demonstrate nonphysical persecution). "The *Kovac* test can support asylum absent a threat to life or freedom if an alien has suffered a severe loss of an existing economic/vocational advantage." *Id.* at 1089 (emphasis removed).

122. Bucur v. I.N.S., 109 F.3d 399, 403 (7th Cir. 1997).

123. "To qualify as persecution, the government 'must be the source of or at least acquiesce in the persecution[,] or there must be some showing that the persecution is due to the government's unwillingness or inability to control the conduct of private actors.'" *Kadri*, 543 F.3d at 20 (quoting Jorgji v. Mukasey, 514 F.3d 53, 57 (1st Cir. 2008)). "Giving an official imprimatur to discrimination magnifies its gravity, as is implicit in the state action requirement of the Fourteenth Amendment." *Bucur*, 109 F.3d at 403. Thus, just like in the equal protection jurisprudence, some kind of government endorsement or toleration of the discrimination is necessary, but not sufficient, to bring a viable claim of economic persecution.

124. *See In re* T-Z-, 24 I. & N. Dec. 163, 170-75 (B.I.A. 2007). See also Judge Posner's generalization that persecution of minority group members differs from discrimination in that persecution is "either official and severe, or nonofficial but lethal and condoned." *Bucur*, 109 F.3d at 403. Notice that under this standard, Kadri's claim of persecution probably fails.

* © 2009 Jason Ullman. J.D. candidate 2010, Tulane University School of Law; B.S. 2007, Old Dominion University. The author would like to thank his family and friends for their continuing love and support.