Bringas-Rodriguez v. Sessions: The Ninth Circuit Brings Sense Back to Evidentiary Requirements of Asylum Applications for Gay Children

I. OVERVIEW

Carlos Alberto Bringas-Rodriguez was first raped by his uncle at age four.[1] Bringas was born in Tres Valles, Veracruz, Mexico, and endured repeated physical beatings and sexual and mental abuse, simply because he was perceived as gay.[2] The abuse continued until he went to live with his mother in the United States when he was twelve.[3] However, when he returned to Mexico because he missed his grandmother, the abuse escalated.[4] He was again subjected to repeated rapes by his uncle and assaults by his cousins and neighbor.[5] After being beaten and raped by his neighbor for refusing a demand for oral sex, Bringas's abusers threatened to hurt his grandmother should Bringas ever report his abuse.[6] At fourteen, Bringas escaped Mexico and entered El Paso, Texas, without inspection to live with his mother.[7] Three years later, he moved to Kansas and then Colorado, working various jobs.[8] In August 2010, Bringas was arrested after a friend of his brought a minor to Bringas's home who then became drunk.[9] While serving his ninety-day sentence, Bringas attempted

1. Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1056 (9th Cir. 2017) (en banc).
2. *Id.* The court described some of the abuse Bringas endured: rape, beatings, and his father telling him to "Act like a boy. You are not a woman." His uncle, some cousins, and a neighbor also referred to him as "fag" and other derogatory terms, but never by his given name.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 1057.

suicide.[10] It was after the resulting hospitalization that Bringas finally revealed the abuse he had suffered in Mexico as a child to a doctor and his mother.[11]

In August 2010, the Department of Homeland Security issued Bringas a Notice to Appear, starting his removal process.[12] The following year, Bringas applied for asylum, withholding of removal, and Convention Against Torture (CAT) protection.[13] At that time, he was twenty years old.[14] In his petition, Bringas described the horrific abuse he suffered during his childhood in Mexico.[15] He also expressed his fear that the persecution would continue if he were forced to return to Mexico and that the Mexican police would not protect him.[16] To justify his position that the Mexican police would not protect him, Bringas credibly testified that the police in Veracruz had laughed at and then ignored his gay friends when they sought protection from similar abuse.[17] Bringas also submitted U.S. Department of State Country Reports and other articles documenting violence against gay individuals in Mexico, including murders, as evidence of his well-founded fear of future persecution claims.[18] These reports reflected an incline in the violence against members of the LGBTQ+ community, despite increasing tolerance in Mexican law.[19] The Board of Immigration Appeals (BIA) upheld the Immigration Judge's (IJ) denial of asylum on the merits.[20] Though the BIA recognized that Bringas had endured "serious abuse," it ultimately held that Bringas had not demonstrated that the Mexican government was "unable or unwilling" to control the abuse of a minor.[21] The BIA concluded that Bringas had not established past persecution and rejected Bringas's well-founded fear argument because there was no criminalization of homosexuality in Mexico.[22] Though the IJ had held that Bringas's sexual orientation was not the basis for the abuse he had suffered as a child, the BIA did not adopt

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1057-58. The Ninth Circuit also noted that the BIA "rejected Bringas's withholding of removal and CAT claims and denied a remand to consider his HIV-positive diagnosis." *Id.*

this rationale; instead, the BIA ruled on the grounds that Bringas lacked evidence to prove Mexico's inability or unwillingness to protect him.[23] The United States Court of Appeals for the Ninth Circuit initially heard Bringas's case as a three-judge panel.[24] The divided panel upheld the denial of asylum, stating that "there is a 'gap in proof about how the government would have responded'" when there is no police report issued.[25] The panel majority then concluded that the petitioner must show what the government response would have been if the abuse had been reported in order to close that evidentiary gap.[26] The court heard the case again, en banc, because the BIA conducted its own review and rejected the IJ's holding.[27] The United States Court of Appeals for the Ninth Circuit *held* that gay children do not have a heightened evidentiary standard to prove that their government was unable or unwilling to protect them, overruling prior precedent to the extent that it created this heightened standard. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (2017) (en banc).

II. BACKGROUND

The United States has long struggled to standardize an approach to refugee and asylum law.[28] For the first time in the United States, the Refugee Act of 1980 established a practical legal framework for refugee admissions and the legal status and rights of asylum.[29] Generally, the Attorney General or Secretary of Homeland Security may grant asylum to an applicant who meets the eligibility requirements of refugee status.[30] Congress defined these requirements in section 101(a) of the Immigration and Nationality Act:

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23. *Id.* at 1073. The court also noted that one of the government's arguments misread the BIA's decision. The government had argued that the BIA rejected Bringas's claims because he had not met the nexus requirement. However, the Ninth Circuit recognized that the BIA's reasoning must have been based on a failure of proof of the inability or unwillingness of the government to protect Bringas because the BIA had immediately turned from describing the persecution and abuse Bringas suffered as a child to a discussion of *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011).

24. *Id.* at 1056.

25. *Id.* at 1058 (quoting *Castro-Martinez*, 674 F.3d at 1081) (citing Bringas-Rodriguez v. Lynch, 805 F.3d 1171, 1178 (9th Cir. 2015)).

26. *Id.*

27. *Id.* at 1059.

28. *Id.* (citing STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 874-76, 878 (5th ed. 2009)).

29. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981) (citing 8 U.S.C. § 1158 (1980)).

30. 8 U.S.C.A. § 1158(b)(1)(A) (2009). The statute explicitly gives the Attorney General power to grant asylum if the petitioner fulfills the requirements of refugee status.

> The term "refugee" means . . . 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 . . . .[31]

The burden of proof for an asylum claim rests on the applicant, who may use credible testimony, with or without corroborating evidence, to sustain their burden.[32] However, the trier of fact has discretion to make a determination on the applicant's credibility and to weigh that credible testimony against other evidence in the record.[33]

A. Defining and Applying "Persecution"

Persecution, although one element of asylum claims, is not explicitly defined in the Immigration and Nationality Act.[34] The Ninth Circuit has determined that persecution is generally "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."[35] The court has also defined persecution "as 'an extreme concept that does not include every sort of treatment our society regards as offensive.'"[36] Ultimately, the court must determine whether the abuse a petitioner has suffered rises to the level of persecution by examining the totality of the treatment they have suffered.[37]

Persecution is not confined to actions committed by state actors.[38] The Ninth Circuit first addressed non-state, or private, persecution in *McMullen v. INS*, where the government conceded that actions done by nongovernment agencies could fit the statutory definition of persecution where the applicant has shown that the government is unable or unwilling to control that agency.[39] This is especially significant considering that a petitioner for asylum must prove the "well-founded fear of future

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31. 8 U.S.C.A. § 1101(42)(A) (2014).

32. 8 U.S.C.A. § 1158(b)(1)(B) (2009). The petitioner has a burden to establish that race, religion, nationality, membership in a particular social group, or political opinion is at least one central reason the applicant was or will be persecuted.

33. *Id.*

34. Korablina v. INS, 158 F.3d 1038, 1043 (9th Cir. 1998).

35. Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969).

36. *Korablina*, 158 F.3d at 1044 (quoting Arriaga-Barrientos v. INS, 937 F.2d 411, 414 (9th Cir. 1998)).

37. *Id.* (citing Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998)).

38. Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1061 (9th Cir. 2017) (en banc).

39. *Id.* at 1061-62 (quoting McMullen v. INS, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981)).

persecution" element of their asylum claim by either proving past persecution or showing a subjectively genuine and objectively reasonable fear of future persecution.[40]

B. Proving the "Unable or Unwilling" Standard

Early decisions concerning private persecution focused on applying the "unable or unwilling" standard to government responses of persecution committed by organized groups.[41] In those cases, documentary evidence, such as country conditions reports, clearly proved that the governments were unable or unwilling to control more powerful groups.[42] However, when the groups persecuting the petitioner were not organized, the court relied on evidence of police response to the requests for protection as evidence of whether the persecution was committed with the quiet acquiescence of the government.[43] In those cases, the court found that "a petitioner need not provide evidence that a government is 'unable or unwilling to control [persecution]'" nationally.[44] Instead, a lack of government protection in the petitioner's home region would suffice to meet the petitioner's burden of proof.[45]

By 2000, the BIA had recognized that the unable or unwilling standard could be proven without the petitioner reporting their persecution to government officials.[46] In those instances, the BIA tested whether the petitioner's government (a) would have been unable or unwilling to control the abuse even if the petitioner had gone to the authorities and (b) whether the persecution would have increased for the petitioner's efforts.[47] Like the BIA, the Ninth Circuit had held that the petitioner was

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40. *Id.* at 1062 (quoting Navas v. INS, 217 F.3d 646, 654-56, 656 n.11 (9th Cir. 2000)) (internal quotation marks omitted).

41. *Id.* (citing Artega v. INS, 836 F.2d 1227, 1231 (9th Cir. 1988); INS v. Elias Zacarias, 502 U.S. 478 (1992); Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997)).

42. *Id.* (citing Gomez-Saballas v. INS, 79 F.3d 912, 916-17 (9th Cir. 1996); *Artega*, 836 F.2d at 1231).

43. *Id.* at 1063 (citing Singh v. INS, 94 F.3d 1353, 1357-60 (9th Cir. 1996) (where the court found that the Fijian government had "encouraged and condoned the discrimination, harassment, and violence" of Singh's ethnic group and the Fijian police had been unresponsive to any of the reports Singh brought forth of the attacks and threats he and his family had suffered)).

44. *Id.* (quoting Mashiri v. Ashcroft, 383 F.3d 1112, 1122 (9th Cir. 2004)).

45. *Id.* (quoting *Mashiri*, 383 F.3d at 1122).

46. *In re* S-A-, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000). The BIA held that the combination of testimony and country reports for Morocco provided enough evidence to show that few Moroccan women reported abuse because the judicial process was biased against them and those who did report their abuse were often sent back to their abusers.

47. *Id.* ("In the instant case, the source of the respondent's repeated physical assaults, imposed isolation, and deprivation of education was not the government, but her own father.

not required to have reported their persecution to establish the government's inability or unwillingness to protect them.[48]

The Ninth Circuit initially determined that credible testimony and corroborating articles were sufficient evidence to meet the petitioner's burden, noting that the lack of evidence presented by the government to dispute the claims is itself evidence of the government's complicity.[49] The court effectively created its initial test to apply the "unable or unwilling" standard when the petitioner has not filed a report by holding that a petitioner must only convincingly establish that submitting such a report to the authorities would have been either futile or subjected them to additional abuse.[50] However, in *Rahimzadeh v. Holder*, the court introduced the idea that the lack of a report creates a "gap in proof" as to how the government would have responded.[51]

The "gap in proof" idea led the Ninth Circuit to create a heightened evidentiary standard for gay children in *Castro-Martinez v. Holder*.[52] There, the court found that Castro had credibly testified and provided country reports about police corruption in Mexico and involvement in the harassment of gay *men*.[53] Because Castro had been persecuted when he was less than ten years old, the court was required to perform its analysis from the perspective of a child.[54] Despite the country reports and credible testimony, which met the *Rahimzadeh* requirements to fill the gap in proof, the court held that the evidence was insufficient to establish that the

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Although she did not request protection from the government, the evidence convinces us that even if the respondent had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father's conduct. The respondent would have been compelled to return to her domestic situation and her circumstances may well have worsened.").

48. *Bringas-Rodriguez*, 850 F.3d at 1064.

49. *Id.* at 1065. The court "noted that '[c]onspicuous by its absence [was] any authoritative evidence from the government disputing the thrust of her evidence and of the government's complicity'" when the petitioner had not issued a report to the authorities and offered both articles on lack of police response in her home country and credible testimony as evidence to satisfy the unable or unwilling standard. *Id.* (quoting Korablina v. INS, 158 F.3d 1038, 1045 (9th Cir. 1998)). The court then indicated that requiring a per se reporting of abuse would be problematic, particularly because a lack of response from the authorities is often a contributing factor to the underreporting of crimes. *Id.* (citing Reyes-Reyes v. Ashcroft, 384 F.3d 782, 789 & n.3 (9th Cir. 2004) (where the court reversed the IJ's imposition of a per se reporting requirement, also noting that circuit precedent acknowledged police abuse of gay individuals in Latin America)).

50. *Id.* (quoting Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1058 (9th Cir. 2006)).

51. *Id.* at 1066 (quoting Rahimzadeh v. Holder, 613 F.3d 916, 922 (9th Cir. 2010)); *see also* Afriyie v. Holder, 613 F.3d 924, 931 (9th Cir. 2010).

52. *Id.* at 1068.

53. Castro-Martinez v. Holder, 674 F.3d 1073, 1081 (9th Cir. 2011).

54. *Id.* (citing Hernandez-Ortiz v. Gonzales, 496 F.3d 1042, 1046 (9th Cir. 2007)).

Mexican government would not have protected gay *children*.[55] Thus, the court also expressly distinguished between country report evidence showing the harassment of gay men and country reports showing the harassment of gay children.[56] By making this distinction, the court concluded that a gay child's belief that police would not have protected him was not sufficient to fill the gap created in the record by not reporting his persecution.[57]

III. COURT'S DECISION

In the noted case, the Ninth Circuit considered the effects of its holding in *Castro-Martinez v. Holder*, overruling the heightened evidentiary standard it created for children to prove that their native governments could not or would not protect them.[58] First, the court established that Bringas had, in fact, suffered persecution through the abuse he suffered as a child.[59] Second, the court discussed whether Bringas was required to report the private persecution he suffered as a child to fulfill his burden of proof for the unable or unwilling standard.[60] In sum, through the lens of Bringas's case, the court recognized the impractical effects of its prior decisions forcing gay children to adhere to a higher evidentiary standard.

A. Establishing Past Persecution

The Ninth Circuit held that Bringas had undoubtedly suffered persecution as a child.[61] In order to be eligible for asylum, Bringas must have shown that he was persecuted on account of his membership in a particular social group.[62] The BIA has held that "sexual orientation and

55. *Id.*

56. *Id.* ("Castro presented country reports documenting police corruption and participation in torture, abuse, and trafficking, as well as incidents of police harassment of gay men. But none of these reports compel the conclusion that the police would have disregarded or harmed a male child who reported being the victim of homosexual rape by another male.").

57. *Id.* ("Castro's primary reason for not contacting the authorities was that he believed the police would not have helped him. However, such a statement, without more, is not sufficient to fill the gaps in the record regarding how the Mexican government would have responded had Castro reported his attacks." (citing Castro-Perez v. Gonzales, 409 F.3d 1069, 1072 (9th Cir. 2005))).

58. Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1056 (9th Cir. 2017).

59. *Id.* at 1073.

60. *Id.*

61. *Id.* ("There is no dispute that the brutal beatings and rapes that Bringas suffered as a child rise to the level of persecution.").

62. *See* 8 U.S.C.A. § 1101(42)(A) (2014).

sexual identity can be the basis for establishing a particular social group."[63] The Ninth Circuit recognized that the evidence in the record clearly established that Bringas suffered persecution as a child because of his identity as a gay male.[64] Although the IJ found that Bringas's persecutors were pedophiliac sexual predators motivated by "perverse sexual urges," the BIA did not adopt that holding.[65] The Ninth Circuit explicitly noted that to hold that Bringas had not suffered persecution on the basis of his identity as gay would be to hold that children "can never be victims of abuse on the basis of sexual identity."[66] The court also emphasized that a petitioner need not show that their sexual orientation is the sole reason for their persecution, merely that it was a central reason.[67]

B. The Unable or Unwilling Standard

The court examined the evidence Bringas presented to determine whether he had effectively shown that the Mexican government was unable or unwilling to control the persecution he suffered.[68] The court specifically examined two key pieces of evidence to hold that Bringas had proven that he had suffered past persecution because he is a gay individual and that "he need not additionally provide evidence specific to him as a gay child."[69]

First, Bringas had repeatedly stated that he had not reported his persecution because all of his abusers had threatened to hurt him and his family should he tell anyone.[70] Even the IJ recognized that, as a child,

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63. *Bringas-Rodriguez*, 850 F.3d at 1073 (citing Boer-Sedano v. Gonzales, 418 F.3d 1082, 1087-88 (9th Cir. 2005); Karouni v. Gonzales, 399 F.3d 1163, 1171-73 (9th Cir. 2005)).

64. *Id.* ("[T]he entire record compels the conclusion that at least one central reason for Bringas's persecution was his sexual orientation. Indeed, there is no evidence in the record suggesting Bringas's abusers were motivated by anything else . . . ."); *see id.* at 1056 ("When he was eight, Bringas's uncle told him that the abuse was because he was gay.").

65. *Id.* ("The government reads the BIA's decision as affirming the IJ's finding that the sexual predators who attacked Bringas were pedophiles motivated by perverse sexual urges. But the BIA did not adopt the IJ's decision, and nothing about the BIA's decision suggests that it denied Bringas's claim on nexus grounds.").

66. *Id.*

67. *Id.* ("Bringas need only demonstrate that his sexual orientation was 'at least one central reason' for the abuse; he need not show it was the only reason." (quoting Parussimova v. Mukasey, 555 F.3d 734, 741 (9th Cir. 2009))).

68. *Id.*

69. *Id.* at 1076.

70. *Id.* at 1074 ("At his removal hearing, Bringas testified that he did not tell *anybody* about the abuse because he was afraid that his abusers would hurt him, his family, and the person he chose to tell.").

Bringas was highly unlikely to report his abuse to the authorities.[71] Further, Bringas had established through credible testimony that going to the police "would have been futile and dangerous," as his friends had experienced.[72] The court explicitly stated that Bringas did not have to report his abuse to show that the Mexican government was not unable or unwilling to protect him because there was sufficient credible testimony showing the danger and futility in making such a report.[73] Between statements made in his asylum application and sworn affidavit, Bringas consistently explained his fear that the police would do nothing to help him and that he was afraid of the potential consequences should his persecutors find out he sought help.[74] The court also recognized that children who suffer from persecution are generally unlikely to report that abuse.[75] "[E]ven the IJ understood the improbability of a younger Bringas reporting his abuse to the authorities; by stating 'you're older now . . . you could tell the police . . . [c]ouldn't you do that,' the IJ recognized the difference between a minor's ability to report and an adult's."[76]

Second, Bringas had supplemented his credible testimony with Human Rights reports and news articles detailing the persecution of gay men in Mexico.[77] The court also recognized and considered the impacts

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71. *Id.* ("[E]ven the IJ understood the improbability of a younger Bringas reporting his abuse to the authorities . . . .").

72. *Id.* at 1073-74. Both the BIA and the IJ held that Bringas's testimony was "credible under the heightened standards of the Real ID Act."

73. *Id.* at 1073-74.

74. *Id.* at 1074.

75. *Id.* at 1071 ("[W]e recognize that children who suffer sexual abuse are generally unlikely to report that abuse to authorities. Because they are unlikely to report, it is similarly unlikely that country reports or other evidence will be able to document the police response, or lack thereof, to the sexual abuse of children."). The court also recognized that children may not be mentally capable of understanding the abuse they suffer and that, even if they do have that ability, they may fear retaliation or simply be unable to get to the police because they are monitored by their abusers. *Id.* (citing Brief for Kids in Need of Defense et al. as Amici Curiae Supporting Petitioner at 9-11, Bringas-Rodriguez v. Lynch, 805 F.3d 1171 (9th Cir. 2015) (No. 13-72682)). Further, there are concerns about whether a child would be able to articulate the abuse they suffered and whether they would be more easily dismissed by authorities because of their age. *Id.* (citing U.N. High Commissioner for Refugees, Guidelines on International Child Protection: Child Asylum Claims Under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, ¶ 39, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009), http://www.unhcr.org/50ae46309.pdf).

76. *Id.* at 1074.

77. *Id.* at 1075 ("In addition to his sworn asylum application, affidavit, and credible testimony, Bringas submitted the 2009 and 2010 U.S. Department of State Human Rights Reports for Mexico and several newspaper articles describing the treatment of gay men in Mexico. [These] reports show official discrimination and violence by police against homosexuals, and show that persecution of gay men remained a serious problem in Mexico five and six years after Bringas fled . . . .").

of their prior lack of consideration of the differences between enactment and enforcement of law in *Castro-Martinez*.[78] The court specifically noted that a country's enacted law is not always indicative of country conditions.[79] Further, there is a difference in how efforts to minimize discrimination are enforced nationally and locally, meaning that national efforts may not be implemented at the local level.[80] The court noted that there have been increasing levels of violence towards members of the LGBTQ+ community in Mexico, despite the country's recent expansion of legal protections for members of those communities.[81] Therefore, there was substantial evidence to support the conclusion that Bringas had established past persecution for his asylum claim, despite his lack of reporting to the authorities.[82]

IV. ANALYSIS

In the noted case, the court fixed an overly harsh error in its prior analysis of the "unable or unwilling" standard by closing the "gap in proof" theory and removing the impractical heightened evidentiary requirement *Castro-Martinez* created for gay children to prove an asylum claim.[83] Significantly, the *Bringas-Rodriguez* decision allows gay children to apply for asylum without worrying about their claims being dismissed for arbitrary evidentiary requirements in proving they have a well-founded fear of past persecution.[84]

The *Bringas-Rodriguez* court found that the "gap in proof" theory established in *Rahimzadeh* was unnecessary because the law was clear that upon review the court must examine all of the evidence in the record to make a determination on the "unable or unwilling" standard.[85] The

78. *Id.* at 1072; *see also id.* at 1075 ("[T]he panel-majority opinion, like the *Castro-Martinez* decision and the BIA decision here, falsely equated legislative and executive enactments prohibiting persecution with on-the-ground progress.").

79. *Id.* ("[I]t is well recognized that a country's laws are not always reflective of actual country conditions.").

80. *Id.* ("[T]he anti-discrimination efforts discussed in *Castro-Martinez* seem to have been made by the national government, and thus do not necessarily reveal anything about the practices within state or municipal jurisdictions." (citing Madrigal v. Holder, 716 F.3d 499, 507 (9th Cir. 2013))).

81. *Id.* (quoting Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1081 (9th Cir. 2015)).

82. *Id.* at 1073-74 ("Although Bringas's prosecutors were private, not government, actors, the record evidence compels the conclusion that the government was unable or unwilling to control them. Bringas was not required to report his abuse to the authorities because ample evidence demonstrates that reporting would have been futile and dangerous.").

83. *See id.* at 1056.

84. *See id.* at 1056, 1076.

85. *Id.* at 1069-70.

reasoning in *Rahimzadeh* essentially created a hole where none had existed previously. The statute already required that a trier of fact must consider the totality of the circumstances when deciding cases involving asylum claims.[86] Case law in the circuit further establishes that a court must look to all the evidence in the record.[87] To state that there is a gap in proof improperly implies a dismissal of the discretion appointed to the trier of fact in adjudicating these claims.[88]

It is difficult to understand why the court in *Castro-Martinez* had initially held that Castro had not met his burden, given that the court had acknowledged that Castro had suffered traumatic persecution.[89] In that case, "[t]he IJ found that Castro had not presented any evidence that the government systematically harms gay men or that it is unwilling to control those who would commit violence against homosexuals."[90] This description of the IJ's decision seems to indicate that the IJ improperly narrowed the circumstances in which asylum could be granted to only two instances: (1) those in which the government itself *systematically* participates in persecution and (2) those in which the government is *unwilling* to control private persecutors.[91] Had the Ninth Circuit upheld this language in *Castro-Martinez*, the court would have fundamentally altered the "unable or unwilling" standard, forgoing those cases in which the government is *unable* to control violence against persecuted groups, such as the gay community. As it was, the BIA dismissed Castro's appeal on the basis that he had not presented a compelling reason why issuing a report to authorities would have been futile.[92] Thus, the BIA imposed a new compelling reason requirement for an asylum applicant to not issue a

86. *See* 8 U.S.C.A. § 1158(b)(1)(B)(iii) (2009).

87. *See* Afriyie v. Holder, 613 F.3d 924, 933 (9th Cir. 2010).

88. *See Bringas-Rodriguez*, 850 F.3d at 1069 ("*Rahinsadeh* and *Afriyie* unnecessarily introduced the construct that the failure to report creates a 'gap' in the evidence, because our law is clear that the agency, and [the Court of Appeals], upon review, must examine all the evidence in the record that bears on the question of whether the government is unable or unwilling to control a private persecutor.").

89. Castro-Martinez v. Holder, 674 F.3d 1073, 1081-82 (9th Cir. 2011) ("In sum, while we do not diminish the trauma Castro experienced, substantial evidence supported the BIA's conclusion that Castro did not meet his burden to show that the government was unable or unwilling to control his attackers and therefore failed to demonstrate that he had been the victim of past persecution.").

90. *Id.* at 1079.

91. *See* Matter of Acosta, 19 I. & N. Dec. 211, 231 (B.I.A. 1985) (holding that the petitioner had not established a well-founded fear of *either* the government or the guerillas attacking him if he were to return to Guatemala).

92. *Castro-Martinez*, 674 F.3d at 1080 (citing Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1057-58 (9th Cir. 2006)).

report of their persecution.[93] While the Ninth Circuit did not explicitly adopt the BIA's reasoning, by differentiating between Castro's age at the time he was subjected to persecution and the country report evidence pertaining to gay men, the court effectively forced gay child applicants to provide country report evidence that may not exist.[94] This heightened evidentiary standard created a reporting requirement for gay children, something that the statute does not require and case law explicitly rejects.[95]

The *Bringas-Rodriguez* decision identified the errors in the *Castro-Martinez* holding and overturned the impractical and unjust heightened evidentiary standard imposed on gay children.[96] The Ninth Circuit rightfully brought sense back to its precedent, enabling gay children to bring forth asylum claims without having to provide the court with nonexistent country report evidence about the treatment of gay children in their country rather than reports of the treatment of the LGBTQ+ community as a whole that do exist.

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93. *See In re* S-A-, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000).

94. *See* Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1071 (9th Cir. 2017) (en banc) ("[W]e recognize that children who suffer sexual abuse are generally unlikely to report that abuse to authorities. Because they are unlikely to report, it is similarly unlikely that country reports or other evidence will be able to document the police response, or lack thereof, to the sexual abuse of children.").

95. *See id.* at 1071-72; *see also id.* at 1069 ("Like all other circuits to consider the question, we do not deem the failure to report to authorities outcome determinative, and we consider all evidence in the record." (citing Castillo-Diaz v. Holder, 562 F.3d 23, 27-28 (1st Cir. 2009); Cardozo v. Att'y Gen., 505 Fed. App'x 135, 138-39 (3d Cir. 2012); Vahora v. Holder, 707 F.3d 904, 908-10 (7th Cir. 2013); Ngengwe v. Mukasey, 543 F.3d 1029, 1035-36 (8th Cir. 2008); Lopez v. U.S. Att'y Gen., 504 F.3d 1341, 1345 (11th Cir. 2007))).

96. *See id.* at 1070 ("By effectively defining Castro's social group as gay children and rejecting Castro's evidence, we 'demand[ed] an unwarranted level of specificity' and 'effectively eliminated [country reports] as a method of showing a foreign government's inability or unwillingness to prevent sexual abuse of gay children." (quoting Bringas-Rodriguez v. Lynch, 805 F.3d 1171, 1192 (Fletcher, J., dissenting) (alteration in original))).

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