U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - HAR
P. O. Box 230217
Hartford, CT 06123-0217

Name: GENEGO, KWEI

A 047-376-145

Date of this notice: 10/2/2014

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

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GENEGO, KWEI
A047-376-145
FRANKIN COUNTY HOUSE OF CORRECTION
160 ELM STREET
GREENFIELD, MA 01301

DHS/ICE Office of Chief Counsel - HAR
P. O. Box 230217
Hartford, CT 06123-0217

Name: GENEGO, KWEI

A 047-376-145

Date of this notice: 10/2/2014

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Wendtland, Linda S.
Pauley, Roger

Userteam:

File: A047 376 145 – Hartford, CT

Date: OCT - 2 2014

In re: KWEI GENEGO a.k.a. Cyril Genego

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Anthony D. Collins, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(F))

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(G))

APPLICATION: Termination

The respondent, a native and citizen of Ghana and a lawful permanent resident of the United States, appeals the March 10, 2014, decision of an Immigration Judge finding him removable as charged.[1] The record will be remanded.

On January 20, 2012, the respondent was convicted of third degree burglary in violation of Connecticut General Statutes Annotated ("CGSA") § 53a-103, and sentenced to 4 years of imprisonment (I.J. at 1; Exhs. 1, 4, and 5). The statute of conviction provides: "[a] person is guilty of burglary in the third degree when he enters or remains unlawfully in a building with intent to commit a crime therein." CGSA § 53a-103. "A person 'enters or remains unlawfully' in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the actor is not otherwise licensed or privileged to do so." CGSA § 53a-100(b). Connecticut further defines "building" to include "any watercraft, aircraft, trailer, sleeping car, railroad car or other structure or vehicle or any building with a valid certificate of occupancy." CGSA § 53a-100(a)(1).

The Immigration Judge concluded that CGSA § 53a-103 is not categorically a burglary offense within the meaning of section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), because the state statute is broader than the generic definition of burglary (I.J. at 2). *See Taylor v. United States*, 495 U.S. 575, 598 (1990) ("the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."); *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (finding that it would conflict with

[1] The respondent did not apply for relief from removal (I.J. at 1-2; Tr. at 11).

Taylor's generic definition of burglary to hold that burglary of a vehicle in violation of Texas law was a burglary offense under section 101(a)(43)(G) of the Act). Applying the modified categorical approach pursuant to *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Immigration Judge held that the Department of Homeland Security ("DHS") established that the respondent's conviction was for an aggravated felony, as defined in section 101(a)(43)(G), by submitting a plea colloquy showing that the respondent was convicted of burglarizing a dwelling (I.J. at 2; Exh. 5). *See* 8 C.F.R. § 1240.8(a) (stating that the DHS bears the burden of proving removability by clear and convincing evidence). The Immigration Judge also held that the DHS demonstrated that the respondent categorically was convicted of an aggravated felony, as defined in section 101(a)(43)(F) of the Act, because burglary involves substantial risk of the use of physical force (I.J. at 2-3). *See* 18 U.S.C. § 16(b); *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). Therefore, the Immigration Judge denied the respondent's motion to terminate.

On appeal, the respondent contends that the Immigration Judge erroneously concluded that CGSA § 53a-103 is divisible under *Descamps*. We agree. A criminal statute is divisible, so as to warrant application of the modified categorical inquiry pursuant to *Descamps*, only if: (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements" more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. *Matter of Chairez*, 26 I&N Dec. 349, 353 (BIA 2014) (*citing Descamps v. United States*, *supra*, at 2281, 2283). CGSA § 53a-103 defines a single offense (burglary) by reference to a disjunctive set of elements, more than one combination of which could support a conviction (e.g., a building *or* a vehicle). *See* CGSA § 53a-100(a)(1). However, a state statute can be divisible into separate offenses under *Descamps* only if state law requires jury unanimity regarding the element in question. *See Matter of Chairez*, *supra*, at 354-55.

The DHS, which bears the burden of proof, has not come forward with any authority to establish the statute's divisibility under *Descamps*. In one relevant case, a Connecticut court stated that it is well settled that a motor vehicle is included within the definition of "building" pursuant to CGSA § 53a-100(a)(1). *State v. Adams*, 539 A.2d 1022, 1027 (Conn. App. 1988). Thus, the court rejected the defendant's claim that his conviction for third degree burglary was based on insufficient evidence of his intent to commit a crime inside a "building" where the evidence only demonstrated his intent to commit a crime inside a vehicle. *Id.* at 1026-27. In other words, the jury was not required unanimously to agree that the defendant entered or remained unlawfully in a vehicle, as opposed to some other "building" that was a structure included within Connecticut's definition of burglary. *See id.* Therefore, we conclude that the Immigration Judge was not authorized to consult the respondent's record of conviction to determine whether he unlawfully entered a building, as opposed to a vehicle. The DHS thus has not met its burden of demonstrating by clear and convincing evidence that the respondent is removable for having been convicted of an aggravated felony burglary offense, as defined in section 101(a)(43)(G) of the Act.

Concerning the charge under section 101(a)(43)(F) of the Act, a crime of violence may be defined for immigration purposes as "any offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the

course of committing the offense." 18 U.S.C. § 16(b). The analysis required under the United States Sentencing Guidelines and the Armed Career Criminal Act, considered by the Supreme Court in *Descamps*, differs from the analysis required for determining whether a crime amounts to a crime of violence for immigration purposes. Thus, whether third degree burglary pursuant to CGSA § 53a-103 constitutes a generic burglary offense has no bearing on whether it amounts to an aggravated felony crime of violence under the Act. The question presented is whether a person who commits the offense of third degree burglary in violation of CGSA § 53a-103 necessarily disregards the substantial risk that, in the course of committing that offense, he or she will have to use physical force against the person or property of another. Moreover, the relevant inquiry is not whether CGSA § 53a-103 can sometimes be violated without physical force being used against the person or property of another; rather, it is necessary to determine whether the conduct encompassed by the elements of the offense presents a substantial risk of the use of physical force in the ordinary case. *See James v. United States*, 550 U.S. 192, 208 (2007); *Matter of U. Singh*, 25 I&N Dec. 670, 677-78 (BIA 2012). As the Court explained:

> [t]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury—for example, an attempted murder where the gun, unbeknownst to the shooter, had no bullets. Or . . . one could imagine an extortion scheme where an anonymous blackmailer threatens to release embarrassing personal information about the victim unless he is mailed regular payments. In both cases, the risk of personal injury to the victim approaches zero. But that does not mean that the offenses . . . are categorically nonviolent.

James v. United States, *supra*, at 208.[2]

The Immigration Judge acknowledged the respondent's argument that the DHS has not shown that his conviction was for a crime of violence because although substantial use of physical force is inherent in burglary of a dwelling, it is not inherent in burglary of a vehicle (I.J. at 3). Yet, he held that regardless of whether a dwelling or vehicle is involved, burglary necessarily entails a substantial risk of using physical force (I.J. at 3). *See Leocal v. Ashcroft*, *supra*, at 10. At the same time, it is possible to hypothesize cases in which the Connecticut burglary statute at issue might not present a genuine risk of the use of force. The statute of conviction provides: "[a] person is guilty of burglary in the third degree when he enters *or remains unlawfully* in a building with intent to commit a crime therein." CGSA § 53a-103 (emphasis added). The statute also does not apparently require that the crime to be committed

[2] We note that the Supreme Court in *James v. United States, supra,* addressed the definition of "violent felony" under the Armed Career Criminal Act, which references the risk of physical injury to another, while the analysis of a crime of violence under 18 U.S.C. § 16(b) focuses on the risk of the use of physical *force*. *See Leocal v. Ashcroft, supra,* at 10 n.7.

after remaining unlawfully in a building (which may be a vehicle, among other things) be a felony, as opposed to some relatively minor crime. *See id.*

However, as noted above, the proper inquiry is not whether CGSA § 53a-103 can sometimes (or hypothetically) be violated without physical force being used against the person or property of another. We will remand for application of the correct categorical standard, which requires determining whether the DHS has shown that "in the ordinary case," a violation of CGSA § 53a-103 presents a substantial risk of the use of physical force against the person or property of another, as necessary to find that the respondent was convicted of a crime of violence aggravated felony. *See James v. United States*, *supra*, at 208.[3] On remand, the parties may submit additional evidence and argument pertaining to any relevant issue. This may include case law illustrating how CGSA § 53a-103 has been applied in the ordinary case.

Accordingly, the following order is entered.

ORDER: The record is remanded for further proceedings consistent with this opinion and the entry of a new decision.

FOR THE BOARD

Board Member Roger A. Pauley concurs in the reversal of the finding below that the respondent's conviction constitutes burglary but respectfully dissents from a remand on the issue whether it is an aggravated felony crime of violence. I would affirm the Immigration Judge on this issue and dismiss the appeal. *See Escudero-Arciniega v. Holder*, 702 F.3d 781 (5th Cir. 2012) (vehicle burglary is an aggravated felony crime of violence where statute requires unauthorized entry accompanied by intent to commit felony or theft). Any hypothetical violation involving remaining unlawfully in a vehicle with intent to commit a crime would not represent the "ordinary case" and in any event would not be without a substantial risk of the use of force (e.g., if the vehicle's owner were present or returned).

[3] Entering and remaining unlawfully in a building are alternative means of violating CGSA § 53a-103, as opposed to alternative elements. *See State v. Cote*, 46 A.3d 256, 267 (Conn. App. 2012) ("To convict the defendant of burglary in the third degree, the state was required to prove beyond a reasonable doubt that the defendant entered or remained unlawfully in a building with intent to commit a crime therein.") (internal quotation omitted). Therefore, since CGSA § 53a-103 is not divisible in this respect, it is not permissible to consult the respondent's record of conviction in a modified categorical analysis to determine whether he was convicted of entering or remaining unlawfully. *See Matter of Chairez*, *supra*, at 354-55. We are also aware of no authority holding that the statute is divisible regarding the "crime" intended to be committed after entering or remaining unlawfully.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
450 MAIN ST., ROOM 628
HARTFORD, CT 06103

In the Matter of:
GENEGO, KWEI

Case No.: A047-376-145

IN REMOVAL PROCEEDINGS

RESPONDENT

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is subject to removal on the charge(s) in the Notice to Appear.

Respondent has made no application for relief from removal.

It is HEREBY ORDERED that the respondent be removed from the United States to GHANA on the charge(s) contained in the Notice to Appear.

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in INA section 237(a), who willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General shall be fined and/or imprisoned for up to ten years. Further, any alien who willfully fails or refuses to depart from the United States pursuant to a final removal order or present for removal at the time and place required by the Attorney General shall pay a civil penalty of not more than $500 to the Commissioner for each day the alien is in violation of this section.

MICHAEL W. STRAUS
Immigration Judge
Date: Mar 10, 2014

Appeal: ~~NO APPEAL~~ Reserved (A/I/B)
Appeal Due By: Apr 9, 2014

by respondent

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [P] Alien's ATT/REP [P] DHS
DATE: 3/10/14 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Form EOIR 7 - 4T (REMOVAL Order)