U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MINAYA RODRIGUEZ, ELVIN M.

A 207-359-653

Date of this notice: 12/6/2019

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:
Malphrus, Garry D.

Userteam: Docket

File: A207-359-653 – Batavia, NY

Date: DEC - 6 2019

In re: Elvin M. MINAYA RODRIGUEZ

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Joseph David Moravec, Esquire

ON BEHALF OF DHS: J. Christopher Moellering
Assistant Chief Counsel

APPLICATION: Termination

The respondent, a native and citizen of the Dominican Republic, and a lawful permanent resident, has appealed from an Immigration Judge's decision dated June 6, 2019, denying his motion to terminate proceedings. The Department of Homeland Security ("DHS") has filed a brief on appeal. During the pendency of the appeal, the respondent submitted a motion to terminate. The DHS has not replied to the motion. The record will be remanded.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On September 7, 2018, the respondent was convicted of Criminal Possession of a Controlled Substance in the Third Degree (fentanyl) in violation of New York Penal Law § 220.16(12), which permits a conviction if an individual possesses one half-ounce or more of various substances containing a narcotic drug (Exh. 3). He was sentenced to one and one-half years of imprisonment, followed by 2 years of post-release supervision (*Id.*).

Based on this conviction, the respondent was placed in removal proceedings with the issuance of a Notice to Appear dated January 18, 2019, and was charged with being removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as an alien convicted of a controlled substance violation (Exh. 1). On March 19, 2019, the respondent, through his attorney, admitted the six factual allegations and denied the charge of removability (Tr. at 3). On April 17, 2019, the respondent submitted a motion to terminate proceedings arguing that the New York and federal definitions of "narcotic drugs" fail to categorically match each other. The DHS submitted a response and requested that the Immigration Judge sustain the charge of removability.

On June 6, 2019, the Immigration Judge sustained the charge of removal via a form order, indicating that "the court agrees with the reasons stated in the opposition to the motion." At a hearing on June 10, 2019, she declined to issue a formal written decision (Tr. at 9-10).

On appeal, the respondent argues that the New York definition of "narcotic drug" is broader than the federal definition of "narcotic drug" because three drugs are purportedly included under New York's list of narcotic drugs but are omitted or excluded from the federal controlled substance list. These drugs are the prescription laxatives, Naldemedine and Naloxegol, and a geometric isomer of 3-methylfentanyl (Respondent's Br. at 7-12). The respondent essentially reiterates the identical arguments set forth in his motion to terminate, and the DHS brief on appeal is essentially identical to its response to the motion.

The respondent must demonstrate that there is a realistic probability that New York prosecutes anyone for criminally possessing isomers of methylfentanyl or the two prescription laxatives at issue. *See Matter of Navarro Guadarrama,* 27 I&N Dec. 560 (BIA 2019)("Where an alien has been convicted of violating a State drug statute that includes a controlled substance that is not on the Federal controlled substance schedules, he or she must establish a realistic probability that the State would actually apply the language of the statute to prosecute conduct involving that substance in order to avoid the immigration consequences of such a conviction"). As the Supreme Court noted in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language."

The respondent's argument presumes that Naldemedine and Naloxegol are controlled under New York law because each is excluded, by name, from Schedule II of the federal list of controlled substances (meaning that they are not controlled substances as defined by 21 U.S.C. § 802), but not similarly excluded, by name, from the New York schedule of controlled substances found in N.Y. Public Health Law § 3306.[1] He further alleges that this absence of a named exclusion means that these prescription laxatives are defined as controlled substances by New York but does not offer any evidence in support (Respondent's Br. at 11-12).

However, the respondent does not address or discuss relevant provisions of New York statutes and related implementing regulations which exempt numerous federally-approved prescription drugs, including these two prescription laxatives, from New York's list of controlled substances. The New York Commissioner of Public Health may, by regulation, except any compound, mixture or preparation containing a narcotic antagonist substance from the application of all or any part of this article if (1) such compound, mixture or preparation has no potential for abuse, and (2) such compound, mixture or preparation has been excepted or exempted from control under the Federal Controlled Substances Act. N.Y. Pub. Health Law § 3307(3). The Commissioner has specifically excepted from N.Y. Public Health Law § 3306 (the New York State controlled substance schedule), two compounds, mixtures or preparations that contain a narcotic antagonist substance having no potential for abuse (and which are excepted or exempted from control under the Federal Controlled Substances Act). This regulation specifically identifies Naloxone (and its salts) and Naltrexone (and its salts). N.Y. Comp. Codes, R. & Regs. Tit. 10, § 80.3(a)(4). Naloxegol is a derivative of Naloxone.

[1] Naloxegol was approved for use as a laxative in 2014 and was removed from the federal schedule of controlled substances on January 23, 2015. 80 Fed. Reg 3468-01, Jan. 23, 2015. Similarly, Naldemedine was approved for over the counter use in 2017 and removed from the controlled substance list in 2017. 82 Fed. Reg. 45436-01, Sep. 29, 2017.

The New York Commissioner of Public Health also has specifically excepted chemical preparations and mixtures listed in 21 C.F.R. § 1308.24 from the application of sections 3306 (the New York State controlled substance schedule) and 3319 (regulating distribution of free samples of controlled substances) of the New York Public Health Law. N.Y. Comp. Codes, R. & Regs. Tit. 10, § 80.3(a)(3). 21 C.F.R. § 1308.24 exempts chemical preparations and mixtures approved pursuant to 21 CFR § 1308.23, which grants the Administrator of the United States Food and Drug Administration the authority to exempt any chemical preparation or mixture that contains either a narcotic or nonnarcotic controlled substance as long as the preparation or mixture does not present any potential for abuse. 21 C.F.R. § 1308.23. Therefore, when the U.S. Drug Enforcement Agency exempted Naldemedine in 2017, that action exempted it from New York's controlled substance list by operation of New York statute and regulation.

The respondent also alleges that the New York definition of "narcotic drugs" includes opiates along with their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers and for purposes of "3-methylfentanyl only, the term isomer includes the optical and geometric isomers." N.Y. Public Health Law § 3306(b). However, it is not clear from the record that a drug containing "geometric isomers of 3-methylfentanyl" actually exists, and the respondent has not provided any proof on appeal.

We will remand for the Immigration Judge to address whether the respondent has met his burden to demonstrate that there is a realistic probability that New York prosecutes anyone for criminally possessing isomers of methylfentanyl or the two prescription laxatives at issue. *See Matter of Navarro Guadarrama*, 27 I&N Dec. at 560.

During the pendency of the appeal, the respondent submitted a motion to terminate because a New York state court has extended the time to accept an appeal of his 2018 conviction (Respondent's Motion at 2). Therefore, he contends that his conviction is not final for immigration purposes and cannot serve as a basis for his removal. On remand, the Immigration Judge should apply *Matter of J.M. Acosta*, 27 I&N Dec. 420 (BIA 2018) to determine whether the respondent's conviction is final for immigration purposes. In remanding this matter, we express no opinion as to the ultimate resolution of the respondent's case.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for the entry of a new decision consistent with the preceding opinion.

FOR THE BOARD