U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 20530

Gautam J. JAGANNATH
Social Justice Collaborative
317 Washington Street, #128
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DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: TUROU, BITAR

A 205-829-460

Date of this notice: 10/4/2013

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:
Adkins-Blanch, Charles K.

TranC
Userteam: Docket

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TUROU, BITAR
A205-829-460
YORK COUNTY
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Name: TUROU, BITAR

A 205-829-460

Date of this notice: 10/4/2013

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:
Adkins-Blanch, Charles K.

TranC
Userteam: Docket

File: A205 829 460 - York, Pennsylvania

Date: OCT 4 2013

In re: BITAR TUROU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gautam J. Jaggannath, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

CHARGE:

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

APPLICATION: Termination of Removal Proceedings

The Department of Homeland Security ("DHS") timely appeals from an Immigration Judge's May 6, 2013, decision, terminating removal proceedings against the respondent. The appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of the Republic of Palau. On August 8, 2012, the respondent was convicted pursuant to a guilty plea in Delaware of the felony offense of Assault in the Second Degree, in violation of DEL. CODE. ANN. Tit. 11, § 612(a)(2), for which he was sentenced to a term of 8 years in prison, 5 years to be suspended after having served 1½ years, and the remaining 18 months to be served on probation (Exh. 2). The Immigration Judge found that the DHS failed to establish that the respondent's 2012 Delaware Assault in the Second Degree conviction qualifies as a "crime of violence" under 18 U.S.C. § 16,[1] and an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F), and terminated proceedings. This appeal followed.

[1] Under 18 U.S.C. § 16, the term "crime of violence" means either "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other 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."

On de novo review, we agree with the Immigration Judge (I.J. at 3) that the statute at issue does not involve "the use, attempted use, or threatened use of physical force against the person or property of another," as a statutory element, and thus, it cannot not qualify as a "crime of violence" under 18 U.S.C. § 16(a). Furthermore, the United States Court of Appeals for the Third Circuit, where this matter arises, has found that the crime of violence definition under § 16(b) refers to those offenses where there is "a substantial risk that the actor will *intentionally* use physical force in committing his crime" (emphasis added). *See Tran v. Gonzales*, 414 F.3d 464, 472 (3d Cir. 2005); *see also Henry v. BICE*, 493 F.3d 303, 307 (3d Cir. 2007).

The Supreme Court in *Moncrieffe v. Holder,* 133 S.Ct. 1678 (2013), indicated that a "categorical approach" must first be employed to determine whether a state offense qualifies as an "aggravated felony" under the Act, which requires examining "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony. *See id.* at 1684 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-187 (2007)). In addition, "[w]here . . . a statute criminalizes different kinds of conduct, some of which would constitute [aggravated felonies] while others would not," the court may apply a modified categorical approach, where the court "may look beyond the statutory elements to determine the particular part of the statute under which the defendant was actually convicted." *See Denis v. Att'y Gen. of the U.S.*, 633 F.3d 201, 206 (3d Cir. 2011). In this case, the Delaware offense of Assault in the Second Degree may be committed in eleven different ways, some of which may involve either an intentional or a reckless mental state, such that the statute is divisible and would not categorically qualify as a "crime of violence" (I.J. at 3). Applying the modified categorical approach to the conviction records submitted by the DHS, the Immigration Judge found that he could not determine the terms of the respondent's change of plea to Count 1 of the Grand Jury's Indictment, which was modified from Assault in the First Degree to the lesser included offense of Assault in the Second Degree.[1] This modification changes the *mens rea* required of the offense from that of *intentionally* causing physical injury to another person exclusively, to a more expansive reading of the *mens rea* requirement which not only allows for the defendant to also be convicted for *recklessly* causing physical injury to another person, but also adding the requirement that it by means of a deadly weapon or a dangerous instrument, as well (emphasis added).

The court in *Aguilar v. Attorney General of U.S.,* 663 F.3d 692 (3d Cir. 2011), considered that although "[*m*]*ens rea* is not featured in [the § 16(b)] definition, both the Supreme Court and [this] court have considered *mens rea* when determining what constitutes a crime of violence under § 16(b)," and "[u]nder those precedents, crimes involving a *mens rea* of negligence or of a variant of recklessness that [the court has] called 'pure' recklessness have been held not to be crimes of violence under § 16(b) because, by their nature, they do not raise a substantial risk that physical force may be used. *Id.* at 696. (citing *Tran v. Gonzales*, *supra,* at 465; and *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)).

As noted by the Supreme Court in *Moncrieffe v. Holder,* as it must first "examine what the state conviction necessarily involved, not the facts underlying the case, [the Court] must presume that the

[1] The statutory language of DEL. CODE. ANN. tit. 11, § 612(a)(2), provides in relevant part, that a person commits Assault in the Second Degree when he "recklessly or intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument. . . ."

conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 1684 (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)). The Court warned, however, that the "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Id.* at 1684-85 (citing *Gonzales v. Duenas-Alvarez*, *supra*, at 197).

Thus, in this case, we find the Immigration Judge properly applied the categorical analysis set forth by the Court in *Moncrieffe v. Holder*, and relevant Delaware state cases and statutory authority, and correctly determined that the minimum conduct necessary to obtain a conviction under Delaware's Assault in the Second Degree, the statute of conviction in this case, is "pure recklessness," which has been found where "the perpetrator runs no risk of intentionally using force in committing his crime, or where force is used accidentally," and determined that this falls outside the purview of § 16(b) (I.J. at 4). *See United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992), abrogated on other grounds by *Begay v. United States*, 553 U.S. 137 (2008). The Immigration Judge noted that the Supreme Court of Delaware considered the element of recklessness in Delaware's Assault in the Second Degree offense in *DeHorty v. State*, 817 A.2d 804 (Del. Supr. 2002), finding in that case that the "folly of approaching a horse-drawn vehicle at night on a dark, narrow county road and attempting to pass within 100 feet of an intersection at a speed in excess of the posted 50 m.p.h. speed limit constituted reckless conduct which caused the collision resulting in serious injury to the buggy's three occupants." In reaching its decision, the court carefully examined DEL. CODE. ANN. Tit. 11, § 263, which defines the elements of negligent and reckless causation.

Furthermore, "recklessness" in Delaware is defined by DEL. CODE ANN. TITLE 11 §231(e), which provides, in pertinent part, as follows:

> **§ 231. Definitions relating to state of mind**
>
> . . .
>
> (e) "Recklessly".--A person acts recklessly with respect to an element of an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from the conduct. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

As noted by the respondent on appeal, while the "application of [Delaware's definition of] recklessness contemplates that the actor would have known that physical injury was at risk, recklessness in [Delaware's Assault in the Second Degree offense] does not contemplate that the actor undertook a 'substantial risk of intentional force'," and, "although the actor disregarded the risk of injury, the statute does not require that the actor know that there is a substantial risk of intentional use of force." *See* R's brief at 10. Citing to cases applying Delaware's definition of recklessness to other offenses, the respondent argues that Delaware considers recklessness in the context of a "disregard of the risk of a resulting physical injury," and not "the substantial risk of the intentional use of force." *See id.* (citing *Lewis v. Delaware*, 977 A.2d 898 (Table) (Del. Supr., 2009) (Delaware Supreme Court in a case involving reckless endangerment in the first degree, found the defendant must have "recklessly

engage[d] in conduct, which creates a substantial risk of death to another person."); *Bailey v. Delaware*, 925 A.2d 503 (Table) (Del.Supr.,2007) (Delaware Supreme Court noted in a case involving a charge of first degree murder by abuse or neglect, that the state had to prove that the defendant recklessly caused the death of her newborn son when she was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" of his death.). Moreover, in *Kirk v. State,* 889 A.2d 283 (Table) (Del. Supr., 2005), in a case similar to the Third Circuit's decision in *Tran v. Gonzales, supra,* where the court found the Pennsylvania crime of reckless burning or exploding was not a crime of violence under §16(b) as it did not involve the intentional use of physical force, the defendant was charged and convicted of Assault in the Second Degree, where the court found the defendant's conduct and/or *mens rea* with respect to the criminal offense, *i.e.*, where the defendant poured rum on one of the stove burners, which started a fire that caused the deaths of a father and two of his children and serious injuries to several other individuals in the apartment building, met the criteria of "recklessly" as defined in the Delaware Code. Notably, as in *Tran*, there is no indication that the crime involved or created a "substantial risk of the intentional use of physical force" in committing the offense.

Furthermore, the respondent on appeal cites to statute's requirement as to the use of either a deadly weapon or dangerous instrument to cause physical injury to the victim. *See* DEL. CODE. ANN. tit. 11, § 612(a)(2). However, as argued by the respondent, to be convicted in Delaware of Assault in the Second Degree, covers "a broad swath of items that are characterized as deadly or dangerous may be used. *See* R's brief at 11 (citing DEL. CODE. ANN. Tit. 11, §§ 222(4), (5)). Included among these dangerous instruments are chemical sprays, *e.g.,* mace, tear gas, pepper spray, etc. We cannot say that the use of these sprays presents a substantial risk that the actor will *intentionally* use physical force in committing his crime in violation of the Delaware statute.

Consequently, we agree with the respondent's contention that pursuant to the Court's decision in *Moncrieffe v. Holder*, there is "a realistic probability, not a theoretical possibility," that the State of Delaware would apply its Assault in the Second Degree statute to conduct that falls outside the generic definition of a crime of violence. *See id.* at 1684-85. Thus, we are not persuaded by the appellate arguments presented by the DHS, and affirm the Immigration Judge's conclusion that the respondent's 2012 Delaware Assault in the Second Degree conviction does not qualify as a "crime of violence" under either 18 U.S.C. §§ 16(a) or (b), and a conviction for an aggravated felony under section 101(a)(43)(F) of the Act. As such, we concur with the Immigration Judge's conclusion that the DHS could not meet its burden of proof as to the respondent's removability by clear, convincing, and unequivocal evidence, and find that he properly terminated these proceedings. *See* section 240(c)(1)(A) of the Act, 8 U.S.C. § 1229a(c)(1)(A).

Accordingly, the following order will be entered.

ORDER: The Department of Homeland Security's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File: A205-829-460 May 6, 2013

In the Matter of

BITAR TUROU	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA); an alien at any time after admission convicted of an aggravated felony as defined in Section101(a)(43)(F) of the INA, a crime of violence as defined in Section 16 of Title 18 of United States Code, but not including a purely political offense (for which the term of imprisonment ordered is at least one year).

APPLICATIONS:

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: RICHARD O'BRIEN, ESQUIRE, ASSISTANT CHIEF COUNSEL
Immigration and Customs Enforcement
York, Pennsylvania

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 41 year old male, native and citizen of Palau. On March 19, 2013, the Department of Homeland Security filed a notice to appear in this matter. The filing of the Notice to Appear vested jurisdiction with this Court. That document is marked as Exhibit No. 1.

On April 15, 2013, the Court took pleadings. The respondent admitted allegations 1 through 5. So the question before the Court was whether or not the respondent was removable as charged. The Court marked a packet of documents into the record as Exhibit No. 2 on April 15, 2013.

On April 16, 2013, the Department of Homeland Security submitted a brief to the Court in support of the aggravated felony charge. In the Government's brief, the Government argued that notwithstanding the fact that the respondent's criminal offense could have been carried out recklessly, ~~that,~~ nonetheless, the respondent had been convicted of a crime of violence as that term is defined in Section 101(e)(43)(F) in accordance with Aguilar v. Attorney General of the United States, 663 F.3d 692 (3rd Cir. 2011).

Under Section 101(a)(43)(F) of the INA, the term "aggravated felony" is defined as a "crime of violence" as that term is defined in 18 United States Code Section 16 for which the term or imprisonment is at least one year. Under 18 United States Code Section 16, the term crime of violence is defined as (a) an offense that has as an element to the use or attempted use or threatened use of physical force against the person or property of another; or (b) any other 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.

To qualify as a crime of violence within the meaning of 18 United States Code Section 16(a), the criminal statute must require a *mens rea* of specific intent to use force, mere recklessness is insufficient. Tran v. Gonzales, 414 F.3d 464, 470 (3rd Cir. 2005).

It is not dispositive if the crime may be proven by a showing of specific intent. All that is necessary to place is outside of Section 16(a) is that it could be established with

proof of a lesser *mens rea*. See Id. Here, the Court would find that assuming the facts in the case in the best light for the Government that the respondent was convicted under 11 Delaware Code Section 612(a)(2). That provision states "a person is guilty of assault in the second degree when it is clear the person recklessly or intentionally causes physical injury to another by means of a deadly weapon or a dangerous instrument." Here, the Court would find that force is not an element of the offense.

Accordingly, the Court would find that the respondent's crime is not a crime of violence as that term is defined in 18 United States Code Section 16(a).

The question then becomes whether or not the respondent's crime is a crime of violence as that term is defined in 18 United States Code Section 16(b). Here, the crime in question is a felony. The issue then is whether, by its nature, the crime involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In determining whether a crime is an aggravated felony, the Court first, as a preliminary matter, applies the categorical approach. That is, that it looks ~~only~~ to the statute of conviction only to determine whether it satisfies the generic definition of aggravated felony. Where, however, the statute is divisible, that is that it defines certain offenses that may be aggravated felonies and certain offenses that are not, the Court is permitted to look at the statute of conviction to determine under which provision of the divisible statute the respondent was convicted.

Here the statute is divisible. Section 612(a)(2) states "if the person recklessly or intentionally causes physical injury to another by means of a deadly weapon or a dangerous instrument." The indictment in the respondent's case does not contain a charge for assault in the second degree. Rather, it appears that the respondent pled down from a charge of assault in the first degree. The terms of the amended~~ment~~ count

in question are not available to the Court. Accordingly, the Court cannot look to that to determine which of the visible elements in the statute the respondent was convicted.

Accordingly, the Court must take the provision in question at its minimum and therefore look to whether the respondent's conviction for recklessly causing physical injury to another person by means of a deadly weapon or a dangerous instrument is a crime of violence as that term is defined in 18 United States Code Section 16(b).

Crimes committed with pure recklessness, where the perpetrator runs no risk of intentionally using force in committing his crime, or where force is used accidentally, fall outside of Section 16(b). Aguilar v. Attorney General, 663 F.3d 692, 698-99 (3rd Cir. 2011) quoting Tran, 414 F.3d 465.

In the Third Circuit "pure" recklessness "exists when the *mens rea* of a crime lacks an intent, desire or willingness to use force or cause harm at all." Aguilar, 663 F.3d at 697 (quoting United States v. Parson, 955 F.2d 858, 866 (3rd Cir. 1992) aggregated on other grounds by Begay v. United States, 553 U.S. 137 (2008)).

The Court in Aguilar contrasted a "pure" recklessness crime. Reckless burning is discussed in Tran with a classic example of a ~~p~~crime covered by 18 United States Code Sections 16(b), burglary,~~.~~ ~~N~~noting that only the latter involved the risk of intentional physical force. Aguilar, 663 F.3d at 698.

Here, the Court finds that the offense in question could be violated through pure recklessness. In making this finding, the Court considers the decision of the Supreme Court of Delaware in the DeHorty v. State, 817 A.2d 804 (Supreme Court of Delaware 2002). In that case, the defendant was recklessly driving an automobile at night when she ran into a horse drawn buggy within 100 feet of an intersection, on an unlighted, unmarked shoulder less narrow country road. The Court found that "the folly of approaching a horse drawn vehicle at night on a dark narrow country road in attempting

to pass within 100 feet of intersection at ~~the~~a speed in excess of the posted 50 mile~~s~~ per hour speed limit constituted reckless conduct which caused the collision resulting in serious injury to the buggy's three occupants.~~,~~" ~~A~~and therefore, constituted assault in the second degree. In reaching its decision, the Court carefully examined 11 Delaware Code Section 263, which defined reckless or negligent causation.

Here, the Court finds that the respondent could have been convicted of the offense through pure recklessness. Accordingly, the Court would find that the Third Circuits decision in Aguilar, 663 F.3d at 698-99, does not apply. Accordingly, the Court finds that the Government has failed to establish by clear and convincing evidence that the respondent is removable as charged. It does not appear that the respondent is otherwise removable from the United States.

Accordingly, it is the order of the Court that these proceedings be terminated without prejudice to re-filing.

Please see the next page for electronic signature

ANDREW R. ARTHUR
Immigration Judge

//s//

Immigration Judge ANDREW R. ARTHUR

arthura on June 6, 2013 at 9:15 PM GMT