U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Serrato, Joanna
The Law Offices of Hugo Pina
1221 E. Polk Avenue
Harlingen, TX 78550

DHS/ICE Office of Chief Counsel - HUN
126 Northpoint Dr., Rm. 2020
Houston, TX 77060

Name: FIGUEROA RIVERA, JOSE RAMI... **A 078-966-986**

Date of this notice: 8/1/2018

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:
Hunsucker, Keith E.
Liebowitz, Ellen C
Malphrus, Garry D.

Userteam: Docket

File: A078 966 986 – Huntsville, TX[1] Date: AUG - 1 2018

In re: Jose Ramiro FIGUEROA RIVERA a.k.a. Jose Ramiro Rivera Figueroa

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joanna Serrato, Esquire

APPLICATION: Cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's March 12, 2018, decision denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The record does not contain a response from the Department of Homeland Security. The appeal will be sustained and the record will be remanded for further proceedings.

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).

The sole issue in this appeal is whether the respondent's 2011 conviction for indecency with a child in violation of section 21.11(a)(1) of the Texas Penal Code constitutes an aggravated felony "sexual abuse of a minor" offense under section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A). The Immigration Judge concluded that it does and pretermitted the respondent's application for cancellation of removal (IJ at 5-22, 26-27).[2] *See* section 240A(a)(3) of the Act (rendering ineligible for relief an alien convicted of an aggravated felony). Upon review, we conclude that the Immigration Judge's conclusion in this regard cannot be upheld in light of the United States Supreme Court's decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

At all relevant times, section 21.11(a)(1) made it unlawful to "engage[] in sexual contact with [a] child or cause[] [a] child to engage in sexual contact." A child for this purpose is defined as an

[1] Proceedings in this matter were completed in Huntsville, Texas, where the respondent was physically located. The Immigration Judge conducted hearings from the Immigration Court in Los Fresnos, Texas, via video teleconference pursuant to section 240(b)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A)(iii).

[2] The Immigration Judge also found the respondent to be subject to removal on this basis. However, as the respondent does not meaningfully challenge the Immigration Judge's alternative removability determination (IJ at 22-25; *cf.* Respondent's Br. at 20), we limit our review of this issue to the question of eligibility for relief. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (when a party does not substantively appeal an issue addressed in an Immigration Judge's decision, that issue is waived on appeal).

individual "younger than 17 years of age." Tex. Penal Code § 21.11(a). The term "sexual contact" is defined to mean any touching, "including touching through clothing, of the anus, breast, or any part of the genitals." Tex. Penal Code § 21.11(c).

The United States Supreme Court recently held that, where an offense proscribes sexual conduct based solely on the age of the participants, "the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1568. The crime of indecency with a child under Texas law applies more broadly than this definition because it defines a child to include those who are 16 years of age. *See* Tex. Penal Code § 21.11(a).[3] Moreover, there is no dispute that section 21.11(a)(1) does not require proof of any aggravating elements such as involuntariness or the existence of a special relationship of trust vis-à-vis the participants that might justify a departure from the Supreme Court's holding that a "minor" is a person under the age of 16 (IJ at 8-9). *Cf. Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1571-72 (declining to address whether its holding extends to such situations).

The Immigration Judge held that the Supreme Court's decision applies only to "statutory rape offenses," *id.* at 1568, and that another provision of Texas law, not section 21.11(a)(1), embodies the applicable statutory rape offense (*Id.* at 5-6, 9). *Cf.* Tex. Penal Code § 22.011(a)(2)(A). We respectfully disagree. Regardless of the terminology employed to label the offense, the Supreme Court's decision mandates that "consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the INA." *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1572. The United States Court of Appeals for the Fifth Circuit has similarly held. *See Shroff v. Sessions*, 890 F.3d 542, 545 (5th Cir. 2018) (rejecting as "untenable" a proposal to read *Esquivel-Quintana v. Sessions* as only applying to statutory rape offenses). Because the crime of indecency with a child under Texas law punishes sexual conduct based solely on the age of the participants and includes a younger partner who is at least 16 years of age, it is categorically broader than the generic sexual abuse of a minor definition established by *Esquivel-Quintana v. Sessions*.

Finally, even assuming section 21.11(a)(1) is divisible amongst the various forms of sexual conduct it proscribes (IJ at 12-13), that does not make the statute divisible for all purposes. Because the statute is overbroad with respect to its age requirement, the relevant inquiry is whether the proscribed age range is an alternative element or alternative means of committing the offense. *See Descamps v. United States*, 570 U.S. 254, 263-64 (2013) (providing that, to be "divisible" in the pertinent sense, the statute must set forth alternative elements and those alternative elements must contain at least one combination that would match the generic crime). In light of the factors set forth in *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016)—including the statutory language defining the offense, *see* Tex. Penal Code § 21.11(a) (defining the offense to include any "child under the age of 17"); the applicable punishments, *see* Tex. Penal Code § 21.11(d) (proscribing punishments irrespective of the victim's age); and the relevant jury instructions,

[3] There is also a realistic probability of the statute so applying. *See, e.g.*, *Green v. State*, No. 13-98-530-CR, 1999 WL 33757671, at *1 (Tex. App. Aug. 31, 1999) (conviction for indecency with a child where the victim was 16); *Gray v. State*, No. B14-88-00173-CR, 1989 WL 1196 (Tex. App. Jan. 12, 1989) (same).

see Texas Crim. Jury Charges § 6:872, Indecency with Child – Sexual Contact (9/1/09-8/31/17) (providing that a jury must find that the prohibited sexual act was committed "with a child younger than seventeen (17) years of age")—we conclude that the statutory age range describes alternative factual means of committing the offense.

While we recognize the Immigration Judge's reference to the special finding under article 42.12, section 4(d)(5) of the Texas Criminal Procedure Code Annotated (*cf.* IJ at 26-27), that provision pertains to restrictions on probation and the special finding authorized therein is a determination made by a sentencing judge regarding the circumstances in which the offense was committed; it is not an alternative element that must be submitted to a jury and proven beyond a reasonable doubt. *See Foster v. State*, 530 S.W.3d 308, 311-12 (Tex. App. 2017) (finding error in a sentencing judge's decision to instruct the jury to make a special finding regarding the age of the victim under this provision).

For these reasons, we conclude that indecency with a child under Texas law is overbroad and indivisible vis-à-vis the generic "sexual abuse of a minor" offense under section 101(a)(43)(A) of the Act. We therefore need not, and cannot, proceed to the modified categorical approach (*cf.* IJ at 12-13, 21-22, 26-27). *See Descamps v. United States*, 570 U.S. at 258 ("[C]ourts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements."). Thus, we disagree with the Immigration Judge that the respondent is ineligible for cancellation of removal for this reason.

The Immigration Judge denied the respondent's application on this basis alone. Given our limited fact-finding abilities, the record must be remanded for further proceedings. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of S-H-*, 23 I&N Dec. 462, 465 (BIA 2002). We express no opinion regarding whether the respondent is otherwise eligible for or warrants as a matter of discretion cancellation of removal.

Accordingly, the following order will be entered.

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

FOR THE BOARD