U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: LEVASHEVA, DARIA

A058-471-381

Date of this notice: 4/25/2011

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:
Greer, Anne J.

File: A058 471 381 - York, PA Date: APR 25 2011

In re: DARIA LEVASHEVA a.k.a. Daria Levasha

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Caitlin Barry, Esquire

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude

APPLICATION: Reinstatement of Proceedings

The Department of Homeland Security ("DHS") appeals from an April 23, 2009, decision by an Immigration Judge terminating proceedings against the respondent. The DHS's request for review by a three-Board-Member panel is denied. *See* 8 C.F.R. § 1003.1(e)(6). The respondent has filed a brief in opposition. The appeal will be dismissed.

The respondent, a native and citizen of Russia, was convicted in 2008 of simple assault in violation of 18 PA. CONS. STAT. ANN. § 2701(a) (West 2003) and placed in removal proceedings in which she was charged as an alien convicted of a crime involving moral turpitude under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i). The Immigration Judge terminated proceedings on December 16, 2008, finding the statute of conviction was categorically not a crime involving moral turpitude. On appeal, the Board remanded for the Immigration Judge to apply the modified categorical approach outlined in *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706-08 (A.G. 2008), to determine whether the respondent had been convicted of a crime involving moral turpitude. On remand, the Immigration Judge again terminated proceedings, finding that the DHS failed to show that the respondent's conviction constitutes a crime involving moral turpitude, as the least culpable conduct necessary for a conviction under this statute would not be morally turpitudinous (I.J. at 3). The sole issue on appeal is whether this determination is erroneous.

Subsequent to the Board's remand and the Immigration Judge's new decision in this case, the United States Court of Appeals for the Third Circuit published a decision rejecting the Attorney General's "realistic probability test" in *Matter of Silva-Trevino* and affirming the historically applied categorical approach. *See Jean-Louis v. Attorney General of the U.S.*, 582 F.3d 462, 473-74 (3d Cir. 2009). Pursuant to this approach, we must consider the criminal statute and the record of

conviction, not the alien's conduct. *Partyka v. Attorney General of the U.S.*, 417 F.3d 408, 411 (3d Cir. 2005); *Knapik v. Ashcroft*, 384 F.3d 84, 88, 90-91 (3d Cir. 2004). Furthermore, "a crime involves moral turpitude when 'the least culpable conduct necessary to sustain a conviction under the statute' can be considered morally turpitudinous." *Mehboob v. Attorney General of the U.S.*, 549 F.3d 272, 275 (3d Cir. 2008) (quoting *Partyka v. Attorney General of the U.S.*, *supra*, at 411). "Where a statute covers both turpitudinous and non-turpitudinous acts, however, it is 'divisible,' and we then look to the record of conviction to determine whether the alien was convicted under that part of the statute defining a crime involving moral turpitude." *Partyka v. Attorney General of the U.S.*, *supra*, at 411-12 (citations omitted).

The relevant statute of conviction provides:

> A person is guilty of assault if he:
> 1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
> 2) negligently causes bodily injury to another with a deadly weapon;
> 3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
> 4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person.

18 PA. CONS. STAT. ANN. § 2701(a). This statute punishes actions–such as the intentional infliction of injury–that are crimes involving moral turpitude and others that are not. *See Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007) (stating that while intentional conduct that results in a "meaningful level of harm" may be turpitudinous, "as the level of conscious behavior decreases . . . more serious resulting harm is required" for a finding of moral turpitude). Therefore, we must apply the modified categorical approach to determine whether the respondent's offense of conviction falls within the definition of moral turpitude. *See Jean-Louis v. Attorney General of the U.S.*, *supra*, at 465-66.

Turning to the respondent's conviction record, the language in the information mirrors the statutory elements of subsections (a)(1) through (a)(3) (I.J. at 1-2; Attachment to Respondent's Motion for Termination of Removal Proceedings). However, the conviction record does not indicate under which subpart the defendant was convicted, nor does it clarify whether the assault committed by the respondent was done intentionally, knowingly, recklessly or negligently (I.J. at 2; Attachment to Respondent's Motion for Termination of Removal Proceedings).[1] Therefore, the "reckless

[1] As the information replaced the criminal complaint as the charging document in the respondent's criminal case, it is no longer appropriate to look to the criminal complaint under the modified categorical approach to determine whether the respondent's conviction involves moral turpitude (I.J. at 2). *See Evanson v. Attorney General of U.S.*, 550 F.3d 284, 293 n.7 (3d Cir. 2008). Furthermore, although the DHS urges us to consider the facts contained in the police report, we have (continued...)

infliction of bodily injury" constitutes the least culpable mental state required for a conviction under section 2701(a). We have held that where a crime involves recklessness, at a minimum there must be an offense involving the infliction of serious bodily injury, or some aggravating factor in order to constitute a crime involving moral turpitude. *See Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996); *see also Matter of Danesh*, 19 I&N Dec. 669, 673 (BIA 1988).

The DHS argues that we can look beyond the statute to determine whether there are "aggravating factors" present in this case that make the prohibited conduct turpitudinous. Specifically, the DHS indicates that there is evidence in the record that the victim was a police officer. However, under the modified categorical approach, we may only look beyond the language of the statute to determine which *statutory* elements were found by a jury, or admitted by a defendant in a guilty plea. *See Evanson v. Attorney General of U.S.*, *supra*, at 290 n.4; *Jean-Louis v. Attorney General of the U.S.*, *supra*, at 471-72. The relevant portion of the statute of conviction does not require that the state prove assault against a particular class of victim. Furthermore, the respondent was not convicted under 18 PA. CONS. STAT. ANN. § 2702, which specifically classifies assault on police officers and other enumerated classes of victims as aggravated assault. Therefore, the respondent's conviction is not for a crime involving moral turpitude. *Cf. Matter of Danesh*, *supra* (finding aggravated assault of a peace officer to be a crime involving moral turpitude where one of the elements necessary for a conviction was that the perpetrator have knowledge that the victim was a peace officer).

For these reasons, exercising our *de novo* review over legal issues, we agree with the Immigration Judge that the DHS has not proven that the respondent's conviction was for a crime involving moral turpitude. *See* 8 C.F.R. § 1003.1(d)(3)(ii). Therefore, termination of these proceedings was appropriate. As we find termination was proper, we need not reach the arguments raised by the respondent in her reply brief. Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

[1] (...continued)
consistently held that a police report by itself is not part of the record of conviction. *Matter of Teixeira*, 21 I&N Dec. 316, 319-21 (BIA 1996); *see also Matter of Milian-Dubon*, 25 I&N Dec. 197 (BIA 2010).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

NATIONALITIES SERVICE CENTER
BARRY, CAITLIN
1216 ARCH STREET, 4TH FLOOR
PHILADELPHIA, PA 19107

IN THE MATTER OF
LEVASHEVA, DARIA

FILE A 058-471-381 DATE: Apr 23, 2009

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

X OTHER: IJ Order

AJT
COURT CLERK
IMMIGRATION COURT FF

CC: DISTRICT COUNSEL, C/O YORK PRISON
3400 CONCORD ROAD
YORK, PA, 174020000

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

IN THE MATTER OF:	)	**IN REMOVAL PROCEEDINGS**
	)	
LEVASHEVA, Daria	)	**File # A** 058-471-381
	)	
Respondent	)	
	)	

ON BEHALF OF RESPONDENT:
Caitlin Barry, Esq.
Nationalities Service Center

ON BEHALF OF DHS
Jon Staples
Assistant Chief Counsel

On Remand From the Board of Immigration Appeals

Findings and Order of Termination

This record was remanded by the Board in an order dated March 17, 2009, from a prior immigration judge's termination of proceedings.[1] Therein the Board remanded for the purpose of (1) determining which part of 18 Pa. C.S. § 2701 respondent stands convicted, and (2) whether such part of the statute renders respondent removable as a crime involving moral turpitude. Based on the following, the court will again terminate proceedings.

Government counsel argues that respondent was convicted under subsection (a)(1) of 18 Pa. C.S. § 2701, which as the Board observed, is divisible given the three levels of *mens rea* of intentionally, knowingly, or recklessly causing bodily injury to another. Respondent, while not specifically admitting that she pled guilty to subsection (a)(1), stresses that the present record does not definitively point to which part of the state statute is implicated. The Information, supplied by respondent, denotes only 18 Pa. C.S. § 2701 (a).

The Information sets forth two counts: count 1 for aggravated assault, and count 2 for simple assault. Since respondent pleaded guilty to simple assault, count 1 is ignored. Under count 2, as government counsel aptly observes, the Information essentially mimics the language of the first three subsections of 18 Pa. C.S. § 2701:

> *"Attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to another; and/or negligently caused bodily injury to another with a deadly weapon; and/or attempted by physical menace to put another in fear of imminent serious*

[1] Due to the transfer of the prior immigration judge, this judge was assigned to the case.

bodily injury. Victim: P.O. Felice."

As noted, the parties agree, and the record supports, that respondent's guilty plea was to simple assault, 18 Pa. C.S. § 2701(a), and that the language of the Information parrots subsections (a)(1) through (a)(3). Importantly, as will be discussed *infra*, subsection (a)(1) contains only the infliction of "*bodily injury*;" "*serious bodily injury*" is restricted to subsection (a)(3).[2]

First, government counsel makes much of the fact that the victim in this case was a police officer, citing Matter of Danesh, 19 I&N Dec. 669 (BIA 1988), in support. Brief at page 4. However, Danesh dealt with a Texas aggravated assault statute which specifically classified the victim as a police officer, and that the perpetrator be aware that the officer was acting pursuant to his authority at the time of the assault. In the present case, the statute does not delineate any specific category or occupation of the victim; it is a straight-forward (and typical) simple assault statute.[3]

In Singh v. Ashcroft, 383 F.3d 144, 153 (3d Cir. 2004), a case this court finds instructive, the circuit court found that Delaware's statute criminalizing sexual contact, 11 Del. C. § 767, *permitted but did not require* that the victim be a minor. Applying the formal categorical approach, the circuit court found that the statute could not support an aggravated felony "sexual abuse of a minor."

While Singh was not an inquiry into whether the state statute was morally turpitudinous, the analogy is apt. That is, 18 Pa.. C.S § 2701(a)(1), permits but does not require the victim to be a police officer, or any other specific victim for that matter. Moreover, the Board has not held the government to a lower standard for establishing a crime involving moral turpitude involving recklessness under a general simple assault statute when the victim just happens to be a peace officer.

Respondent is correct that the conviction record does not specify under which *mens rea* she entered her guilty plea. As such, a crime will involve moral turpitude only if the least culpable conduct necessary to sustain a conviction under the statute can be considered morally turpitudinous. Mehboob v. Att'y Gen., 549 F.3d 272, 275 (3d Cir. 2008). And while government counsel points to the allegations in the Criminal Complaint, the Information in this case supplanted the Criminal Complaint as the accusatory instrument.[4] In effect, the Criminal Complaint references conduct, which has no place within the categorical or modified categorical approach. Partyka v. Att'y Gen., 417 F.3d 408, 411 (3d Cir. 2005).

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[2] Indeed, 18 Pa. C.S. § 2301 defines both *bodily injury* and *serious bodily injury*; thus, the two are not synonomous.

[3] Unlike 18 Pa. C.S. § 2702(c) under the state's aggravated assault statute which specifies a variety of public officers, law enforcement and otherwise.

[4] That is, it is the Information to which respondent pleaded guilty, not the Criminal Complaint.

The minimal *mens rea* under 18 Pa.C.S. § 2701(a)(1) is the *reckless* causation of bodily injury to another. When recklessness is the *mens rea* involved, the Board has made it clear that only *serious bodily injury* will be required for a crime involving moral turpitude. In Matter of Fualaau, 21 I&N Dec. 475, 477 (BIA 1996), the Board was called upon to determine whether the Hawaii third degree assault statute constituted a morally turpitudinous offense. Importantly, Pennsylvania's simple assault statute under 18 Pa.C.S. § 2701(a)(1) is identical to Hawaii's third degree assault statute: "A person commits the offense of assault in the third degree if he...(1) intentionally, knowingly, or recklessly causes bodily injury to another person." Haw. Rev. Stat. § 707-712 (1992).

The Board ultimately concluded that since the state statute governing the misconduct simply caused *bodily injury* rather than *serious bodily injury*, no aggravating factor was present to support a CIMT. That is, the Board resolved that "[I]n order for an assault of the nature at issue in this case to be deemed a crime involving moral turpitude, the element of *reckless* state of mind must be coupled with an offense involving the infliction of *serious bodily injury*." *Id* at 478. The Third Circuit has concurred with the Board's approach to recklessness; that moral turpitude will inhere only when there is a "statutory aggravating factor present." Knapik v. Ashcroft, 384 F.3d 84, 90 (3d Cir. 2004). Under Fualaau, that "statutory aggravating factor" is *serious bodily injury* rather than *bodily injury*.

Conclusion

Once again, after due consideration, the court is constrained to concur with respondent that the record is unclear as to the extent of her conviction under Pa.C.S. § 2701(a)(1). That burden is borne by the government by clear and convincing evidence. INA § 240(c)(3)(A). Since respondent's conviction could have resulted from *recklessness*, and since Pa.C.S. § 2701(a)(1) only requires the infliction of *bodily injury*, the government has failed in its burden of establishing an offense under INA § 237(a)(2)(A)(i). The following order is hereby entered.

ORDER: These proceedings are again terminated.

Walter A. Durling
Immigration Judge

April 23, 2009