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

Rodriguez, Carmen Isaura
The Bronx Defenders
360 E 161st St.
Bronx, NY 10451

DHS/ICE Office of Chief Counsel - NYD
201 Varick, Rm. 1130
New York, NY 10014

Name: ARCHER, MITCHELL AUGUSTUS **A 037-775-438**

Date of this notice: 2/22/2018

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:
Wendtland, Linda S.
Greer, Anne J.
Pauley, Roger

Userteam: Docket

File: A037 775 438 – New York, NY

Date: FEB 22 2018

In re: Mitchell Augustus ARCHER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carmen I. Rodriguez-Arroyo, Esquire

ON BEHALF OF DHS: Kamephis Perez
Assistant Chief Counsel

APPLICATION: Termination; administrative closure; cancellation of removal

The respondent, a native and citizen of Jamaica, is a lawful permanent resident of the United States. The respondent appeals an August 28, 2017, decision in which an Immigration Judge ordered his removal to Jamaica. The appeal will be sustained and the record will be remanded.

The Board reviews findings of fact, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i) (2017); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On July 7, 2011, the respondent was convicted of sexual abuse in the first degree in violation of section 130.65(3) of the New York Penal Law ("NYPL") (IJ at 2; Exh. 2, Tab B). The Department of Homeland Security ("DHS") charged the respondent with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), asserting that his conviction was for an aggravated felony, as defined in section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A) (Exh. 1). In addition, the DHS charged the respondent with removability pursuant to section 237(a)(2)(E)(i) of the Act (Exh. 11).

It is undisputed that at the time of the hearing below, the respondent's conviction was on direct appeal pursuant to section 460.10(1)(a) of the New York Criminal Procedure Law (Tr. at 12, 22-23, 34-35; Exh. 3, Tabs A-B; DHS's Br. at 3). *See Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009), vacated on other grounds by *Abreu v. Holder*, 378 F. App'x 59 (2d Cir. 2010). The Immigration Judge interpreted our decision in *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015), to hold that there is no requirement that all direct appeals be exhausted or waived before a conviction is considered final for immigration purposes under section 101(a)(48)(A) of the Act (IJ at 4).

However, *Montiel* does not purport to resolve "the issue whether a conviction must be "final" to support removability." *Id.* at 555 n.1. Rather, *Montiel* allows the Immigration Judge to consider

whether removal proceedings may be delayed through a continuance or administrative closure pending the adjudication of a direct appeal of a criminal conviction.[1]

On remand, the parties may submit additional evidence and argument regarding the status of the respondent's appeal. Pending the remand, we hold in abeyance the respondent's alternative argument that the Immigration Judge erroneously determined that NYPL § 130.65(3) is categorically an aggravated felony, as defined in section 101(a)(43)(A) of the Act (IJ at 5; Respondent's Br. at 18-24).

Accordingly, the following order is entered.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, and the record is remanded for further proceedings and the entry of a new decision consistent with this opinion.

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would hold that a conviction pending on direct appeal is a conviction for immigration purposes, for the reasons set forth in my separate opinion in *Matter of Cardenas Abreu*, 24 I&N Dec. 795, 803 et seq. (BIA 2009).

[1] Although the respondent requested termination because of his pending direct appeal, *Montiel* did not provide termination as an outcome in this situation.

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

File: A037-775-438 August 28, 2017

In the Matter of

MITCHELL AUGUSTUS ARCHER	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended -- at any time after admission, having been convicted of an aggravated felony as denied in Section 101(a)(43)(A) of the Act, a law relating to murder, rape, or sexual abuse of a minor; and

Section 237(a)(2)(E)(i) of the Immigration and Nationality Act, as amended -- alien who at any time after entry has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment

APPLICATIONS: Motion to terminate and cancellation of removal for lawful permanent residents

ON BEHALF OF RESPONDENT: Carmen I. Rodriguez-Arroyo, Esquire
The Bronx Defenders
360 East 161st Street
Bronx, New York 10451

ON BEHALF OF DHS: Michael McFarland, Assistant Chief Counsel
Office of the Chief Counsel
Immigration and Customs Enforcement
Department of Homeland Security
201 Varick Street, Room 1130
New York, New York 10014

ORAL DECISION OF THE IMMIGRATION JUDGE

INTRODUCTION AND JURISDICTIONAL STATEMENT

There is a Notice to Appear in this file, dated December 20, 2016. It was served on the Immigration Court on February 14, 2017, thereby vesting jurisdiction with this court. It charges the respondent with removability under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as set forth above. The respondent, through counsel, admitted the first three allegations contained in the Notice to Appear, but denied the charge of removability, arguing that because it was on direct appeal, that the respondent does not have a final conviction for immigration purposes. The respondent also denied the 237(a)(2)(A)(iii) charge.

On August 7 of 2017, the Department of Homeland Security served a form I-261, charging the respondent with removability under Section 237(a)(2)(E)(i) of the Immigration and Nationality Act, as amended, and the respondent has conceded that charge. The concession was entered on August 28 of 2017 by current counsel.

The record contains a submission by the Department of Homeland Security, which is contained in the record at Exhibit 2. It presents respondent's immigrant visa and alien registration document, a conviction record for Case Number 02328-2009, as well as a rap sheet. Of particular note, I note that there is, contained in the record at Exhibit 2, Sub-Tab B, a certificate of disposition reflecting that the respondent suffered a conviction for sexual abuse in the first degree, in violation of Penal Law 130.65, Paragraph 3, and that document further states that on July 7 of 2011, the conviction by trial before Judge Marvin [phonetic] resulted in a sentencing of the respondent to sexual abuse in the first degree, a term of imprisonment for three years and post-release parole supervision for a period of 10 years, as well as fines.

The Department also provided the court with a copy of the indictment, reflecting that at Page 4, the respondent was charged with conduct that reflects that the subject/victim in this case was Yam Tamila Stribel [phonetic], who was, at the time, less than 11 years old. And she was subject to sexual contact by the placement of the respondent's hands to her vagina, as well as to sexual contact through the placement of hands to her breasts, and that this was done without her consent. See Exhibit 2, Sub-Tab B. The Department filed a proffer of evidence in the form of a pre-sentence report as well, through submission on May 23rd, 2017. See Exhibit 13. The respondent filed a motion to terminate these proceedings on May 18 of 2017. See Exhibit 4. The Department filed opposition to that motion on May 23rd of 2017. That's been marked as Exhibit 12. There's also a second motion to terminate that was filed in this case on May 18 of 2017, and that's been marked as Exhibit 3. The record also reflects that the respondent filed a reply to the Department's opposition to the motion to terminate, and that's been marked as Exhibit 5. Let the record also reflect that the Department filed an opposition to the respondent's motion to terminate, and that's been marked as Exhibit 6. The case was scheduled for a decision on the pending contested charge at that time, and the matter only had one charge -- and that was the sole contested charge, which was the 237(a)(2)(A)(iii), and the matter had been set for decision on July 24, 2017. See Exhibit 7. However, on July 31, the court notes that the Department had filed on July 18 of 2017 a supplemental submission in opposition to the respondent's termination motion. See Exhibit 8. The respondent asked for some additional time in order to further understand the impact of the Supreme Court's -- at that time -- very recent ruling, in the Matter of Esquivel-Quintana v. Sessions. And the respondent wanted to reply to any supplemental arguments by the Department. The court set a briefing schedule and ordered that the Department file a brief on the impact of the Supreme Court decision by

August 7, 2017. That was timely filed and has been marked as Exhibit 9. The court also ordered that the respondent file a reply. That was timely filed on August 14 of 2017, and that's been marked as Exhibit 10. The record also reflects that the Department filed a form I-261 on August 7 of 2017. As the court has previously noted, that charge has already been conceded. See Exhibit 11.

The respondent's motions to terminate are twofold. The first is that because the respondent's conviction that the court previously referenced is pending direct appeal, that the court should, according to the respondent's argument, find that that is not a final conviction for immigration purposes. In addition, the respondent argues that a conviction for a violation of New York Penal Law Section 130.65 Paragraph 3 is not an aggravated felony.

The court denies both motions to terminate currently pending before this court. First, the court notes that, in the case of Puello v. Bureau of Citizenship and Immigration Services, 511 F.3d 324, 332 (2d Cir. 2007), the Board of Immigration Appeals held that a conviction was not a conviction for immigration purposes until all direct appeals were exhausted. However, that case went on to state that IIRAIRA did, however, eliminate the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the state. See Puello, 511 F.3d at 232. See also Abiodun v. Gonzales, 461 F.3d 1210, 1213 (10th Cir. 2006). In Matter of Montiel, 26 I&N Dec. 555 (BIA 2015), the Board of Immigration Appeals acknowledges the fact that INA Section 101(a)(48)(A) lacks a finality requirement. And absent contrary Second Circuit precedent, the decision in Montiel is binding on this court. See 8 C.F.R. § 1003.10(d). Therefore, the court denies the respondent's motion to terminate this matter for lack of finality of the criminal conviction.

Secondly, the court further concludes that a conviction for a violation of New York Penal Law Section 130.65, Paragraph 3, is an aggravated felony as defined in Section 101(a)(43)(A). As the Department has argued in its brief contained in the record at Exhibit 6, sexual abuse in the first degree, in violation of New York Penal Law Section 130.65(3) is categorically an aggravated felony, involving the sexual abuse of a minor under Section 101(a)(43)(A). Sexual abuse is "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually-explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." See 18 § 3509(a)(8). See also Matter of Esquivel-Quintana, U.S. 137 Supreme Court 1562 (2017). A victim of sexual abuse who is under the age of 18 is a minor for purposes of Section 101(a)(43)(A) of the Act, and there is no realistic probability that has been advanced that an offender could engage in sexual conduct, as it is defined under New York Penal Law, and not simultaneously engage in the molestation of a child victim. See Penal Law Section 130.00(3). The Department further argues that the respondent's conviction under this section of the penal law is categorically a crime of violence, aggravated felony under 101(a)(43)(F), as set forth in its brief at Exhibit 6. The court has concluded that the respondent is removable under Section 237(a)(2)(A)(iii), and that this is an aggravated felony.

Furthermore, the court concludes that because the respondent has suffered a conviction for an aggravated felony, he is statutorily barred from pursuing cancellation of removal for lawful permanent residents. The court has denied the respondent's motions to terminate. Let the record also reflect that the respondent made an oral motion to administratively close these proceedings pursuant to Matter of Avetisyan at the hearing on July 31 of 2017. The court denied that request, citing the

fact that the respondent's arguments did not support a basis for finding any of the factors set forth in the Matter of Avetisyan were present in this case to support a motion to administratively close. I further noted that the Department opposed the motion to administratively close at that proceeding. I did invite the respondent to submit any written motions to administratively close in these proceedings as well. I have not received a written motion.

Currently, there is no application for relief currently before this court. ~~It is further ordered that any request of the respondent to pursue an application for cancellation of removal for lawful permanent residents would be and hereby is denied -- although I note that there is no pending application currently before this court.~~

Accordingly, the following order is entered:

ORDER

It is hereby ordered that the respondent is removable as charged.

It is further ordered that the respondent's pending motions to terminate be and they hereby are denied.

~~It is further ordered that any request of the respondent to pursue an application for cancellation of removal for lawful permanent residents would be and hereby is denied -- although I note that there is no pending application currently before this court.~~

The respondent is ordered removed to Jamaica on the charges contained in the Notice to Appear and the form I-261.

Please see the next page for electronic signature

MIMI TSANKOV
Immigration Judge

Appeal Date: September 27, 2017

//s//

Immigration Judge MIMI TSANKOV

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