U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: T[redacted], G[redacted] J[redacted]

A [redacted]-612

Date of this notice: 11/14/2019

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:
Wilson, Earle B.
Rosen, Scott
Greer, Anne J.

Userteam: Docket

File: [redacted]-612 – Miami, FL Date: NOV 14 2019

In re: G[redacted] J[redacted] T[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Danna F. Magloire-Fenelon, Esquire

APPLICATIONS: Cancellation of removal; asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Haiti and a lawful permanent resident of the United States, appeals from an Immigration Judge's February 26, 2018, decision ordering her removed from the United States. The record will be remanded.

The respondent concedes she is removable from the United States as an alien convicted of a crime involving moral turpitude and a controlled substance violation (IJ at 2; Tr. at 10-11). Sections 212(a)(2)(A)(i)(I) and 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), (II) (2012).

During the proceedings below, the respondent requested four forms of relief or protection from removal: asylum under section 208 of the Act, 8 U.S.C. § 1158; withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18; and cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). The Immigration Judge denied the respondent's applications for asylum, withholding of removal, and cancellation of removal by finding that she was convicted, in Jamaica, of at least one drug trafficking aggravated felony (IJ at 3-4).[1] The Immigration Judge also denied the respondent's application for protection under the Convention Against Torture, stating "there has been nothing presented concerning the likelihood of her being tortured if she were returned to Haiti" (IJ at 4).

On March 19, 2018, the respondent filed a timely notice of appeal (Form EOIR-26) in which she claims that the Immigration Judge erroneously denied her requests for relief. In a "statement of reasons" addendum to the notice of appeal, she specifically challenges the Immigration Judge's finding that she was convicted of an aggravated felony, maintains that her mother was improperly

[1] Aliens with aggravated felony convictions are ineligible for asylum and cancellation of removal as a matter of law. Sections 208(b)(2)(A)(ii), 208(b)(2)(B)(i), and 240A(a)(3) of the Act. Further, aliens convicted of drug trafficking aggravated felonies are presumptively ineligible for withholding of removal pursuant to *Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002).

prevented from testifying on her behalf, and generally asserts that an "actual threat of harm" awaits her in Haiti.[2]

The Immigration Judge found that in February 2009, the respondent was convicted in Jamaica of "possession of cocaine, dealing in cocaine, [and] attempting to export cocaine" in violation of sections 8A, 8B, and 13(5) of the Jamaican Dangerous Drugs Act (IJ at 2, 4), and he found some or all of these crimes to be categorical aggravated felonies, although his decision does not clearly specify which (IJ at 3, 4). Whether the respondent's Jamaican drug crimes are aggravated felonies is a legal question we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

To determine whether a crime is an aggravated felony, we employ the categorical approach, which requires us to disregard the respondent's offense conduct and focus instead on the elements of her crimes and the minimum conduct that has a realistic probability of being prosecuted thereunder. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). To qualify as an aggravated felony, a drug offense must be "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." Section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).[3] An offense involves "illicit trafficking" under this section if it is a felony in the convicting jurisdiction and necessarily involves "unlawful trading or dealing" in a federally controlled substance, *Matter of L-G-H-*, 26 I&N Dec. 365 (BIA 2014), while an offense is a "drug trafficking crime" under 18 U.S.C. § 924(c) if its elements correspond to those of an offense punishable as a felony under the federal drug laws, *Matter of Rosa*, 27 I&N Dec. 228, 229 (BIA 2018).

We begin with the text of the respondent's statutes of conviction.[4] In 2009, section 8A of the Jamaican Dangerous Drugs Act provided as follows:

> **8A Cultivating, selling or dealing in or transporting cocaine, etc.**
>
> (1) Every person who …

[2] The respondent checked the box on the notice of appeal indicating that she intended to file an explanatory brief. No such brief was ever filed, however; thus, we address only the arguments raised in the notice of appeal. As that notice adequately sets forth the basis for the respondent's appeal, albeit in abridged form, we conclude that the appeal is not subject to summary dismissal under 8 C.F.R. § 1003.1(d)(2)(i)(E). *Esponda v. U.S. Att'y Gen.*, 453 F.3d 1319 (11th Cir. 2006).

[3] The undesignated paragraph appearing at the end of section 101(a)(43) of the Act states that the term "aggravated felony applies to an offense described in this paragraph … in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years."

[4] The administrative record contains a copy of the Jamaican Dangerous Drugs Act, but it does not appear to have been formally admitted into evidence by the Immigration Judge. As the court and the parties have treated the exhibit, without objection, as if it had been admitted into evidence, we deem it admitted. *Cf. United States v. Barrett*, 111 F.3d 947, 951 (D.C. Cir. 1997).

> (a) sells or distributes any drug to which this Part applies, or
>
> (b) being the owner or occupier of any premises uses such premises for the manufacture, sale or distribution of any such drug or knowingly permits such premises to be so used; or
>
> (c) uses any conveyance for carrying any such drug or for the purpose of the sale or distribution of such drug or, being the owner or person in charge of any conveyance, knowingly permits it to be so used, shall be guilty of an offence.

Section 8B provided:

> **8B Possession of cocaine, etc.**
>
> (1) A person shall not, save as authorized by a license, or under any regulations made under this Act, be in possession of any drug to which this Part applies.

And finally, section 13(5) provided:

> **13 The export of dangerous drugs**
>
> ***
>
> (5) Every person who exports, causes to be exported, or takes any steps preparatory to exporting, any dangerous drug from the Island except under and in accordance with, the provisions of this Act shall be guilty of an offence against this Act.

At the outset, it is plain that section 8B is not an aggravated felony because it covers simple possession of drugs. Simple possession is not "unlawful trading or dealing" under the "illicit trafficking" clause, nor does it correspond to any federal drug felony within the meaning of the "drug trafficking crime" clause. *See* 21 U.S.C. § 844 (providing, with a few exceptions not applicable here, that simple possession of a controlled substance is a federal misdemeanor).

Some of the conduct punishable under section 8A—e.g., selling drugs—would qualify as "illicit trafficking," but other such conduct—e.g., using a conveyance to carry drugs—would not. The same is true of the "drug trafficking crime" clause. Though selling or distributing drugs, or maintaining premises for the purpose of selling drugs, are punishable as federal felonies under 21 U.S.C. §§ 841(a) and 856, respectively, using a conveyance to carry drugs is not. Hence, section 8A is categorically overbroad vis-à-vis the aggravated felony definition.

Finally, though exporting drugs under section 13(5) may qualify as "illicit trafficking," and certainly qualifies as a "drug trafficking crime," *see* 21 U.S.C. § 960, "tak[ing] *any* steps preparatory to exporting" satisfies neither clause. Such conduct is not "unlawful trading or dealing" in and of itself, nor is it punishable as a federal felony, since an "attempt" conviction under 21 U.S.C. § 846 requires a "substantial step" toward commission of the completed crime;

"mere preparation" is insufficient. *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976).[5] Thus, section 13(5) is also categorically overbroad vis-à-vis the aggravated felony definition.

Because the respondent was convicted under Jamaican statutes that are categorically overbroad with respect to the aggravated felony definition, those convictions do not bar her from applying for asylum, withholding of removal, or cancellation of removal unless the Jamaican statutes are "divisible" under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and application of the "modified categorical approach" is either inconclusive or shows that her particular convictions were for "illicit trafficking" or a "drug trafficking crime." Because the Immigration Judge evidently found the respondent's crimes to be categorical aggravated felonies, he has not yet conducted the required divisibility or modified categorical inquiries. The record will therefore be remanded for further proceedings in that regard.

On remand, the Immigration Judge should also reevaluate the respondent's application for protection under the Convention Against Torture, if necessary. Though the Immigration Judge's decision states that "there has been nothing presented" to support the respondent's Convention Against Torture claim, the record reflects that she submitted both a written application for such protection and sworn testimony to support that application.[6]

For the foregoing reasons, the record will be remanded for further review of the respondent's eligibility for asylum, withholding of removal, protection under the Convention Against Torture, and cancellation of removal.

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

FOR THE BOARD

[5] Fifth Circuit opinions handed down prior to September 31, 1981, are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[6] We discern no error in the Immigration Judge's decision denying the respondent's request to present her mother as a witness. The respondent, who was represented by counsel below, did not file a witness list with the court or otherwise advise the judge in advance of her desire to call her mother as a witness.