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

CLARKE, TONY ALPHONSUS A
A086-931-015
BERGEN COUNTY JAIL
160 SOUTH RIVER STREET
HACKENSACK, NJ 07601

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

Name: CLARKE, TONY ALPHONSUS A **A 086-931-015**

Date of this notice: 10/21/2015

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:
Guendelsberger, John
Adkins-Blanch, Charles K.
O'Leary, Brian M.

Userteam: Docket

File: A086 931 015 – New York, NY Date: OCT 21 2015

In re: TONY ALPHONSUS A. CLARKE a.k.a. Toney Clarke a.k.a. Tony A. Clarke

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Christopher Tod St. John
Deputy Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") has appealed from the Immigration Judge's June 12, 2015, decision terminating the proceedings against the respondent, a native and citizen of St. Lucia. The respondent has not filed a brief in opposition to the appeal. The record will be remanded to the Immigration Judge.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. See 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

The Immigration Judge terminated proceedings upon motion by the respondent presenting evidence that the conviction underlying the DHS's lodged charges of removability is on appeal in the New York State Supreme Court (I.J. at 1). The Immigration Judge determined that the conviction was not final for immigration purposes (I.J. at 2). The DHS argues on appeal that termination is not appropriate as the respondent's conviction is final for immigration purposes.

In terminating proceedings, the Immigration Judge determined that a conviction becomes final for immigration purposes only once direct appellate review has been exhausted or waived (I.J. at 2). He cited to *Abreu v. Holder*, 378 Fed. Appx. 59 (2d Cir. 2010), and determined that because he was "bound by Second Circuit precedent, clearly more than the recent Board decision," termination was appropriate. The Court of Appeals for the Second Circuit has not specifically addressed whether a conviction pending direct appeal is final for immigration purposes. *See Abreu v. Holder*, *supra* (remanding for the Board to determine in the first instance whether a conviction is sufficiently final to warrant removal where a direct appeal of the conviction is pending). Furthermore, in our recent decision, *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015), we considered whether administrative closure of proceedings – not termination – would be warranted when there is a direct appeal of a conviction pending. As the Second Circuit has not issued any binding precedent to the contrary, the Immigration Judge is bound by our precedential case law. *See e.g. Matter of Chairez*, 26 I&N Dec. 478, 481 (BIA 2015) (Board case law is to be followed by Immigration Judges who sit in a jurisdiction of a court of appeals that has not yet addressed the legal issue). Accordingly, we will reinstate proceedings and remand the record to the Immigration Judge. On remand, the Immigration Judge may consider

any requests for a continuance or administrative closure, and the parties may submit additional evidence accordingly. In light of the foregoing, the following order will be entered.

ORDER: The Immigration Judge's June 12, 2015, decision is vacated and the record is remanded to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD

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

File: A086-931-015 June 12, 2015

In the Matter of

CLARKE, TONY ALPHONSUS A.	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 101(a)(43)(A), 237(a)(2)(E)(i).

APPLICATION: Motion to terminate.

ON BEHALF OF RESPONDENT: PAUL B. GROTAS

ON BEHALF OF DHS: KAMEMPHIS PEREZ

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent moved to terminate removal proceedings based on a New York State Appellate Division, Second Judicial Department of New York order granting a late notice of appeal. In its decision dated June 4, 2015, the Appellate Division, Second Judicial Department, granted respondent's motion and ordered that the respondent's moving papers "are deemed to constitute a timely notice of appeal." (See Exhibit 2, respondent's motion to terminate.)

The matter on appeal relates to Allegation 5 in the Notice to Appear.

The INA defines conviction as a formal judgment of guilt entered by a court. INA

Section 101(a)(48)(A). The conviction becomes final for Immigration purposes only once direct appellate review has been exhausted or waived. See Pino v. Landon, 349 U.S. 901 (1955); Walcott v. Chertoff, 517 F.3d 149, 154 (2nd Cir. 2008); See also Orabi v. Attorney General, 738 F.3d 535, 540-41 (3rd Cir. 2014). Further, the Second Circuit has found no distinction between a timely-filed appeal and a late appeal once permission, as here, has been granted by the Appellate Court. See Abreu v. Holder, 378 Fed. Appx. 59 (2nd Cir. May 24, 2010). The Court is bound by Second Circuit precedent, clearly more than the recent Board decision of Matter of Montiel, 26 I&N Dec. 555 (BIA 2015).

For the above reasons, this case is terminated.

Please see the next page for electronic signature

THOMAS J. MULLIGAN
Immigration Judge

//s//

Immigration Judge THOMAS J. MULLIGAN

mulligat on August 3, 2015 at 12:35 PM GMT