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

REID, CAINO KENARIS
A204-697-163
c/o PIKE COUNTY
175 PIKE COUNTY BLVD
LORDS VALLEY, PA 18428

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

Name: REID, CAINO KENARIS

A 204-697-163

Date of this notice: 11/27/2015

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:
Pauley, Roger

Userteam: Docket

File: A204 697 163 – York, PA

Date: NOV 27 2015

In re: CAINO KENARIS REID

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Brian G. McDonnell
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(E)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] -
Violated court protective order

APPLICATION: Termination

The respondent is a native and citizen of Jamaica and a lawful permanent resident of the United States. He appeals from a September 3, 2015, decision by an Immigration Judge finding him removable as charged, following an August 4, 2015, remand from this Board pursuant to an order of the United States Court of Appeals for the Third Circuit. The appeal will be dismissed.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a *de novo* standard of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

As background, in a June 16, 2014, decision, the Immigration Judge found the respondent removable under the provisions of section 237(a)(2)(E)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(ii), because the Luzerne County, Pennsylvania Court of Common Pleas found that he violated a protective order (I.J.'s June 16, 2014, Order at 1-2; Exhs. 1, 2). *See Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011). Our September 25, 2014, decision affirmed the Immigration Judge's holding because, although the respondent may have believed that his civil proceedings, which resulted in his conviction for indirect criminal contempt, were constitutionally defective, he could not collaterally challenge his conviction in these instant removal proceedings and any post-conviction motion did not negate the finality of his conviction for immigration purposes. *See Paredes v. U.S. Att'y Gen.*, 528 F.3d 196, 198-99 (3d Cir. 2008).

The Third Circuit remanded this case on the motion of the government, for consideration whether the Supreme Court's decision in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013) (holding that a categorical approach should ordinarily be utilized to establish a "conviction" in the immigration context) applied to a determination of removability under section 237(a)(2)(E)(ii) of the Act. Upon our remand of the case to the Immigration Judge, he entered an order finding (1)

that the categorical analysis of *Moncrieffe v. Holder*, *supra*, had no application to the instant case, given that the finding that the respondent violated an order of protection was not a conviction pursuant to a criminal statute, and (2) the respondent was removable as charged.

We will affirm the Immigration Judge's decision. We observe that in *Moncrieffe*, the Supreme Court was concerned with determining whether a state offense was "a categorical match" to a federal offense and indicated that it would be only if a conviction under the state statute "necessarily involved facts equating to the generic federal offense." *Moncrieffe v. Holder*, *supra*, at 1684. As stated in our previous decision and in the Immigration Judge's order, a conviction is not required in order to sustain a charge of removability under the provisions of section 237(a)(2)(E)(ii) of the Act. Instead, the Department of Homeland Security need only establish, by clear and convincing evidence, that the respondent is "any alien who at any time after admission is enjoined under a protection order issued by a court and whom (sic) the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued."

While our consideration of the alien's removability in *Matter of Strydom, supra*, involved his conviction under a Kansas statute dealing with violations of protective and restraining orders, the respondent's case does not. That is, the Immigration Judge found that the respondent was found in contempt of an order of the Court of Common Pleas of Luzerne County, Pennsylvania, resulting in a civil infraction, penalty, and probation (I.J. at 2; Exh. 2). *See* 23 Pa. Cons. Stat. § 6114. The Immigration Judge further found that the order entered against the respondent was for the protection "against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued" (I.J. at 3). Although the Immigration Judge further found that it was issued pursuant to section 6108 of title 23 of the Pennsylvania Consolidated Statutes, which is not divisible, we do not find in the context of this case that it is necessary that the state statute under which the protection order was issued is limited to orders involving "protection against credible threats of violence, repeated harassment, or bodily injury." Rather, whether the protection order at issue is one covered under the removability provisions of section 237(a)(2)(E)(ii) of the Act is subject to proof by clear and convincing evidence and fact-finding and analysis by the Immigration Judge, just as other removability provisions are that do not require convictions. *Cf. Parra-Rojas v. U.S. Att'y Gen.*, 747 F.3d 164, 169 (3d Cir. 2014) (holding that, with respect to a charge of inadmissibility resulting from alien smuggling, the Third Circuit looks to the alien's actual conduct, as opposed to his conviction); *Rojas v. U.S. Att'y Gen.*, 728 F.3d 203, 215-16 (3d Cir. 2013) (en banc) (holding that the categorical approach does not apply to the determination of whether an offense is one "relating to a controlled substance" under section 237(a)(2)(B)(i) of the Act).

The Immigration Judge found that the order of protection entered against the respondent by the Court of Common Pleas "only contains provisions directly protecting against credible threats of violence, repeated harassment, or bodily injury" (I.J. at 2). This includes the "no-contact" provisions of the order. *Matter of Strydom*, *supra*, at 510. *See* Exh. 2. The record also evidences that a court found that he had violated that order (Exh. 2). Accordingly, we find no cause to disturb the finding that the respondent is removable as charged, and the respondent's arguments to the contrary (urging that his "conviction" below was contrary to the evidence, that

the Immigration Judge is biased, and that he did not violate the protective order) are unpersuasive and unavailing. We cannot go beyond the court orders that are of record in the respondent's case to find that he did not violate the protective order. Further, as explained above, the state finding that he violated said order is not a criminal conviction requiring a jury trial. We also find no evidence of bias in the record before us.

For the foregoing reasons, we will dismiss the appeal and hereby enter the following order.

ORDER: The appeal is dismissed.

FOR THE BOARD

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

REID, CAINO KENARIS
PIKE COUNTY
175 PIKE COUNTY BLVD
LORDS VALLEY, PA 18428

IN THE MATTER OF
REID, CAINO KENARIS

FILE A 204-697-163 DATE: Sep 3, 2015

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X 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
5107 Leesburg Pike, Suite 2000
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

__ OTHER: _____

_____

DVQ
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
IMMIGRATION COURT
YORK, PENNSYLVANIA

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
REID, Caino Kenaris	**A** 204-697-163
Respondent	
ON BEHALF OF RESPONDENT:	**ON BEHALF OF DHS:**
Pro se	Richard O'Brien, Esq.

Ground of Removal: INA § 237(a)(2)E)(ii)

On Remand from the Board of Immigration Appeals

DECISION AND ORDER

On September 25, 2014, the Board remanded this record following a remand from the Third Circuit Court of Appeals. In the remand order, the Board directs the court to reconsider, in light of Moncrieffe v. Holder, 133 S.Ct. 1678 (2013), whether respondent's violation of a protection from abuse order violates INA § 237(a)(2)(E)(ii).

On December 19, 2013, respondent was found in violation of the final protection from abuse order (PFA) issued by the Luzerne County Court of Common Pleas, PA, on October 1, 2013;[1] he was sentenced to probation for 6 months. The Police Criminal Complaint, page 37 of government evidence, does not allege any specific acts, but only cites to the general language of Pennsylvania's Protection from Abuse Act, 23 Pa.C.S. § 6101 *et seq*.

On September 25, 2014, in its denial of respondent's appeal arguing his conviction did not violate INA § 237(a)(2)E)(ii), the Board applied its holding in Matter of Strydom, 25 I&N Dec. 507 (BIA 2011). There, the Board examined the Kansas Protection from Abuse Act, observing that since portions of the Kansas statute would not violate the INA, the statute was divisible and therefore amenable to the modified categorical approach to determine which part of the statute the alien violated.

After making such inquiry, the Board resolved that the alien violated that part of the state statute which "involve[ed] protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued" within the meaning of INA § 237(a)(2)(E)(ii). *Id*. at 509. The gravamen of Strydom, therefore, is that the immigration courts are permitted to resort to utilizing the modified

[1] The Board removed the exhibit tabs of the government evidence. This document is marked page 14.

categorical approach to a state protection from abuse law if the statute is not indivisible, and therefore would otherwise subject the alien to removal.

In its motion to the Third Circuit requesting remand to the Board, the government proffered that the Board should resolve whether it is proper to apply the categorical approach to a state statute to determine an alien's removability, rather than using the categorical approach solely to determine what part of a state statute an alien was convicted under.

In Moncrieffe v. Holder, 133 S.Ct. 1678 (2013), the Supreme Court, *inter alia*, held that the categorical approach is to be applied to determine whether a state offense is comparable to an offense listed in the INA. Or more specifically, whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony. In such determination is the presumption that the conviction "rest[s] upon nothing more than the least of the acts criminalized, and then [to] determine whether even those acts are encompassed by the generic federal offense." *Id.* at 1684.

The Supreme Court then qualified its use of the categorical approach to those statutes which are indivisible. For those which contain several different crimes, each described separately, "we have held that a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record of the factual basis for the plea.'" *Id.*, *citing* Shepard v. United States, 544 U.S. 13, 35 (2005).

While Moncrieffe addressed whether a Georgia conviction for selling marijuana constituted an aggravated felony drug trafficking offense, *i.e.*, a generic federal felony, respondent's violation of his Pennsylvania court order of protection is an altogether different beast. Unlike a conviction under any of the aggravated felony provisions, any one of which must have a comparable generic federal felony offense, INA § 237(a)(2)E)(ii) does not require a conviction for its violation. The relevant wording of INA § 237(a)(2)(E)(ii) provides:

"Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has *engaged in conduct* that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable." Emphasis added.[2]

At least in Pennsylvania, violating a protection order is not prosecuted under the Commonwealth's criminal statutes. Rather, a finding by a magistrate or judge that an individual has violated the terms of a PFA results in a civil contempt penalty, which may include fines, probation, or jail. While the individual has the right to counsel, he does not have a right to a jury trial. 23 Pa.C.S. § 6114. The burden of proof is on the plaintiff to prove the PFA violation by a preponderance of evidence. 23 Pa. C.S. § 6107.

[2] While respondent received punishment - 180 days of probation - there need be no *conviction* for an INA violation as that term is defined in INA § 101(a)(48)(A).

Unlike the Kansas PFA in Strydom, the PFA issued against respondent, pages 31-34 of government evidence, only contains provisions directly protecting against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued. INA § 237(a)(2)(E)(ii). There is nothing divisible about the order, nor is there anything divisible under 23 Pa.C.S. § 6101, *et seq*. Pursuant to 23 Pa.C.S. § 6108, all 10 subsections thereunder are directed at providing protection to the victim for whom the PFA order is issued.

Conclusion

No portion of the PFA order is divisible. Nor is the Commonwealth's statute, 23 Pa.C.S. § 6101 *et seq*., divisible. Each provision in the PFA order directly pertains to protecting against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued. As far as this court can discern, Moncreiffe has no applicability to this INA violation since a conviction is not required. As such, it is respondent's conduct under scrutiny, not the elements of a crime of conviction. *See* Parra-Rojas v. Att'y Gen., 747 F.3d 164 (3d Cir. 2013 (*en banc*)(the categorical approach has no applicability for a violation of the INA which requires no conviction; it is the alien's conduct which matters).

As respondent's violation of the PFA issued against him, as found by a preponderance of evidence by the judge of the Court of Common Pleas, clearly violated the provisions of INA § 237(a)(2)(E)(ii), the court again finds that the government has met its burden of proof by clear and convincing evidence.

Order: Respondent is ordered removed to Jamaica.

Walter A. Durling
Immigration Judge

September 3, 2015