U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: OMER, FIRASATH FAZILATH **A 056-143-178**

Date of this notice: 4/18/2019

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:
Greer, Anne J.

SchwarzA
Userteam: Docket

File: A056-143-178 – Chicago, IL

Date: APR 18 2019

In re: Fazilath Firasath OMER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard Hanus, Esquire

ON BEHALF OF DHS: Elizabeth Bayly
Assistant Chief Counsel

APPLICATION: Termination of removal proceedings

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's decision, dated April 18, 2018, terminating removal proceedings against the respondent. The appeal will be dismissed.

The respondent, a native and citizen of Canada and a lawful permanent resident ("LPR") of the United States, was convicted on September 8, 2005, of fraud under $5,000, in violation of section 380(1)(b) of the Criminal Code of Canada. After sustaining this conviction, the respondent traveled abroad and in November 2017, he presented himself for DHS inspection and requested permission to reenter the United States as a returning LPR. Upon discovering the respondent's fraud conviction, however, the DHS initiated these removal proceedings, charging him with inadmissibility as an "applicant for admission" convicted of a crime involving moral turpitude ("CIMT") under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012).[1] The Immigration Judge terminated the proceedings based on her conclusion that the offense defined by section 380(1)(b) of the Criminal Code of Canada is not a CIMT. The DHS appeals.

Whether the respondent was convicted of a CIMT is a legal question that we review *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii). To answer that question, we employ the "categorical approach," which "requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular

[1] As an LPR, the respondent was presumed not to be seeking "admission" at the time of his return from travel abroad, which in turn would preclude him from being charged with inadmissibility under section 212(a) of the Act. *See* section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C); *see also Matter of Pena*, 26 I&N Dec. 613 (BIA 2015). However, the presumption can be rebutted if the DHS proves by clear and convincing evidence that the respondent "has committed an offense identified in section 212(a)(2)." *See* section 101(a)(13)(C)(v) of the Act; *see also Matter of Rivens*, 25 I&N Dec. 623, 626 (BIA 2011).

violation of that statute." *Matter of Ortega-Lopez*, 27 I&N Dec. 382, 384-85 (BIA 2018) (quoting *Matter of Silva-Trevino (Silva-Trevino III)*, 26 I&N Dec. 826, 831 (BIA 2016)).[2] To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state. *Id.* at 385. For CIMT purposes, conduct is "reprehensible" in the relevant sense if it is "'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.'" *Id.* A "culpable" mental state is one which requires deliberation or consciousness, such as intent, knowledge, willfulness, or recklessness. *Matter of Tavdadishvili*, 27 I&N Dec. 142, 143-44 (BIA 2017); *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 849 (BIA 2016).

When the respondent committed his offense and sustained his conviction, section 380 of the Criminal Code of Canada provided as follows, in pertinent part:

> **Fraud**
>
> **380**
> **(1)** Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> > **(a)** is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
> >
> > **(b)** is guilty
> > > **(i)** of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
> > > **(ii)** of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars.

[2] The DHS argues that we should abandon the categorical approach, or at least the "divisibility" analysis espoused by *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), in this case because it does not apply to foreign convictions (DHS Br. at 4-7). Contrary to the DHS's interpretation of our precedent, we deem this argument foreclosed by *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978) (holding that for foreign convictions, once it has been determined that a foreign conviction is for conduct which is deemed criminal in the United States, prevailing United States standards will be applied to determine whether the crime involves moral turpitude). Additionally, the United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this case arises, has explicitly adopted the categorical approach in deciding whether a crime involves moral turpitude. *See Cano-Oyarzabal v. Holder*, 774 F.3d 914, 917 (7th Cir. 2014). The DHS alternatively argues that the respondent's crime qualifies as a CIMT under the *McNaughton* analysis. However, the statute at issue in *McNaughton*, had a specific element of "intent to defraud," and the respondent's statute of conviction does not. Canadian Criminal Code, Revised Statutes of Canada ("R.S.C."), s 338(2).

> **(2)** Affecting public market
>
> Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Canadian Criminal Code, R.S.C. 1985, c.C-46, s 380.

Initially, the Immigration Judge concluded that the statute of conviction is not a categorical CIMT because it covers conduct falling outside the definition of a CIMT (IJ at 2-3). Therefore, the offense cannot be a basis for removal unless it is "divisible" relative to the definition of a CIMT, in which case a further "modified categorical" inquiry would be appropriate. *See Matter of Chairez* ("*Chairez III*"), 26 I&N Dec. 819, 822 (BIA 2016) (citing *Descamps v. United States*, 133 S. Ct. at 2283 (explaining that where a single offense is defined by reference to disjunctive sets of elements, and one (but not all) of those listed elements is a categorical match to the relevant generic standard, the statute is divisible).[3]

Section 380 is divisible with regard to subsections (1) and (2) because it requires distinct and separate elements and defines separate offenses. It is further divisible by letter subsections 1(a) and 1(b) because the statute requires a separate element of proof surrounding the subject matter's value. As such, we agree that section 380 is not categorically a CIMT, that the statute is divisible and that the Immigration Judge properly proceeded to the modified categorical approach. *See Matter of Silva-Trevino III*, 26 I&N Dec. at 831-33.

During the hearing, the Immigration Judge concluded that the respondent was charged and convicted under section 380(b)(1) of the statute. As determined by the Immigration Judge, and as the plain language makes clear, the respondent's conviction does not depend upon proof that he acted with the specific intent to defraud or deceive, which is also undisputed by the parties (IJ at 2). Rather, the Immigration Judge observed that, while negligent conduct is insufficient to sustain a conviction, a person may be convicted of fraud under section 380(1)(b) whether or not he intended the prohibited consequence or was reckless in that regard (IJ at 4). *See R. v. Theroux* (1993) 2 S.C.R. 5 (Can.) (finding an offender guilty whether he actually intended the deprivation or was reckless as it its occurrence); *see also R. v. Plange*, (2018) O.N.S.C. 1657 (finding fraud proven regardless if the accused actually intended the deprivation of was reckless as to its

[3] A statute phrased in the alternative is divisible if each statutory alternative defines a discrete "element" of the offense, as opposed to a mere "brute fact" or factual "means" by which an element may be proven. *Id.* at 823 (citing *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016)). We have held that "elements," as opposed to "means," are facts that must be proven by the prosecution beyond a reasonable doubt to sustain a conviction. *Matter of Chairez III*, 26 I&N Dec. at 823 (outlining an approach for distinguishing "elements" from "means" in a criminal statute) (quoting *Mathis v. United States*, 136 S. Ct. at 2256-57).

consequences). Therefore, we agree with the Immigration Judge that the minimum culpable mens rea is recklessness (IJ at 4).

As further observed by the Immigration Judge, in cases arising in the jurisdiction of the Seventh Circuit, crimes that do not involve an element of specific intent to defraud or deceive are not necessarily turpitudinous absent aggravating factors – such as actual harm or intended harm to others (IJ at 3-4). *See Arias v. Lynch,* 834 F.3d 823 (7th Cir. 2016) (explaining that crimes of simple dishonesty and deception that do not have specific intent are not necessarily crimes involving moral turpitude and would generally require aggravating factors to be present like actual or intended harm).

Similarly to the Seventh Circuit, this Board has found that recklessness is a culpable mental state for purposes of assessing moral turpitude in certain circumstances. *See Matter of Leal*, 26 I&N Dec. 20 (BIA 2012). For instance, "as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude." We have found, for example, that recklessly causing mere "physical injury" is not morally turpitudinous. *Cf. Matter of Leal*, 26 I&N Dec. at 22 (holding reckless endangerment involved moral turpitude because the offense required endangering another with a "substantial risk of imminent death"); *Matter of Hernandez*, 26 I&N Dec. 464 (BIA 2015) (holding that recklessly placing another in "imminent danger of serious bodily injury" involved moral turpitude).

Thus, with this framework in mind, the actus reus of Canadian fraud must also be sufficiently reprehensible and depraved to make it a CIMT – i.e. have aggravating factors present. After conducting a survey of Canadian law, the Immigration Judge concluded that the actus reus component of the statute does not have aggravating factors and is insufficiently depraved to qualify as a CIMT. In this regard, the Immigration Judge noted that the subject matter value in the statute of conviction may be anywhere between zero and $5,000 – meaning that actual loss is not essential to the offense because imperiling an economic interest is sufficient even if no actual loss occurs. *See R. v. Plange*, (2018) O.N.S.C. at ¶ 33 (citing *R. v. Riesberry,* (2015) 3 S.C.R. 1167 (Can.)). The Immigration Judge further found that the prohibited act under the statute need not even be, by its nature deceitful, but rather may consist of some other fraudulent means – i.e. making it simple dishonesty. *See id.*

We agree with the Immigration Judge that aggravating factors are not present in the respondent's statute of conviction because it does not require any actual injury, financial or otherwise, to anyone or to the general public and therefore, the statute lacks a sufficiently reprehensible and depraved actus reus component to qualify as a CIMT in the Seventh Circuit. *See Arias v. Lynch,* 834 F.3d at 828.

For these forgoing reasons, we will affirm the Immigration Judge's decision terminating the removal proceedings.[4]

[4] The DHS has not challenged the Immigration Judge's determinations that none of the respondent's remaining crimes qualify as CIMTs (IJ at 4). Accordingly, those issues are waived.

ORDER: The appeal is dismissed.

FOR THE BOARD

See, e.g., Matter of Cervantes, 22 I&N Dec. 560, 561 n.1 (BIA 1999) (expressly declining to address an issue not raised by party on appeal).