U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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1 Federal Drive, Suite 1800
Ft. Snelling , MN 55111

Name: A [redacted] A [redacted]

A [redacted]407

Date of this notice: 5/12/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Kendall Clark, Molly
Guendelsberger, John

Userteam: Docket

File: A[redacted]407 – Fort Snelling, MN

Date:

MAY 12 2017

In re: A[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Katherine L. Evans
Supervising Attorney

Blake A. Harris[1]
Legal Intern
University of Idaho College of Law
Immigration Clinic

ON BEHALF OF DHS: Kenneth R. Knapp
Assistant Chief Counsel

CHARGES:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination of proceedings

The Department of Homeland Security (DHS) has filed an appeal concerning an Immigration Judge's November 22, 2016, decision. The Immigration Judge terminated the proceedings without prejudice. Both the respondent, and the DHS, submitted briefs concerning the decision of the Immigration Judge. The appeal will dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including law, discretion, and judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

[1] The "Motion to Allow Law Student to Appear" is granted.

We adopt and affirm the Immigration Judge's decision. *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). We find no error in the Immigration Judge's decision that the respondent is not subject to removal as charged, or in her order terminating these proceedings. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
FORT SNELLING, MINNESOTA

File Number: A [redacted]407	**Date:** NOV 22 2016
In the Matter of:	**In Removal Proceedings**
[redacted] A[redacted],	**-Detained**
Respondent.	

Charges: INA § 237(a)(2)(A)(iii) – aggravated felony [INA § 101(a)(43)(F) – crime of violence]

INA § 237(a)(2)(A)(ii) – convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct

Re: **Removability**

RESPONDENT:
[redacted] *pro se*
1 Federal Dr., Suite 1640
Fort Snelling, MN 55111

ON BEHALF OF THE DHS:
Office of Chief Counsel/ICE
1 Federal Dr., Suite 1800
Fort Snelling, MN 55111

MEMORANDUM AND ORDER OF THE IMMIGRATION JUDGE

I. Background

[redacted] A[redacted], Respondent, is a 20-year-old native of Somalia and DHS alleges he is also a citizen of Somalia.[1] (Ex. 1; Ex. 2). Respondent was admitted to the United States at New York City, New York on or about May 29, 2008 as a refugee. (Ex. 1). Respondent's status was adjusted to that of a lawful permanent resident on September 20, 2011 under section 209(a) of the Act. Id. On September 29, 2016, Respondent was convicted of Simple Assault in violation of North Dakota Cent. Code § 12.1-17-01. Id. Respondent was sentenced to a term of imprisonment of 36 months for that conviction. Id. On March 12, 2014, Respondent was convicted of Theft in violation of Washington State Stat. § 9A.56.050(2). Id. These crimes do not arise out of a single scheme of criminal misconduct. Id.

On October 26, 2016, the Department of Homeland Security (DHS) commenced removal proceedings with the filing of a Notice to Appear (NTA), charging Respondent with being removable pursuant to the above-captioned charges of the Immigration and Nationality Act ("the

EXHIBIT# 1

[1] Respondent stated he is unsure if he is a citizen of Somalia but admitted he is a Somali national.

NOV 22 2016

Kristin W. Olmanson
Immigration Judge

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serious harm. See In Re Fualaau, 21 I&N Dec. 475, 477 (BIA 1996); see also Alonzo v. Lynch, No. 15-2024, 2016 WL 1612772, at *7 (8th Cir. Apr. 22, 2016) ("stating 'that, although the assault statute at issue contained an aggravating factor—assault against a member of one's family or household—the statute nevertheless was not categorically a [CIMT] because it 'does not require the actual infliction of physical injury and may include any touching, however slight.' ").

Respondent was convicted of Simple Assault under N.D. Cent. Code which states,

> 1. A person is guilty of an offense if that person:
>
> a. Willfully causes bodily injury to another human being; or
>
> b. Negligently causes bodily injury to another human being by means of a firearm, destructive device, or other weapon, the use of which against a human being is likely to cause death or serious bodily injury.
>
> 2. The offense is:
>
> a. A class C felony when the victim is a peace officer or correctional institution employee acting in an official capacity, which the actor knows to be a fact; an employee of the state hospital acting in the course and scope of employment, which the actor knows to be a fact, and the actor is an individual committed to or detained at the state hospital pursuant to chapter 25-03.3; a person engaged in a judicial proceeding; or a member of a municipal or volunteer fire department or emergency medical services personnel unit or emergency department worker in the performance of the member's duties.

N.D. Cent. Code Ann. § 12.1-17-01.

Respondent's conviction records show that he was convicted of a class C felony, Ex. 3 at 1, so the victim was in a special category deserving protection such that this would be an aggravating factor that makes an assault a CIMT. See Matter of Tran, 21 I&N Dec. at 294. CIMTs also require scienter, or intent. Bobadilla, 679 F.3d 1053-54. Respondent plead guilty to N.D. Cent. Code §12.1-17-01(1)(a), which requires scienter. (Ex. 3 at 6).

However, although this statute involves scienter and an aggravating factor, "bodily injury" is too broad for this conviction to qualify as a CIMT. " 'Bodily injury' means any impairment of physical condition, including physical pain." N.D. Cent. Code Ann. § 12.1-01-04 (West). In State v. Hannah, 873 N.W.2d 668 (2016), the Supreme Court of North Dakota held that the prosecution could prove pain based on indirect evidence and did not have to rely solely on a victim's statement. Id. The Court also stated, "Pain, which is a qualifying, but not necessary, circumstance of bodily impairment under N.D.C.C. § 12.1-01-04(4), is a phenomenon of common experience and understanding." Therefore, this statute is overbroad as to morally turpitudinous conduct because it covers both physical injury and slight impairment. See In Re Fualaau, 21 I&N Dec. at 477; see also Alonzo, No. 15-2024, 2016 WL 1612772, at *7. The statute of conviction is also not divisible as to the term "bodily injury." Therefore, because "bodily injury" is overbroad and not divisible, Respondent's conviction of Simple Assault is categorically not a CIMT, and the Court will dismiss the charge under INA § 237(a)(2)(A)(ii) because Respondent has not been convicted of two CIMTs.

b. Removability under § 237(a)(2)(A)(iii) for a crime of violence

DHS also charges Respondent with removability charging that his conviction for Simple Assault is an aggravated felony under INA § 101(a)(43)(F), which states "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offiense) for which the term of imprisonment [is] at least 1 year." Respondent was sentenced to a term of imprisonment of 36 months, which is at least one year. (Ex. 3 at 1). The remaining issue is whether Respondent's conviction for Simple Assault in violation of N.D. Cent. Code Ann. § 12.1-17-01 is a crime of violence.

18 U.S.C. § 16(a) defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Physical force means violent force, or force capable of causing pain or injury to another person, and mere touching is not enough. Johnson v. US, 559 U.S. 133 (2010). Based on the State v. Hannah addressed above, Simple Assault is not a crime of violence because it does not require violent force since the state does not have to prove pain. State v. Hannah, 873 N.W.2d at 672. Thus, the definition of "bodily injury" in Respondent's statute of conviction is overbroad and does not match the definition of crime of violence. The term "bodily injury" is also not divisible, so the Court does not proceed to the modified categorical approach. Thus, Respondent's conviction does not qualify as a crime of violence under 18 U.S.C. 16(a).

18 U.S.C. § 16(b) states that a crime of violence can also be "any other offiense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Because the definition of "bodily harm" is so broad, this offiense by its very nature does not involve a substantial risk of physical force. Therefore, Respondent's conviction is also not a crime of violence under 18 U.S.C. § 16(b).

Accordingly, the Court issues the following order:

Order

IT IS HEREBY ORDERED that the charge of removability brought under INA § 237(a)(2)(A)(ii) be **NOT SUSTAINED.**

IT IS FURTHER ORDERED that the charge of removability brought under INA § 237(a)(2)(A)(iii) be **NOT SUSTAINED.**

IT IS FURTHER ORDERED that these proceedings be **TERMINATED** without prejudice.

Kristin W. Olmanson

Kristin W. Olmanson
Immigration Judge