U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: OSMAN, SAMATAR SIRAD **A 075-315-807**

Date of this notice: 5/7/2019

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:
Cole, Patricia A.

Userteam: Docket

File: A075-315-807 – Fort Snelling, MN

Date:

MAY - 7 2019

In re: Samatar Sirad OSMAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ari B. Lukoff, Esquire

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

APPLICATION: Termination

The Department of Homeland Security ("DHS") has appealed from the decision of the Immigration Judge dated November 16, 2017, terminating removal proceedings. The respondent has filed a brief opposing the DHS's appeal. The appeal will be dismissed.

We review the Immigration Judge's findings of fact, including determinations as to credibility and the likelihood of future events, under a "clearly erroneous" standard. *See Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including issues of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The record reveals that the respondent was initially charged by the DHS as being removable pursuant to section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii) (Exh. 1). The respondent was charged as removable under section 237(a)(2)(A)(ii) of the Act based upon his August 4, 2010, conviction for the offense of check forgery in violation of Minn. Stat. § 609.631, subdivision 3 (Exh. 3) and his September 14, 2016, conviction for the offense of terroristic threats/reckless disregard risk in violation of Minn. Stat. § 609.713, subdivision 1 (Exh. 3-4).[1] The respondent was also charged as removable under section

[1] The Immigration Judge observed that the respondent's record of conviction reflect that the respondent was convicted of "terroristic threats" but that the Minnesota legislature renamed the offense "threats of violence" in May 2015 (IJ at 1, footnote 1). The Immigration Judge acknowledged that the statute is still often referred to as "terroristic threats" (IJ at 1). Minn. Stat. § 609.713, subd. 1, which is entitled "threaten violence; intent to terrorize," states as follows:

> Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, vehicle or facility of public transportation or otherwise to cause serious public inconvenience, or in a reckless disregard of the risk of causing such terror or inconvenience may be sentenced to imprisonment for not more than five years or

237(a)(2)(B)(i) of the Act; 8 U.S.C. § 1227(a)(2)(B)(i) based upon his July 8, 2010, convictions for the offense of possess-sell small amounts of marijuana in violation of Minn. Stat. § 152.027, subdivision 4(a) (Exh. 7). However, the DHS withdrew the charge of removability under section 237(a)(2)(B)(i) of the Act as the respondent's convictions for the offense of possession-sell small amounts of marijuana were vacated on September 21, 2017 (IJ at 2; Exh. 9, 13).

In a written decision, the Immigration Judge determined that Minn. Stat. § 609.713, subd. 1, is overbroad and is not categorically a crime involving moral turpitude ("CIMT"). Accordingly, the Immigration Judge did not sustain the charge of removability under section 237(a)(2)(A)(ii) of the Act, and granted the respondent's motion to terminate removal proceedings.

On appeal, the DHS argues that the respondent's conviction for Threats of violence in violation of Minn. Stat. § 609.713, subdivision 1 is categorically a CIMT and that the Immigration Judge erred in finding that the respondent's conviction for Threats of violence is not a CIMT.[2]

In his response brief, the respondent argues that the Immigration Judge correctly determined that Threats of violence is not categorically a CIMT. Further, the respondent argues that the Board does not have subject matter jurisdiction in his removal proceedings because his notice to appear (NTA), which was personally served on the respondent on June 23, 2017, did not specify the time and date of his initial removal hearing.

First, we reject the respondent's jurisdictional claim. The respondent argues that his NTA was defective under the Supreme Court's precedent in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), in which the Court held that an NTA that does not specify the time and place at which the proceedings will be held does not trigger the stop-time rule for purposes of cancellation of removal. However, this Board subsequently held in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), that an NTA that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a), so long as a notice of hearing specifying this information is later sent to the alien. *See generally Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019) (deferring to the Board's ruling in *Matter of Bermudez-Cota*); *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018) (same). In this case, there is no dispute that such a hearing notice was later sent to the respondent, and he in fact attended that hearing. Moreover, the stop-time rule that was at issue in *Pereira v. Sessions* is not at issue in this matter. Hence, we find no merit to the respondent's argument.

> to payment of a fine of not more than $10,000, or both. As used in this subdivision, "crime of violence" has the meaning given "violent crime" in section 609.1095, subdivision 1, paragraph (d).

Minn. Rev. Stat. § 609.713, subd. 1 (2017).

[2] The CIMT status of the respondent's check forgery conviction has not been challenged by the parties. Thus, it appears that the respondent's check forgery offense constitutes a valid factual predicate for a charge of removability under section 237(a)(2)(A)(ii) of the Act.

Next, we find that the Immigration Judge set forth the appropriate legal framework to determine whether an offense is a CIMT (IJ at 2-5). *See Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016) (concluding that the categorical and modified categorical approaches provide the proper framework for determining when a conviction is for a crime involving moral turpitude). The Immigration Judge also recognized that the Eighth Circuit had addressed Minn. Stat. § 609.713, subdivision 1 (IJ at 5). *See Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004), and *Avendano v. Holder*, 770 F.3d 731 (8th Cir. 2014). The Immigration Judge noted, however, that the Eighth Circuit in *Avendano v. Holder* did not apply the "realistic probability test," as the Eighth Circuit has required, in its analysis of whether Minn. Stat. § 609.713, subd. 1, is a CIMT (IJ at 7). *See Villatoro v. Holder*, 760 F.3d 872, 876-77 (8th Cir. 2014). *See also Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-85 (2013); *Matter of Silva-Trevino*, 26 I&N Dec. at 831-33 ("To determine whether the respondent's offense qualifies as a CIMT, we employ the 'categorical approach,' which requires a focus on the minimum conduct that has a realistic probability of being prosecuted under the statutes of conviction rather than on the actual conduct which led to the respondent's particular convictions").

The Immigration Judge observed that the majority in *Avendano v. Holder* explicitly left open the question of whether [Minn. Stat. § 609.713, subd. 1] covers non-turpitudinous conduct, finding that the respondent in that case waived the argument by not raising it (IJ at 7). *Avendano v. Holder*, 770 F.3d at 736; *see also Avendano v. Holder*, 770 F.3d at 739-40 (J. Kelly, concurring in part and dissenting in part) (arguing that Minn. Stat. § 609.713, subd.1, is likely overbroad and citing Minnesota case examples). Based on the cases cited in the dissenting opinion in *Avendano v. Holder*, the Immigration Judge found that the respondent demonstrated that there is a realistic probability that a defendant can be convicted of the "reckless disregard" prong of Minn. Stat. § 609.713, subd. 1, for conduct that is not morally tupitudinous (IJ at 9). The Immigration Judge thus determined that the statute is overbroad. Citing *United States v. McFee*, 842 F.3d 572 (8th Cir. 2016), in which the Eighth Circuit determined that Minn. Stat. sect 609.713, subd. 1, is not divisible, the Immigration Judge determined that the statute is not subject to the modified categorical approach, and concluded that the respondent's conviction was not for a CIMT (IJ at 7-9). *See Matter of Silva-Trevino*, 26 I&N Dec. at 827.

For the reasons set forth in the Immigration Judge's decision, we agree with the conclusion that the DHS did not sustain its burden to establish the respondent's removability under section 237(a)(2)(A)(ii) of the Act.

Accordingly, the following order will be entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD