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

Canal, Eduardo A
Eduardo A. Canal, Esq
3971 SW 8th Street
Suite 203
Coral Gables, FL 33134

DHS/ICE Office of Chief Counsel - MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: C[redacted] R[redacted], J[redacted] A[redacted] **A [redacted]-252**

Date of this notice: 11/14/2018

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:
Malphrus, Garry D.
Creppy, Michael J.
Liebowitz, Ellen C

Userteam: Docket

Immigrant & Refugee Appellate Center, LLC | www.irac.net

For more unpublished decisions, visit
www.irac.net/unpublished/index

File: A[redacted]-252 – Miami, Florida Date: NOV 14 2018

In re: J[redacted] A[redacted] C[redacted] R[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Eduardo A. Canal, Esquire

ON BEHALF OF DHS: Rachel Silber
Associate Legal Advisor

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Honduras, appeals from the September 13, 2016, decision of the Immigration Judge, which found the respondent removable as charged and pretermitted his application for cancellation of removal. Section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). Pursuant to our request, the Department of Homeland Security (DHS) submitted a supplemental brief in this case.[1] The record will be remanded.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On February 11, 2008, the respondent was convicted of false imprisonment in violation of Florida Statutes (Fla. Stat.) § 787.02(1)(a), which is a third degree felony as designated by Fla. Stat. § 787.02(2) (IJ at 6, 9; Exh. 2). For this offense, the respondent was found guilty with adjudication withheld, and placed on probation for 5 years (Tr. at 6). The respondent conceded that he is removable as charged under sections 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. §§ 1182(a)(6)(A)(i), (a)(7)(A)(i)(I) (present without being admitted or paroled, and no valid immigrant visa or entry document, respectively) (Tr. at 5, 10, 28-29, 38; Exh. 1). The Immigration Judge sustained the additional charge of removability under section 212(a)(2)(A)(i)(I) of the Act (crime involving moral turpitude) and pretermitted the respondent's application for cancellation of removal. *See* section 240A(b)(1)(C) of the Act.

The issue is whether the respondent has been convicted of a crime involving turpitude (CIMT). The statutory phrase "crime involving moral turpitude" is broadly descriptive of a class of offenses involving reprehensible conduct committed with a culpable mental state. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). Conduct is "reprehensible" in the pertinent sense if

[1] We note that while the respondent initially filed a brief on appeal, he did not file anything further in response to our request for supplemental briefing.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

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.*, at 833.

To determine whether the respondent's offense constitutes a CIMT, we use the categorical approach, which requires a focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction rather than on the actual conduct that led to the respondent's particular conviction. *Id.*, at 831-33; *see also Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241 (11th Cir. 2018); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011). In assessing whether an alien has been convicted of a CIMT under a statute containing elements involving some aggravating factor indicating the perpetrator's moral depravity, we weigh the level of danger posed by the perpetrator's conduct along with his or her degree of mental culpability in committing that conduct. *See Matter of Wu*, 27 I&N Dec. 8, 10-11 (BIA 2017).

If the statute of conviction is not categorically a CIMT, the next step is to determine whether the statute is divisible such that the modified categorical approach may be applied. *See Matter of Silva-Trevino*, 26 I&N Dec. at 833; *see also Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016). A statute is divisible when it lists a number of alternative elements that effectively create several different crimes, some of which involve moral turpitude and some of which do not. *See Matter of Silva-Trevino*, 26 I&N Dec. at 833.

Fla. Stat. § 787.02(1)(a) (2007) states in relevant part: "The term "false imprisonment" means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will." (IJ at 6, 9; Tr. at 44, 47; Exh. 6).

We cannot agree with the Immigration Judge's determination that the respondent's conviction in violation of Fla. Stat. § 787.02(1)(a) has the requisite intent in order to constitute an offense that is categorically a CIMT (IJ at 9-11; Tr. at 33-34, 36, 43-45, 47-48). To satisfy the mens rea element, a CIMT requires a "degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness." *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 n.1 (A.G. 2008), *vacated on other grounds as recognized in Matter of Silva-Trevino*, 26 I&N Dec. 826, 828 n.2 (BIA 2016). The false imprisonment statute is a general intent statute encompassing all unlawful restraints without the specific intent enumerated in the kidnapping statute. *State v. Graham*, 468 So. 2d 270 (Fla. 2d DCA 1985).

The minimum conduct that has a realistic probability of being prosecuted under the criminal statute of conviction is not a crime involving moral turpitude. As explained in *Oakes v. State*, 85 So. 3d 526, 527 (Fla. 1st DCA 2012):

> the essence of false imprisonment is the act of depriving the victim of personal liberty or freedom of movement for any length of time. The force used to restrain the victim need not be substantial; it must be sufficient to restrict the victim's movement. For this reason, false imprisonment may be completed by the simple momentary grasp of another person.

Id. (citing *Proko v. State*, 566 So.2d 918, 920 (Fla. 5th DCA 1990), and other cases) (internal quotations omitted). Moreover, the text of the statute provides that the crime can be done "secretly"

Immigrant & Refugee Appellate Center, LLC | www.irac.net

so that the victim is not aware of the abduction.[2] Because there is a realistic probability that Fla. Stat. § 787.02(1)(a) includes conduct that is not categorically reprehensible, the respondent's conviction for false imprisonment is not categorically a CIMT (IJ at 9-10; Tr. at 44). *Matter of Silva-Trevino*, 26 I&N Dec. at 833.

Given the above, we will remand the record to the Immigration Judge to further address whether the respondent is eligible for cancellation of removal (IJ at 11; Tr. at 45, 48, 57; Exh. 3).[3] *See* sections 240(c)(4) and 240A(b)(1)(C) of the Act; 8 C.F.R. § 1240.8(d); *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii). The Immigration Judge should also address any other factual or legal issues necessary for resolution of this case, and provide the parties an opportunity to present new evidence or testimony. For purposes of the exercise of discretion, we point out that the Immigration Judge is not limited by the categorical approach and thus may consider an alien's actual conduct in determining whether an alien warrants relief in the exercise of discretion.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this opinion, and the entry of a new decision.

FOR THE BOARD

[2] The DHS contends that Florida false imprisonment, even when accomplished secretly, presents a serious potential risk of physical injury to another because the risk "need not be from force applied by the perpetrator." The DHS cites to *United States v. Schneider*, 681 F.3d 1273, 1281 (11th Cir. 2012). However, this case addressed whether the crime was a violent felony pursuant to the residual clause of 18 U.S.C. § 924(e)(2)(B). In the case at hand, the issue is whether the minimum conduct is a CIMT. *Cf. Turijan v. Holder*, 744 F.3d 617, 621-22 (9th Cir. 2014) (felony false imprisonment under California law is not a categorical CIMT because, inter alia, it does not involve an intent to injure someone, an actual injury or a protected class of victims).

[3] While the decision in *Fajardo v. U.S. Att'y Gen.*, at 1306 did not ultimately resolve whether a conviction under Fla. Stat. § 787.02(1)(a) is categorically a CIMT, it stated "under the categorical approach, if either the use of forcible threats or secret confinement or restraint would not constitute a "crime involving moral turpitude," Sanchez Fajardo could not be deemed inadmissible under INA § 212(a)(2)(A)(i)(I)."

Immigrant & Refugee Appellate Center, LLC | www.irac.net