NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

R[redacted] R[redacted] C[redacted], A[redacted]-976

Respondent

FILED
Aug 16, 2023

ON BEHALF OF RESPONDENT: John Peng, Esquire

ON BEHALF OF DHS: Latrice Campbell, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS
On Appeal from a Decision of the Immigration Court, Napanoch, NY

Before: Saenz, Appellate Immigration Judge

SAENZ, Appellate Immigration Judge

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's March 1, 2022, decision granting the respondent's motion to reopen and terminate proceedings. The respondent, a native and citizen of Jamaica and lawful permanent resident of the United States, opposes the appeal. The appeal will be dismissed..

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On or about April 19, 1988, the respondent was convicted of Attempted Criminal Possession of a Controlled Substance in the Third Degree in violation of section 110/220.16 of the New York Penal Law (1987) (IJ at 1; Exh. 3). On or about May 23, 1989, the respondent was convicted of Criminal Possession of a Weapon in the Third Degree in violation of section 265.02(04) of the New York Penal Law (1987) (IJ at 1; Exh. 4). On or about June 15, 1992, the respondent was convicted of Criminal Sale of a Controlled Substance in the First Degree in violation of section 220.43 of the New York Penal Law (1991) (IJ at 1; Exh. 5). Based on these convictions, DHS charged the respondent with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii), as defined in sections 101(a)(43)(B) and (C) of the INA, 8 U.S.C. § 1101(a)(43)(B) and (C), and under section 237(a)(2)(B)(i) of the INA, 8 U.S.C. § 1227(a)(2)(B)(i) (IJ at 1; Exh. 1). On February 6, 2009, an Immigration Judge sustained the charges of removal and ordered the respondent removed (IJ at 1; Exh. 6).

On February 1, 2022, the respondent filed a motion to reopen and terminate proceedings (IJ at 1). The Immigration Judge granted the respondent's motion after determining that the respondent's convictions no longer render him removable as charged (IJ at 1-5).

DHS argues that the respondent's motion before the Immigration Judge was time-barred and the respondent did not merit equitable tolling (DHS' Br. at 4-6). However, Immigration Judges have discretion to reopen proceedings sua sponte, regardless of a time-bar. *See* 8 C.F.R. § 1003.23(b)(1). We decline to disturb the Immigration Judge's discretionary decision to reopen sua sponte the respondent's proceedings.

The DHS argues that the Immigration Judge erred in determining that the respondent's conviction for Criminal Possession of a Weapon in the Third Degree in violation of section 265.02(04) of the New York Penal Law does not qualify as an aggravated felony under section 101(a)(43)(C) of the INA, 8 U.S.C. § 1101(a)(43)(C) (DHS' Br. at 6-12).[1] For the reasons stated in the Immigration Judge's decision, we affirm that the New York definition of firearm is broader than the federal definition such that the respondent is no longer removable for an aggravated felony firearms offense (IJ at 2). *See Williams v. Barr*, 960 F.3d 68, 72-73 (2d Cir. 2020) (providing that a categorical comparison of the federal firearms statute with the state firearms statute at issue required consideration of whether the federal and state "antique firearm" exceptions were coextensive); *Jack v. Barr*, 966 F.3d 95, 98 (2d Cir. 2020) (stating that the New York definition of a firearm criminalizes "conduct involving loaded antique firearms, while the INA's removal provisions exclude loaded antique firearms").

We have considered DHS' argument that, under *United States v. Mayo*, 705 F.2d 62, 74-76 (2d Cir. 1983) and *Quito v. Barr*, 948 F.3d 83, 92-93 (2d Cir. 2020), the antique firearm exception is an affirmative defense rather than an element of the statute, and thus cannot render section 265.02(04) of the New York Penal Law overbroad (DHS' Br. at 7-12). We do not find DHS' reliance on *Mayo* to be persuasive. *Mayo* was decided almost 40 years ago, before the advent of strict categorical approach analysis in cases like *Taylor v. United States*, 495 U.S. 575, 599-602 (1990). The Second Circuit's decisions in *Jack* and *Williams* are consistent with *Taylor* and its progeny. The DHS' reliance on *Quito* is also misplaced. In *Quito*, the court explained that affirmative defenses are not relevant to the categorical approach because they are not "elements of an offense." 948 F.3d at 92-93. The federal child pornography statute at issue in *Quito*, 18 U.S.C. § 2252(a)(4)(B), separately lists the exception at issue as an affirmative defense at 18 U.S.C. § 2252(c). Here, neither the respondent's statute of conviction, section 265.02(04) of the New York Penal Law, nor the federal statute cited in the INA, 18 U.S.C. § 921, designate the antique firearms exception as a separate affirmative defense. We affirm the Immigration Judge's reliance on *Williams* and *Jack*.

The DHS also argues that the Immigration Judge erred in determining that the respondent's convictions under NYPL §§ 110/220.16 and 220.43 do not render the respondent removable under section 237(a)(2)(B)(i) of the INA, 8 U.S.C. § 1227(a)(2)(B)(i), and section 237(a)(2)(A)(iii) of

[1] DHS' brief states in places that the respondent is removable under INA § 237(a)(2)(C) for his conviction pursuant to NYPL § 265.03(1)(b) (DHS' Br. at 12). The Notice to Appear does not include this charge of removability, and the record does not indicate the respondent has this conviction (IJ at 1; Exhs. 1, 3, 4, 5). We also note that DHS cites "Matter of Ovidio" several times but appears to be referring to *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010).

the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), as defined in section 101(a)(43)(B) of the INA, 8 U.S.C. § 1101(a)(43)(B) (DHS' Br. at 13-27). In 1988 and 1992, New York's schedule of controlled substances was broader than the federal schedule because New York's schedule included constitutional, optical, and geometric isomers of cocaine while the Controlled Substance Act ("CSA") included only optical and geometric isomers of cocaine (IJ at 3; Respondent's Mot. at Tabs D, E). For the reasons stated in the Immigration Judge's decision, we agree that the respondent's drug offenses no longer render him removable as charged (IJ at 4-5). *See, e.g., U.S. v. Owen*, 54 F.4th 292, 295-96 (8th Cir. 2022) (explaining the limits of the federal criminalization of isomers of cocaine as opposed to a state statute that criminalized all isomers of cocaine and was thus overbroad).

DHS argues that the substances thebaine-derived butorphanol, naloxegol, and naldemedine do not render the respondent's statutes of conviction overbroad as to the federal schedule (DHS' Br. at 18-21). The Immigration Judge did not rely on these substances to conclude that the New York schedule was overbroad (IJ at 3), and thus we do not consider them. DHS argues that the respondent's convictions render him removable based on *Pascual v. Holder*, 707 F.3d 403 (2d Cir. 2013), which held that a conviction for third-degree criminal sale of cocaine under section 220.39(1) of the New York Penal Law is an aggravated felony drug trafficking offense under the INA (DHS' Br. at 21-25). We agree with the Immigration Judge that *Pascual* does not establish that the respondent is removable (IJ at 5), as it did not reach the overbreadth of the narcotic drug definition. To the extent *Pascual* is still good law, it is not controlling.[2]

DHS also argues that the respondent's statutes of conviction are not overbroad because the Federal Analogue Act ("FAA") extends the reach of the CSA to cover even the "missing" isomers that are covered in New York's schedule (DHS' Br. at 14-18). The FAA allows an analogue of a controlled substance, if intended for human consumption, to be treated for purposes of any federal law as a schedule I controlled substance. *See* 21 U.S.C. § 813. However, in an analogue case, the government has an explicit burden to prove the defendant knew he was distributing a federal analogue or what analogue he was distributing. *McFadden v. United States*, 576 U.S. 186, 194 (2015). The respondent's New York statutes of conviction do not impose this requirement. *See, e.g., Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (state drug offense could not qualify as aggravated felony where the federal offense required the prosecutor to charge and prove an element that was not present in petitioner's state conviction). Consequently, there is no match between the New York and the federal schedules. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

[2] Neither are the other decisions cited by DHS where, unlike this case, the noncitizen did not allege that there was a substance criminalized under his or her specific New York statutes of conviction that was not federally controlled (IJ at 5).