U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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NEWBURGH NY 12550

Name: B[redacted] C[redacted], T[redacted] A[redacted] A [redacted]-231

Date of this Notice: 8/31/2021

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:

O'Connor, Blair
Brown, Denise G
de Cardona, Lisa A.

Userteam: Docket

File: A[redacted]231 – Napanoch, NY

Date: AUG 31 2021

In re: T[redacted] A[redacted] B[redacted] O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Margret R. Lindstrom, Esquire

ON BEHALF OF DHS: Daniel W. Kelly
Assistant Chief Counsel

APPLICATION: Termination; Convention Against Torture

The respondent, a native and citizen of the Dominican Republic, appeals the Immigration Judge's February 16, 2021, decision, finding him removable as charged and denying his application for protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) (CAT). 8 C.F.R. §§ 1208.16-1208.18. The Department of Homeland Security (DHS) filed an opposition to the appeal.[1] The appeal will be sustained, and the respondent's removal proceedings will be terminated.

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).

In May 2017, the respondent was convicted of Criminal Sale of a Controlled Substance in the Third Degree in violation of N.Y. Penal Law § 220.39(1) (Exhs. 1, 3). The DHS then issued a Notice to Appear (NTA), charging the respondent as removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), for having been convicted of a violation of a law relating to a controlled substance, and under section 237(a)(2)(A)(iii) of the Act, for having been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), illicit trafficking in a controlled substance. The respondent denied removability and filed a motion to terminate, which the Immigration Judge denied (IJ at 2).[2] The respondent now appeals.

[1] Both the respondent's and the DHS's motions to extend the page limitations of their respective appellate briefs are granted.

[2] While the Immigration Judge's reason for denying the motion to terminate is referenced in the transcript, the Immigration Judge's February 16, 2021, order does not satisfy the requisites for a

The respondent argues that his conviction for N.Y. Penal Law § 220.39(1) is overbroad as to a controlled substance offense under section 237(a)(2)(B)(i) of the Act and as to an illicit trafficking in a controlled substance aggravated felony under section 237(a)(2)(A)(iii) of the Act as defined by section 101(a)(43)(B) of the Act. As such, we apply the categorical approach to determine whether the elements of N.Y. Penal Law § 220.39(1) match those of the generic federal definition for both charges of removability. *Matter of Dikhtyar*, 28 I&N Dec. 214, 215 (BIA 2021). Under the categorical approach, we focus on the Controlled Substances Act (CSA) schedules in effect at the time of the respondent's conviction. *Doe v. Sessions*, 886 F.3d 203, 210 (2d Cir. 2018). Additionally, in order to categorically fit within the generic definition of both charges of removability, N.Y. Penal Law § 220.39(1) must have, as an element, a substance listed under the CSA. *Matter of P-B-B-*, 28 I&N Dec. 43, 45-46 (BIA 2020).

At the time of the respondent's conviction, N.Y. Penal Law § 220.39(1) stated: "A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells . . . a narcotic drug." In turn, "narcotic drug" is defined as including "any controlled substance listed in schedule I(b), I(c), II(b), or II(c) other than methadone." N.Y. Penal Law § 220.00(7).

When the respondent was convicted in May 2017, schedule II(b)(1) included "any . . . derivative . . . of opium" "[u]nless specifically excepted or unless listed in another schedule." N.Y. Pub. Health Law § 3306, sched. II(b)(1) (2017). Additionally, at the time of the respondent's conviction, New York specifically excluded regulation of the following six opium derivatives: "apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone." *Id.*

By contrast, the Drug Enforcement Agency regulations concerning federally controlled substance schedules in effect in May 2017 excluded eight opium derivatives: "apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, nalmefene, naloxegol, naloxone, and naltrexone." 21 C.F.R. § 1308.12(b)(1) (2017). The respondent asserts that the opium derivative "naloxegol" was explicitly excluded from the CSA through regulation, but was not excluded from the New York controlled substance schedule (Respondent's Br. at 23-25). Therefore, in practice, New York continued to regulate use of naloxegol, while federal agencies did not. Because naloxegol was explicitly excluded by regulation from the CSA, but not from the New York schedule II(b)(1), New York's definition of "narcotic" is overbroad.[3]

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summary decision rendered in accordance with 8 C.F.R. § 1240.12(b). *See Matter of A-P-*, 22 I&N Dec. 468, 477 (BIA 1999).

[3] Because we find that New York's definition of narcotic is overbroad due to its regulation of naloxegol, we find it unnecessary to address whether the definition is also overbroad by its inclusion of certain isomers. Additionally, although the respondent argues that naldemedine is excluded from the CSA and not from the New York schedules, the federal exclusion of naldemedine occurred after the respondent's conviction under N.Y. Penal Law § 220.39(1) and is therefore not relevant to these proceedings, as we consider the contents of the CSA at the time of the respondent's conviction (Respondent's Br. at 20-23). *Doe*, 886 F.3d at 210; *see* Schedules of Controlled Substances: Removal of Naldemedine From Control, 82 Fed. Reg. 45,436, 45,436 (Sept. 29, 2017).

The DHS argues that precedents from the United States Court of the Appeals for the Second Circuit mandate we find that N.Y. Penal Law § 220.39(1) is a categorical match to a controlled substance offense (DHS Br. at 6-7). *See Pascual v. Holder*, 723 F.3d 156, 158-59 (2d Cir. 2013) (determining N.Y. Penal Law § 220.39(1) constitutes an aggravated felony, illicit trafficking in a controlled substance). However, *Pascual* was decided in 2013, before naloxegol was excluded from federal regulation in 2015. *See* Schedules of Controlled Substances: Removal of Naloxegol from Control, 80 Fed. Reg. 3468, 3468 (Jan. 23, 2015) (codified at 21 C.F.R. § 1308.12(b)(1)). Moreover, *Pascual* addressed the issue of whether N.Y. Penal Law § 220.39 was overbroad insofar as it criminalizes "a mere offer[] to sell" a narcotic drug. 723 F.3d at 158 (internal quotation marks and citation omitted). It did not address the issue we are faced with here, whether New York's schedules of narcotic drugs list substances that are not federally controlled under the CSA. Therefore, the question at issue here in no way "falls entirely within the four corners of *Pascual*" (DHS Br. at 6).

The DHS also argues that the Second Circuit has found other convictions regarding the use of "narcotics" to be categorical illicit trafficking in a controlled substance aggravated felonies (DHS Br. at 7). In *Heredia v. Sessions*, 865 F.3d 60, 63 (2d Cir. 2017), the Second Circuit, while discussing background information regarding the petitioner's case, stated, without any analysis, that the petitioner's 1999 conviction for possession of a narcotic with intent to sell under N.Y. Penal Law § 220.16(1) was an aggravated felony. *Id.* However, as discussed with regard to *Pascual*, the petitioner's conviction in *Heredia* occurred in 1999, before the deregulation of naloxegol in 2015. *Id.* Additionally, the DHS cites to *Henriquez v. Sessions*, 890 F.3d 70 (2d Cir. 2018),but that case found that the statute of conviction, N.Y. Penal Law § 220.06, was divisible, and the petitioner was convicted under a specific subsection of the statute which criminalized the possession of cocaine, which is a federally controlled substance in the CSA. *Id.* at 72-73. The analysis in *Henriquez* did not require the application of the categorical approach between the definition of a "narcotic drug" and the CSA. Therefore, the DHS's arguments are unavailing.

As N.Y. Penal Law § 220.39(1) is categorically overbroad as to both charges of removability, the respondent's conviction cannot support his removal unless N.Y. Penal Law § 220.39(1) is divisible with respect to the identity of the particular "narcotic drug" a defendant possesses. *See Matter of Dikhtyar*, 28 I&N Dec. at 215 ("[I]f the respondent's State statute of conviction is categorically overboard, we must consider whether it is divisible—that is, whether it 'sets out one or more elements of the offense in the alternative.'") (quoting *Descamps v. United States*, 570 U.S. 254, 257 (2013)). The parties disagree as to whether N.Y. Penal Law § 220.39(1) is divisible—therefore, we must determine whether the identity of the specific narcotic involved is an "element" of N.Y. Penal Law § 220.39(1) or an alternative "means" (Respondent's Br. at 6-10; DHS Br. at 7-17). *Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016) (distinguishing between statutory "elements" and the "alternative means of fulfilling" one or more of those elements).

New York case law indicates that, when a defendant is convicted of a violation involving a narcotic, the prosecution need not "'distinguish between the types of narcotic possessed, but treats all drugs classified as narcotics interchangeably.'" *People v. Kalabakas*, 124 N.Y.S.3d 448, 454 (N.Y. App. Div. 2020) (quoting *People v. Martin*, 545 N.Y.S.2d 287, 288 (N.Y. App. Div. 1989)), *leave to appeal denied*, 25 N.Y. 3d 1067 (N.Y. 2020). Thus, someone who is arrested for

possession of multiple narcotic drugs on the same occasion can be convicted for an offense involving "a narcotic," and the prosecution need not prove the identity of one specific narcotic to the exclusion of others. *People v. Kalabakas*, 125 N.Y.S.3d at 454; *People v. Miller*, 789 N.Y.S.2d 423, 423 (N.Y. App. Div. 2005); *People v. Maldonado*, 706 N.Y.S.2d 876, 876-77 (N.Y. App. Div. 2000).

Citing several of the same cases, the Second Circuit has noted in a published opinion that "[s]everal opinions state that different narcotic drugs do not create separate crimes under this statute, and that jurors need not agree as to the particular narcotic drug in question," informing the court's determination to find that the identity of a controlled substance is not an element in N.Y. Penal Law § 220.39(1). *Harbin v. Sessions*, 860 F.3d 58, 67 (2d Cir. 2017); *see also United States v. Townsend*, 897 F.3d 66, 70 n.2 (2d Cir. 2018). We find no basis for reaching a different conclusion here.[4] Therefore, because the identity of the narcotic drug is not an element of N.Y. Penal Law § 220.39(1), the respondent's conviction is overbroad as to a controlled substance offense under section 237(a)(2)(B)(i) of the Act and as to an illicit trafficking in a controlled substance aggravated felony under section 237(a)(2)(A)(iii) of the Act as defined by section 101(a)(43)(B) of the Act.

As such, we find the Immigration Judge erred in determining that the DHS has met its burden in establishing that the respondent is removable as charged. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The respondent's removal proceedings are terminated.

FOR THE BOARD

[4] The DHS asserts we should rely on *Matter of Dikhtyar* to determine that the identity of the narcotic is an element (DHS Br. at 7-17). However, *Matter of Dikhtyar* discussed a Utah statute which metes out different punishments depending on the controlled substance possessed, where the jury is instructed to identify the controlled substance in order to convict under that statute, and where state courts have discussed the identity of the controlled substance as an element. Such is not the case here. *See* 28 I&N Dec. at 218-221. Additionally, *Matter of Dikhtyar* applied the case law of the United States Court of Appeals for the Tenth Circuit; here, we are must apply the case law of the Second Circuit.

U.S. Department of Justice
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Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted]-231 – Napanoch, NY

Date: AUG 3 1 2021

In re: [redacted]

CONCURRING OPINION: Blair O'Connor

I concur with the result in this case because the categorical approach requires me to. I write separately to note that this is one of an increasing number of immigration cases involving New York controlled substance convictions where we are no longer able to find the respondents removable because New York's schedules contain obscure, rarely heard of substances that have been removed from the federal list of controlled substances. I have serious reservations that Congress could have intended for criminal aliens to escape the immigration consequences of their drug convictions because of the possibility, however remote, that their conviction could have been for a controlled substance that is still regulated in New York, despite having been removed from the list of federally controlled substances given "its currently accepted medical use in treatment in the United States," and the fact that it "does not possess abuse or dependence potential," 80 Fed. Reg. 3468, 3468-69 (Jan. 23, 2015).

Moreover, in this case we know for a fact that the respondent did not possess naloxegol, and instead possessed cocaine. We know this because cocaine is the narcotic drug identified in the judgment from his criminal case (Exh. 3), and because the respondent testified that he sold cocaine before the Immigration Judge (Tr. at 50-51, 53). So to the casual outside observer, it would beg the question how the respondent cannot be removable for having been convicted of a controlled substance offense. That would be an excellent question for which I am unable to provide a reasonable answer. And that would be because the categorical approach eschews reason and common sense, and instead imposes ridiculous limitations on immigration adjudicators making criminal law determinations, requiring us to close our eyes as to what actually happened and "instead proceed with eyes shut" as to what could have happened, even though we know it did not. *United States v. Chapman*, 866 F.3d 129, 138 (Jordan, J., concurring). So instead of simply acknowledging the respondent's admission before the Immigration Judge that he did, in fact, sell cocaine, a federally controlled substance, a fact he in no way disputes on appeal, we must engage in a complicated analysis of federal and New York controlled substances laws to determine if New York has exempted naloxegol from its lists of controlled substances. In the process, the respondent "escapes the consequences that Congress intended for [his] conduct." *United States v. Valdivia-Flores*, 876 F.3d 1201, 1211 (O'Scannlain, J., specially concurring). I believe the costs of the categorical approach, particularly when applied to criminal law determinations in immigration cases, have long outstripped its benefits, and in the words of Judge Owens, "[a] better mousetrap is long overdue." *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483 (Owens, J., concurring) (en banc).