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

MCCLELLAN, CHRISTINE DANIELLE
PRISONERS' LEGAL SERVICES OF NE
41 STATE STREET SUITE M112
ALBANY NY 12207

DHS/ICE OFFICE OF CHIEF COUNSEL - BTV
4250 FEDERAL DR.
BATAVIA NY 14020

Name: G[redacted], T[redacted] D[redacted] **A [redacted]**

Date of this Notice: 4/19/2021

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
MONSKY, MEGAN
FOOTE
Pepper, S. Kathleen

Userteam: Docket

File: A[redacted] – Batavia, NY

Date:

APR 19 2021

In re: T[redacted] D[redacted] G[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Christine D. McClellan, Esquire

ON BEHALF OF DHS: Sydney V. Probst
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent is a native and citizen of Jamaica and a lawful permanent resident of the United States. He appeals from an Immigration Judge's October 1, 2020, decision finding him removable under section 237(a)(2)(A)(iii) and section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i). The respondent also appeals from the Immigration Judge's decision denying his application for asylum, withholding of removal, and request for protection pursuant to 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). The respondent's request for a waiver of the appellate filing fee is granted. *See* 8 C.F.R. § 1003.8(a)(3). The appeal will be sustained.[1] The record will be remanded.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the respondent, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In May 2018, the respondent was convicted of two counts of the sale of a controlled substance in the third degree under section 220.39(00) of the New York Penal Law ("NYPL"); one count of criminal sale of a controlled substance under NYPL § 220.39(1); and one count of criminal possession of a controlled substance in the third degree under NYPL § 220.16(1) (Exhs. 1A, 3-5). The issue on appeal is whether the respondent's convictions render him removable under: (1) section 237(a)(2)(A)(iii) of the Act, as an alien who has been convicted of an aggravated felony offense relating to trafficking in a controlled substance as defined under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B); or (2) section 237(a)(2)(B)(i) of the Act as an alien convicted of a violation of State law "relating to a controlled substance (as defined in section 102 of the

[1] The Board grants the respondent's motion to extend the page limit on his appellate brief.

Controlled Substance Act (21 U.S.C. [§] 802))."[2]

We agree with the respondent that the Immigration Judge erred in relying solely on *Heredia v. Sessions*, 865 F.3d 60 (2d Cir. 2017), to determine that NYPL § 220.16(1) is categorically an aggravated felony (Respondent's Br. at 9; Tr. at 38). The court's statement in *Heredia* that section 220.16(1) is an aggravated felony was not a substantive holding. *Id.* at 62. Rather, the statement appeared in the background section of the decision without analysis or discussion, which suggests that the respondent's status as an aggravated felon was not an issue on appeal before the U.S. Court of Appeals for the Second Circuit. Hence, *Heredia* is not persuasive authority for the Immigration Judge's aggravated felony determination.[3]

Section 101(a)(43)(B) of the Act defines the term "aggravated felony" as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." An offense is a "drug trafficking crime" as defined in section 18 U.S.C. § 924(c) if it is punishable as a felony under the Controlled Substance Act ("CSA"). *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006). To determine whether the respondent has been convicted of a controlled substance trafficking offense, we use the categorical approach. This approach requires us to focus on the elements of the offense of conviction rather than on the respondent's offense conduct. *Matter of P-B-B-*, 28 I&N Dec. 43, 45-46 (BIA 2020). Applying that approach, we conclude that section 220.16(1) is not punishable as a felony under the CSA because it is categorically overbroad. Specifically, NYPL § 220.16(1) prohibits the possession of several "narcotic drugs" that are not "controlled substances" as defined in CSA.[4] *Mellouli v. Lynch*, 575 U.S. 798, 813 (2015) (holding that, "to trigger removal under [section 237(a)(2)(B)(i) of the Act], the Government must connect an element of the alien's conviction to a drug 'defined in [§ 802]'") (second alteration in original).

New York law defines the term "narcotic drug" to include "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." N.Y. Penal Code § 220.00(7). When the respondent was convicted in May 2018, New York's schedule II(b)(1) covered any derivative of opium "[u]nless specifically excepted or unless listed in another schedule." N.Y. Pub. Health Law § 3306, sched. II(b)(1) (McKinney 2018). Then (as today), New York law excepted six opium derivatives from control, specifically "apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone" (Respondent's Br. at 23). *Id.* By contrast, the federal drug schedules in effect in May 2018 (which also included all derivatives of opium unless expressly excepted)

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[2] The respondent does not appeal his removability under section 237(a)(2)(A)(ii) of the Act (Respondent's Br. at 8 n.2).

[3] The Immigration Judge did not consider whether any of the respondent's other convictions were for an aggravated felony.

[4] Although we use the present tense for ease of reference, the respondent's removability depends on the law in effect at the time of his conviction. *Doe v. Sessions*, 886 F.3d 203, 208 (2d Cir. 2018). Thus, the categorical approach requires us to compare the New York and federal drug schedules as they existed in May 2018.

excluded nine opium derivatives from control, specifically "apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, naldemedine, nalmefene, naloxegol, naloxone, and naltrexone" (Respondent's Br. at 23). 21 C.F.R. § 1308.12(b)(1) (2018). Comparing the state and federal laws, it is clear that when the respondent was convicted, the term "narcotic drug" used in section 220.16(1) included three opium derivatives (thebaine-derived butorphanol, naloxegol, and naldemedine) that were not then federally controlled substances. Hence, we agree with the respondent that there is a categorical mismatch between the opium derivatives regulated under the CSA and New York law (Respondent's Br. at 23-26).[5]

Under the CSA, the Attorney General, acting through the DEA, can exclude from control certain drugs that would otherwise qualify as "controlled substances." One avenue for doing so, authorized by 21 U.S.C. § 811(g)(3)(B), is to exempt a substance that "does not present any potential for abuse" and that is "intended for laboratory, industrial, educational, or special research purposes and not for general administration to a human being or other animal." 21 C.F.R. §§ 1308.23(a), 1308.24. The CSA, however, also allows the DEA "by rule" to "remove any drug or other substance from the schedules if...the drug or other substance does not meet the requirements for inclusion in any schedule." 21 U.S.C. § 811(a)(2). When the DEA removed thebaine-derived butorphanol, naloxegol, and naldemedine from the federal schedules, it did so in rules that unequivocally indicated the substances were being "decontrolled" under 21 U.S.C. § 811(a)(2), not merely "exempted" under 21 U.S.C. § 811(g)(3). *See* 57 Fed. Reg. 31,126 (July 14, 1992) (thebaine-derived butorphanol); 80 Fed. Reg. 3,468 (Jan. 23, 2015) (naloxegol); 82 Fed. Reg. 45,436 (Sept. 29, 2017) (naldemedine). It follows that thebaine-derived butorphanol, naloxegol, and naldemedine were "narcotic drugs" under New York law at the time of the respondent's conviction.[6]

Further, because NYPL § 220.16(1) is categorically overbroad, the respondent's conviction cannot be used to sustain the charge under section 237(a)(2)(A)(iii) of the Act unless the state statute is divisible with respect to the identity of the particular narcotic drug a defendant possesses. *Matter of Chairez*, 26 I&N Dec. 819, 819-20 (BIA 2016). The statute is divisible only if the identity of the particular "narcotic drug" a defendant possesses or sells is an "element" of the offense that must be proved to a unanimous jury beyond a reasonable doubt, as opposed to a mere "brute fact" about which the jury need not agree in order to find a defendant guilty. *Mathis v. United States*, 136 S. Ct 2243, 2248-49 (2016).

New York case law indicates that NYPL § 220.16(1), like other state drug possession statutes, "does not distinguish between the types of narcotics possessed, but treats all drugs classified as narcotics interchangeably." *People v. Martin*, 545 N.Y.S.2d 287, 288 (N.Y. App. Div. 1989);

[5] Given that section 220.16(1) is overbroad based on its inclusion of thebaine-derived butorphanol, naloxegol, and naldemedine, we need not address the respondent's argument that the statute also is overbroad because it includes certain isomers that are not federally controlled (Respondent's Br. at 11-22).

[6] When the DEA exempts a substance from control pursuant to 21 U.S.C. § 811(g)(3) and 21 C.F.R. §§ 1308.23-1308.24, it says so explicitly in the relevant rule. *See, e.g.*, 83 Fed. Reg. 62,347 (Dec. 3, 2018); 78 Fed. Reg. 4,446 (Jan. 22, 2013); 57 Fed. Reg. 5,818 (Feb. 18, 1992).

People v. Kalabakas, 124 N.Y.S.3d 448, 454 (N.Y. App. Div. 2020) (same). Thus, someone who is arrested for possessing multiple narcotic drugs on the same occasion can only be prosecuted for a single violation of NYPL § 220.16(1). *Id.*; *People v. Miller*, 789 N.Y.S.2d 423 (N.Y. App. Div. 2005). The Second Circuit, under whose jurisdiction this case arises, also has recognized that NYPL § 220.16(1) is indivisible regarding the narcotic drug involved. *Harbin v. Sessions*, 860 F.3d 58, 67 (2d Cir. 2017).

For these reasons we conclude that the respondent's May 2018 conviction for criminal possession of a controlled substance under section 220.16(1) of the New York Penal Law does not qualify as an aggravated felony drug trafficking offense. We will reverse the Immigration Judge's determination that the respondent is removable for an aggravated felony under section 237(a)(2)(A)(iii) of the Act.

The analysis is much the same for determining whether the respondent is removable under section 237(a)(2)(B)(i) of the Act based on his conviction under NYPL § 220.16(1). The Immigration Judge concluded, without analysis, that the respondent had been convicted of a controlled substance offense (Tr. at 48-49). We can resolve the issue as a matter of law, however, because the respondent's removability for violating a law relating to a controlled substance also turns on New York's definition of "narcotic drug." As discussed, the definition is overbroad vis a vis its federal counterpart. A "narcotic drug" under New York law is not analogous to the controlled substances set forth under the CSA because schedule II of the state statute regulates controlled substances not regulated under the federal schedules. Thus, because an offense under the state statute may involve a controlled substance not included on the federal schedule, the respondent has not been convicted of a violation of State law relating to a controlled substance as defined in the CSA. We will reverse the Immigration Judge because the respondent is not removable under section 237(a)(2)(B)(i) of the Act.

Although we conclude that the respondent is not removable under section 237(a)(2)(A)(iii) or 237(a)(2)(B)(i) of the Act, the respondent remains removable under section 237(a)(2)(A)(ii) of the Act (Respondent's Br. at 8 n.2). Given our conclusion that the respondent has not been convicted of an aggravated felony based on his conviction under NYPL § 220.16(1), the respondent may not be statutorily ineligible for asylum, nor presumptively ineligible for withholding of removal (IJ at 5-6). *See* sections 208(b)(2)(A)(ii), (B)(1), 241(b)(3)(B) of the Act, 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(1), 1231(b)(3)(B). We will remand the record for the Immigration Judge to reconsider the respondent's eligibility for asylum and withholding of removal, including an analysis of whether any of his other convictions are particularly serious crimes. We take no position regarding the ultimate outcome of these proceedings.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

A[redacted]

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

Blair O'Connor

FOR THE BOARD