U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: R , K K **A -680**

Date of this notice: 3/9/2018

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:
Pauley, Roger

Userteam: Docket

File: 680 – Fort Snelling, MN Date: MAR - 9 2018

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Philip L. Torrey, Esquire

ON BEHALF OF DHS: Luke R. Nelson
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") timely appeals the Immigration Judge's September 19, 2017, decision granting the respondent's motion to terminate removal proceedings. The DHS's appeal will be dismissed.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, 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, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

It is undisputed that on May 3, 2017, the respondent was convicted in the District Court of Ramsey County, Saint Paul, Minnesota, for three counts of the offense of threats of violence – reckless disregard risk, in violation of Minn. Stat. § 609.713, subd. 1 (Exhs. 1, 3).[1] In a written decision, the Immigration Judge determined that Minn. Stat. § 609.713, subd. 1, is overbroad and is not categorically a CIMT. Accordingly, she did not sustain the sole charge of removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1227(a)(2)(A)(i) (2012), and granted the respondent's motion to terminate removal

[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 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).

proceedings. On appeal, the DHS argues that the United States Court of Appeals for the Eighth Circuit, in a precedent decision, has determined that Minn. Stat. § 609.713, subd. 1, is a CIMT, and that the Immigration Judge is bound to follow such precedent (DHS Brief at 4-6; Notice of Appeal). *Avendano v. Holder*, 770 F.3d 731, 736 (8th Cir. 2014). The only issue on appeal is whether Minn. Stat. § 609.713, subd. 1, is a CIMT.

We find that the Immigration Judge set forth the appropriate legal framework to determine whether an offense is a CIMT (IJ at 2-3). *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). We agree with the Immigration Judge that *Avendano v. Holder* is not dispositive. The Immigration Judge correctly observed that the majority in *Avendano v. Holder* "explicitly left open the question 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 6). *Avendano v. Holder*, 770 F.3d at 736; *see also* 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* (cases to which the respondent had referred), 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 6-7). The Immigration Judge thus determined that the statute is overbroad. Further, 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 7-8). *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 her conclusion that the DHS did not sustain its burden to establish the respondent's removability under section 237(a)(2)(A)(i) of the Act, as an alien convicted of a CIMT.

Accordingly, the following order will be entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD