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

Goldman, Michael Z.
Law Offices of Michael Z. Goldman
100 Church St.
Suite 800
New York NY 10007

DHS/ICE Office of Chief Counsel - NYC
26 Federal Plaza, 11th Floor
New York NY 10278

Name: APPENTENG, GIFTY

A [redacted]

Date of this Notice: 9/26/2022

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:

Brown, Denise G
Liebowitz, Ellen C
Petty, Aaron R.

Userteam: Docket

NOT FOR PUBLICATION

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

MATTER OF:

Gifty APPENTENG, A[redacted]

Respondent

FILED
Sep 26, 2022

ON BEHALF OF RESPONDENT: Michael Z. Goldman, Esquire

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

Before: Liebowitz, Appellate Immigration Judge; Petty, Appellate Immigration Judge; Brown, Temporary Appellate Immigration Judge[1]

Opinion by Appellate Immigration Judge Liebowitz

LIEBOWITZ, Appellate Immigration Judge

The respondent, a native and citizen of Ghana and lawful permanent resident of the United States, appeals the Immigration Judge's decision dated October 29, 2018, which denied her motion to terminate her removal proceedings, found her inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(2)(A)(i)(I), and ordered her removed from the United States. The Department of Homeland Security ("DHS") has not filed any response. The appeal will be sustained, the Immigration Judge's decision will be vacated, and 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).

The respondent was accorded lawful permanent resident status in 2001. She was convicted on December 6, 2006, in the Crown Court at Isleworth, City of London, of the crime of "knowingly concerned in fraudulent evasion of prohibition or restriction on importation of goods" in violation of section 170(2) of the United Kingdom's Customs and Excise Management Act ("CEMA").[2] The respondent was sentenced to 12 years imprisonment.

[1] Temporary Appellate Immigration Judges sit pursuant to appointment by the Attorney General. *See generally* 8 C.F.R. § 1003.1(a)(1), (4).

[2] The respondent was convicted under 170(2) of the CEMA (Exh. 3). The Immigration Judge's oral decision was incorrectly transcribed as stating that the respondent was convicted under section

On June 2, 2013, the respondent sought admission to the United States. Based on her conviction, the DHS charged her as inadmissible and removable under the following sections; 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude; 212(a)(2)(A)(i)(II) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having violated "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) ... "); and 212(a)(2)(C) of the INA, 8 U.S.C. § 1182(a)(2)(C), as a person the Attorney General knows or has reason to believe has been an illicit trafficker in any controlled substance or in any listed chemical (Exh. 1). The Immigration Judge determined the respondent's offense constituted a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the INA (IJ at 2-4). The Immigration Judge reasoned that the "fraudulent evasion" of the prohibition or restriction on goods is "inherently fraudulent" and, therefore, a crime involving moral turpitude (IJ at 3). The Immigration Judge did not address any of the other removal grounds. Thus, the issue on appeal is whether the respondent has been convicted of a crime involving moral turpitude.

The respondent argues that her conviction for violating section 170(2) of CEMA is not a crime involving moral turpitude for several reasons, including that the crime does not require the intent to defraud, nor does it inhere fraudulent conduct (Respondent's Br. at 3-10, Exh. B).

Whether the respondent's conviction constitutes a crime involving moral turpitude is legal question we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii). To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state. *See Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 834 (BIA 2016). "[F]raud has consistently been regarded as such a contaminating component within any crime that American courts have, without exception, included such crimes within the scope of moral turpitude." *Jordan v. De George*, 341 U.S. 223, 229 (1951); *see also Mendez v. Barr*, 960 F.3d 80, 86 (2d Cir. 2020).

To decide the elements of the underlying crime, we employ the categorical approach, which "requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute." *See Matter of Ortega-Lopez*, 27 I&N Dec. 382, 384-85 (BIA 2018) (quoting *Silva-Trevino III*, 26 I&N Dec. at 831). If the elements of a crime encompass any conduct that does not involve moral turpitude, then the crime is not a crime involving moral turpitude unless it is "divisible," and permits consideration of the respondent's record of conviction under the "modified categorical" approach. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 570 U.S. 254 (2013).

We agree with the Immigration Judge that CEMA § 170(2) is not divisible (IJ at 2). However, we do not agree with the Immigration Judge's that a violation of section 170(2) of CEMA is

---

172 of the CEMA, but this is harmless error as the Immigration Judge analyzed the correct statutory language (IJ at 2).

categorically a crime involving moral turpitude because the crime inherently involves fraudulent conduct (IJ at 3).

Section 170(2) of CEMA (1979) provides as follows:

> (2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion:
> (a) of any duty chargeable on the goods;
> (b) of any prohibition or restriction for the time being in the force with respect to the goods under or by virtue of any enactment; or
> (c) of any provision of the Customs and Excise Acts 1979 applicable to the goods, he shall be guilty of an offence under this section any may be detained.

To begin, we look to the statute to ascertain the essential elements required for a conviction. The statute requires that the offender "knowingly concerned [himself] in the fraudulent evasion" of any goods subject to duty tax, any goods subject to prohibition or restriction, or any goods subject to any provision of the 1979 Customs and Excise Acts. The mens rea in this statute is "knowingly," which has been defined to mean that the offender "knows that the operation with which he is concerning himself in is an operation designed to evade the prohibition and evade it fraudulently." *R. v. Hussain*, 2 QB 567, 53 Cr. App. R. 448 (1969). An intent to defraud is not an element that must be proven to sustain a conviction (IJ at 3).

With respect to criminal conduct required by the statute, the court in *R. v. Jawahir*, EWCA Crim. J0606-14 (1996), held that the government must prove that the offender "played some part in" the evasion operation. The offender does not need to commit any act of deceit or fraud against a customs officer (*e.g.*, falsely declaring to a customs officer that he is not carrying any prohibited goods when in fact he is carrying prohibited goods in his luggage). *See A.G. Reference* (No. 1 of 1981) (1982) Q.B. 848. Nor does he need to be a member of or associated with the original smuggling team. *See R. v. Neal*, 77 Cr. App. R. 283 (1983). Thus, in order to convict someone of violating section 170(2) of CEMA, the government must prove at a minimum that the offender: (1) knowingly concerned himself in an operation designed to evade the prohibition or restriction, and (2) that he played some part in that operation, irrespective of his role in the operation.

We now examine whether the elements of this crime constitute a crime involving moral turpitude. The Immigration Judge found that the statute involved conduct that was inherently fraudulent (IJ at 3). However, a violator of the statute need not commit any act of deceit on a customs officer, nor does he or she need to a be part of the smuggling team (*i.e.*, offender does not need to perform any deceptive act in bringing the prohibited or restricted goods into the United Kingdom). For example, a business owner who knowingly stored smuggled and prohibited goods in his warehouse can be held in violation of the statute because he knowingly played some part in

the enterprise. *See R. v. Neal*, 77 Cr. App. R. 283 (providing a hypothetical example of the various participants in the evasion operation that can be held in violation of the statute, including the owner of a building that stored the uncustomed goods). Therefore, the statute requires at a minimum that the offender engaged in some sort of dishonest conduct in violating the statute but not necessarily conduct that can be deemed "inherently fraudulent."

This statute otherwise does not involve "conduct that shocks the public conscience as being inherently vile, base, or depraved, and contrary to the accepted rules of morality and the duties owed between persons to society in general. *Mendez v. Mukasey*, 547 F.3d 345, 347 (2d Cir. 2008) (internal citations omitted); *see also Silva-Trevino III*, 26 I&N Dec. at 834. As the minimal conduct required under this statute is that the person knowingly played some part in the evasion operation, there is a realistic probability that a person may be convicted under the statute for conduct less that which is without doing anything that would be deemed inherently base, vile, or depraved. *See e.g., R. v. Neal*, 77 Cr. App. R. 283 (providing a hypothetical example of the various participants in the evasion operation that can be held in violation of the statute, including the owner of a building that stored the uncustomed goods). The United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, has held that, absent the essential element of the intent to defraud, crimes involving dishonesty or deceit alone are not crimes involving moral turpitude. *See Mendez v. Barr*, 960 F.3d 80, 86 (2d Cir. 2020) (holding that "almost all crimes involve – some dishonest and deceitful behavior, which explains why our past cases ... require more to hold that a crime categorically constitutes a CIMT."); *see also Jang v. Garland*, 33 F.4th 154 (2d Cir. 2022) (holding that a New York conviction for attempted second-degree money laundering did not constitute a crime involving moral turpitude); *see also Matter of Tiwari*, 19 I&N Dec. 875, 876, 882 (BIA 1989) (holding that smuggling an alien into the U.S. without "financial gain" is not a crime involving moral turpitude); *Matter of V-*, 1 I&N Dec. 293 (BIA 1942) (holding that the importation of narcotics in violation of the Narcotic Drugs Import and Export Act is not a crime involving moral turpitude even if it involves deceit).

To conclude, section 170(2) of CEMA can be violated in a myriad of ways, some of which would not necessarily involve moral turpitude under the relevant case law. Thus, given the breadth of the crime at issue in this case, we conclude that section 170(2) of CEMA (1979) is not categorically a crime involving moral turpitude.

The Immigration Judge did not address the remaining charges under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the INA, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), (C). We will therefore remand the record for the Immigration Judge to further address the issue of removability and any other relevant matters.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained, and the Immigration Judge's decision is vacated.

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