



The Commonwealth of Massachusetts

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys **July 2014**

U.S. Court of Appeals for the First Circuit

Jaquez v. Holder, No. 13-2186, 2014 U.S. App. LEXIS 13409 (July 15, 2014)

The Petitioner, Mr. Jose Manuel Jaquez, challenged the Immigration Judge's ("IJ") discretionary denial of relief from removal. The IJ based his denial on numerous Department of Children and Family (DCF) Child Abuse/Neglect reports against Mr. Jaquez and Mr. Jaquez's admission to DCF investigators that he inflicted physical and emotional abuse upon his daughter. Since the Court lacked jurisdiction to review discretionary findings or a discretionary denial of relief by an immigration judge unless the appeal raised a constitutional claim or question of law, which this appeal did not, the Court dismissed the appeal.

Practice Tip

In removal proceedings, many forms of relief from removal can be denied by the IJ in the exercise of discretion. Thus, even if the respondent meets the statutory requirements for relief, the Judge may still deny relief. Such decisions are unreviewable by an appellate court. As Mr. Jaquez's situation exemplifies, an IJ may have access to more than a respondent's criminal record and can rely on a broad array of information as the basis of his decision.

Kaufmann v. Holder, 2014 U.S. App. LEXIS 13329 (July 14, 2014)

The petitioner, Peter Heinz Kaufmann, was convicted under Connecticut law of possession of child pornography. The IJ and the Board of Immigration Appeals ("BIA") found him removable under 8. U.S.C. §1101(a)(43)(I), which makes possession of child pornography an aggravated felony. On appeal, Mr. Kaufmann argued that the Connecticut offense did not fall within the federal definition of child pornography and he should therefore not be deportable.

To determine whether a state offense matches the federal definition, the courts must apply the categorical approach to see whether the elements of a state crime line up with the elements of the federal offense. When applying the categorical approach, immigration courts are not concerned with what the defendant actually did, only with the statutory offense. However, when a statute is "divisible" in that it contains alternative elements constituting separate offenses under the statute, courts may look beyond the statute to

the record of conviction (a limited class of documents, such as a complaint or indictment, docket sheet, and plea colloquy, but not the police report) to determine the specific offense for which the individual was convicted. This secondary approach is called the modified categorical approach.

Here, the Connecticut statute was broader than the federal definition and included “erotic fondling” which was defined as “touching a person’s clothed or unclothed genitals, pubic area, buttocks...or breasts.” Mr. Kaufmann’s argument was that fondling of clothed areas of the body does not fall within the federal definition and therefore the government could not show he had been convicted of an aggravated felony. However, because the court found that the Connecticut statute was divisible and some categories satisfied the federal definition while others did not, they applied the modified categorical approach. The court looked to the plea colloquy, which included admissions from Mr. Kaufmann that the images on his computer were of “children having sex.” The court decided that “no reasonable person” would ascribe the term “having sex” to mean clothed fondling and therefore, using the modified categorical approach, it was clear that the conviction fell within the federal definition of child pornography.

Practice Tip

This case is an excellent example of how the record of conviction can help or harm a noncitizen client. If the plea colloquy had been silent as to the nature of the images or had affirmatively stated that the images were of “clothed fondling,” Mr. Kaufmann would not have been deportable as an aggravated felon. When dealing with divisible statutes, defense attorneys should work with the IIU to determine whether there are ways that the record of conviction can be structured to help protect the client.

Massachusetts Appeals Court (unpublished)

Guardianship of De La Cruz, No. 14-P-505, 2014 Mass. App. Unpub. LEXIS 894 (July 31, 2014)

Special Immigrant Juvenile (SIJ) Status is a federal law that helps certain undocumented youth in the state court system to obtain lawful immigration status. Under the federal statute, the first step in the SIJ process requires a state court with jurisdiction over the child to make the following findings:

1. That the juvenile is dependent on the court or the court has legally committed the child to, or placed him under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court;
2. Reunification with one or both parents is not viable due to abuse, neglect or abandonment of the child or a similar basis under state law; and
3. It is not in the child’s best interest to be returned to his or her country of nationality or last habitual residence.

If a Juvenile or Probate Court judge issues these findings, the juvenile can then apply for SIJ status with the United States Citizenship and Immigration Services (USCIS). It is USCIS that adjudicates the SIJ status and determines whether to issue the juvenile a green card.

In the instant case, Jorge Guiterrea De La Cruz was before the Probate Court on a guardianship matter. As part of the proceedings, Jorge requested SIJ findings from the judge. Jorge submitted a proposed order that included all the necessary findings to establish the first step of the process and enable him to apply for SIJ status with the federal government. The judge approved the petition for guardianship, but denied the

proposed order inasmuch as it stated that reunification with Jorge's father was not possible and that it was not in Jorge's best interest to return to Guatemala. Jorge appealed the decision.

The Court of Appeals found that the Probate Court judge's findings were "totally unsupported" because there was ample evidence that Jorge's father "severely and unrelentingly" abused Jorge and his mother was unable to protect him, which led to the conclusion that reunification with his parents was not viable and it would not be in Jorge's best interest to return to Guatemala. The court vacated the probate judge's order and ordered entry of the necessary SIJ findings in their entirety.

Practice Tip

For many undocumented children, SIJ is the only pathway to legal status in the U.S. This decision provides strong support that SIJ findings are legitimate and within the purview of the state courts. When representing undocumented children, attorneys representing minors in the Probate and Juvenile Courts should consider pursuing SIJ findings when possible. The IIU can provide assistance with determining whether clients are eligible for SIJ and with sample filings for the required findings.

Board of Immigration Appeals

Matter of Chairez-Castrejon, 26 I & N Dec. 349 (2014)

This case is the Board of Immigration Appeal's (BIA) first published opinion related to the categorical approach since the Supreme Court ruled a year ago in *Descamps v. United States*, 570 U.S. ___, 133 S. Ct. 2276 (2013). Generally, the categorical approach is used to determine whether a particular state criminal conviction matches the federal criminal grounds of deportability or inadmissibility. In *Descamps*, the Supreme Court clearly reasserted that under the categorical approach, the court is not concerned with what the defendant actually did, but only with the "elements," those facts that must be found beyond a reasonable doubt by a unanimous jury, of the statutory offense. Under this approach, courts look to the minimum conduct necessary to satisfy the elements of state offense and if those elements do not match the federal removal ground, the noncitizen is not subject to removal – so long as there is a "realistic probability" that a person would be prosecuted for that minimum conduct. Only when a statute is considered "divisible" may courts look beyond the statute to the record of conviction (a limited class of documents, such as a complaint or indictment, docket sheet, and plea colloquy, but not the police report) to determine the specific offense for which the individual was convicted. This secondary approach is called the modified categorical approach.

In the instant case, the BIA considered whether a respondent's conviction for discharging a firearm in violation of the Utah laws was a deportable offense and an aggravated felony under the immigration statutes. The issue forced the Board to revisit its method of analyzing divisibility as set out in *Matter of Lanferman*, 25 I&N Dec. 721 (2012), in which it stated that a statute is divisible whenever its elements "could be satisfied either by removable or non-removable conduct," or whether it would adopt the method as set forth in *Descamps*. Despite the arguments of the Department of Homeland Security to the contrary, the Board held that in light of the Supreme Court's ruling in *Descamps*, it was prohibited from applying the divisibility analysis in *Lanferman* and it withdrew that decision to the extent it is inconsistent with *Descamps*. Therefore, under both the Supreme Court and the BIA, a "statute is divisible, so as to warrant a modified categorical inquiry, only if

- (1) It lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of ‘elements,’ more than one combination of which could support a conviction; and
- (2) At least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the [federal definition].”

Chairez- Castrejon at 353.

For a more nuanced discussion of *Chairez*, including how the Board applied the “realistic probability” analysis discussed above and how burden of proof impacts the categorical analysis, see the National Immigration Project and the Immigrant Defense Project Practice Advisory [here](#).

Practice Tip

Since *Descamps*, immigration practitioners have been waiting for the BIA to adopt the test the Supreme Court established. Having accepted the *Descamps* method, this decision may impact which Massachusetts criminal offenses fall into the various categories of inadmissibility and deportability. When analyzing the immigration consequences of criminal convictions, the IIU can help understand and apply *Descamps*. As always, appointed counsel should seek out the assistance of the IIU to determine the consequences for individual clients.