

09-4834-ag
Oouch v. Holder

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2010

(Submitted: September 2, 2010 Decided: January 28, 2011)

Docket No. 09-4834-ag

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ALEXANDER OOUCH, a.k.a. ALEXANDER STASHA, a.k.a. ALEXANDER
OUSH,

Petitioner,

- v.-

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ERIC H.
HOLDER, JR., in his capacity as Attorney General of the
United States,

Respondents.

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Before: JACOBS, Chief Judge, RAGGI, Circuit
 Judge, RAKOFF, District Judge.*

Petitioner seeks review of an October 23, 2009 decision
of the Board of Immigration Appeals, dismissing his appeal
from a June 1, 2009 decision of an immigration judge deeming

* The Honorable Jed S. Rakoff, District Judge, United States District Court for the Southern District of New York, sitting by designation.

1 him removable as an aggravated felon under 8 U.S.C.
2 § 1227(a)(2)(A)(iii) and denying cancellation of removal,
3 for his conviction of use of a child in a sexual performance
4 in violation of N.Y. Penal Law § 263.05. **DISMISSED.**

5 FREDERICK P. KORKOSZ, Pearson &
6 Korkosz, Albany, NY, for
7 Petitioner (on submission).
8

9 STEFANIE NOTARINO HENNES, Office
10 of Immigration Litigation,
11 United States Department of
12 Justice, Washington, DC (Tony
13 West, Leslie McKay, and Kelly J.
14 Walls on the brief), for
15 Respondents (on submission).
16

17 DENNIS JACOBS, Chief Judge:
18

19 Petitioner Alexander Oouch, a native and citizen of
20 Russia, was convicted of (inter alia) the use of a child in
21 a sexual performance in violation of New York Penal Law
22 ("N.Y.P.L.") § 263.05. Based on that conviction, the
23 Department of Homeland Security issued a Notice to Appear,
24 initiating removal proceedings under 8 U.S.C.
25 § 1227(a)(2)(A)(iii) for the aggravated felony of "sexual
26 abuse of a minor" in 8 U.S.C. § 1101(a)(43)(A).¹ On June 1,

¹ Oouch was also convicted of N.Y.P.L. § 263.16, Possessing a Sexual Performance by a Child, which could have been a ground for removability under 8 U.S.C. § 1101(a)(43)(I). The Notice to Appear, however, did not list the conviction as a ground for removal.

1 2009, an immigration judge determined he was removable and
2 ineligible for cancellation of removal.

3 The Board of Immigration Appeals ("BIA") dismissed his
4 appeal on October 23, 2009, applying the categorical
5 approach set forth in Taylor v. United States, 495 U.S. 575
6 (1990), to determine that the conviction was an aggravated
7 felony. The BIA reasoned that, although N.Y.P.L. § 263.05
8 is divisible, all divisions constitute sexual abuse of a
9 minor, so that any conviction under the statute constitutes
10 an aggravated felony.

11 Oouch filed a timely petition for our review, which
12 presents a question of law: whether N.Y.P.L. § 263.05
13 constitutes an "aggravated felony" for purposes of 8 U.S.C.
14 § 1227(a)(2)(A)(iii). We dismiss the petition.

15
16 **I**

17 An alien who has committed an aggravated felony can be
18 removed from the country upon the order of the Attorney
19 General. See 8 U.S.C. § 1227(a)(2)(A)(iii). We lack
20 jurisdiction to review any final order removing an alien who
21 committed an aggravated felony covered in
22 § 1227(a)(2)(A)(iii). See § 1252(a)(2)(C). We retain

1 jurisdiction, however, to determine constitutional claims
2 and questions of law that arise from BIA proceedings. See
3 § 1252(a)(2)(D). Whether an offense is an aggravated felony
4 for purposes of the immigration laws is a question of law.
5 See Blake v. Gonzales, 481 F.3d 152, 155-56 (2d Cir. 2007).
6 We review these legal and constitutional issues de novo.
7 Pierre v. Gonzales, 502 F.3d 109, 113 (2d Cir. 2007).

8 One category of aggravated felony is "sexual abuse of a
9 minor." 8 U.S.C. § 1101(a)(43)(A). Oouch was charged with
10 removability on that basis. We therefore consider, de novo,
11 whether a violation of N.Y.P.L. § 263.05 constitutes "sexual
12 abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A), with
13 Chevron deference as to the BIA's construal of the
14 Immigration and Nationality Act ("INA"), see Joaquin-Porras
15 v. Gonzales, 435 F.3d 172, 178 (2d Cir. 2006). The inquiry
16 determines our jurisdiction: If Oouch's conviction is an
17 aggravated felony, we must dismiss the petition for lack of
18 jurisdiction; if not, we may exercise jurisdiction and
19 vacate the order of removal. See Sui v. INS, 250 F.3d 105,
20 110 (2d Cir. 2001).

21
22 **A**

1 The BIA is charged with interpreting and enforcing the
2 INA, including 8 U.S.C. § 1101(a)(43)(A). See § 1103(a)(1);
3 8 C.F.R. § 1003.1. The BIA's interpretation of the INA is
4 entitled to the deference prescribed in Chevron, U.S.A.,
5 Inc. v. Natural Resources Defense Council, Inc., 467 U.S.
6 837 (1984). Joaquin-Porras, 435 F.3d at 178; Sui, 250 F.3d
7 at 111-12. Congress provided no further definition of the
8 term "sexual abuse of a minor" in § 1101(a)(43)(A). Since
9 the term is not self-defining and is of uncertain reach, we
10 cannot conclude in this case that the intent of Congress is
11 manifest.

12 The BIA analyzed and interpreted the term "sexual abuse
13 of a minor" in In re Rodriguez-Rodriguez, 22 I. & N. Dec.
14 991, 994-96 (BIA 1999). In so doing, it consulted other
15 federal statutes that define similar sex offenses. The
16 narrow definition of "sexual abuse" in 18 U.S.C. §§ 2242,
17 2243, and 2246 was deemed inapposite because it required
18 contact with the victim. Id. at 996. Instead, the BIA
19 adopted the meaning of "sexual abuse" in 18 U.S.C. § 3509²

² The statute concerns the rights of child victims and child witnesses. 18 U.S.C. § 3509(a)(8) states:

[T]he term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or

1 to operate as a "guide in identifying the types of crimes
2 [it] would consider to be sexual abuse of a minor." Id.
3 The BIA adopted so broad and flexible a definition in view
4 of the congressional intent to "expand the definition of an
5 aggravated felony and to provide a comprehensive statutory
6 scheme to cover crimes against children" through the grounds
7 of deportability added by the Illegal Immigration Reform and
8 Immigrant Responsibility Act of 1996, Pub. L. No. 104-208,
9 Div. C, 110 Stat. 3009-546. Id. at 994, 996.

10 We have already held that this definition is entitled
11 to Chevron deference. See Mugalli v. Ashcroft, 258 F.3d 52,
12 56 (2d Cir. 2001). Oouch urges us to follow the Ninth
13 Circuit's in banc decision to the contrary in Estrada-
14 Espinoza v. Mukasey, 546 F.3d 1147 (9th Cir. 2008) (in
15 banc), which declined to give Chevron deference to
16 Rodriguez-Rodriguez in a case involving a statutory rape
17 statute. But since Estrada-Espinoza is contrary to Mugalli,

coercion of a child to engage in, or assist
another person to engage in, sexually explicit
conduct or the rape, molestation, prostitution, or
other form of sexual exploitation of children, or
incest with children.

"Sexually explicit conduct" is defined further in
§ 3509(a)(9).

1 we adhere to our Circuit law.³

2
3 **B**

4 In assessing whether an alien's conviction renders him
5 removable, we use a categorical approach that looks to the
6 elements of the penal statute rather than the particulars of
7 the alien's conduct. Taylor, 495 U.S. at 602; Canada v.
8 Gonzales, 448 F.3d 560, 565 (2d Cir. 2006). The inquiry is
9 whether "every set of facts violating a statute" satisfies
10 the criteria for removability; in effect, only the minimum
11 criminal conduct necessary for a conviction is relevant.
12 Abimbola v. Ashcroft, 378 F.3d 173, 176 (2d Cir. 2004).

13 The inquiry gets complicated when a criminal statute
14 proscribes several classes of criminal acts--some of them
15 grounds for removal, and some not. See Dulal-Whiteway v.
16 U.S. Dep't of Homeland Sec., 501 F.3d 116, 121-22 (2d Cir.

³ Other circuits that have considered the issue have either expressly granted deference to Rodriguez-Rodriguez or have assumed that § 3509(a)(8) provides an appropriate definition of "sexual abuse of a minor." See, e.g., Gaiskov v. Holder, 567 F.3d 832, 838 (7th Cir. 2009); Bahar v. Ashcroft, 264 F.3d 1309, 1312 (11th Cir. 2001). As it happens, the Ninth Circuit has retreated from its analysis, and has limited Estrada-Espinoza to statutory rape laws. See United States v. Medina-Villa, 567 F.3d 507, 515 (9th Cir. 2009).

1 2007), abrogated on other grounds by Nijhawan v. Holder, 129
2 S. Ct. 2294, 2298 (2009). For such a “divisible statute,”
3 the record of conviction may be reviewed under a modified
4 categorical approach to ascertain which class of criminal
5 act furnished the basis for the defendant’s conviction.
6 See, e.g., id. at 124-27. We have not yet fixed on an
7 approach for determining when a statute is thus divisible.⁴
8 There is no need to do that now, however; N.Y.P.L. § 263.05
9 is drafted as discrete offenses in a disjunctive list. It
10 is settled in this Circuit that such structure establishes
11 divisibility, if one or more offenses in the list (but not
12 all) are grounds for removal. See id. at 126.

13 We must therefore consider whether N.Y.P.L. § 263.05 is
14 divisible, by analyzing the discrete offenses independently.
15 If they yield different results, the statute is divisible
16 (and the additional steps under the modified categorical
17 approach must be undertaken); otherwise, the statute is
18 indivisible and our inquiry is complete.

⁴ We have recently discussed three potential approaches without selecting one. See Lanferman v. Bd. of Immigration Appeals, 576 F.3d 84, 90-92 (2d Cir. 2009); Dulal-Whiteway, 501 F.3d at 126-28.

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II

Since the BIA has no interpretive responsibility over a state criminal statute, we review de novo its interpretation of the New York Penal Law. See Michel v. INS, 206 F.3d 253, 262 (2d Cir. 2000). Oouch was convicted under N.Y.P.L. § 263.05, which consists of [i] a “preliminary clause,” [ii] a “general clause,” and [iii] a “parental clause”:

[i] A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof [ii] he employs, authorizes or induces a child less than seventeen years of age to engage in a sexual performance or [iii] being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

We consider the general and parental clauses in turn.

A

As to the general clause, we consider whether the types of performances, the conduct that is criminalized, and the required mental state are all equivalent to or narrower than their corollaries in the BIA’s interpretation.

A “sexual performance” under the N.Y.P.L. is one that exhibits “sexual conduct.”⁵ See § 263.00(1). Under the

⁵ “Sexual conduct” is defined as

1 federal statute, "sexual abuse" entails "sexually explicit
2 conduct." See 18 U.S.C. § 3509(a)(8).⁶ Each category of
3 "sexual conduct" under New York law is subsumed in the
4 federal definition of "sexually explicit conduct."⁷ The

actual or simulated sexual intercourse, oral
sexual conduct, anal sexual conduct, sexual
bestiality, masturbation, sado-masochistic abuse,
or lewd exhibition of the genitals.

See N.Y.P.L. § 263.00(3).

⁶ "Sexually explicit conduct" is defined as:

[A]ctual or simulated--

- (A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;
- (B) bestiality;
- (C) masturbation;
- (D) lascivious exhibition of the genitals or pubic area of a person or animal; or
- (E) sadistic or masochistic abuse

See 18 U.S.C. § 3509(a)(9).

⁷ To avoid a recursive definition, two subparts of sexual conduct--oral sexual conduct and anal sexual conduct--are defined by reference to N.Y.P.L. § 130.00(2). See § 263.00(7). These definitions in § 130.00(2) are covered by the corresponding terms described in 18 U.S.C. § 3509(a)(9)(A).

1 state law therefore does not cover any performances not
2 covered by the federal definition of "sexually explicit
3 conduct" from the BIA's interpretation.

4 Similarly, the conduct that triggers liability under
5 the general clause--employing, authorizing, or inducing⁸--is
6 subsumed in the broader range of prohibited actions in the
7 federal statute.⁹ Oouch argues that the state statutory
8 text prohibits conduct that is not specifically included in
9 the federal statutory text: to "authorize" a sexual
10 performance. However, the BIA has cautioned that its
11 reference to 18 U.S.C. § 3509(a) was intended as a guide

⁸ The relevant text from N.Y.P.L. § 263.05:

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof *he employs, authorizes or induces* a child less than seventeen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance. (emphasis added)

⁹ Section 3509(a) (8) states:

[T]he term "sexual abuse" includes the *employment, use, persuasion, inducement, enticement, or coercion* of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children. (emphasis added)

1 rather than a definitive standard. Rodriguez-Rodriguez, 22
2 I. & N. Dec. at 996. Section 3509(a) itself defines "sexual
3 abuse" by non-exhaustive inclusion, dictating that "the term
4 'sexual abuse' *includes* the employment, use"
5 (emphasis added). Moreover, to "authorize" a child to
6 engage in a sexual performance has the same effect as
7 "employing" or "inducing" the child to perform because the
8 law does not view minors as autonomous actors. A person in
9 a position to "authorize" a child's conduct has a degree of
10 control (other than as a parent, guardian, or legal
11 custodian) tantamount to control by employment or
12 inducement. It is the element of control that makes the
13 performance more likely to occur when a defendant is
14 offering or pimping the child as a participant. In view of
15 these shared characteristics and the guidance from the list
16 of prohibited actions in the federal statutory text, an act
17 "authorizing" a child to engage in a sexual performance
18 constitutes "sexual abuse of a minor" consistent with
19 Congress's intent to define that term expansively and
20 comprehensively. See Rodriguez-Rodriguez, 22 I. & N. Dec.
21 at 994 (recognizing that Congress's intent in adding
22 § 1101(a)(43)(A) was "to expand the definition of an

1 aggravated felony and to provide a comprehensive statutory
2 scheme to cover crimes against children”).

3 We must also consider whether the mental state
4 requirement of the general clause accords with the
5 requirement in the federal statute. In Leocal v. Ashcroft,
6 the Supreme Court concluded that a conviction under a
7 Florida statute for causing bodily harm while driving under
8 the influence could not constitute the aggravated felony of
9 a “crime of violence.” 543 U.S. 1, 5-6 (2004). It reasoned
10 that a “crime of violence” entailed a higher degree of
11 intent than mere negligent conduct, while the state statute
12 required no proof of any mental state. Id. Although the
13 decision hinged upon a specific interpretation of a “crime
14 of violence” rather than “sexual abuse of a minor,” it
15 counsels caution when a state statute has a lesser mental
16 state requirement.

17 The general clause of N.Y.P.L. § 263.05 has a
18 heightened mental state requirement, because it follows
19 directly the “knowing the character and content thereof”
20 wording from the preliminary clause. This mental state is
21 fully as stringent as the mental state implied by the
22 actions enumerated in the federal statutory text.

1 Because the relevant attributes of the general clause
2 (the types of performances, the conduct that is
3 criminalized, and the required mental state) all cover an
4 equivalent or narrower range of conduct than the BIA’s
5 interpretation, the general clause categorically constitutes
6 “sexual abuse of a minor.”

7

8 **B**

9 The parental clause is more complicated. The statute
10 is ambiguous as to whether the requirement of “knowing the
11 character and content thereof” also applies to the parental
12 clause. See Gonzalez v. Ashcroft, 369 F. Supp. 2d 442, 449-
13 51 (S.D.N.Y. 2005) (recognizing and analyzing ambiguity).
14 The Gonzalez opinion argued that the grammar of the statute
15 militated against the conclusion that the parental clause
16 requires awareness of the nature of the performance. Id. at
17 454. It followed that the statute criminalized conduct
18 beyond “sexual abuse of a minor,” and therefore did not
19 constitute an aggravated felony. Id.

20 We conclude that the phrase “knowing the character and
21 content thereof” applies as well to the parental clause.
22 First, a reading of the parental clause in conjunction with

1 the preliminary clause yields a coherent (if not exemplary)
2 English sentence:

3 A person is guilty of the use of a child in a
4 sexual performance if knowing the character and
5 content thereof . . . being a parent, legal
6 guardian or custodian of such child, he consents
7 to the participation by such child in a sexual
8 performance.
9

10 Second, if the mental state requirement is read out of
11 the parental clause, there would be serious constitutional
12 concerns about felony liability for caretakers who were
13 unaware of the nature of the performance consented to.
14 Offenses that require no mens rea are disfavored, and some
15 indicium of legislative intent for strict liability is
16 generally required before dispensing with mens rea as an
17 element. Staples v. United States, 511 U.S. 600, 606-07
18 (1994); see United States v. Alameh, 341 F.3d 167, 175 (2d
19 Cir. 2003) (declining to limit "knowledge" mental state to
20 only one clause of naturalization provision 18 U.S.C.
21 § 1425(b)). The New York legislature provides specific
22 guidance that when a penal statute contains only one mental
23 state requirement, "it is presumed to apply to every element
24 of the offense unless an intent to limit its application
25 clearly appears." N.Y.P.L. § 15.15(1). In view of these
26 concerns and the absence of any clear legislative intent for

1 strict liability, we have little trouble concluding that the
2 legislature intended the mental state to apply to the
3 parental clause.

4 Third, we disagree with the Gonzalez court's analysis.
5 Gonzalez rejected the reading we adopt, reasoning that this
6 interpretation penalizes only conduct already penalized by
7 the general clause, thereby rendering the parental clause
8 superfluous. See Gonzalez, 369 F. Supp. 2d at 450. At a
9 minimum, the plain wording draws two distinctions that
10 redeem the parental clause from mere surplusage. The action
11 penalized by the parental clause--to "consent"--does not
12 appear in the general clause; although the general clause
13 includes the similar act of "authoriz[ing]," there is no
14 reason to conclude that the two terms are necessarily
15 coterminous. (The power of consent would seem to be lodged
16 only in a person who is a parent, or in a parent's place.)
17 Furthermore, the general clause prohibits acts relating to
18 "engage[ment]" in a sexual performance, whereas the parental
19 clause uses the arguably broader word "participation." We
20 defer to New York courts to illuminate these distinctions;
21 for our purposes it suffices that they describe conduct
22 criminalized by the parental clause but not the general

1 clause.

2 Fourth, although New York cases do not illuminate the
3 requisite mental state for the parental clause, other state
4 materials (in the margin¹⁰) suggest the “knowing the
5 character and content thereof” standard applies. These
6 sources counsel against recognizing a mens rea disparity in
7 an unfamiliar state statute where none is required or
8 recognized in practice.

9 Finally, even if the legislature intended the “knowing”
10 requirement to apply only to the general clause, the act of
11 “consent” in the parental clause presumes awareness of the
12 nature of the performance: One cannot consent fully to a
13 sexual performance if the nature of the performance is
14 unknown. The Supreme Court reached a similar conclusion in
15 Leocal.¹¹

¹⁰ Practice commentary (written by a New York State judge) accompanying the statute indicates that the mental state applies across the entire statute. See William C. Donnino, Practice Commentary, appended to N.Y.P.L. § 263.00 (McKinney’s 2008). Moreover, a model jury charge for the parental clause includes “knew the character and content of the performance” as an element. See Howard G. Leventhal, 2 Charges to Jury & Requests to Charge in Crim. Case in N.Y. § 70:33.

¹¹ It reasoned that, in light of the context and surrounding terms, the word “use” provided an implicit mens rea element, requiring a higher degree of intent than

1 Having established that the parental clause has a
2 knowledge requirement equivalent or comparable to the
3 general clause, a conviction under the parental clause is an
4 aggravated felony for the same reasons as the general
5 clause.

6
7 **III**

8 Oouch argues that the conduct criminalized by N.Y.P.L.
9 § 263.05 is described more closely by the category of
10 aggravated felony in 8 U.S.C. § 1101(a)(43)(I): offenses
11 relating to child pornography. He asserts that § 263.05
12 does not categorically constitute a child pornography
13 offense for purposes of 8 U.S.C. § 1101(a)(43)(I). This
14 argument is irrelevant. The document that initiated Oouch's
15 removal specified 8 U.S.C. § 1101(a)(43)(A) as the only
16 basis for removal. The choice of grounds for removal is an
17 unreviewable exercise of prosecutorial discretion. See 8
18 U.S.C. § 1252(g); Ali v. Mukasey, 524 F.3d 145, 150 (2d Cir.
19 2008). Even if the offense were described more aptly as

"negligent or merely accidental conduct." 543 U.S. at 9;
see also People v. Velasquez, 528 N.Y.S.2d 502, 503 (Sup.
Ct. 1988) (interpreting "knowingly" mental state for
possession of a defaced firearm statute to apply to both
possession and defacement elements).

1 child pornography, it constitutes "sexual abuse of a minor"
2 and that is a proper ground for removal.

3

4

CONCLUSION

5 The state statute, N.Y.P.L. § 263.05, is not divisible,
6 and any conviction under it categorically constitutes
7 "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A)
8 for purposes of removal for an aggravated felony pursuant to
9 8 U.S.C. § 1227(a)(2)(A)(iii). Having concluded, under 8
10 U.S.C. § 1252(a)(2)(D), that N.Y.P.L. § 263.05 was properly
11 interpreted as an aggravated felony, it follows that we lack
12 jurisdiction to review the removability order. See
13 § 1252(a)(2)(C). The petition for review is therefore
14 dismissed.