

10-599-ag
Prus v. Holder

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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7 August Term, 2011
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9 (Argued: September 13, 2011 Decided: September 28, 2011)
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11 Docket No. 10-599-ag
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14 OKSANA NIKOLAYEVNA PRUS,
15

16 *Petitioner,*
17

18 -v.-
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20 ERIC H. HOLDER, JR., United States Attorney General,
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22 *Respondent.*
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26 Before:

27 CALABRESI, WESLEY, and LYNCH, *Circuit Judges.*
28

29 Petition for review of a Board of Immigration Appeals
30 order, which declined to reconsider its previous decision
31 that Petitioner had been convicted of an aggravated felony.
32 The order dismissed Petitioner's appeal from an Immigration
33 Judge's order of removal, which denied Petitioner's
34 application for asylum, withholding of removal, and relief
35 under the Convention Against Torture. We hold that the
36 Petitioner's New York state offense of promoting
37 prostitution in the third degree did not constitute an
38 aggravated felony, and thus, Petitioner is not removable.
39

40 Petition **GRANTED.**
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43 ANNE E. DOEBLER, Buffalo, NY, *for Petitioner.*
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1 JEFFREY BERNSTEIN, Attorney, U.S. Department of
2 Justice, Civil Division (Tony West, Assistant
3 Attorney General, Civil Division, Richard M.
4 Evans, Assistant Director, Allen W. Hausman,
5 Senior Litigation Counsel, Office of
6 Immigration Litigation, *on the brief*), for
7 Eric H. Holder, Jr., United States Attorney
8 General, Washington, D.C., *for Respondent*.
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12 PER CURIAM:

13 Petitioner Oksana Nikolayevna Prus was convicted in New
14 York for promoting prostitution in the third degree. The
15 Board of Immigration Appeals ("BIA") found her removable,
16 concluding that her offense constituted an aggravated felony
17 under the Immigration and Nationality Act ("INA")
18 § 101(a)(43)(K)(i), 8 U.S.C. § 1101(a)(43)(K)(i). Prus
19 seeks review of the BIA's order declining to reconsider
20 whether she had been convicted of an aggravated felony and
21 dismissing her appeal from an order of removal. Prus argues
22 that her offense does not constitute an aggravated felony
23 because New York law defines "prostitution" more broadly
24 than federal law does for the INA. We agree and hold that
25 the BIA erred in finding that Prus's offense was an
26 aggravated felony. Accordingly, we grant the petition for
27 review. We vacate the order of removal and remand to the
28 BIA to terminate Prus's removal proceedings.

Background

Prus, a native of Ukraine, entered the United States in May 1995 as a derivative refugee. In June 1996, she adjusted her status from refugee to lawful permanent resident. In June 2007, she was convicted of promoting prostitution in the third degree, in violation of New York Penal Law §§ 20.00 and 230.25. In November 2007, Prus was served with a Notice to Appear charging her as removable under INA § 237(a)(2)(A)(iii) for having been convicted of an aggravated felony under INA § 101(a)(43)(K)(i).

In her removal proceedings, Prus admitted her conviction but contested removability. She argued that the New York conviction for promoting prostitution was not an aggravated felony under INA § 101(a)(43)(K)(i). The Immigration Judge ("IJ") agreed. The IJ held that Prus's conviction did not constitute an aggravated felony because New York's definition of prostitution is broader than the the INA's applicable definition, which includes only sexual intercourse for hire. The IJ, therefore, terminated Prus's removal proceedings.

The government appealed, and in a June 23, 2009 order, the BIA vacated the IJ's decision. *In re Oksana Nikolayevna*

1 *Prus*, No. A071 310 449 (B.I.A. June 23, 2009), *vacating* No.
2 A071 310 449 (Immig. Ct. Buffalo, NY Jan. 3, 2008). The BIA
3 found that Prus's conviction constituted an aggravated
4 felony. *Id.* The BIA noted that even though New York's
5 definition of prostitution encompassed acts that would not
6 constitute prostitution under the federal law, Prus's
7 offense "'relat[ed] to' the owning, controlling, managing or
8 supervising of a 'prostitution business' as described in the
9 [INA]." *Id.*

10 On remand, Prus filed an application for asylum,
11 withholding of removal, and relief under the Convention
12 Against Torture ("CAT"). The IJ denied Prus's application
13 for relief and ordered her removed to Ukraine. The IJ found
14 that Prus was ineligible for asylum because she had been
15 convicted of an aggravated felony and that she did not meet
16 her burden of proof to establish eligibility for withholding
17 of removal or CAT relief.

18 On January 22, 2010, the BIA dismissed Prus's appeal,
19 declining to reconsider its previous holding that Prus had
20 been convicted of an aggravated felony. *In re Oksana*
21 *Nikolayevna Prus*, No. A071 310 449 (B.I.A. Jan. 22, 2010),
22 *aff'g* No. A071 310 449 (Immig. Ct. Buffalo, NY Sept. 28,

1 2009). The BIA also agreed with the IJ that Prus was
2 ineligible for asylum and that she did not establish her
3 eligibility for withholding of removal or relief under the
4 CAT. *Id.* Prus now petitions this Court to review the BIA's
5 decision.

6 Discussion

7 Prus challenges the BIA's finding that her New York
8 conviction for promoting prostitution in the third degree
9 constitutes an aggravated felony under INA
10 § 101(a)(43)(K)(i).¹ Federal courts lack jurisdiction to
11 consider a petition for review filed by an alien who is
12 removable due to commission of an aggravated felony, but we
13 retain jurisdiction to review whether an alien has, as a
14 matter of law, committed such an aggravated felony.

15 *Kamagate v. Ashcroft*, 385 F.3d 144, 149 (2d Cir. 2004).

16 We review the BIA's determination that a state
17 conviction constitutes an aggravated felony *de novo*,
18 *Richards v. Ashcroft*, 400 F.3d 125, 127 (2d Cir. 2005), and
19 employ the categorical approach to determine whether the
20 crime for which Prus was convicted constitutes an aggravated

¹ INA § 101(a)(43)(K)(i) provides that an aggravated felony includes an offense that "relates to the owning, controlling, managing or supervising of a prostitution business."

1 felony.² “Under this approach, the singular circumstances
2 of an individual petitioner’s crimes should not be
3 considered, and only the minimum criminal conduct necessary
4 to sustain a conviction under a given statute is relevant.”
5 *Blake v. Gonzales*, 481 F.3d 152, 156 (2d Cir. 2007)
6 (internal quotation marks and alteration omitted). “If the
7 criminal statute punishes conduct that falls outside the
8 INA’s definition, then the crime does not constitute an
9 aggravated felony.” *Richards*, 400 F.3d at 128.

10 Congress did not define “prostitution” in the INA. The
11 Attorney General, however, has—for a different provision of
12 the INA—defined the term as “engaging in promiscuous sexual
13 intercourse for hire.” 22 C.F.R. § 40.24(b). In *Matter of*
14 *Gonzales-Zoquiapan*, 24 I&N Dec. 549, 553 (BIA 2008), the BIA
15 employed that definition to interpret INA § 212(a)(2)(D),
16 which relates to the inadmissibility of aliens entering the
17 United States to engage in prostitution. Because the term

² We reserve opinion on whether the state statute under which Prus was convicted—New York Penal Law § 230.25(1)—is a divisible or non-divisible statute, and, in turn, whether it requires analysis under the categorical or modified categorical approach. See *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 88–89 (2d Cir. 2009) (per curiam). Because Prus’s record of conviction contains no facts beyond recitations of § 230.25(1) in full, the outcome of our analysis would be the same whichever of the two approaches we applied.

1 prostitution is undefined in the INA, the BIA's reasonable
2 view of the definition of the term in *Matter of Gonzales-*
3 *Zoquiapan* is entitled to *Chevron* deference. See *Xia Fan*
4 *Huang v. Holder*, 591 F.3d 124, 129 (2d Cir. 2010). And
5 because it is "the normal rule of statutory construction
6 that identical words used in different parts of the same act
7 are intended to have the same meaning," the same definition
8 of prostitution should be used to interpret INA
9 § 101(a)(43)(K)(i). *Theodoropoulos v. INS*, 358 F.3d 162,
10 171 (2d Cir. 2004) (quoting *Gustafson v. Alloyd Co.*, 513
11 U.S. 561, 570 (1995)). Thus we conclude that "prostitution"
12 in INA § 101(a)(43)(K)(i) refers to "promiscuous sexual
13 intercourse for hire."

14 Under New York law, a person is guilty of promoting
15 prostitution in the third degree when she knowingly
16 "[a]dvances or profits from prostitution by managing,
17 supervising, controlling or owning, either alone or in
18 association with others, a house of prostitution or a
19 prostitution business or enterprise involving prostitution
20 activity by two or more prostitutes." N.Y. Penal Law
21 § 230.25(1). In New York, "[a] person is guilty of
22 prostitution when such person engages or agrees or offers to

1 engage in sexual conduct with another person in return for a
2 fee." *Id.* § 230.00.

3 Although "sexual conduct" is not defined in Article
4 230, the plain language of the statute makes clear that
5 prostitution in New York encompasses accepting payment for
6 sexual acts beyond the "sexual intercourse" that is the
7 exclusive subject of the immigration-law definition.

8 "Conduct" is an extremely broad term, defined as "the way a
9 person acts," *The American Heritage College Dictionary* 290
10 (3d ed. 2000); a legislature could not plausibly be
11 understood to have used such a broad term if it meant to
12 refer only to the specific act of sexual intercourse.

13 The New York courts have indeed so interpreted the
14 statute. While New York courts have differed in how they
15 have defined the term, and in where they have looked for aid
16 in interpreting it, they have consistently held, over a
17 nearly 40-year period, that the term encompasses acts other
18 than intercourse. For example, in *People v. Block*, 337
19 N.Y.S.2d 153, 156-58 (Cnty. Ct. 1972), the court looked to
20 the definitions of "sexual conduct" in New York Penal Law
21 Articles 235 and 245 (respectively defining the crimes of
22 obscenity and public lewdness) and held that "sexual

1 conduct" for purposes of the definition of prostitution
2 included physical conduct with a "person's clothed or
3 unclothed genitals" or "pubic area."³ Rejecting the *Block*
4 court's reliance on definitions from other articles of the
5 criminal code, the court in *People v. Costello*, 395 N.Y.S.2d
6 139, 141 (Sup. Ct. 1977), reasoned that Article 230
7 "prohibit[ed] the commercial exploitation of sexual
8 gratification," and relied on a "common understanding of the
9 term 'prostitution'" to include "sexual intercourse, deviate
10 sexual intercourse, and masturbation" within the
11 definition.⁴ More recently, the term has been held to
12 encompass acts such as lap dancing in which the dancer's
13 naked body is touched. *People v. Hinzmann*, 677 N.Y.S.2d
14 440, 442 (Crim. Ct. 1998). Yet another court expressed the
15 consensus of these cases that in using the term "sexual
16 conduct," "the legislature opted for an elastic concept
17 which encompassed traditional forms of prostitution but

³ In addition to these definitions, a slightly different, but also expansive, definition of "sexual conduct" appears in New York Penal Law Article 130, which defines the term for purposes of the crimes of sexual assault and abuse.

⁴ See also *People v. Tribble*, N.Y.L.J., Sept. 29, 1992, at 22, col. 3 (Crim. Ct.); *People v. Fink*, N.Y.L.J., May 22, 1992, at 23, col. 4 (Crim. Ct.); *People v. Kovner*, 409 N.Y.S.2d 349, 416 n.* (Sup. Ct. 1978).

1 could also adapt to new methods of selling the arousal of
2 sexual desire." *People v. Medina*, 685 N.Y.S.2d 599, 601
3 (Crim. Ct. 1999). We have identified no New York case that
4 limits the meaning of "prostitution" under New York law to
5 the selling of "sexual intercourse," as it is defined for
6 purposes of federal immigration law.

7 In sum, whatever uncertainty may exist about the
8 precise contours of the New York definition of
9 "prostitution," it is evident that the law encompasses a
10 broader range of sexual activity than the "sexual
11 intercourse" that is the sole subject of the definition
12 applicable in the immigration context. Indeed, it is so
13 evident that the BIA acknowledged that "the Immigration
14 Judge was *correct* in noting that the term 'prostitution'
15 under New York law encompassed acts that fall outside the
16 federal definition of that term." *In re Oksana Nikolayevna*
17 *Prus*, No. A071 310 449 (B.I.A. June 23, 2009) (emphasis
18 added).

19 Nevertheless, the BIA found that Prus's conviction
20 constituted an aggravated felony under INA
21 § 101(a)(43)(K)(i) because the state statute includes
22 conduct that "'relates to the owning, controlling, managing

1 or supervising of a prostitution business.'" *Id.* (quoting
2 INA § 101(a)(43)(K)(i)). The BIA premised its decision on
3 the similarity of the language of the state and federal
4 statutes, finding that "the New York statute similarly
5 requires that the perpetrator of the crime be 'managing,
6 supervising, controlling, or owning' the house of
7 prostitution." *Id.* This was error.

8 The plain language of INA § 101(a)(43)(K)(i) limits the
9 statute's reach to crimes associated with prostitution, not
10 crimes associated with other proscribed conduct. See
11 *Mizrahi v. Gonzales*, 492 F.3d 156, 158-59 (2d Cir. 2007).
12 Thus, while the term "relates to" indicates that a broad
13 array of crimes are encompassed in § 101(a)(43)(K)(i)'s
14 ambit, the provision only encompasses crimes involving
15 conduct meeting the relevant definition of prostitution—not
16 something merely like prostitution. We have previously
17 explained that "the phrase 'relating to' is deemed
18 synonymous to 'in connection with,' 'associated with,' 'with
19 respect to,' and 'with reference to.'" *Kamagate*, 385 F.3d
20 at 154. In *Kamagate*, we concluded that possession of a
21 forged instrument with the intent to deceive, defraud, or
22 injure was a crime "relating to counterfeiting" because the

1 criminalization of possession discouraged the underlying
2 crime of counterfeiting. *Id.* at 155. Contrary to the BIA's
3 interpretation, the term "relates to" in § 101(a)(43)(K)(i)
4 does not bring within the provision's sweep the management
5 of conduct that is like, but is *not*, prostitution. The
6 phrase "relates to" modifies "owning, controlling, managing
7 or supervising"; it does not modify the definition of the
8 underlying crime.⁵

9 Accordingly, because N.Y. Penal Law § 230.25(1)
10 punishes conduct that does not involve a "prostitution
11 business" as the term prostitution is used in the INA,
12 Prus's conviction does not constitute an aggravated felony.
13 *See Richards*, 400 F.3d at 128. Thus, the BIA erred in
14 finding Prus removable. Because Prus is not removable, we
15 need not address her challenge to the agency's denial of her
16 application for asylum, withholding of removal, and CAT
17 relief.

⁵ While this is a case of first impression in this Circuit, the Ninth Circuit addressed the exact issue here in *Depasquale v. Gonzales*, 196 F. App'x 580 (9th Cir. 2006). The Ninth Circuit held that a conviction under a Hawaii statute for promoting prostitution in the second degree did not constitute an aggravated felony under INA § 101(a)(43)(K) because, notwithstanding the "relates to" language in that provision, "the definition of 'prostitution' in Hawaii's statutes encompasses conduct broader than any federal definition of prostitution." *Depasquale*, 196 F. App'x at 581-82.

1 **Conclusion**

2 For the foregoing reasons, the petition for review is
3 **GRANTED**. The order of removal is **VACATED**, and the case is
4 **REMANDED** to the BIA with directions to terminate
5 Petitioner's removal proceedings. The pending motion for a
6 stay of removal in this petition is **DISMISSED** as moot.