

14-3631-ag
Weiland v. Lynch

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term, 2015

5
6 (Submitted: June 27, 2016 Decided: June 29, 2016)

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8 Docket No. 14-3631-ag
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13 Thomas Weiland,

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15 *Petitioner,*

16
17 v.

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19 Loretta E. Lynch, United States Attorney General,

20
21 *Respondent.*
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24 Before:

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26 PARKER, LOHIER, and CARNEY, *Circuit Judges.*
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28 Thomas Weiland, a citizen of Germany, petitions for review of a Board
29 of Immigration Appeals (“BIA”) decision dismissing his appeal from a
30 decision of the Immigration Court ordering his removal. Weiland was
31 charged as removable based on his conviction for possession of child
32 pornography under New York Penal Law § 263.11. Weiland argues that this
33 conviction does not qualify as an aggravated felony under the Immigration
34 and Nationality Act (“INA”) because it lacks an interstate commerce element
35 that is present in the analogous federal child pornography statute. But in
36 Torres v. Lynch, 136 S. Ct. 1619 (2016), the Supreme Court held that violation
37 of a state criminal law may constitute an aggravated felony for purposes of

1 the INA even if the law lacks a federal jurisdictional element. We therefore
2 **DENY** the petition for review of the BIA's decision.

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4 Stephen K. Tills, Orchard Park, NY, *for*
5 *Petitioner.*

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7 D. Nicholas Harling, Trial Attorney
8 (Ernesto H. Molina, Jr., Assistant
9 Director, *on the brief*), *for* Benjamin C.
10 Mizer, Principal Deputy Assistant
11 Attorney General, United States
12 Department of Justice, Washington, DC,
13 *for Respondent.*

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15 PER CURIAM:

16 Thomas Weiland, a citizen of Germany, petitions for review of a Board
17 of Immigration Appeals ("BIA") decision dismissing his appeal from a
18 decision of the Immigration Court ordering his removal. Weiland was
19 charged as removable based on his conviction for possession of child
20 pornography under New York Penal Law § 263.11, which the Government
21 characterizes as an aggravated felony. Weiland argues that this conviction
22 does not qualify as an aggravated felony under the Immigration and
23 Nationality Act ("INA") because it lacks an interstate commerce element that
24 is present in the analogous federal child pornography statute. But in Torres v.
25 Lynch, which was decided after briefing concluded in this appeal, the

1 Supreme Court held that violation of a state criminal law may constitute an
2 aggravated felony for purposes of the INA even if the law lacks a federal
3 jurisdictional element. 136 S. Ct. 1619, 1634 (2016). We therefore DENY the
4 petition for review of the BIA's decision.

5 **BACKGROUND**

6 Weiland entered the United States as a visitor in 1969 and became a
7 lawful permanent resident the following year. In 2004 he was convicted of
8 possessing an obscene sexual performance by a child in violation of New
9 York Penal Law § 263.11. The Department of Homeland Security later
10 initiated removal proceedings against him based on the 2004 conviction,
11 which it viewed as an aggravated felony as defined in 8 U.S.C.
12 § 1101(a)(43)(I). The INA includes in its definition of aggravated felonies any
13 offense "described in section . . . 2252 of Title 18," which prohibits the
14 possession, reproduction, and distribution of child pornography. 8 U.S.C.
15 § 1101(a)(43)(I); 18 U.S.C. § 2252. As the INA further makes clear, "[t]he term
16 [aggravated felony] applies to an offense . . . whether in violation of Federal
17 or State law." 8 U.S.C. § 1101(a)(43).

1 Weiland argued to the Immigration Judge that this definition of
2 “aggravated felony” did not cover his conviction. Both parties agreed that
3 § 2252(a)(4) was the federal provision that most resembled the elements of the
4 New York child pornography statute under which Weiland was convicted.
5 But § 2252(a)(4) includes a federal jurisdictional requirement that New York’s
6 child pornography statute lacks. In order to convict a defendant under the
7 federal statute, the visual depiction must have been possessed either within
8 the special maritime and territorial jurisdiction of the United States or on any
9 land or building owned, leased, used, or controlled by the United States
10 Government; or it must have been transported using a means or facility of
11 interstate or foreign commerce. 18 U.S.C. § 2252(a)(4). According to Weiland,
12 his conviction was not an offense described in § 2252(a)(4) because the New
13 York statute does not have an interstate commerce requirement.

14 The Immigration Judge rejected this argument and ordered Weiland
15 removed. Relying on the BIA’s decision in In re Vasquez-Muniz, 23 I. & N.
16 Dec. 207, 213 (BIA 2002), the Immigration Judge concluded that a state
17 criminal law need not contain a federal jurisdictional element to be “described
18 in” one of the corresponding federal statutes identified in § 1101(a)(43). The

1 BIA dismissed Weiland's appeal. In re Thomas Weiland, No. A019 352 694
2 (BIA Aug. 28, 2014). This appeal followed. With the agreement of both
3 parties, we held our disposition of the appeal in abeyance pending the
4 Supreme Court's decision in Torres v. Lynch, 136 S. Ct. 1619 (2016).

5 DISCUSSION

6 On appeal, Weiland renewed his claim that New York's child
7 pornography statute is not "an offense described in" 18 U.S.C. § 2252. But, as
8 Weiland appears to acknowledge, that argument was foreclosed by our
9 decision in Torres v. Holder, 764 F.3d 152 (2d Cir. 2014).

10 In Torres we considered whether a New York state conviction for
11 attempted arson qualified as an aggravated felony under the INA. Id. at 153.
12 New York's arson law, like the child pornography law under which Weiland
13 was convicted, had a federal analogue that was included in the INA's
14 definition of an aggravated felony. See 8 U.S.C. § 1101(a)(43)(E)(i). The
15 federal statute differed from the state law only insofar as it required that the
16 property damaged was "used in interstate or foreign commerce or in any
17 activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). We
18 were inclined to conclude for purposes of § 1101(a)(43) that an offense

1 “described in” a federal statute “need not reproduce the federal jurisdictional
2 element to have immigration consequences.” Torres, 764 F.3d at 157. But we
3 also acknowledged that “this conclusion [did not] follow[] inexorably from
4 the INA’s text and structure.” Id. We therefore deferred to the interpretation
5 of the BIA, which held in In re Bautista, 25 I. & N. Dec. 616 (BIA 2011), that
6 New York’s arson statute was an offense “described in” 18 U.S.C. § 844(i).
7 Torres, 764 F.3d at 158; see also Chevron, U.S.A., Inc. v. Nat. Res. Def.
8 Council, Inc., 467 U.S. 837, 843-44 (1984) (“[I]f the statute is silent or
9 ambiguous with respect to the specific issue . . . a court may not substitute its
10 own construction of a statutory provision for a reasonable interpretation
11 made by the administrator of an agency.”).

12 On appeal, Weiland urged us to reconsider our decision in Torres.
13 “Generally speaking,” we are “bound by prior decisions of this court unless
14 and until . . . [they] are reversed en banc or by the Supreme Court.” In re
15 Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 154 (2d Cir. 2015)
16 (quotation marks omitted). “[T]here is an exception to this general rule when
17 an ‘intervening Supreme Court decision casts doubt on our controlling
18 precedent.’” Id. (alteration omitted) (quoting Wojchowski v. Daines, 498 F.3d

1 99, 106 (2d Cir. 2007)). Weiland argued we should nevertheless disregard
2 Torres because the Third Circuit has vacated Bautista, the BIA decision to
3 which we deferred. See Bautista v. Attorney Gen. of U.S., 744 F.3d 54, 66 (3d
4 Cir. 2014). Shortly after briefing concluded in Weiland's appeal, however, the
5 Supreme Court granted certiorari review of our decision in Torres and
6 affirmed, thus abrogating the Third Circuit's decision in Bautista. See Torres
7 v. Lynch, 136 S. Ct. at 1634 (2016). The Court held that a federal jurisdictional
8 element "is properly ignored when determining if a state offense counts as an
9 aggravated felony under § 1101(a)(43)." Id.

10 After the Supreme Court decided Torres v. Lynch, we permitted the
11 parties to submit additional briefing. Abandoning his original argument,
12 Weiland now claims that, unlike the arson statute at issue in Torres v. Lynch,
13 which, he asserts, has no "innate link to interstate commerce," the interstate
14 commerce component of the federal child pornography statute is a
15 requirement of the underlying substantive offense. See Pet'r's Letter 2, June
16 7, 2016, ECF No. 90. This argument is unavailing for two reasons. First,
17 Weiland ignores that, in addition to proscribing the transportation of child
18 pornography using a means of interstate commerce, § 2252 also criminalizes

1 the possession of child pornography “in the special maritime and territorial
2 jurisdiction of the United States, or on any land or building owned by, leased
3 to, or otherwise used by or under the control of the Government of the United
4 States.” 18 U.S.C. § 2252(a)(4). Weiland does not argue that this element is
5 also a requirement of the substantive offense. Second, the Court in Torres v.
6 Lynch expressed concern that requiring a state law to include a federal
7 jurisdictional element in order to be an offense “described in” one of the
8 federal laws identified in § 1101(a)(43) would exclude most state child
9 pornography laws — an outcome that the Court characterized as “perverse.”
10 Torres v. Lynch, 136 S. Ct. at 1628-29. In light of Torres v. Lynch, we conclude
11 that New York’s child pornography statute is an offense “described in”
12 § 2252.

13 CONCLUSION

14 For the foregoing reasons, we DENY the petition for review of the
15 BIA’s decision.