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Legal Sidebar

UPDATE: What Constitutes "Sexual Abuse of a Minor" For Immigration Purposes?

06/07/2017

UPDATE: On May 30, 2017, the Supreme Court issued a decision in Esquivel-Quintana v. Sessions, holding that, in the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the term "sexual abuse of a minor"—as employed by the Immigration and Nationality Act (INA)—requires the age of the victim to be less than 16. The Court based its holding on legal dictionary definitions of "age of consent," as well as provisions of the INA which "suggest[ed] that sexual abuse of a minor encompasses only especially egregious felonies." The Court also considered 18 U.S.C. § 2243(a), the "closely related" federal criminal statute for sexual abuse of a minor, as further evidence of the age requirement under the INA. Finally, the Court turned to state statutory rape provisions, the majority of which set the age of consent at 16, for additional guidance. Based on this context, the Court reversed the Board of Immigration Appeals' interpretation of "sexual abuse of a minor," which had included statutory rape offenses where the victim is under 18. Notably, because the Court determined that there was no ambiguity in the meaning of "sexual abuse of a minor," the Court declined to address whether the rule of lenity (which calls for resolving any ambiguity in the defendant's favor) applied, or whether the Board's interpretation was subject to deference. The Court, however, limited its holding to statutory rape offenses based solely on the ages of the participants, and it left open the questions of whether sexual abuse of a minor requires a particular age differential between the victim and the perpetrator, or whether the offense includes sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants.

The original post from April 6, 2017, is below.

The Immigration and Nationality Act (INA) provides that certain criminal conduct constitutes an "aggravated felony." A conviction for an aggravated felony carries serious immigration consequences, such as subjecting an alien to removal from the United States, barring the alien from most forms of relief from removal, and precluding the alien from being readmitted into the United States following removal. Under the INA, the term "aggravated felony" covers a wide range of criminal offenses, including "sexual abuse of a minor." While Congress defined some aggravated felony offenses in the INA by cross-referencing federal criminal statutes, Congress was silent on the meaning of "sexual abuse of a minor." The federal courts of appeals have differed over how broadly the phrase "sexual abuse of a minor" should be construed. Confronted with this circuit split, the U.S. Supreme Court agreed to address the issue in *Esquivel-Quintana v. Sessions*, and heard arguments on February 27, 2017.

The INA does not plainly define what constitutes "sexual abuse of a minor" for immigration purposes. As a result, the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration laws, has looked to other federal statutes when considering the term's scope. Notably, 18 U.S.C. § 3509(a), a procedural statute addressing the rights of child victims and witnesses, defines "sexual abuse" to include "sexually explicit conduct" with a "child," which the statute defines as a person under eighteen. In contrast, 18 U.S.C. § 2243(a), the federal criminal statute for sexual abuse of a minor, covers an individual who "knowingly engages in a sexual act" with a person who is at least twelve but less than sixteen, and who is at least four years younger than the perpetrator, and a related provision defines "a sexual act" to involve direct physical contact with the victim (the federal statute for aggravated sexual abuse covers sexual acts with children under twelve).

In *Matter of Rodriguez-Rodriguez*, the BIA considered whether "sexual abuse of a minor" should be construed to encapsulate any sexually explicit conduct, or whether it should be limited to crimes requiring contact as an element. In adopting 18 U.S.C. § 3509(a)'s more expansive definition, the BIA explained that the statute's broad scope was consistent with the common usage of the term "sexual abuse," and with Congress's intent to provide "a comprehensive scheme to cover crimes against children." Subsequently, in *Matter of V-F-D-*, the BIA addressed the age requirements for "sexual abuse of a minor," and once again turning to 18 U.S.C. § 3509(a), held that a person under eighteen is a "minor" for purposes of the aggravated felony definition.

The petitioner in *Esquivel-Quintana* is a lawful permanent resident from Mexico who was convicted in 2009 of statutory rape under California law, which covers sexual intercourse when the victim is under the age of eighteen and at least three years younger than the perpetrator. At the time of the offense, Esquivel-Quintana was twenty-one and the minor was seventeen. Following his conviction, Esquivel-Quintana moved to Michigan, where he was charged with removability as an alien convicted of an aggravated felony, and ordered removed to Mexico. In a published decision, the BIA rejected Esquivel-Quintana's invitation to limit "sexual abuse of a minor" to offenses for which the victim is under sixteen and has at least a four-year age difference with the defendant—as would be required for criminal liability to attach under 18 U.S.C. § 2243(a). Instead, the BIA held that a statutory rape offense where the victim is at least sixteen constitutes "sexual abuse of a minor" as long as there is a "meaningful age differential" between the perpetrator and the victim.

In *Esquivel-Quintana v. Lynch*, the Sixth Circuit held that the BIA's determination was permissible because "multiple criminal provisions of the United States Code define a 'minor' as a person under eighteen." The court determined that, although 18 U.S.C. § 2243(a) addressed sexual acts with a victim between the ages of twelve and sixteen, the BIA was not required to limit "sexual abuse of a minor" to this definition. The court declared that Congress could have cross-referenced 18 U.S.C. § 2243(a) when it identified "sexual abuse of a minor" as an aggravated felony for INA purposes, but Congress chose not to "because it wanted to sweep in a broad array of state-law convictions." The court concluded that restricting "sexual abuse of a minor" to the requirements of 18 U.S.C. § 2243(a) "would be contrary to Congress's intent to allow state-law convictions to serve as grounds for removal." The court also held that the rule of lenity, which instructs that statutory ambiguity in criminal cases be resolved in the defendant's favor, did not apply in a civil removal proceeding.

The Sixth Circuit is not alone in upholding the BIA's interpretation of "sexual abuse of a minor." The Second, Third, and Seventh Circuits have also deferred to the BIA's interpretation as being consistent with the general meaning of "sexual abuse," and with Congress's intent to broaden the scope of federal immigration laws to cover crimes against children. Other circuits, however, have adopted more restrictive interpretations. For example, the Tenth Circuit has adopted 18 U.S.C. § 2243(a)'s requirement that the perpetrator acted "knowingly." For *statutory rape* crimes, the Ninth Circuit has gone further to hold that "sexual abuse of a minor" requires proof of all the elements in 18 U.S.C. § 2243(a). For assessing whether other sexual crimes constitute "sexual abuse of a minor," the court has defined such offenses to involve conduct that causes "physical or psychological harm" in light of the victim's age. Meanwhile, the Fourth and Eleventh Circuits have defined "sexual abuse of a minor" as involving "the perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification."

In short, the federal courts of appeals have adopted divergent formulations of the phrase "sexual abuse of a minor." As a result, criminal convictions under the same state statute may have different outcomes on immigration cases depending on the jurisdiction where the removal proceedings arise (but the fact that an offense does not fall under "sexual abuse of a minor" does not preclude application of other grounds for removal, including potentially for commission of a "crime of violence" or "rape," both which constitute aggravated felonies for immigration purposes). The Supreme Court's forthcoming decision in *Esquivel-Quintana* offers an opportunity to resolve that split and provide guidance as to the scope of criminal sex offenses that the federal immigration laws encompass. The Court may decide whether the agency's broad interpretation of the phrase "sexual abuse of a minor" is a permissible interpretation of an ambiguous statute, or whether that term should be defined more restrictively. The Court may also tackle the question of whether the rule of lenity, which calls for resolving any ambiguity in the defendant's favor, applies where a statute has both criminal and noncriminal applications, a legal question for which there appears to be no conclusive answer. Ultimately, the Court's resolution may lead Congress to reexamine the scope of sexual crimes considered aggravated felonies for immigration purposes.