

OCT - 2 2015

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 15A137

MOONES MELLOULI, APPLICANT

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON STAY OF PROCEEDINGS BEFORE THE BOARD OF IMMIGRATION APPEALS

JOINT MOTION TO VACATE STAY

Pursuant to Rule 21 of the Rules of this Court, the Solicitor General, on behalf of the Attorney General, and Applicant Moones Mellouli respectfully move to vacate the stay of proceedings before the Board of Immigration Appeals (Board or BIA) entered by this Court pending the filing of a petition for a writ of certiorari or a petition for a writ of mandamus and prohibition. We are authorized to represent that applicant joins in this motion.

1. Applicant, a citizen of Tunisia, became a lawful permanent resident of the United States in 2009. 13-1034 J.A. 12. An immigration judge determined in 2010 that applicant was removable from the United States under 8 U.S.C. 1227(a)(2)(B)(i), based on applicant's conviction for possession

of drug paraphernalia in violation of Kansas law. See 13-1034 Pet. App. (Pet. App.) 30-34. The Board dismissed applicant's appeal, id. at 17-19, and the court of appeals denied a petition for review, id. at 1-14. The court held that "a conviction for violating the Kansas paraphernalia statute is, categorically, related to a controlled substance within the meaning of [Section] 1227(a)(2)(B)(i)," as necessary to make an alien removable under that provision, even though Kansas classified as controlled a small number of substances that were not also federally controlled. Id. at 11.

This Court granted a petition for a writ of certiorari, 134 S. Ct. 2873, and reversed the Eighth Circuit's judgment upholding the removal order, 135 S. Ct. 1980. This Court rejected the conclusion of the court of appeals that aliens who violate state drug paraphernalia laws are categorically removable under Section 1227(a)(2)(B)(i) even if the State at issue controls some substances that are not also federally controlled. 135 S. Ct. at 1991.

2. Following this Court's decision, the Eighth Circuit vacated its prior decision, sua sponte recalled its mandate, "and remand[ed] to the BIA for further proceedings in light of the Supreme Court's decision." No. 12-3093, 2015 WL 4079087, at *3. In a statement accompanying that disposition, the court of appeals recognized that this Court had established that,

contrary to the court of appeals' holding, "to trigger removal under [Section] 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a" federally controlled drug. Id. at *1 (quoting 135 S. Ct. at 1991). But the court of appeals wrote that, in its view, the Board could consider on remand whether an alien's removability under Section 1227(a)(2)(B)(i) could be established based on circumstance-specific evidence that an alien's drug-paraphernalia conviction involved a federally controlled substance. Id. at *1 & n.2. Ibid. The court noted that the record before the Board contained circumstance-specific evidence that applicant's conviction involved the federally controlled substance of Adderall, which had been used to establish "that [applicant's] drug paraphernalia conviction did not fall within the exception" to removability "in § 1227(a)(2)(B)(i) for 'a single offense involving possession for one's own use of 30 grams or less of marijuana.'" Id. at *2.

The court did not request or receive supplemental briefing from applicant or the government prior to its disposition on remand from this Court.

3. The court of appeals issued its mandate on the same day it issued its judgment remanding applicant's case to the Board. See Judgment, No. 12-3093 (July 6, 2015); Mandate, No. 12-3093 (July 6, 2015). Applicant then moved to recall the mandate, on

the ground that it had been issued prematurely. See Motion to Recall the Mandate, No. 12-3093 (July 31, 2015). The government filed a motion to hold applicant's motion to recall the mandate in abeyance. The government informed the court of appeals that (as explained below) the Department of Homeland Security (DHS) had already sought to dismiss removal proceedings against applicant rather than pursue the circumstance-specific approach discussed by the court of appeals, and further stated that it "ha[d] no intention of initiating further removal proceedings based on [applicant's] 2010 conviction under Kan. Stat. Ann. 21-5709(b)(2) or any other basis at this time." See Motion to Hold in Abeyance Petitioner's Motion, No. 12-3093 (Aug. 5, 2015). The court subsequently denied applicant's motion to recall the mandate, and denied DHS's motion as moot. See Order, No. 12-3093 (Aug. 6, 2015).

4. Before the Board, following the court of appeals' remand described above, DHS moved to dismiss removal proceedings pursuant to 8 C.F.R. 1239.2(c), rather than seeking removal based on the circumstance-specific theory posited by the court of appeals. DHS Mot. to Dismiss Removal Proceedings Without Prejudice (DHS Mot. to Dismiss) 1. DHS's motion stated that, in light of the record in the case, applicant "is restored to his status as a lawful permanent resident and will not be regarded as an applicant for admission under 8 U.S.C. 1101(a)(13) upon

his return to the United States, nor is he subject to further removal proceedings based on his 2010 conviction under Kan. Stat. Ann. 21-5709(b)(2)." Ibid. The regulation DHS invoked in seeking dismissal is a generally applicable regulation that provides for dismissal of proceedings for a variety of reasons, including that an alien "is not deportable or inadmissible under the immigration laws." 8 C.F.R. 239.2(a)(2); see 8 C.F.R. 1239.2(c). The regulation provides that a dismissal under it shall be without prejudice.

Applicant opposed DHS's motion, arguing that this Court's decision in applicant's case established that it would not be appropriate for DHS to remove applicant based on his drug-paraphernalia conviction and that, as a result, "the proper course is for the Board to terminate these proceedings with prejudice." Opp. to DHS Mot. to Dismiss Removal Proceedings Without Prejudice 1. Applicant then filed a further motion asking that the Board "eliminate his removal order and terminate [proceedings] with prejudice," or, in the alternative that the Board hold applicant's case in abeyance pending the filing of a petition for a writ of certiorari or a petition for a writ of mandamus and prohibition with this Court. Mot. to Terminate With Prejudice and Alternate Mot. to Hold Case in Abeyance 1, 3.

5. On August 10, 2015, applicant filed in this Court an application for a stay of the Board's proceedings pending the

filing of a petition for a writ of certiorari or a petition for a writ of mandamus and prohibition. On August 21, 2015, this Court granted the application, staying further proceedings before the Board of Immigration Appeals pending "the timely filing of a petition for a writ of certiorari, or of a petition for writ of mandamus and prohibition, and further order of this Court."

6. Since the Court's grant of a stay, the parties have agreed on a disposition of applicant's case. The parties have agreed to jointly move the Board to terminate removal proceedings against applicant through a motion that stipulates that petitioner is not removable based on his Kansas drug-paraphernalia conviction under the immigration laws.

It is the position of the government that the circumstance-specific rationale for removal discussed by the Eighth Circuit in the statement accompanying its remand order is not a valid basis for establishing removability under Section 1227(a)(2)(B)(i) of the INA. Under Section 1227(a)(2)(B)(i), consideration of circumstance-specific evidence would be appropriate in a case involving marijuana and only if DHS has first established using a categorical approach that an alien "has been convicted of a violation of (or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined

in section 802 of title 21)." At that point, the Board has held that circumstance-specific evidence may be considered in order to determine whether an alien falls within the exception to removability in Section 1227(a)(2)(B)(i) for "a single offense involving possession for one's own use of 30 grams or less of marijuana." See In re Dominguez-Rodriguez, 26 I. & N. Dec. 408 (B.I.A. 2014).

The government therefore does not intend to seek the removal of applicant or any other alien on the basis of the theory apparently posited (but not decided) by the court of appeals. The government also agrees with applicant that dismissal of the removal proceedings against applicant will be with prejudice insofar as DHS may not seek applicant's removal based on applicant's Kansas drug-paraphernalia conviction.

Because the parties intend to seek the termination of applicant's immigration proceedings in this manner, the parties request that this Court vacate the stay of Board proceedings that this Court entered, pending the filing of a petition for a writ of certiorari or a petition for a writ of mandamus and prohibition, so that the Board can act upon the parties' joint motion to dismiss proceedings. Applicant intends to file petitions for certiorari and for mandamus and prohibition, but

will dismiss the petitions if the Board grants the parties' joint motion.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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