

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT



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4 August Term, 2003
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9 (Argued: September 8, 2003 Decided: October 17, 2003)
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11 Docket No. 02-2652
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13 -----X
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15 Serge Chery,
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17 Petitioner-Appellee,
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19 - v. -
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21 John Ashcroft, United States Attorney General,
22

23 Respondent-Appellant.
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25 -----X
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28 Before: VAN GRAAFEILAND, McLAUGHLIN and CABRANES, Circuit
29 Judges.
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31 Respondent appeals from the grant of a habeas petition by
32 the United States District Court for the District of Connecticut
33 (Dorsey, J.). The district court ruled that a conviction under
34 Conn. Gen. Stat. § 53a-71 does not constitute a crime of violence
35 for the purposes of deportation under 8 U.S.C. § 1101(a)(43)(F).
36

37 REVERSED.
38

39 JANICE K. REDFERN, Office of
40 Immigration Litigation, United
41 States Department of Justice,
42 Washington, D.C. (ROBERT D.
43 McCALLUM, JR., Assistant Attorney
44 General, Civil Division, United
States Department of Justice,
Washington, D.C.; CHRISTOPHER C.

1 FULLER, Senior Litigation Counsel,
2 United States Department of
3 Justice, Washington, D.C.) for
4 Respondent-Appellant.
5

6 MICHAEL G. MOORE, Springfield, MA,
7 for Petitioner-Appellee.

8 McLAUGHLIN, Circuit Judge:

9 Serge Chery was convicted of Sexual Assault in the Second
10 Degree in violation of Conn. Gen. Stat. § 53a-71. Based on
11 Chery's conviction, the Immigration and Naturalization Service
12 ("INS") held a removal hearing. The Immigration Judge ("IJ")
13 found that Chery's conviction was an aggravated felony (more
14 specifically, a "crime of violence") under 8 U.S.C.
15 § 1101(a)(43)(F). The Board of Immigration Appeals ("BIA")
16 affirmed, finding that the Connecticut statute, "§ 53a-71, by its
17 nature, involves substantial risk that physical force against the
18 victim may be used in the course of committing the offense."

19 The United States District Court for the District of
20 Connecticut (Dorsey, J.) granted Chery's habeas petition pursuant
21 to 28 U.S.C. § 2241, holding that Chery's conviction does not
22 constitute a crime of violence. The Government appeals.

23 We conclude that Chery's conviction under Conn. Gen. Stat.
24 § 53a-71 is a crime of violence under 18 U.S.C. § 16(b). It
25 therefore constitutes a removable "aggravated felony" under 8
26 U.S.C. § 1101(a)(43)(F). Accordingly, we REVERSE the district
27 court's grant of Chery's habeas petition.

1 BACKGROUND

2 Serge Chery is a citizen of Haiti and a lawful permanent
3 resident of the United States. In 1998, he was arrested upon a
4 complaint by the mother of a 14-year-old girl that Chery, then 33
5 years old, had sexually assaulted her daughter. The victim told
6 police that Chery had picked her up on several occasions and
7 driven her to his apartment where they had sexual intercourse.

8 Chery was convicted of second degree sexual assault in
9 violation of Conn. Gen. Stat. § 53a-71. He was sentenced to 5
10 years' imprisonment, with 18 months to serve and 10 years'
11 probation.

12 Based on Chery's conviction, the Immigration and
13 Naturalization Service ("INS") informed Chery that he was subject
14 to deportation as an alien convicted of an aggravated felony.
15 Chery's removal hearing was held before an Immigration Judge
16 ("IJ") who found that Chery was removable because his sexual
17 assault conviction constituted an aggravated felony (more
18 specifically, a "crime of violence") under 8 U.S.C. §
19 1101(a)(43)(F).

20 Chery appealed to the Board of Immigration Appeals ("BIA")
21 claiming that second degree sexual assault under § 53a-71 is not
22 a "crime of violence" as defined by 18 U.S.C. § 16(b). The BIA
23 dismissed Chery's appeal and found that Chery's conviction did
24 constitute a crime of violence because "§ 53a-71, by its nature,
25 involves a substantial risk that physical force against the

1 victim may be used in the course of committing the offense.”

2 Chery filed a habeas petition pursuant to 28 U.S.C. § 2241
3 in the United States District Court for the District of
4 Connecticut (Dorsey, J.). The district court granted the
5 petition, ruling that Chery’s felony conviction did not
6 constitute a crime of violence. Utilizing the so called
7 “categorical approach,” the court determined that § 53a-71 “does
8 not inherently involve use of force, nor may . . . the use of
9 force . . . be inferred.” Chery v. Ashcroft, No. 3:01 CV 1883,
10 2002 U.S. Dist. LEXIS 26034, *6, *10-11 (D. Conn. May 21, 2002)
11 (internal citation omitted).

12 The district court granted the Government’s motion for
13 reconsideration, but adhered to its original ruling and denied
14 the Government’s request for a stay pending appeal.

15 DISCUSSION

16 I. Relevant Statutes

17 Any alien who is convicted of an “aggravated felony” after
18 admission to the United States may be deported. 8 U.S.C.
19 § 1227(a)(2)(A)(iii). Twenty-one aggravated felonies are
20 specified in various subsections of 8 U.S.C. § 1101(a)(43).
21 Subsection (F) thereof identifies one such “aggravated felony” as
22 a “crime of violence” for which the term of imprisonment is at
23 least one year. 8 U.S.C. § 1101(a)(43)(F). “Crime of violence”
24 is, in turn, defined in Title 18 as:

1 (b) any . . . offense that is a felony and that, by
2 its nature, involves a substantial risk that physical
3 force against the person or property of another may be
4 used in the course of committing the offense.

5
6 18 U.S.C. § 16 (emphasis added).

7 A "crime of violence" under § 16(b) has two elements:

8 (1) a crime that is a felony; and (2) a crime that, "by its
9 nature, involves a substantial risk that physical force"
10 may be used. Sutherland v. Reno, 228 F.3d 171, 175 (2d
11 Cir. 2000). Chery cannot dispute that he was convicted of
12 a felony. He maintains, however, that his conviction under
13 § 53a-71 of the Connecticut statute does not involve a
14 substantial risk of physical force.

15 Section 53a-71 prohibits sexual intercourse with individuals
16 who are: (1) thirteen years of age or older and under sixteen
17 years of age (where the defendant is at least two years older);
18 or (2) mentally incapacitated and unable to consent; or
19 (3) physically helpless; or (4) under eighteen years of age
20 (where the defendant is the victim's guardian). It also
21 prohibits sexual intercourse between individuals in positions of
22 influence over their victims (e.g., patient-psychotherapist).

23 II. Jurisdiction

24 Chery filed a habeas petition pursuant to 28 U.S.C. § 2241.
25 Section 2241(c) (3) permits federal courts to entertain habeas
26 petitions from federal prisoners "in custody in violation of the
27 Constitution or laws or treaties of the United States." See

1 Jiminian v. Nash, 245 F.3d 144, 147 (2d Cir. 2001).

2 Judicial review of final orders of removal against aliens
3 who are removable based upon a conviction of an aggravated felony
4 is generally prohibited. See 8 U.S.C. § 1252(a)(2)(C); Jobson v.
5 Ashcroft, 326 F.3d 367, 371 (2d Cir. 2003); Dalton v. Ashcroft,
6 257 F.3d 200, 203-04 (2d Cir. 2001). We retain residual
7 jurisdiction, however, to determine whether Chery has been
8 convicted of an aggravated felony under 8 U.S.C.
9 § 1101(a)(43)(F), as defined by 18 U.S.C. § 16. Jobson, 326 F.3d
10 at 371 (citations omitted).

11 Because the BIA is charged with administering the
12 Immigration and Nationality Act ("INA"), its interpretation of
13 the INA's provisions must be granted deference. See Chevron
14 U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837,
15 844 (1984). However, we review its interpretation of federal or
16 state criminal statutes de novo. See Dalton, 257 F.3d at 203;
17 Michel v. INS, 206 F.3d 253, 263 (2d Cir. 2000).

18 This case requires us to decide whether the state crime of
19 sexual assault in the second degree under § 53a-71 is a "crime of
20 violence" as defined in the federal criminal code, 18 U.S.C. §
21 16. As such, we review de novo whether Conn. Gen. Stat. § 53a-71
22 is a crime of violence. See Dalton, 257 F.2d at 203.

23 III. Categorical Approach

24 This Court follows what has been termed a "categorical

1 approach" to determine whether an offense is a crime of violence
2 within the meaning of § 16(b). Jobson, 326 F.3d at 371; Dalton,
3 257 F.3d at 204. Under this rubric, we focus on the "intrinsic
4 nature of the offense rather than on the factual circumstances
5 surrounding any particular violation." Dalton, 257 F.3d at 204.
6 Accordingly, "only the minimum criminal conduct necessary to
7 sustain a conviction under a given statute is relevant." Id.
8 (internal quotation marks omitted).

9 IV. Crime of Violence

10 The risk of physical force in § 16(b) "concerns the
11 defendant's likely use of violent force as a means to an end."
12 Jobson, 326 F.3d at 373. We have found that § 16(b) "refers only
13 to those offenses in which there is a substantial likelihood that
14 the perpetrator will intentionally employ physical force."
15 Dalton, 257 F.3d at 208 (internal quotation marks omitted).

16 In finding that second-degree manslaughter under N.Y. Penal
17 Law § 125.15 (requiring only recklessness) was not a crime of
18 violence, this Court rejected the argument "that an offense
19 satisfies section 16(b) as long as many (but not all) convictions
20 involve a substantial risk of the use of force." Jobson, 326
21 F.3d at 374 (examining N.Y.P.L. § 125.15(1)). We stressed in
22 Jobson that even "passive conduct or omissions alone are
23 sufficient for conviction" under the statute. Id. at 373. For
24 example, failure to feed a child, People v. Stubbs, 122 A.D.2d 91

1 (2d Dep't 1986), or failure to provide medical care to a child
2 beaten by someone else, People v. Salley, 153 A.D.2d 704 (2d
3 Dep't 1989), resulted in convictions for second-degree
4 manslaughter under New York law. The Connecticut statute at
5 issue here is distinguishable, however, in that a conviction
6 requires affirmative conduct by the defendant (namely, sexual
7 intercourse with a protected individual).

8 In determining that the felony of driving while intoxicated
9 was not a "crime of violence" warranting removal, we observed
10 that, "a defendant can be found guilty of driving while
11 intoxicated even if he or she is asleep at the wheel of a car
12 whose engine is not running and evidence is adduced at trial that
13 the vehicle never moved." Dalton, 257 F.3d at 205 (examining
14 N.Y.V.T.L. § 1192.3). Accordingly, we noted that a person could
15 be convicted under the statute "even when there is no risk that
16 force may be used" Id.

17 In this case, however, although a conviction may be obtained
18 under § 53a-71 for consensual sexual intercourse and force may
19 not be present in all circumstances, the risk of the use of force
20 is inherent in each of the offenses set forth in the statute.
21 "It matters not one whit whether the risk ultimately causes
22 actual harm." United States v. Rodriguez, 979 F.2d 138, 141 (8th
23 Cir. 1992). All that is required by § 53a-71, is that there be
24 "a substantial risk that force may be used" to accomplish sexual

1 intercourse with the victim. Sutherland, 228 F.3d at 176.

2 Because § 53a-71 specifically criminalizes consensual sexual
3 intercourse, a defendant may be convicted where no actual force
4 is used - for instance, where a 17-year-old male is convicted for
5 having sexual intercourse with his 15-year-old girlfriend.

6 Doubtless, cases can be imagined where a defendant's conduct does
7 not create a genuine probability that force will be used, but the
8 risk of force remains inherent in the offense. Burglary, for
9 example, has been held to constitute a crime of violence even
10 though in the particular case the defendant's conduct does not
11 create a risk that force will be used - i.e., entering through a
12 wide-open door when no one is inside. See Jobson, 326 F.3d at
13 373 (noting that "burglary is a crime of violence even though no
14 force is used in a particular instance, because 'a burglar of a
15 dwelling risks having to use force if the occupants are home and
16 hear the burglar'" (quoting United States v. Parson, 955 F.2d
17 858, 866 (3d Cir. 1992) (emphasis added))).

18 Recognizing that § 53a-71 criminalizes sexual intercourse
19 with a victim who is unable to give consent, we are persuaded
20 that - when the victim cannot consent - the statute inherently
21 involves a substantial risk that physical force may be used in
22 the course of committing the offense. In short, because of the
23 disparate ages of the defendant and the victim, or the mental
24 incapacity or physical helplessness of the victim, or the

1 defendant's position of authority over the victim, the crime,
2 semper et ubique, includes a substantial risk of physical force.

3 In cases involving sexual crimes against children, courts
4 have repeatedly recognized a substantial risk that physical force
5 will be used to ensure compliance. United States v. Velazquez-
6 Overa, 100 F.3d 418 (5th Cir. 1996), is illustrative. There the
7 court held that the offense of indecency with a child by sexual
8 contact (Texas Penal Code § 21.11), constituted a "crime of
9 violence" under 8 U.S.C. § 16(b). Id. at 421-22. In holding
10 that this offense (which applied only to child victims under the
11 age of seventeen) inherently involved a substantial risk that
12 physical force would be used, the court reasoned:

13 [I]t is obvious that such crimes . . . are generally
14 perpetrated by an adult upon a victim who is not only
15 smaller, weaker, and less experienced, but is also
16 generally susceptible to acceding to the coercive power
17 of adult authority figures. A child has very few, if
18 any, resources to deter the use of physical force by an
19 adult intent on touching the child. In such
20 circumstances, there is a significant likelihood that
21 physical force may be used to perpetrate the crime.

22
23 Id. at 422

24 Other courts have arrived at the same conclusion. See,
25 e.g., United States v. Alas-Castro, 184 F.3d 812, 813 (8th Cir.
26 1999) (holding that a Nebraska conviction for sexual assault of a
27 child is a "crime of violence" because this "type of contact
28 between parties of differing physical and emotional maturity
29 carries a substantial risk that physical force . . . may be used

1 in the course of committing the offense" (internal quotation
2 marks omitted)); Ramsey v. INS, 55 F.3d 580, 583 (11th Cir. 1995)
3 (holding that the Florida offense of attempted lewd assault on a
4 child under the age of sixteen is a "crime of violence" even
5 though the offense might be accomplished without use of physical
6 force); United States v. Reyes-Castro, 13 F.3d 377, 379 (10th
7 Cir. 1993) ("A common sense view of the sexual abuse statute, in
8 combination with the legal determination that children are
9 incapable of consent, suggests that when an older person attempts
10 to sexually touch a child under the age of fourteen, there is
11 always a substantial risk that physical force will be used to
12 ensure the child's compliance.").

13 We conclude that a conviction under § 53a-71 constitutes a
14 crime of violence and that the district court erred in granting
15 Chery's habeas petition.

16 CONCLUSION

17 For the reasons stated herein, we REVERSE the district
18 court's grant of Chery's petition for a writ of habeas corpus.