

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-4393  
Summary Calendar

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ADEMOLA MICHAEL OGUNLEYE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION  
SERVICE,

Respondent.

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Petition for Review of an Order of the  
Immigration and Naturalization Service  
A 26 896 911

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( August 27, 1993 )

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.\*

GARWOOD, Circuit Judge:

Petitioner, Ademola Michael Ogunleye (Ogunleye), a citizen and native of Nigeria, following, *inter alia*, a hearing in April 1990 before an Immigration Judge (IJ), was ordered deported because when he last entered the United States in March 1986 he in effect

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

misrepresented his identity, which was material in that it precluded discovery of his April 1985 Oklahoma larceny conviction and thus cut off an avenue of inquiry which might well have resulted in a proper determination that he be excluded. Ogunleye appealed to the Board of Immigration Appeals (BIA) which on September 24, 1990 dismissed the appeal, rejecting Ogunleye's complaints of the IJ's order and holding that Ogunleye was properly ordered deported. Ogunleye thereafter petitioned this Court for review, and we declined to disturb the BIA's order, finding that its "thorough and well written opinion" correctly disposed of the issues and that the IJ's "order of deportation is supported by reasonable, substantial, and probative evidence on the record when considered as a whole." *Ogunleye v. INS*, No. 90-4758 (5th Cir. July 15, 1991) (unpublished) (rehearing denied without opinion December 31, 1991).

In March 1992 Ogunleye moved the BIA to reopen the proceedings. By order of April 1, 1992 the BIA denied the motion to reopen, determining, *inter alia*, that Ogunleye's tendered new evidence was not material and that he had not shown *prima facie* eligibility for the relief sought. Ogunleye now petitions this Court for review of the BIA's decision denying his petition to reopen. We affirm.

Abuse of discretion is the proper standard of review of a BIA denial of a motion to reopen on the ground that the alien failed either to introduce previously unavailable, material evidence or failed to establish a *prima facie* case for the relief sought. *INS v. Doherty*, 112 S.Ct. 719, 725 (1992).

Ogunleye's arguments in this Court, to the extent they are not merely a disagreement with the September 1990 BIA decision and deportation order which we previously affirmed, rely for new evidence only on two letters from deputy clerks of the Supreme Court of Oklahoma dated January 28, 1991 and February 13, 1991. Ogunleye contends that these letters show that his April 1985 conviction was not final when he reentered in March 1986, and thus that that conviction would not then have been a grounds for his exclusion. He also claims that the letters show that the Oklahoma trial court in some manner improperly prevented his appeal from being perfected. However, the letters show nothing of the sort. They only show no record of his appeal being docketed. The February 13 letter says "a timely Petition in Error was not received." There is nothing to suggest that the attempted appeal had not aborted long before March 1986 or that its failure was due to some legal wrong by the Oklahoma convicting court. In fact, the record of the April 1990 hearing before the IJ indicates that the Oklahoma courts in 1987 denied Ogunleye's petition for post-conviction relief in respect to his April 1985 conviction.

A conviction not void on its face is final for immigration law purposes when it has not been set aside, no direct appeal is pending and the time for such appeal has lapsed; and this is true even though not all avenues of *collateral* attack have been exhausted. See *Martinez-Montoya v. INS*, 904 F.2d 1018, 1025 (5th Cir. 1990); *Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982); *Zinnanti v. INS*, 651 F.2d 420, 421 (5th Cir. 1981). Ogunleye's April 1985 conviction is not facially void and it has never been

set aside; the IJ found that Ogunleye's appeal from that conviction had been considered abandoned in October 1985 and Ogunleye at that hearing said "that is very probable"; nothing Ogunleye has submitted demonstrates that when he reentered in March 1986 his direct appeal was still pending or that the time for appeal had not lapsed.

The BIA did not abuse its discretion in denying the motion to reopen. Accordingly, the BIA's decision is

AFFIRMED.