

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4508

Summary Calendar

OLAYINKA O. SOBAMOWO,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
(A27 862 773)

(December 15, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

The petitioner appeals the immigration judge's deportation order after his appeal was dismissed by the Board of Immigration Appeals. We affirm.

I.

Sobamowo is a native and citizen of Nigeria who entered the United States on September 18, 1986 as a nonimmigrant visitor

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

authorized to remain here for six months. In 1987, Sobamowo was convicted in the United States District Court for the District of Columbia for conspiracy to distribute and to possess with intent to distribute heroin in violation of 21 U.S.C. § 846. His conviction was affirmed on appeal. See United States v. Sobamowo, 892 F.2d 90 (D.C. Cir. 1989).

On April 17, 1990, the INS instituted deportation proceedings against Sobamowo, charging him with deportability under 8 U.S.C. § 1251(a)(1)(B) as an overstay and 8 U.S.C. § 1251(a)(2)(B)(i) for having been convicted of a drug offense.¹ At a hearing before the immigration judge, Sobamowo admitted that he had overstayed his authorized period. The INS also introduced Sobamowo's judgment of conviction and the court of appeal's decision affirming his conviction. The immigration judge found that Sobamowo was deportable under both sections. After determining that Sobamowo was ineligible for any relief from deportation, the immigration judge entered an order that Sobamowo be deported.

Sobamowo appealed to the Board of Immigration Appeals which dismissed his appeal on April 24, 1992. The Board determined, among other things, that Sobamowo's drug conviction was final for immigration purposes, notwithstanding his pending habeas corpus proceeding under § 2255, that the immigration judge did not abuse his discretion by denying a stay of deportation for Sobamowo to complete his pending civil actions, and that it had no authority to

¹Before the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29 1990) ("IMMACT") these sections were numbered § 1251(a)(2) and § 1251(a)(11) respectively.

apply the doctrine of estoppel against the INS. Sobamowo appealed to this court.

II.

Sobamowo's deportability is supported by the record. He admitted that he has exceeded his authorized stay, therefore he is deportable under 8 U.S.C. § 1251(a)(1)(B). See Shahla v. INS, 749 F.2d 561, 563 (9th Cir. 1984); Milande v. INS, 484 F.2d 774, 776 (7th Cir. 1973). 8 U.S.C. § 1251(a)(2)(B)(i) also authorizes deportation. Sobamowo's drug conviction is final for deportation purposes, notwithstanding his pending habeas corpus proceeding. His conviction became final after it was affirmed on direct appeal. See Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982); Morales-Alvarado v. INS, 655 F.2d 172, 175 (9th Cir. 1981); Aguilera-Enriquez v. INS, 516 F.2d 565, 570-71 (6th Cir. 1975). We reject Sobamowo's distinction based on the fact that he did not plead guilty but was convicted by a jury. The fact of conviction is controlling, not the method of conviction. See Yazdchi v. INS, 878 F.2d 166, 167 (5th Cir. 1989); Qureshi v. INS, 519 F.2d 1174, 1176 (5th Cir. 1975).

Sobamowo argues that he is entitled to a stay to pursue his various civil suits. He has sued a number of government officials for their actions surrounding his arrest and conviction. As the Board stated in its decision, neither it nor an immigration judge has the authority to grant such a stay. Their authority to stay deportation is limited. An immigration judge may stay deportation pending determination of a motion to reopen or reconsider filed

with him and pending the appeal from his determination on such a motion. 8 C.F.R. § 242.22. The Board may stay deportation while an appeal is pending from the denial of a motion to reopen or reconsider by the immigration judge if that officer has refused to grant a stay pending appeal. 8 C.F.R. § 3.6(b).

Sobamowo is an alien under a final order of deportation, therefore his request for stay must be made to the District Director. See 8 C.F.R. § 243.4. In this case, the District Director denied Sobamowo's request. Sobamowo's recourse against that decision is first with the appropriate district court, not with this court. See Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); Johns v. Department of Justice of the United States, 653 F.2d 884, 891, 892 (5th Cir. 1981). We express no views on the District Director's decision.²

Finally, Sobamowo's argument that the INS should be estopped from deporting him is without merit. A party seeking to estop the government must establish affirmative misconduct. Office of Personnel Management v. Richmond, 110 S. Ct. 2465, 2469-71 (1990); INS v. Miranda, 459 U.S. 14, 17 (1982). Sobamowo has not made this rare showing.

AFFIRMED.

²If Sobamowo is deported, he may seek to be paroled into this country for the purpose of litigating his lawsuits. See 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 212.5(a)(2)(iv).