

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-5096  
Summary Calendar

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MICHAEL EDWIN AJAYI,

Plaintiff-Appellant,

VERSUS

JOHN B. Z. CAPLINGER and  
IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Louisiana

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(92-CV-1127)

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(March 15, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:\*

BACKGROUND

Michael Edwin Ajayi, a citizen of Nigeria, is currently incarcerated at the Federal Correctional Institute in Oakdale, Louisiana. He originally entered the United States as a non-immigrant student on January 14, 1988. On September 15, 1989, he

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pleaded guilty to the offense of false impersonation in an Oklahoma state court. On September 7, 1990, he was convicted of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 and aiding and abetting mail fraud in violation of 18 U.S.C. §§ 1341 and 2 in the U.S. District Court for the Northern District of Oklahoma. He was sentenced to eighteen months imprisonment, three years supervised release, and restitution in the amount of \$26,999.10.

Upon completion of his term of imprisonment, Ajayi was released into the custody of the Immigration and Naturalization Service (INS). His bond was set at \$20,000 on September 17, 1991. At a hearing before an immigration judge on September 20, 1991, his bond was raised to \$50,000. Ajayi appealed the amount of his bond to the Board of Immigration Appeals (BIA), which sustained the bond, but lowered the amount to \$20,000. The BIA considered Ajayi's criminal history and concluded that a \$20,000 bond was "reasonable and necessary to ensure [his] appearance at future immigration proceedings."

An immigration judge found Ajayi deportable on October 7, 1991. Ajayi appealed to the BIA, which affirmed and dismissed his appeal on December 17, 1991.

On June 10, 1992, Ajayi filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 alleging that his rights to due process and equal protection had been violated by his continuing detention and excessive bail. On June 17, 1993, the magistrate judge issued a report and recommendation that Ajayi's

petition for writ of habeas corpus be denied. The magistrate judge found that the BIA did not abuse its discretion in concluding that a bond in the amount of \$20,000 was reasonable. After an independent review of the record and a de novo determination of the issues, the district court adopted the report and recommendation of the magistrate judge and denied Ajayi's application for writ of habeas corpus.

Ajayi's first petition to this Court for review of the deportation order issued by the BIA resulted in the order being affirmed in part and vacated and remanded in part on November 19, 1992. See Ajayi v. I.N.S., No. 92-4169 (5th Cir. Nov. 19, 1992) (unpublished). On February 19, 1993, Ajayi filed his second petition for review of his deportation order with this Court. On November 18, 1993, this Court dismissed his petition as meritless. See Ajayi v. I.N.S., No. 93-4164 (5th Cir. Nov. 18, 1993) (unpublished).

#### OPINION

Ajayi argues that the district court erred by denying his petition for writ of habeas corpus challenging the bond determination of the BIA. He contends that the \$20,000 bond was excessive and violated his rights under the Due Process and Equal Protection Clauses and the Eighth Amendment. He also asserts that the bond was improper because he lacked the financial resources to pay it. Ajayi alleges that he is entitled either to have his bond reduced to \$500 or to be released under his own recognizance.

This Court's jurisdiction over direct appeals from the BIA is limited to reviewing final orders of deportation and does not include bond determinations involving INS detainees. Young v. Dep't. of Justice, I.N.S., 759 F.2d 450, 457 (5th Cir.), cert. denied, 474 U.S. 996 (1985). This Court, however, does have authority to review a bond determination in a habeas corpus proceeding "upon a conclusive showing . . . that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." 8 U.S.C. § 1252(a)(1) (West Supp. 1993).

An alien taken into custody pending a final determination of deportability may, in the discretion of the Attorney General, be held in custody, released under bond of at least \$500, or released on conditional parole. 8 U.S.C. § 1252(a)(1). The Immigration and Naturalization Act of 1952 "vests wide discretion in the Attorney General and his delegates to determine whether or not to release an alien on bail pending a final decision in deportation proceedings." United States ex rel. Barbour v. District Dir. of I.N.S., 491 F.2d 573, 577 (5th Cir.), cert. denied, 419 U.S. 873 (1974). The Attorney General has delegated virtually all powers under the Act to the BIA. Id. at 577 & n.4. To override the Attorney General's authority, an alien must demonstrate that the Attorney General has abused her discretion. Id. at 577-78. The Court looks to see whether any basis in fact

supports the agency's decision. Id. at 578; see also Bamidele v. Gerson, No. 93-4201 (5th Cir. June 7, 1993) (unpublished).

The district court correctly applied an abuse-of-discretion standard of review to Ajayi's habeas petition. See Bamidele at 6. An alien's criminal record affects the determination whether he poses a risk of flight before deportation proceedings. Id. at 5. As Ajayi has a criminal record, the BIA's decision has a basis in fact, and thus there was no abuse of discretion by the Attorney General. See id. at 6.

8 U.S.C. § 1252(c) requires that deportation proceedings be completed within six months once the order of deportation becomes final. It is undisputed that Ajayi has been in INS custody since September 1991. A deportation order is not final, however, until all judicial review has been completed. 8 U.S.C. § 1252(c). Judicial review of Ajayi's deportation order was not completed until December 16, 1993, the date the mandate issued; thus he has not been detained beyond the six-month period allowed by § 1252(c). See Balogun v. I.N.S., 9 F.3d 347, 350-51 (5th Cir. 1993).

Further, there is no support for Ajayi's proposition that indigence should affect bond determinations. See Bamidele at 6. Moreover, because his current imprisonment is a result of a deportation proceeding and not a criminal conviction, the Eighth Amendment is inapplicable. Equan v. United States I.N.S., 844 F.2d 276, 279 (5th Cir. 1988).

Ajayi also contends that his bond was set at a prohibitively high level because of his national origin, thus denying his constitutional right to equal protection. A claimant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination. McCleskey v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

Although Ajayi purported to document discrimination against Nigerian detainees, the BIA found his proffered evidence "inconclusive" and "insufficient to show that the immigration judge applied an impermissible standard in the consideration of [his] bond request." The district court did not err in concluding that the BIA's determination had a basis in fact and that the BIA did not abuse its discretion in reaching its decision. Ajayi has thus failed to meet his burden of proving the existence of purposeful discrimination.

Finally, Ajayi's argument that the bond instrument was falsified was not raised in his original appellate brief. This Court does not review arguments raised for the first time in a reply brief, even by a pro se appellant. Knighten v. Commissioner, 702 F.2d 59, 60 & n.1 (5th Cir.), cert. denied, 464 U.S. 897 (1983).

AFFIRMED.