

~~644, G.2~~

15/1963

1.

IN THE PRIVY COUNCIL

No. 5 of 1963

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N

ALHAJI D.S. ADEGBENRO (joined by Order of  
Court dated 25/5/62) (Defendant) Appellant

- and -

HON. S.L. AKINTOLA PREMIER, WESTERN  
NIGERIA (Plaintiff) Respondent

HIS EXCELLENCY SIR ADESOJI ADEREMI  
GOVERNOR OF WESTERN NIGERIA (Defendant) Respondent

Pro Forma

HIS EXCELLENCY SIR ADESOJI ADEREMI  
GOVERNOR OF WESTERN NIGERIA

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

19 JUN 1964

RAFFLES SQUARE  
LONDON, W.C.1.

C A S E

FOR THE RESPONDENT HON. S.L. AKINTOLA

74144

1. This is an appeal from a decision of the Federal Supreme Court of Nigeria (Ademola, F.C.J., Taylor and Bairamian F.J.J., Brett F.J. dissenting) given and made the 7th July, 1962, whereby, in answer to the questions referred thereto pursuant to sub-section 2 of section 108 of the Constitution of the Federation of Nigeria by the High Court of Western Nigeria, as arising in the action brought in the said High Court by this Respondent against the Pro Forma Respondent and the Appellant challenging the validity of his purported dismissal as Premier of the House of Assembly of Western Nigeria by the Pro Forma Respondent, then Governor of Western Nigeria, in purported exercise of his powers as such under sub-section 10 of section 33 of the Constitution of Western Nigeria, it was adjudged and decided that the said dismissal was invalid.

Record  
pp. 36-48;  
48-52;  
53-54

p.24, L.38 -  
p.25, L.14

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Record  
p.39, L.40 -  
p.40, L.11

2. The undisputed facts, and upon which the said reference to the Federal Supreme Court was made, are as follows:-

(1) This Respondent was (on 11th August, 1960) duly appointed Premier of the House of Assembly of Western Nigeria.

(2) The Pro Forma Respondent in purportedly removing him as Premier aforesaid purportedly acted under Section 33 (10) of the Constitution of Western Nigeria. 10

p.11, L.12 -  
p.14

(3) The decision by the Pro Forma Respondent to remove the Respondent from the said Premiership was based on a letter purporting to be from 66 members of the House of Assembly of Western Nigeria to the effect that they no longer had confidence in him as Premier.

pp.1 - 3  
p.3, L.23 -  
p.5, L.16

3. On 21st May, 1962, this Respondent commenced the said action in the said High Court, and after he had done so and filed a Notice of Motion for an interim injunction to restrain the Pro Forma Respondent from purporting unconstitutionally to remove him from his office as Premier aforesaid the Pro Forma Respondent purported to remove him from his said office and proceeded to swear in the Appellant in his place. As a result thereof this Respondent applied for and obtained leave to join the Appellant as an additional Defendant in the said action. 20

p.5, LL.19-35

p.24, L.38 -  
p.25, L.8

4. On 5th June, 1962, it having been agreed between Counsel for the respective parties that certain agreed issues should be referred to the Federal Supreme Court, the Honourable Chief Justice of the said High Court ordered that the same be referred accordingly, pursuant to the provisions of sub-section 2 of section 108 of the Constitution of the Federation of Nigeria. 30

p.25, LL.8-14

5. By sub-sections 2 and 3 of section 108 of the Constitution of the Federation of Nigeria it is provided as follows:-

"(2) Where any questions as to the interpretation of this Constitution or the constitution of a Region arises in any proceedings in the High Court of a territory and the Court is of opinion that the question involves a substantial question of law, the Court may, and 40

shall if any party to the proceedings so requests, refer the question to the Federal Supreme Court.

(3) Where any question is referred to the Federal Supreme Court in pursuance of this section, the Federal Supreme Court shall give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision."

10 6. The said issues were as follows:-

p.24, L.42 -  
p.25, L.8

"1. Can the Governor validly exercise power to remove the Premier from office under Section 33, sub-section 10 of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House?

20 2. Can the Governor validly exercise power to remove the Premier from office under Section 33 (10) of the Constitution of Western Nigeria on the basis of any materials or information extraneous to the proceedings of the House of Assembly?"

7. The answers as adjudged and decided by the said majority of the Federal Supreme Court to the said questions raised by the said issues as afore-said were that, as to the first question:

p.53, LL.16-31

30 ".....the Governor cannot validly exercise power to remove the Premier from office under section 33 (10) of the Constitution of the Western Nigeria except in consequence of proceedings on the floor of the House whether in the shape of no confidence or of a defeat in a major measure or of a series of Defeats on measures of some importance showing that the Premier no longer commands the support of a majority of the members of the House of Assembly."

40 And that as to the second question, in view of the said answer to the first question it would be unnecessary to answer it.

Record  
p.53, L.32 -  
p.54, L.17

8. The answers to the said questions of the minority decision of Brett F.J., were that the answer to the first question was in the negative and as to the second question as follows:-

"In answer to the second question, I would say, that always assuming good faith, the Constitution does not preclude the Governor from acting on any information which he considers reliable. In the present case bad faith has been pleaded and as the nature of the information on which the Governor acted is one of the matters the Court below will have to take into consideration in deciding whether bad faith has been established I abstain from commenting on it." 10

9. Section 33 (10) of the Constitution of Western Nigeria (The Nigeria (Constitution) Order on Council, 1960, Schedule 4 (S.I. 1960 No.1652)) which is in Chapter 3, headed "Executive Powers" and the whole of which chapter is mutatis mutandis identical with similar provisions and all other corresponding provisions in the Constitution of the Federation of Nigeria (ibid. Schedule 2) and also the respective Constitutions of the other territories of Nigeria, namely, Northern Nigeria (ibid. Schedule 3) and Eastern Nigeria (ibid. Schedule 5), is as follows: 20

"33 (10) Subject to the provisions of subsections (8) and (9) of this section, the Ministers of Government of the Region shall hold office during the Governor's pleasure. 30

Provided that:-

(a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly."

Sections 31 to 39 of the Constitution of Western Nigeria which it is material to refer to are set out in the Appendix hereto. 40

p.43, L.20 -  
p.48, L.23

10. In coming to their said decision the majority of the Federal Supreme Court in the Opinion delivered by Ademola F.C.J., in which Taylor and Bairamian F.J.J., concurred, he said as follows:-

10 "Now, there can be no doubt that the Court is called upon to perform a difficult duty. For the interpretation of Section 33 (10) of the Constitution of Western Nigeria, no precedent can be found. The meaning of the subsection and the scope of its application must be read in the light of convention and, of course, other relevant sections of the Constitution must be looked at. As we stated earlier in our ruling on the preliminary objection, three of the four main points in the claim made by the Plaintiff have been admitted by the defence and this Court acts on matters referred to it, only when facts as admitted, or as found, are before it.

20 The truth is that Mr. Moore was right when he said that Section 33 (10) was an attempt to write down the constitutional convention of the English Constitution. It is also true that in England political processes have a flexibility and easy adaptability to the moods of the country. The English tradition, which is emulated in Nigeria, goes very far; but circumstances in Nigeria are so different and life is so much more complex that it is difficult to accept in a generation what England has learnt through the centuries by bitter experience both in and out of Parliament. Cabinet Government or Representative Government in Nigeria has taken the form of the English Cabinet. In England the Crown is the fixed point from which almost everything emanates and around which everything revolves. Nigeria has not yet found it possible to settle and find for herself her own doctrine, her own form of Government and what form Cabinet Government will take. With England, there are conventions of the Constitution. Nigeria has a written Constitution; some of the English conventions are put into writing as part of this Constitution.

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Section 32 of the Constitution of Western Nigeria vests the Executive Authority of the Region in Her Majesty, and subject to the provisions of the Constitution, the Executive authority of the Region may be exercised on behalf of Her Majesty by the Governor, either directly or through officers subordinate to him. The Governor is appointed by the Queen,

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but on the recommendation of the Premier. He (the Governor) may be removed by the Queen presumably on the recommendation of the Premier. Under Section 33 (2) of the Constitution of Western Nigeria, the Governor appoints the Premier. He is the head of Government; he and his Ministers (who are appointed by the Governor on the advice of the Premier) have collective responsibility to the Legislative Houses of the Region (Section 35 (1)). For the Premier's removal, the Constitution makes a provision under Section 33 (10), and in an extreme case under Section 31 (4) (b). A careful examination of Sections 31 to 39 of the Western Nigeria Constitution reveals that they are based on the constitutional conventions of the English system of Cabinet Government.

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The Premier, like the Prime Minister of England, depends upon the support of a majority in the House, and ultimately on the electorate. In the year 1841 in England Government was defeated in the House of Commons on the budget but preferred to stay in office. Sir Robert Peel, the leader of the Opposition, moved a resolution that their continuance in office in such circumstances was at variance with the spirit of the Constitution; this was carried by one vote and a dissolution followed. It will be observed that the Queen did not remove the Prime Minister when his Government was defeated and he refused to leave office, the matter was left for a decision on the floor of the House.

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In England the Sovereign acts exclusively on the advice of the Cabinet, tendered, as a rule, through the Prime Minister. By a convention of the Constitution, not only must the Sovereign act on that advice, but may accept no other. Also the Sovereign must be kept informed of the general run of Government and of political events, particularly the deliberations of the Cabinet, and it is the duty of the Prime Minister to do this. In the same way, Section 39 of the Constitution of Western Nigeria lays the duty on the Premier to keep the Governor informed of these matters.

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An examination of some sections of the

Constitution of the Western Nigeria, in so far as they are relevant, will be useful. Section 31 deals with prorogation and dissolution of legislative Houses. Sub-sections (4) and (4) (b) are relevant. Sub-section 4 reads:

'(4) In the exercise of his powers to dissolve the legislative Houses of the Region, the Governor shall act in accordance with the advice of the Premier: Provided that - '

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sub-section (b) to (4) reads:

'(b) if the House of Assembly passes a resolution that it has no confidence in the Government of the Region and the Premier does not within three days either resign or advise a dissolution, the Governor may dissolve the legislative Houses.'

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That proviso gives the Governor a discretion, but it is clear that the Government or the Premier must have suffered a defeat on the floor of the House before the Governor could act.

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Section 38 (i) has already been referred to above. The proviso gives the Governor power to act in accordance with his own deliberate judgment in four cases; one of them (b) concerns the powers to appoint the Premier under Section 33 (2). The subsection is very important. Whilst it empowers the Governor to use his own deliberate judgment in appointing a Premier, it does not state that he (the Governor) shall use his deliberate judgment in removing him. It seems this is a pointer that something more would be necessary before the Governor could remove. He must have the House with him. The question might be asked why the Governor was given power to use his own judgment in the exercise of the power to appoint. The reasons are not far to seek. It is because circumstances may arise in which on a Premier's death or resignation on personal grounds, either of two party leaders would be able to form a Government and command the support of the House. There is also the question of personal ambition.

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Section 39 is designed to keep the Governor abreast of political events and the temper of the House, as appearing from its proceedings, all through the Premier.

It reads:

'39. The Premier shall keep the Governor fully informed concerning the general conduct of the government of the Region and shall furnish the Governor with such information as he may request with respect to any particular matter relating to the government of the Region.'

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It appears this is the section which affords the Governor an opportunity of evaluating from the trend of the proceedings in the House whether the Premier still commands the support of a majority of the House. It gives a chance for discussion with the Premier himself. When, for instance, various measures of Government are defeated from time to time, the Governor is in a position to suggest to the Premier to resign or test his popularity on the floor of the House. As it was put by the learned Solicitor-General, Eastern Nigeria, 'The only way the House speaks whether it lost confidence in the Government or in the Premier is on the floor of the House by vote.'

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To my mind the conclusion is inescapable that the framers of the Constitution wanted the House to be responsible at every level for the ultimate fate of Government and the Premier. The horizon must be larger than leaving it to one man. The Governor might eventually be the instrument used to effect this, but his position as final arbiter must be dictated by events in the House or events emanating from the House, and not by a letter, however well meaning, signed by a body of members of the House. Law and convention cannot be replaced by party political moves outside the House.

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Ours is a constitutional democracy. It is of the essence of democracy that all its members are imbued with a spirit of tolerance, compromise and restraint. Those in power are willing to respect the fundamental rights of everyone including the minority, and the



minority will not be over obstructive towards the majority. Both sides will observe the principle as accepted principles in a democratic society.

10 Further, there are, in a democratic society, certain accepted conventions in responsible Government and tenure of office; when those forming the Government of the day find that they no longer command the support of the majority in the House, they resign: Alternatively, the Premier asks for a dissolution and fresh elections in the belief that he and his supporters will get a majority in the elections. I think that the Constitution was framed in the light of normal constitutional practice and should be interpreted in that light rather than by a consideration of an extremely unlikely possibility that one can only imagine as being adopted by a Premier who would then, in truth, be entering the path of dictatorship, for if a Premier were to go on although he knew that he did not command a majority, he would be departing from the democratic principle of majority rule which pervades the Constitution - a departure which public opinion would not tolerate and which I think was not contemplated by the framers of the Constitution.

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30 I believe that the Constitution contemplated proceedings in the House as being the touchstone of whether the Premier (and his Government) commands the support of a majority of the members or no longer commands such support.

40 I think that the House of Assembly cannot be relieved of its responsibilities and duties as the House by a letter to the Governor signed by members of the House. It will be an unduly narrow and restrictive interpretation of the powers of the House, and a correspondingly unduly wide interpretation of the powers of the Governor, if in the circumstances, Section 33 (10) is interpreted in any other way except in a way which makes it clear that the evidence emanates from proceedings of the House.

The answer to the first question therefore is that the Governor cannot validly exercise power to remove the Premier from office under Section 33

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subsection 10 of the Constitution of Western Nigeria except in consequence of proceedings on the floor of the House whether in the shape of a vote of no-confidence or of a defeat on a major measure or of a series of defeats on measures of some importance showing that the Premier no longer commands the support of a majority of the members of the House of Assembly.

It will therefore be unnecessary to answer the second question." 10

p.49, LL.6-18 11. In his dissenting Opinion, Brett, F.J., says:

"I accept the submission made on behalf of (this Respondent) that the Constitution of Western Nigeria embodies the essential characteristics of responsible Government, as developed in the United Kingdom, in a Ministry collectively (except on a few clearly defined issues) responsible to the Legislature (S.35) and a Governor exercising the executive authority of the Region on behalf of Her Majesty (S.32) and required to act on ministerial advice except in the strictly limited cases where he is expressly empowered to act in accordance with his own deliberate judgment (S.38)." 20

But having said this, which the Respondent respectfully submits, is fundamental and instead of following up this (as this Respondent submits) correct approach, he goes on to say:

p.49, LL.18-22 "The resemblance does not extend, however, to matters with which this reference is concerned, and what we have to do is to construe a written Constitution, not to apply a set of unwritten conventions." 30

Having gone thus far astray (as this Respondent respectfully submits), as is thus shown, he goes completely astray as the rest of his dissenting Opinion shows, in arriving at his (as this Respondent submits) erroneous decision.

And in regard to this last quoted passage from his Opinion this Respondent would by way of contrast and illustration respectfully repeat the following passage from the Opinion of the majority members of the Federal Supreme Court delivered by Ademola F.C.J., 40

as indicating the correct lines of approach and leading to a correct conclusion as follows:

"For the Premier's removal, the Constitution makes a provision under Section 33 (10) and an extreme case under Section 31(4)(b). A careful examination of Sections 31 to 39 of the Western Nigeria Constitution reveals that they are based on the ..... constitutional conventions of the English system of Cabinet Government."

p.44, L.26

12. Besides the reasoned judgements before referred to a formal opinion on the reference was given dated the same 7th July 1962.

p.53

Application was made on the same day by the present Appellant (but not by the Respondent pro forma) for leave to appeal to Her Majesty in Council against the answers of the Federal Supreme Court of the 7th July 1962 as of right under section 114(1)(c) of the Federal Constitution, to which it was objected on behalf of the present Respondent that the grant of such leave was incompetent, there having been no final decision. The Federal Supreme Court, in purported reliance on a former decision of that Court, overruled the objection, and on the 19th July 1962 granted or purported to grant conditional leave to appeal upon fulfilment of the usual conditions as to security and costs. Upon the 29th October 1962 the Federal Supreme Court granted or purported to grant to the Appellant final leave to appeal to Her Majesty in Council.

pp.54-64

p.58 L.3  
p.58 LL.8-40

pp.59-60

pp.62-63

pp.63-64

13. This Respondent respectfully submits that the said decision of the Federal Supreme Court is not appealable to Her Majesty in Council under section 114 of the Constitution of the Federation of Nigeria, or at all, in that the said decision is merely the expression of the opinions of the majority of the judges who heard the reference together with a statement of the grounds upon which those opinions are based and is merely advisory or consultative so is not in the proper or legal sense of the term such a decision as is capable of appeal to Her Majesty in Council.

This Respondent further or alternatively submits that, if it be a decision of an appealable nature, it is an interlocutory decision which does

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p.58 L.3

not dispose of the case and is consequently not appealable as of right under section 114(1) (c) of the said Constitution (under which the application was made and leave to appeal granted) which gives an appeal as of right only from final decisions in any civil or criminal proceedings on questions as to the interpretation of the Federal Constitution or the Constitution of a Region.

Though the Federal Supreme Court has given its opinion on what is an important, and even a vital question in the suit, which might be decisive of the 10 suit in the Court (that is the High Court of the Western Region) in which the question arose, it remained for the High Court to give a final judgement and dispose of the case in accordance with section 108(3) of the said Constitution, from which judgement (it is submitted) an appeal would lie as of right to the Federal Supreme Court under s.110 (2) of the said Constitution, clearly under head (a) as a final decision in a civil proceeding before the High Court sitting at first instance, if not under head (c) 20 as a decision in a civil proceeding on a question as to the interpretation of the Constitution of the Western Region of Nigeria. It is submitted however that head (c) is directed to giving an appeal to the Federal Supreme Court from any decision, whether final or interlocutory, of a High Court as to the interpretation of the Federal Constitution or the Constitution of any Region on a question which had not been already referred to the Federal Supreme Court by the High Court under section 108(2) of the 30 Federal Constitution.

The decision of the Federal Supreme Court in such appeal, at any rate if the appeal brought under head (a) of section 110(2) of the Federal Constitution, could and, in most cases, would, (it is submitted), be a final decision of the Federal Supreme Court, appealable as of right to Her Majesty in Council under section 114(1)(c) of such Constitution.

It is respectfully submitted that, if the 40 decision of the Federal Supreme Court is of an appealable nature, leave to appeal should have been sought and obtained (but has not been) under section 114(2) head (a) of the Constitution and that the leave which has been given does not fulfil the statutory conditions, so has been given without jurisdiction and therefore this appeal is not properly before Her Majesty in Council.

14. This Respondent respectfully submits that this appeal should be dismissed for the following among other

R E A S O N S

- A.1. BECAUSE the said decision of the Federal Supreme Court is not of an appealable nature and the leave purported to be given is not competent.
- 10 A.2. BECAUSE, if the said decision is of an appealable nature, it is not a final decision but an interlocutory decision and the Federal Supreme Court had not jurisdiction to give leave to appeal against it under section 114(1)(c) of the Federal Constitution.
- B.1. BECAUSE the decision of the Federal Supreme Court, if appealable is right and should be affirmed for the following, among other, reasons:-
- 20 B.2. BECAUSE it is in accordance with the constitutional convention of the English system of Cabinet Government embodied in Section 33 (10) of the Constitution of Western Nigeria and also as it is in the constitutions similarly worded of the constitutions respectively of the Federation of Nigeria and Northern and Eastern Nigeria as applicable to Section 33 (10) proviso (a) of the Constitution of Western Nigeria.
- 30 B.3. BECAUSE it is in accordance with the English constitutional convention that the removal of a Premier by a governor or the sovereign should depend only on a vote taken on the floor of the legislature.
- 40 B.4. BECAUSE as a matter of law it was not possible for it to appear to the Pro Forma Respondent that this Respondent no longer commanded the support of a majority of the members of the House of Assembly since no vote to this effect had been carried in the House of Assembly and from the letter purporting to be signed by a majority of such members it could not appear to the Pro Forma Respondent that this Respondent no longer commanded such support.

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- B.5. BECAUSE it is in accordance with the true construction, meaning and effect of Section 33 (10)(a) of the Constitution of Western Nigeria.
- B.6. BECAUSE for the reasons given therefor in the said majority Opinion of the Federal Supreme Court and for other good and sufficient reasons it is right.

JOHN FOSTER.

S.N. BERNSTEIN.

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A P P E N D I X  
(Separately reproduced)

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IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE FEDERAL SUPREME COURT  
OF NIGERIA

A D E G B E N R O

- v -

A K I N T O L A

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C A S E

for the Respondent  
HON. S.L. AKINTOLA

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