IN THE SUPREME COURT OF NIGERIA

Suit No: FSC73/1961

Petitioner: J.S. Olawoyin
And
Respondent: Commissioner of Police

Date Delivered: 1961-04-06

Judge(s): Adetokunbo Ademola (Chief Justice of the Federation) Sir Lionel Brett (Federal Justice) Unsworth (Federal Justic

Judgment Delivered

The following questions have been referred to this Court by the High Court of the Northern Region in accordance with section 108 of the Constitution of the Federation:

'(1) Whether the provisions of section 59c of the Northern Region High Court Law in so far as they make the Grand Kadi or the Deputy Grand Kadi or an appointee of the Grand Kadi capable to sit as a member of the Appellate Division of the High Court have not been invalidated by the provisions of Chapter IV of the Third Schedule to the Nigeria (Constitution) Order in Council, 1960.

(2) Whether the Appellate Division of the High Court is properly and ade'quately constituted by two Judges of the High Court; or

(3) Whether the Appellate Division of the High Court is properly and ade'quately constituted by three Judges of the High Court.'

Section 59c of the Northern Region High Court Law was enacted by the Northern Region High Court (Amendment) Law, 1960, which was assented to in Her Majesty\'s name on the 12th July, 1960, and section 59c was brought into operation on the 30th September, 1960 by N.R.L.N. 88 of 1960. It is not sug'gested that the section was invalid at the time when it was enacted, and before considering the grounds on which it is submitted that it is invalid now it will be convenient to set out the provisions of the Constitution relating to appeals to the High Court of the Northern Region as they were on the 12th July, 1960, and the legislation passed by the legislature of the Region in accordance with those provisions.

The relevant Constitutional provisions were contained in sections 142A, 142B, 142C, 142D and 148 of the Nigeria (Constitution) Order in Council, 1954, (L.N. 117 of 1954, hereinafter referred to as the 1954 Constitution Order) as amended from time to time, and in particular by the Orders in Council published in Nigeria as Legal Notices 58 of 1958, 59 and 228 of 1959, and 19 of 1960. Sections 142A, 142B and 142c established a High Court of Justice for the Region and provided, inter alia, for the appointment, qualifications, tenure of office and removal of the Judges of the Court.

The Judges of the Court were to be appointed by the Governor: The Chief Justice after consultation with the Chief Justice of the Federation and the other Judges on the recommendation of the Judicial Service Commission of the Region. The qualification required was that the person appointed should be or have been a Judge of a Court of unlimited civil and criminal jurisdiction in some part of Her Majesty\'s dominions, or of a Court hearing appeals from such a Court, or should be qualified to practise in such a Court and have been qualified for not less than ten years. A Judge once appointed was to hold office until he attained the age of sixty-two. He could only be removed for inability to dis'charge his functions or for misconduct, and then only after an independent inquiry and on the advice of the Judicial Committee of the Privy Council.

Section 142D empowered the Regional legislature to establish Courts of justice for the Region in addition to the High Court. Section 148, as set out in section 58 (1) of the Nigeria (Constitution) (Amendment No. 3) Order in Council, 1959 (L.N. 228 of 1959) dealt with appeals to the High Court of the Region from sub'ordinate Courts of the Region, and, without restricting the power of the appro'priate legislature to grant additional rights of appeal, laid down certain rights as part of the Constitution. Generally speaking, an appeal was to lie either as of right or by leave of the High Court from the decisions of subordinate Courts in all criminal matters, in all except minor civil matters, and in all matters involv'ing the Fundamental Rights contained in the Sixth Schedule to the Constitution Order, but there were two qualifications to this, one permanent and one tran'sitional. The permanent qualification was contained in the proviso to subsection (1), which laid down that, unless a law in force in the Region so prescribed, an appeal should not lie to the High Court as of right from a decision in civil pro'ceedings on a question relating to 'Moslem matters', if the Regional legislature had provided for an appeal as of right to a Court established for the Region solely for the purpose of determining appeals from such decisions. Questions relating to 'Moslem matters' were defined as meaning various questions regarding mar'riage, family relationship, inheritance and other incidents of personal law where the questions fell to be determined according to Moslem law. The transitional qualification to the rights of appeal conferred by section 148 was contained in subsection (2) of section 58 of L.N. 228 of 1959, which provided that until a date to be fixed by the Governor of the Region, the rights of appeal conferred by section 148 should not apply in relation to the decisions of such subordinate Courts of the Region as the Governor might prescribe.

Among the Courts established for the Northern Region by the legislature of the Region are a number of Native Courts established by warrant under the Native Courts Law, 1956. These exercise varying degrees of original or appellate jurisdiction in civil and criminal matters. There is also a Court known as the Sharia Court of Appeal, established by the Sharia Court of Appeal Law, 1960. The long title of the Law is 'A Law to establish a Sharia Court for the hearing of appeals from Native Courts in cases governed by Moslem personal law, and for matters ancillary thereto', and the Court is one set up for the purposes referred to in the proviso to section 148 (1) of the 1954 Constitution Order to which reference is made above. The members of the Court are a Grand Kadi, a Deputy Grand Kadi and two other Judges, and they are required to be Moslems of not less than thirty-five years of age, and possessed either of recognised academic qualifications in Moslem law, or of at least ten years' practical experience in administering it.

It is now possible to turn to the subject-matter of this reference. As the Constitution stood in July 1960, subsection (13) of section 142A, inserted with effect from the 13th February, 1960 by L.N. 19 of 1960, read as follows:

A law enacted by the legislature of the Northern Region may provide that, when the High Court of that Region is exercising jurisdiction on appeals from decisions of a native Court in such cases as may be prescribed by any such law, members of any such Court as is referred to in paragraph (b) of the pro'viso to subsection (1) of section 148 of this Order may sit as additional mem'bers of the High Court.

Among the purposes of the Northern Region High Court (Amendment) Law, 1960 (N.R. No. 14 of 1960) was to exercise the power conferred by this pro'vision of the Constitution, and a new Part IVA was inserted in the principal Law, under the crossheading 'Appeals from Native Courts'. It contained four sec'tions, of which the following are material:

59B. There shall be a division of the High Court which shall be called the Native Courts Appellate Division of the High Court which shall have jurisdiction to hear appeals (other than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal) from Grade A and Grade A limited native Courts and Provincial Courts.

59C. (1) A Court of the Native Courts Appellate Division of the High Court shall be constituted of three Judges, two of whom shall be Judges of the High Court and one of whom shall be the Grand Kadi, or the Deputy Grand Kadi or such other Judge of the Sharia Court of Appeal as the Grand Kadi shall appoint.

(2) The member of the Court constituted in accordance with subsection (1) who is considered by a majority of the Judges of such Court to have the greatest knowledge of the law to be administered in a particular appeal shall preside at the hearing of such appeal.

This amendment was brought into operation on the 30th September, 1960, together with a number of other Laws, including the Sharia Court of Appeal Law. Collectively the Laws brought into operation on this date constituted a sub'stantial reorganisation of the jurisdiction and procedure of the Courts of the Region, and the establishment of the new Native Courts Appellate Division of the High Court was part of this reorganisation.

On the 1st October, 1960, the Nigeria (Constitution) Order in Council, 1960 (hereinafter referred to as the 1960 Constitution Order) came into operation, revoking and replacing all previous Constitutional provisions. It contains eigh'teen sections and five Schedules, of which the Second is the Constitution of the Federation and the Third the Constitution of Northern Nigeria. Chapter IV of the Third Schedule contains provisions relating to the Courts of Northern Nigeria, and except in one respect reproduces the substance of the relevant Constitutional provisions relating to the composition and jurisdiction of the Courts, as they existed immediately before the 1st October, 1960, though it takes account of what has been done by referring to the Sharia Court of Appeal by name. The exception is that the Constitution of Northern Nigeria now contains no provision similar to that formerly contained in section 142A (13) of the 1954 Constitution Order. It is because of this omission that the question has arisen whether section 59c of the Northern Region High Court Law remains valid as it stands.

The following appear to be the relevant Constitutional provisions:

(i) Section 5 (1) of the Constitution of the Federation provides that:

Subject to the provisions of this Constitution and the Nigerian Independence Act, 1960, the Constitution of each Region

shall have the force of law throughout that Region, and if any other law is inconsistent with that Constitution, the provisions of that Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

(ii) Section 64 of the Constitution of the Federation confers certain leg'islative powers on Parliament, i.e., the legislature of the Federation, and goes on to provide:

(5) Subject to the provisions of subsection (4) of this section (which deals with inconsistency between Federal and Regional laws) nothing in this section shall preclude the legislature of a Region from making laws with respect to any matter that is not included in the Exclusive Legislative List.

(iii) Section 4 of The Constitution of Northern Nigeria Provides That:

There shall be a Legislature for the Region, which shall consist of Her Majesty, a House of Chiefs and a House of Assembly and which shall have power to make laws for the peace, order and good government of the Region.

(iv) Section 3 of the 1960 Constitution Order reads:

(1) Subject to the provisions of this section, the existing laws shall, notwithstanding the revocation of the Orders specified in the First Schedule to this Order, have effect after the commencement of this Order as if they had been made in pursuance of this Order, and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order.

(7) For the purposes of this section, 'the existing laws' mean all Ordinances, Laws, rules, regulations, orders and other instruments hav'ing the effect of law made or having effect as if they had been made in pursuance of the Orders in Council revoked by this Order and having effect as part of the law of the Colony and Protectorate of Nigeria or any part thereof immediately before the commencement of this Order.

(v) Section 4 (1) of the 1960 Constitution Order reads, in part:

Subject to the provisions of this section, all offices, Courts of law and authorities established under the Orders in Council revoked by this Order for the Colony and Protectorate of Nigeria and existing immedi'ately before the commencement of this Order shall, so far as is consistent with the provisions of this Order continue after the commencement of this Order as if they were offices, Courts and authorities established under this Order for Nigeria.

The argument against the validity of section 59c of the Northern Region High Court Law, as expressed by Chief Rotimi Williams, is as follows:

Chapter IV of the Constitution of Northern Nigeria does not enable anyone but a qualified High Court Judge to sit as a member of the High Court; therefore any Law which makes such provision is inconsistent with the Constitution and is, to the extent of that inconsistency, void under s. 5 of the Constitution of the Federation; section 3 of the Nigeria (Constitution) Order in Council, 1960, only saves an existing Law if it is in conformity with the Constitution, and section 4 only saves existing Courts so far as is consistent with the provisions of the Order.

In my opinion this argument must be accepted. The detailed provisions which the Constitution contains for the qualifications and independence of the Judges of the High Court could be defeated if it were within the power of a Regional legislature to enable other persons to take part in the exercise of the jurisdiction of the Court. The point at issue is not whether the section in question is a rea'sonable one in the conditions of Northern Nigeria, but whether the Constitution leaves it open to the Regional legislature to enact such a section without express authority. I do not consider that it does. The Constitution establishes a number of special authorities for the exercise of particular functions, and it seems clear on principle that any law which provides for the sharing of those functions with other persons must, unless the Constitution expressly permits it, be regarded as inconsistent with the Constitution. It is significant that section 48 of the Constitution of Northern Nigeria expressly authorises the Director of Public Prosecutions of the Region to exercise his powers through members of his staff or to delegate them to the Director of Public Prosecutions of the Federation; sim'ilarly, section 64 authorises the Public Service Commission of the Region to del'egate its powers.

For these reasons I think the answer to the first question referred to the Court must be that section 59c of the Northern Region High Court Law has been inval'idated to the extent referred to in the question, but out of respect to the Attorney-General of the Region I shall endeavour to set out his arguments and explain why I find myself unable to accept them. I hope I am not doing them an injustice in summarising them as follows:

(i) Section 59c of the Northern Region High Court Law is consistent with the present Constitution, and is kept in being by sections 3 and 4 of the 1960 Constitution Order. Even if it is conceded that the Regional legislature could not now enact such a section, that is merely because the Constitution gives it no power to do so, not because the section is inconsistent with the Constitution.

(ii) Section 142A (13) of the 1954 Constitution Order was merely an enabling section. Once the power conferred by it had been exercised it was spent, and it was not repeated in the 1960 Constitution because it was no longer necessary.

(iii) Section 38 of the Interpretation Act, 1889, which applies to the Constitution Orders as it does to an Act of the Parliament of the United Kingdom, provides that the revocation of the 1954 Constitution Order shall not affect any rights acquired under the Order. This would preserve the right of persons in Northern Nigeria to have their appeals determined by a Court composed in a particular way.

(iv) The jurisdiction of the High Court of the Northern Region to sit with an additional member is not to be taken away except by express words.

(v) It requires explanation if a power conferred on the Regional legislature on the 13th February, 1960, was taken away on the 1st October, 1960. If there is ambiguity, the Court may consider the surrounding circumstances on the date on which the existing Constitution was introduced, and in particular, may look at the Report of the Resumed Conference on the Constitution of Nigeria.

The Court ruled against submission (v) during the hearing, and refused to consider the Report of the Conference. The Attorney-General cited the judgment of Lord Halsbury in Eastman Photographic Materials Co. v Comptroller of Patents (1898) A.C. 571, 575, and other authorities on the ques'tion what sources of construction the Courts are entitled to appeal to in order to construe a statute, but the rules enunciated in those cases only come into oper'ation if the words used in the statute are ambiguous. This principle was re-stated recently in the Judgement of the Privy Council in Katikiro of Buganda v Attorney-General (1961) 1 W.L.R. 119, 128, where their Lordships upheld the refusal of the Court of Appeal for Eastern Africa to admit a White Paper in evi'dence for the purpose of construing one of the Constitutional instruments in force in the Protectorate of Uganda, on the ground that they 'found no ambiguity which would justify the admission of extraneous evidence'. It appeared to me that Chief Rotimi Williams put the matter correctly when he said that the omis'sion from the Constitution of Northern Nigeria of any provision corresponding to section 142A (13) of the 1954 Constitution Order was something which might cause surprise, but not something which led to ambiguity.

Of the remaining submissions I propose to leave (i) to the last. As regards (ii), it is of course true that section 142A (13) of the 1954 Constitution Order was an enabling section, that is to say a section conferring power to do something, but there is a distinction between a power which is to be exercised once and for all and is thereafter not required any longer and a power to enact legislation hav'ing a continuing effect like section 59c of the Northern Region High Court Law. The Attorney-General referred to the decision of the House of Lords in Leeds Industrial Corporation v Slack (1924) A.C. 851, in which it was held that the powers conferred by Lord Cairns' Act remained in being notwithstanding the repeal of the Act, but the reasons given by Lord Finlay at page 862 are, if I may say so, not of general application, and in any event the effect of section 16 of the Judicature Act, 1873, on the problem in that case makes it distinguishable from the present one. A Regional legislature has the powers conferred upon it by the Constitution and no others, and no disrespect is involved in treating the decisions on the implied revocation of delegated legislation by the withdrawal of the power to enact such legislation as being in point. The decisions in Surtees v Ellison (1829) 7 L.J. (O.S.) K.B. 335, and Watson v. Winch (1916) 1 KB. 688, were followed by this Court in Egwim v. Egwim (decided on the 10th January, 1958) and the effect of them is that unless the Regional legislature still has the power to enact section 59c of the Northern Region High Court Law the section must be held invalid. The Attorney-General invited us to distinguish Egwim v. Egwim on the ground that the amending Order in Council which had brought about the situation under consideration in that case contained no express saving clause like section 3 of the 1960 Constitution Order, but the Interpretation Act, 1889, applied to it, and I am unable to agree that the absence of a saving clause is a ground for not following it.

As regards submission (iii), I do not consider that the right to have an appeal determined by a Court composed in a particular way is a right of the kind which is preserved by section 38 of the Interpretation Act, 1889. It seems to me to be a procedural matter, and it has been held that no one has a vested right in any particular form of procedure: Wright v. Hale (1860) 30 LJ. Ex. 40, 42.

Submission (iv) also seems to me to deal with a procedural point, and, with respect, I do not consider that a question affecting the composition of the Court is a question of jurisdiction in the sense in which that word is used in Swith v Brown (1871) L.R. 6 EB. 729,733, and the other cases to which the Attorney-General referred us.

That leaves submission (i), that section 59c of the Northern Region High Court Law is consistent with the existing Constitution. When putting forward this submission at the beginning of his address the Attorney-General was pre'pared to concede that the Regional legislature could not now enact such a sec'tion, but this led him into a logical dilemma, and at the end of his address he withdrew the concession and submitted that it was within the present powers of the Regional legislature to enact the section. The dilemma arose from the fact that although in Northern Nigeria the 'totality of legislative power', to adopt an expression used by Lord Atkin, in Attorney-General for Canada v. Attorney-General for Ontario (1937) A.C. 326 is divided between the Federal and the Regional legislatures, one legislature or the other has power to make laws for any matter whatsoever, subject only to the restrictions imposed by the Constitution. The composition of the High Court of the Region is clearly not a matter within the competence of the Federal legislature and it must therefore be within Regional competence to enact any law providing for the composition of the Court which is not inconsistent with the Constitution. Logically, therefore, the Attorney-General's final submission was the only one which he could make if the validity of the section was to be upheld.

With regret, but without hesitation, I find myself unable to accept the sub'mission. The fact that if it is correct it was unnecessary to enact section 142A (13) of the 1954 Constitution Order in the first place is perhaps not conclusive against it. What I cannot accept is that the Constitution, after establishing a High Court, laying down the qualifications for the Judges of the Court, and providing for various rights of appeal to the Court, by mere silence leaves it open to the Regional legislature to provide that the jurisdiction of the Court may be exer'cised jointly by Judges of the Court and other persons. There is, of course, no suggestion of bad faith about the insertion of the section we are now consid'ering, and I would respectfully add that there has been no suggestion that the Grand Kadi and the other members of the Sharia Court of Appeal, possessing the prescribed qualifications in Moslem law which I have already set out, are not entitled to be regarded as thoroughly competent jurists in the system of law which they administer. It is not for this Court to inquire whether the section in question would make for the better administration of justice in Northern Nigeria any more than it can inquire whether the Constitution gives effect to what was agreed at the Conferences which led up to its introduction. The function of the Court is to answer the questions referred to it by interpreting the Constitution as it stands. Section 59c of the Northern Region High Court Law provides for the hearing of certain appeals by a Division of the Court with a majority of High Court Judges, but if we were to hold that without express words the Constitution permitted the Regional legislature to lay down who is to exercise the jurisdiction of the High Court, it is difficult to see on what principle we could refuse to uphold the validity of legislation which went further and enabled the Constitutional jurisdiction of the High Court to be exercised by a majority of wholly unqualified persons. Subsections (4) and (6) of the Constitution of the Federation lay down a special procedure for any amendment to the Constitution of a Region which relates to the establishment of a High Court, the appointment, tenure of office and terms of service of a Judge of a High Court, and appeals to a High Court from subordinate Courts, and this Court is under a special obli'gation not to permit such amendments to be made by a side-wind.

If the first question referred to us is answered as I suggest, the second and third questions, which are asked in the alternative, become material. In addition to inserting Part IVA in the Northern Region High Court Law, the amending Law introduced a definition of \"Judge\" in section 2, which provided that for the purposes of Part IV a the word should include both a Judge of the High Court and the Grand Kadi, the Deputy Grand Kadi and a Judge of the Sharia Court of Appeal, and when section 59c lays down that a Court of the Appellate Division of the High Court shall be constituted of three Judges it uses the words \"Judges\" in this sense. This definition becomes ineffective, and if we hold that the provision enabling the Grand Kadi and other Judges of the Sharia Court of Appeal to sit is void, we have to decide whether the

Appellate Division is prop'erly constituted by three Judges of the High Court or by two. Purely as a matter of grammatical construction, arguments could be adduced in favour of either interpretation, and I think there is a genuine ambiguity here, which entities us to consider what the legislature intended. In a sense, this involves us in assuming the role of legislators, since we are dealing with a case which the legislature can hardly be supposed to have considered, and it should not be thought that in every case where this Court holds part of a section void it will be able to give effect to the remainder. In the present case I would not decline to answer the questions, and I am of the opinion that in answering them, we should look at the substance of section 59c, not at the particular grammatical form in which it was cast at a time when its validity as a whole was not open to doubt. For the hearing of all other appeals, two Judges of the High Court are sufficient, under section 40 of the law, and I think it is clear beyond argument that the sole pur'pose of altering this rule for the Native Courts Appellate Division was to enable the Grand Kadi or another Judge of the Sharia Court of Appeal to sit. In the cir'cumstances, I would answer questions 2 and 3 by saying that a Court of the Appellate Division of the High Court is properly and adequately constituted of two Judges of the High Court.

As the procedure by way of reference under section 108 of the Constitution of the Federation is still comparatively new to all of us, perhaps I may be allowed to make one observation, as a suggestion for the future. If question 1 of the questions referred to us is answered as I have proposed, no issue can arise as to the validity of subsection (2) of section 59c of the Northern Region High Court Law, but if question 1 were answered differently such an issue might well arise. Chief Rotimi Williams was allowed to address the High Court on this issue, and wished to address this Court. We declined to allow him to do so, on the ground that no question relating to the issue had been referred to us, and I think that in interpreting the Constitutions of the Federation and the Regions this Court will do well to observe the rule which the Privy Council laid down for itself for considering sections 91 and 92 of the British North America Act in Citizens Insurance Company of Canada v Parsons (1881) 7 A.C. 96:

'In per'forming this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.'

I am satisfied that this is the proper rule to observe, but, without in any way wishing to criticise those responsible for framing the questions referred to us in the present case, I would point out that, if any sort of finality is to be achieved, the rule requires that questions referred to this Court should be expressed in terms which enable this Court to deal with all the Constitutional issues which fairly arise out of the points in dispute in the Court below.

Judgement delivered by Adetokunbo Ademola. CJF

I concur.

Judgement delivered by Unsworth. F.J.

I concur.

Judgement delivered by John Idowu Conrad Taylor. F.J.

I concur.

Judgement delivered by Sir Vahe Bairamian. F.J.

I concur.