*Privy Council Appeal No. 5 of* 1963

**Alhaji D. S. Adegbenro** – – – – – – – *Appellant*

*v.*

**Chief S. L. Akintola** – – – – – – – – *Respondent*

and

**Sir Adesoji Aderemi** – – – – – – *Respondent Pro Forma*

FROM

**THE FEDERAL SUPREME COURT OF NIGERIA**

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MAY, 1963

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*Present at the Hearing:*
VISCOUNT RADCLIFFE.
LORD JENKINS.
LORD GUEST.
LORD DEVLIN.
SIR KENNETH GRESSON.
[*Delivered by* VISCOUNT RADCLIFFE]

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This appeal concerns the right of the Governor of the Western Region of Nigeria to remove a Premier from office on the ground that it appears to him that the Premier no longer commands support of a majority of the members of the House of Assembly, although there has been no adverse vote in the House.

The proceedings commenced by a writ of summons, dated 21st May, 1962, by the first respondent, Chief Akintola against the second respondent, the Governor of Western Nigeria in which a declaration was claimed that the Governor had no right to relieve the Premier from office in the absence of a prior resolution of the House of Assembly reached on the floor of the House to the effect that the Premier no longer commands the support of the House. There was a subsidiary claim for injunction which in the events which occurred is spent.

After writ was issued the Governor removed Chief Akintola the Premier from office and appointed the appellant, Alhaji Adegbenro in his place. The appellant was then joined as a defendant.

In removing the Premier from office the Governor acted upon receipt of a letter, dated 21st May, 1962, signed by 66 members of the House of Assembly in which it was stated that they no longer supported Chief Akintola. The House of Assembly is composed of 124 members.

When the case came before the Chief Justice of the Western Region it was agreed by counsel for all parties that the following issues be referred to the Federal Supreme Court pursuant to section 108 of the Constitution of the Federation of Nigeria:—

> " (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?
>
> (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? "

After overruling preliminary objections the Federal Supreme Court by a majority answered the question in the following terms:—

> " The answer to the first question therefore is that the Governor cannot validly exercise power to remove the Premier from office under Section 33 Sub-section 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. "

The Court found it unnecessary to answer the second question. Brett, F. J. dissented and would have answered the first question in the affirmative.

The appellant applied for conditional leave to appeal to Her Majesty in Council against the answers given by the Federal Supreme Court, and on 19th July, 1962, the Federal Supreme Court after overruling an objection that the opinion was not a final judgment granted conditional leave to appeal.

The Constitution of Western Nigeria is contained in the Fourth Schedule to the Nigeria (Constitution) Order in Council, 1960. The following are the relevant provisions of the Constitution.

> " 1. (1) There shall be a Governor of the Region, who shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and who shall be Her Majesty's representative in the Region.
>
> (2) The Premier shall consult the Prime Minister of the Federation before tendering any advice to Her Majesty for the purposes of this section.
>
> 32. (1) The executive authority of the Region shall be vested in Her Majesty.
>
> (2) Subject to the provisions of this 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.
>
> (3) Nothing in this section shall prevent the Legislature of the Region from conferring functions on persons or authorities other than the Governor.
>
> 33. (1) There shall be a Premier of the Region, who shall be appointed by the Governor.
>
> (2) Whenever the Governor has occasion to appoint a Premier he shall appoint a member of the House of Assembly who appears to him likely to command the support of the Majority of the members of the House.
>
> (3) There shall be, in addition to the office of Premier, such other offices of Minister of the Government of the Region as may be established by the Legislature of the Region or, subject to the provisions of any Regional law, by the Governor, acting in accordance with the advice of the Premier.
>
> (4) Appointments to the office of Minister of the Government of the Region other than the office of Premier shall be made by the Governor, acting in accordance with the advice of the Premier.
>
> Provided that at least two Ministers shall be appointed from among the members of the House of Chiefs.
>
> (8) The office of the Premier shall become vacant—
>
> (*a*) when, after any dissolution of the Legislative Houses of the Region, the Premier is informed by the Governor that the Governor is about to re-appoint him as Premier or to appoint another person as Premier; or
>
> (*b*) if he ceases to be a member of the House of Assembly otherwise than by reason of a dissolution of the Legislative Houses.
>
> (9) The office of a Minister of the Government of the Region other than the Premier shall become vacant if the office of Premier becomes vacant.

(10) Subject to the provisions of sub-sections (8) and (9) of this Section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure:

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; and

(*b*) the Governor shall not remove a Minister other than the Premier from office except in accordance with the advice of the Premier. "

Section 108 of the Constitution of the Federation of Nigeria provides for the reference of questions as to the interpretation of the constitution of a region in the following terms:—

" 108. (1) Where any question as to the interpretation of this Constitution or the constitution of a Region arises in any proceedings in any court of law in any part of Nigeria (other than the Federal Supreme Court, the High Court of a territory or a court-martial) and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the High Court having jurisdiction in that part of Nigeria and the High Court shall—

(*a*) if it is of opinion that the question involves a substantial question of law, refer the question to the Federal Supreme Court; or

(*b*) if it is of opinion that the question does not involve a substantial question of law, remit the question to the court that made the reference to be disposed of in accordance with such directions as the High Court may think fit to give.

(2) Where any question 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 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."

When the appeal came before the Board, the first respondent took a preliminary objection that the decision of the Federal Supreme Court was not appealable as of right, that the leave purported to be given was not competent and that the Board had no jurisdiction to entertain the appeal. Section 114 of the Constitution of the Federation of Nigeria which governs appeals to Her Majesty in Council is in the following terms:—

" 114. (1) Subject to the provisions of this Constitution, an appeal shall lie from decisions of the Federal Supreme Court to Her Majesty in Council as of right in the following cases—

(*a*) where the matter in dispute on the appeal to Her Majesty in Council is of the value of five hundred pounds or upwards or where the appeal involves directly or indirectly a claim to or question respecting property, or a right of the value of five hundred pounds or upwards, final decisions in any civil proceedings;

(*b*) final decisions in proceedings for dissolution or nullity of marriage;

(*c*) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution or the constitution of a Region; and

(*d*) such other cases as may be prescribed by Parliament. "

The answer to the preliminary point depends upon a proper construction of the last quoted section. The respondent argued that an appeal as of right did not lie to Her Majesty in Council on questions as to the interpretation of the Constitution until a final decision had been reached in the proceedings. " The proceedings ", it was said, were the suit before the Chief Justice of the

Western Region, and the reference in these proceedings under section 108 to the Federal Supreme Court was interlocutory and the decision upon the question referred was not final. He asked the Board to read the word " final " in the sense in which it is normally understood as finally disposing of the rights of the parties in regard to the whole suit. The cases of *Abdul Rahman v. D. K. Cassim & Sons* (1932) 60 Indian Appeals p. 76, and *Ramchand Manjimal v. Goverdhandas Vishindas Ratanchand* (1920) 47 Indian Appeals p.124 were referred to. It was further argued that section 114 (1) (*c*) must be read as if it had provided " final decisions in any civil proceedings on questions involving the interpretation of this Constitution or the Constitution of a Region ". Reference was made to the *Commonwealth of Australia v. Bank of New South Wales* [1950] A.C. 235 at page 295.

If section 114 had stood alone, there might be great force in these observations, but in their Lordships' opinion the provisions of this section must as far as possible be read so as to provide for the cases which arise out of section 108. That section provides for the reference to the Federal Supreme Court of questions as to the interpretation of the Constitution and by sub-section (3) where a question is referred " the Federal Supreme Court shall give its decision upon the question ". Now the Federal Supreme Court has given a decision in civil proceedings on a question as to the interpretation of the Constitution. Is it a final decision? The decision may not be final in the proceedings before the Chief Justice, but so far as the Federal Supreme Court is concerned it is final. The Court has finally disposed of the matter referred to them, namely the question as to the interpretation of the constitution. This construction accords with that adopted by Brett, Ag.C.J.F. in *Dr. Chike Obi v. Director of Public Prosecutions* F.S.C. 56 of 1961. Their Lordships have accordingly reached the conclusion that the decision of the Federal Supreme Court on the reference under section 108 was a final decision and that an appeal lies as of right to Her Majesty in Council under section 114.

This interpretation of section 114 in relation to section 108 provides a highly convenient method on which questions as to the Constitution can be determined. It enables parties, if they so desire, to obtain the decision of Her Majesty in Council upon constitutional questions which arise in the course of civil or criminal proceedings before the case is finally determined. The construction contended for by the respondent might result in wholly abortive procedure if in the end of the day the interpretation of the Constitution by the Federal Supreme Court was held to be wrong upon an appeal to Her Majesty in Council.

For these reasons their Lordships are of opinion that the objection to the competency of the appeal is not a good one and they will now address themselves to the merits of the appeal.

The question to which an answer has to be found is of obvious importance, but it lies, nevertheless, within a very small compass. Its decision turns upon the meaning to be attached to the wording of section 33 (10) of the Constitution of Western Nigeria, read, as it should be, in the context of any other provisions of the Constitution that may legitimately influence its meaning.

It is clear, to begin with, that the Governor is invested with some power to dismiss the Premier. Logically, that power is a consequence of the enactment that Ministers shall hold office during the Governor's pleasure, for, subject to the saving conditions of provisoes (*a*) and (*b*) that follow, the Governor has only to withdraw his pleasure for a Minister's tenure of office to be brought to an end. Where the Premier's office is concerned it is proviso (*a*) that limits the Governor's power to withdraw his pleasure constitutionally, for by that proviso he is precluded from removing 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 ". By these words, therefore, the power of removal is at once recognised and conditioned: and, since the condition of constitutional action has been reduced to the formula of these words for the purpose of the written Constitution, it is their construction and nothing else that must determine the issue.

What then is the meaning of the words " the Premier no longer commands the support of a majority of the members "? It has been said, and said truly, that the phrase is derived from the constitutional understandings that support the unwritten, or rather partly unwritten, constitution of the United Kingdom. It recognises the basic assumption of that Constitution, as it has been developed, that, so long as the elected House of representatives is in being, a majority of its members who are prepared to act together with some cohesion is entitled to determine the effective leadership of the Government of the day. It recognises also one other principle that has come to be accepted in the United Kingdom: that, subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.

It is said too that the " support " that is to be considered is nothing else than support in the proceedings of the House itself, and with this proposition also their Lordships are in agreement. They do not think, however, that this is in itself a very pregnant observation. No doubt, everything comes back in the end to the question what action the members of a party or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to vote in the House, and it appears to their Lordships somewhat unreal to try to draw a firm dividing line between votes and other demonstrations where the issue of " support " is concerned.

This indeed is the crux of the question that has now been raised. The respondent maintains, and it is implied in the decision that he has obtained from the Federal Supreme Court, that the Governor cannot constitutionally take account of anything in the matter of " support " except the record of votes actually given on the floor of the House. Consequently, it is said, his action in removing the first respondent from the Premiership on the strength, it appears, of the letter addressed to him by the 66 members of the House referred to and without waiting until there had been an adverse vote in the House itself was not within the powers conferred upon him by the Constitution.

The difficulty of limiting the statutory power of the Governor in this way is that the limitation is not to be found in the words in which the makers of the Constitution have decided to record their description of his powers. By the words they have employed in their formula, " it appears to him ", the judgment as to the support enjoyed by a Premier is left to the Governor's own assessment and there is no limitation as to the material on which he is to base his judgment or the contacts to which he may resort for the purpose. There would have been no difficulty at all in so limiting him if it had been intended to do so. For instance, he might have been given power to act only after the passing of a resolution of the House " that it has no confidence in the Government of the Region ", the very phrase employed in an adjoining section of the Constitution (see section 31 (4), proviso (*b*)) to delimit the Governor's power of dissolving the House even without the Premier's advice. According to any ordinary rule of construction weight must be given to the fact that the Governor's power of removal is not limited in such precise terms as would confine his judgment to the actual proceedings of the House, unless there are compulsive reasons, to be found in the context of the Constitution or to be deduced from obvious general principles, that would impose the more limited meaning for which the respondent contends.

Their Lordships have not discovered any such reasons It is one thing to point out the dangers of a Governor arriving at any conclusion as to his Premier's support in the House except upon the incontrovertible evidence of

votes recorded there on some crucial issue. There are indeed such dangers. Expressions of opinion, attitude or intention upon such a delicate matter may well prove to be delusive. He may judge the situation wrongly and so find himself to have taken a critical step in a direction which is proved to be contrary to the wishes of the majority of the House or of the electorate. Again, if he is not to rely on his Premier for advice as to the balance of support in the House, he is likely to find that he is in effect consulting indirectly the views of Opposition leaders who may turn out in the event to be no more than an opposition: or he will find himself backing the political judgments conveyed to him by his own private advisers against the political judgment of the Premier himself.

All these are real dangers which any Governor proposing to act under his power of removal would need to bear in mind, since, if he ignores them, he would run the risk of placing the constitutional sovereign power, whose representative he is, in conflict with the will of the elected House of representatives whose majority is for the time being expressed in the person of the Premier. Anyone familiar with the constitutional history and development of the United Kingdom would naturally dwell upon these aspects of the Sovereign's position, if he was invited to advise a Governor as to the circumstances and occasions upon which he could wisely exercise his power of removal.

But, while there may be formidable arguments in favour of the Governor confining his conclusion on such a point to the recorded voting in the House, if the impartiality of the constitutional sovereign is not to be in danger of compromise, the arguments are considerations of policy and propriety which it is for him to weigh on each particular occasion: they are not legal restrictions which a Court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe. To sum up, there are many good arguments to discourage a Governor from exercising his power of removal except upon indisputable evidence of actual voting in the House, but it is none the less impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded votes.

Another argument has been advanced to the effect that the Nigerian constitutions are modelled on the current constitutional doctrines of the United Kingdom, and, since the British sovereign would not be regarded as acting with constitutional propriety in dismissing a Prime Minister from office without the foundation of an adverse vote on a major issue in the House of Commons, so the Governor in Western Nigeria must similarly be treated as precluded from exercising his power of removal in the absence of a vote of the same kind. This approach to the matter appears to their Lordships to have had some influence upon the view taken by the majority of the Federal Supreme Court in this case, and, since it seems capable of conveying an implication that could be misleading in other situations apart from the present one, their Lordships wish to make two observations upon it.

The first is that British constitutional history does not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister. Since the principles which are accepted to-day began to take shape with the passing of the Reform Bill of 1832 no British Sovereign has in fact dismissed or removed a Prime Minister, even allowing for the ambiguous exchanges which took place between William IV and Lord Melbourne in 1834. Discussion of constitutional doctrine bearing upon a Prime Minister's loss of support in the House of Commons concentrates therefore upon a Prime Minister's duty to ask for liberty to resign or for a dissolution, rather than upon the Sovereign's right of removal, an exercise of which is not treated as being within the scope of practical politics. In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where dismissal is an actual possibility: and the right of removal which is explicitly recognised in the Nigerian constitutions must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import.

The second observation is perhaps only another way of making the same point. It is true that the Western Nigerian Constitution, allowance made for the federal structure, does embody much of the Constitutional practice and principle of the United Kingdom. That appears from a study of its terms. There are identifiable differences of scheme to be found in certain sections, but no one, it seems, questions the general similarity or the origin of many of its provisions. But, accepting that, it must be remembered that, as Lord Bryce once said, the British constitution " works by a body of understandings which no writer can formulate "; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the constitutions of Australia or the United States where federal issues are involved, it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.

Their Lordships have not been able to find any indications either in the general scheme or in other specific provisions which would enable them to say that the Governor is legally precluded from forming his opinion upon the basis of anything but votes formally given on the floor of the House. It is plain that in any event he is invested with responsibilities that on occasions will require of him delicate political judgment: the provisoes attached to section 31 (4) dealing with the power to refuse a Premier a dissolution or to dissolve the House without his advice make that clear. When one turns to section 33 itself, the same kind of phrase " appears to him likely to command the support of the majority of the members of the House " (see sub-section (2)) is employed with regard to the Governor's selection of a Premier as is employed in sub-section (10), " appears to him that the Premier no longer commands the support of a majority of the members ", with regard to the Governor's power of removal; and yet no one has suggested in the course of argument that a Governor exercising the power of selection is under any legal restriction as to the persons he may consult or the material to which he may turn in aid of his decision.

Certainly, it is to be noted that this power of appointment is listed in section 38 (1) as one of the functions in exercising which a Governor is free to use his " deliberate judgment "; whereas the power of removal is not included as one of the items in this list. This circumstance, which is perhaps one of the curiosities of the drafting of the complicated provisions of the Constitution, has given rise to the suggestion that it amounts to a recognition that the Governor's power of removal in section 33 (10) is not to be the product of his own judgment and, by a somewhat questionable step in the argument, is therefore to be understood as confined to an observation of votes recorded in the House. Their Lordships however would regard such a deduction as inadmissible. The explanation of the fact that the power of removal is not included in the functions mentioned in section 38 (1) appears to them to be the simple one that the only purpose in listing these functions is to except them from the statutory direction with which the sub-section opens to the effect that in exercising his functions under the Constitution the Governor must act in accordance with the advice of the Executive Council. As the Executive Council is a Cabinet formed by the Premier and a group of his Ministers recommended by him it could hardly have occurred to the draftsmen of the Constitution that the Governor, in removing a Premier, would have to consult and act on the Executive Council's advice. The idea of his doing so is a contradiction in terms. If so, it could hardly have been felt that there was any need to make an exception of a function that was not regarded as capable of being affected by section 38 (1) at all.

For the reasons that have been set out their Lordships have been unable to arrive at the same conclusion with regard to the two questions submitted as that reached by the Supreme Court. While appreciating the force of much

that is said in the judgment of the learned Chief Justice and the propriety of his constitutional doctrines, they do not find that the scheme or provisions of the Constitution of Western Nigeria enable a Court of law to restrict the Governor's power of removal in the way imposed by the Supreme Court's answer to the first question; nor do they think that a different answer would produce a result contrary to the basic assumption of such democratic constitutions that the Government of the territory cannot in the end be conducted without the support of a majority of members of the elected House.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed; that the Answer of the Supreme Court given on the 7th July, 1962, should be reversed; and that in lieu thereof it should be declared that the Answer to the first Question is Yes and that the Answer to the second Question is Yes also, and that the costs of the defendant Alhaji Adegbenro of the proceedings in the Supreme Court should be his costs in the cause. His costs of this appeal and of his Motion before the Board on the 6th March, 1963, must be dealt with in the same way.

(87816) Wt. 8052/97 120 6/63 Hw.

**In the Privy Council**

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ALHAJI D. S. ADEGBENRO

*v.*

CHIEF S. L. AKINTOLA
and
SIR ADESOJI ADEREMI

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DELIVERED BY VISCOUNT RADCLIFFE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW
1963