

Removal of Chief Judge of a State in Nigeria: A Review of Elelu Habeeb & Anor v The Attorney General of the Federation & Ors

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Abstract

Just as it provides in the case of appointment of a Chief Judge of a state and Chief Justice of the Federation in Nigeria, the Nigerian Constitution also provides for the removal of the said Chief Judge and Chief Justice. It is, however, the recurring vexed issue of the interpretation of the Constitution, and in particular with regard to removal of a Chief Judge of a State that played out in the case of Hon. Justice Raliat Elelu-Habeeb & Anor v the Attorney-General of the Federation & Ors delivered by the Supreme Court of Nigeria on Friday the 17th of February, 2012. In interpreting the relevant provision(s) of the Constitution on removal of a Chief Judge of a State in the case under review, the Apex Court came to the conclusion that the Governor of a state cannot remove a Chief Judge without the input of the National Judicial Council (NJC). This is notwithstanding the fact that there is no express substantive or principal provision in the Constitution which provides that the National Judicial Council must be involved in the process of removal of a Chief Judge of a state, or the Chief justice of the Federation, as opposed to the process of removal of other judges who are not Heads of their courts, which process must involve the NJC. This paper seeks to examine the facts of the case; the laws applicable to removal of a Chief Judge of a State in Nigeria; the reasons for the Supreme Court decision as well as to appraise the said judgement.



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Keywords: Chief Judge, Constitution, Governor, National Judicial Council (NJC), Removal

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1.0 Introduction

On 17th February, 2012, in the case of *Hon. Justice Raliat Elelu-Habeeb & Anor v The Attorney-General of the Federation & Ors*¹ the Supreme Court of Nigeria, comprising of a Panel of 7 (Seven) Justices² unanimously delivered a judgement in an appeal filed by the former Chief Judge of Kwara State over her removal as the Chief Judge of the State. In a unanimous decision wherein the leading judgement was read by His Lordship, Mahmud Mohammed, J.S.C., the Supreme Court held that a Chief Judge of a State cannot be removed without recourse to the National Judicial Council (NJC).

The Constitution of the Federal Republic of Nigeria, like other Federal Constitutions, no doubt provides for the appointment and removal of judges generally. And in the case of Nigerian Constitution, it is expressly provided that the removal of judges generally, as opposed to removal of heads of courts (Chief Judges), must be with the involvement of the NJC³. With regard to the removal of the Chief Judges, however, it is clear, as obvious in the substantive sections of the Nigerian Constitution that no such requirement of the input of the NJC is provided for⁴. And the provision of the 3rd Schedule in this regard which is procedural, and which was relied on by the court in arriving at their judgment cannot supersede the independent substantive provisions in the same Constitution on removal of a Chief Judge of a State in Nigeria. Little surprise therefore, that despite the fact that the case under review was referred to in the recent decision of the same Supreme Court case of *A.G. Cross River State v. FRN*⁵, where the Chief Justice of Nigeria was removed without any input of the NJC, the Supreme did not follow its decision in the case under review. Rather, the case was dismissed on the ground that the Plaintiff has no locus standi to institute the action on behalf of the Chief justice of Nigeria, Honourable Justice Walter Samuel Nkanu Onnoghen.

It is based on the position of the Supreme Court as reflected in the case under review that this paper seeks to examine the facts of the case vis-à-vis the reasoning of the court in arriving at the decision handed down by the Supreme Court on removal of a Chief Judge of a state in Nigeria. In the case under review, many issues call for consideration, especially as to the correct interpretation of the Constitution on the issue, as well as the status and relevance of a Schedule to an enactment or legislation. Taking into consideration all the above, this paper aims at an appraisal of the Supreme Court judgement in the case under review. Finally, the paper recommends that the provisions of the Constitution on removal of Judges be harmonised, amended and/or overhauled to avoid unnecessary controversy which is imminent

¹ (2012) 13 NWLR (Pt.1318) 423.

² Coram: Mahmud Mohammed, J.S.C., Walter Nkanu Onnoghen, J.S.C., Christopher Mitchell Chukwuma-Eneh, J.S.C.,

Muhammad Saifullahi Muntaka-Coomassie, J.S.C., Olufunlola Oyelola Adekeye, J.S.C., Mary Ukaego Peter-Odili, J.S.C.,

Olukayode Ariwoola, J.S.C.

³ See section 292 (1)(b) of the Constitution

⁴ See section 292 (1)(a)(ii) of the Constitution upon which the Kwara State House of Assembly acted

⁵ {2019} 10 NWLR (Pt1681) 401

in the interpretation of the provisions of the Constitution on removal of Chief Judges/Chief Justice in Nigeria.

2.0 Facts of the Case

The Governor of Kwara State on 28th March, 2008 appointed Honourable Justice Raliat Elelu-Habeeb (hereinafter referred to as “the Appellant”) as the Chief Judge of the state, and she occupied that position until 5th May, 2009 when she was removed by the same Governor acting on an “address” supported by two-thirds majority of the House of Assembly of Kwara State. The grounds of her removal as stated by the House of Assembly of the State were her inability to discharge the functions of her office as well as acts of misconduct which contravened the Code of Conduct for Chief Judicial Officer of a State.

Aggrieved by her removal, the Appellant approached the Federal High Court, Ilorin wherein she instituted an action against the National Judicial Council & 3 others⁶, vide Originating Summons which was supported with a 23 paragraph affidavit. The Appellant also annexed to the processes attachments including the grounds relied upon by the Governor of Kwara State to substantiate the allegations of misconduct, as well as letters of invitation to the House of Assembly of Kwara State, in support of the Originating Summons in the action.

After parties had joined issues, the main issues that arose before the trial court for consideration were:

- (i) Whether the Federal High Court had jurisdiction to try the matter; and
- (ii) Whether the Kwara State House of Assembly and the Governor of the State have the power under the Constitution of the Federal Republic of Nigeria to remove the Appellant from her office as the Chief Judge of Kwara State.

The trial Federal High Court, after consideration of the issues held that it had jurisdiction over the matter, and on merit of the case, also gave judgement in favour of the Appellant, declaring her removal as the Chief Judge as unconstitutional, null and void.

Dissatisfied with the judgement of the trial court, the Respondents appealed to the Court of Appeal⁷. In its judgement, the Court of Appeal held that the Federal High Court lacked the jurisdiction to entertain the suit. It however, went on to determine the case on merit, holding that the removal of the Chief Judge without recourse to the National Judicial Council (NJC) was unlawful.

Aggrieved by the Court of Appeal’s decision, both parties appealed to the Supreme Court. The Appellants were not pleased with the decision of the Court of Appeal on the issue of jurisdiction of the Federal High Court to entertain the matter, and they filed their separate

⁶ Other Defendants in the suit at the Federal High Court are: *The Attorney-General of the Federation* as the 2nd Defendant; *the House of Assembly of Kwara State* as the 3rd Defendant; while *the Honourable Attorney-General of Kwara State* was sued as the 4th Defendant.

⁷ The Notices of Appeal however, excluded that of the 2nd Appellant (National Judicial Council (NJC) who was the 1st Defendant at the trial court, but who, upon application by the 1st Appellant, was later joined in the appeals as one of the respondents at the Court of Appeal.

appeals against the decision. The 3rd and 4th Defendants/Respondents⁸ who were appellants at the Court of Appeal also filed their separate appeals against the decision of the Court of Appeal to hear the matter on merit after having held that the trial Federal High Court lacked jurisdiction to entertain the matter. The 1st Respondent⁹ who was the 2nd Defendant at the trial Court neither filed an appeal nor cross-appeal.

After due consideration of the preliminary objections taken in the case, as well as the entire case, the Supreme Court, unanimously allowed the appeal and dismissed the cross-appeal of the 2nd and 3rd Cross-Appellants.

3.0 Basis of the Supreme Court Judgment

A careful reading of the full judgment of the Apex Court shows that it is clear from the judgement in this case that the decision of the Supreme Court is based on what is considered a holistic interpretation of the Constitution, including the provisions of the Schedule thereto. The Court also placed heavy reliance on the provisions of the 3rd Schedule to the Constitution. In the words of the Court:¹⁰

It is quite plain from the provisions of paragraphs (c) and (d) of part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria, 1999, that the National Judicial Council is the body that had been assigned the duty and responsibility of recommending to the Governors of the States of the Federation, suitable persons for appointments to the offices of Chief Judges of the States and other judicial officers in the States. In addition to its role in the appointment of Chief Judges of the States and other judicial officers, the same National Judicial Council is also empowered under sub-paragraph (d) of paragraph 21 to recommend to the Governors of the States, the removal from office of the Chief Judges of the States and other judicial officers of the States, and also to exercise disciplinary control over such Chief Judges of the States and other judicial officers of the state. Therefore, from these very clear provisions of the Constitution which are very far from being ambiguous, the Governors of the States and the Houses of Assembly of the State cannot exercise disciplinary control touching the removal of Chief Judges of States or other officers in the States.

4.0 An Appraisal of the Judgment

The position of the Supreme Court above with regard to the role of the National Judicial Council in the appointment and removal of Chief Judge of the States and other judicial officers of the States, is as provided in the Schedule to the Constitution¹¹. With the greatest respect and humility to their Lordships, however, it is to be noted that this provision is contained in a Schedule to the Constitution. This point becomes crucial as this writer believes

⁸ The Hon. Attorney-General of Kwara State, and the House of Assembly of Kwara State respectively

⁹ The Hon. Attorney-General of the Federation

¹⁰ At page 492, para G-H.

¹¹ See: part 1, paragraph 21 (c) and (d) of the 3rd schedule to the Constitution

firmly that the provisions of section 292 (1) (a) (ii) of the same Constitution are in a clear contrast with the provisions of the paragraph 21 (d) of the 3rd Schedule to the same Constitution. It need also be stressed that section 292 is a principal, *afortiori*, independent section or clause. The section provides as follows:

“292 (1) A judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances-

(a) in the case of -

(i) Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of Federal High Court, President of the National Industrial Court, Chief Judge of the High Court of the Federal Capital Territory, Abuja, Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and President Customary Court of Appeal of the Federal Capital Territory, Abuja, by the President acting on an address supported by two-thirds majority of the Senate.

(ii) Chief Judge of a State, Grand Kadi of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State by the Governor acting on an address Supported by two-thirds majority of the House of Assembly of the State

Praying that he be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or body) or for misconduct or contravention of the Code of Conduct.

(b) In any case, other than those to which paragraph (a) of this subsection applies, by the President or, as the case may be, the Governor acting on the recommendation of the National Judicial Council that the Judicial officer be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or body) or for misconduct or contravention of the Code of Conduct.”¹²

What is glaring from the afore quoted provisions is that, as far as the removal of a Chief Judge of a State is concerned, the Constitution makes it clear, without the aid of any canon of construction of statutes,¹³ that a recourse to the National Judicial Council is uncalled for. Hence, the Separate provisions in paragraph 292 (i) (b), which begins with the phrase “In any case, other than those to which paragraph (a) of this Constitution applies....”

Relying on their decisions in *Attorney-General, Bendel State v Attorney-General, Federation*,¹⁴ among others, the Supreme Court also laid down some guidelines observable in the

¹² Underlining mine, for emphasis.

¹³ Such as the *eiusdem generis* rule or any other rule of interpretation.

¹⁴ (1981) 16 SC 1; (2001) FWLR (Pt. 65) 448,

interpretation of statutes, particularly the provisions of the Constitution.¹⁵ These guidelines include:

“Effect should be given to every word used in the Constitution”; and that “the language of the Constitution, where clear an unambiguous must be given its plain and evident meaning.”

It is respectfully posited that, while the guidelines are very useful to the construction of Statutes, they are inapplicable in this case and have no place as far as the interpretation of section 292 (1) (a) (ii) of the Constitution is concerned. The provision is so clear and unambiguous. And the trite principle of law which has crystallised in our jurisprudence or corpus on interpretation of statutes, is that words of a statute or provision in a statute must be given its plain meaning where it is clear and unambiguous¹⁶ as we have in this case. In *Adesanoye v Adewole*¹⁷, Iguh, J.S.C., held, inter alia:

*The first point that I desire to make before I proceed to examine the relevant sections of the Edict is that it is a cardinal principle in the construction of statutes that they should be construed according to the intention expressed in the statutes themselves. Where the words of any section are clear and unambiguous, then no more is necessary than to give them their natural and ordinary meaning unless this would lead to absurdity or be in conflict with the other provisions of the statute. The words of the statute do alone best declare the intention of the law makers where the words as aforesaid are clear and unambiguous.*¹⁸

From the afore quoted dictum of the Supreme Court, what is obvious is that, for the literal interpretation to apply, the statutory provision in question must not conflict with other provisions of the statute. Herein lies the dilemma: section 292 (1) (a) (ii) is clearly in conflict with provision of Paragraph 21 (d) of the 3rd Schedule to the Constitution. However, given that the position of the law is trite and clear in a situation such as this, it is respectfully submitted that the Supreme Court should have no difficulty whatsoever in holding that the provisions of section 292 (1) (a) (ii) prevails over the provisions of a Schedule.

Given that the law is that a Schedule in an Act of parliament is as much an enactment as any other part of such Act,¹⁹ the law is that a principal clause or section in a statute would prevail where there is a conflict between the provisions of the Schedule and the principal clause or section.²⁰

¹⁵ See pages 489-490 of the judgement

¹⁶ See the cases of *Dickson v. Sylva* {2017} 8 NWLR (Pt1567) 167, and *Tumsah v. FRN* {2018} 17 NWLR (Pt1648) 238.

¹⁷ (2000) 9 NWLR (PT.671) 127 @ 173; (2000) 5 S.C. 172.

¹⁸ Underlining mine, for emphasis

¹⁹ See: *Ibidapo –VS- Lufthansa Airlines* (1997) 4 NWLR (Pt. 498) 124 @ 162

²⁰ See: *Action Congress –VS- INEC* (2007) 12 NWLR (Pt. 1048) 222 @ 290; and A.G., *Anambra State –VS- A.G., Federation* (1993)6 NWLR (Pt. 302) 692 @ 720

In *FCSC v Laoye*,²¹ the Supreme Court, per Oputa, J.S.C., (of blessed memory) encapsulated the trite principle thus:

Schedules, tables and forms are useful in construing the provisions in the body of a statute. In cases of ambiguity, they become useful handmaid to interpretation. But they will not over-rule the plain words of the statute. If there is any contradiction, the enacting clause will prevail. It would be quite contrary to recognised principles of construction of statutes to restrain the operation of clear and unambiguous words or sections by reference to what appears in a schedule, table or form....²²

Again, in *Aodoankaa v Ajo*,²³ the Court of Appeal, per Nzeako, J.C.A., held, on the procedural nature of schedule, *inter alia*: The provisions in a schedule, being only procedural, confers no right and cannot derogate from rights by the Decree useful.²⁴

An ex-ray of the provisions of the Constitution, being a statute and the grundnorm of our laws, examined above shows without any iota of doubt that what we have in section 292 (1) (a) (ii) of the Constitution and paragraph 21 (d) of the 3rd schedule thereto is contradiction, and not ambiguity. And based on the judicial pronouncements of our courts espoused above, section 292 (1) (a) (ii) of the Constitution ought to prevail over the provision of paragraph 21 (d) of the Schedule to the Constitution. Their Lordships, while commenting further on section 292 (1) (a) (ii) of the Constitution held further that:²⁵

“The provisions of section 292 (1) (a) (ii) of the Constitution above also deals with the power of the Governor to remove the Chief Judge of a State in conjunction with the House of Assembly of the State. Although it is true, as argued by the learned Senior Counsel to the cross-appellant that, the above section 292 (i) made no provision for the National Judicial Council to play any role in the removal of a Chief Judge of a State, the fact that the Council has a vital role to play in the appointment, removal and exercising control over a Chief Judge of a State under section 271 (1) of the Constitution and also under paragraph 21 of part 1 of the third schedule to the same constitution is not at all in doubt.”²⁶

Section 271 (1) of the Constitution is a principal section or enactment. With great respect, however, to their Lordships, section 271 (1) of the Constitution only provides for involvement of the National Judicial Council only in appointment of Chief Judges of States and other Judges. It does NOT provide for their involvement in cases of removal of the Chief Judges and other Judges of the State High Courts. We are therefore left with only the

²¹ (1989)2 NWLR (Pt. 106) 652 @ 711

²² Underlining mine, for emphasis.

²³ (1999)5 NWLR (Pt. 602) 206 @225

²⁴ Underlining mine, for emphasis

²⁵ See page 494 Of the judgment.

²⁶ Underlining mine, for emphasis

provision of paragraph 21 (d) of the schedule to the Constitution which clearly contradicts the provisions of 292 (1) (a) (ii), a principal clause or section and which, it is submitted prevails over the provisions of the Schedule as shown above.

To further substantiate the point that the legislature or lawmaker intended to dispense with the involvement of a Chief Judge, it is pertinent to note that section 292 (1) (a) (ii) provides for the Governor to act only on an “address” supported by two-thirds of majority of the House of Assembly of the State in order to remove a Chief Judge of a State.

Now, the word “address” has been defined thus:

“2. In some States, a legislature’s formal request to the executive to do a particular thing, such as to remove a judge from office.”²⁷

It is an argument that has backing in recent world that there exists a most effective and unusually liberal system for the speedy removal of judges. Many states for example, in the United States provide for removal of judges by *address*, but practically all of these states stipulate that a two-thirds vote of both the House of Representatives and the Senate is necessary in order to remove the judge. These provisions which are contained in the Constitutions of various States of the United States of America is very much akin to the provisions of Section 292 (1) (a) (ii) of the Nigerian Constitution which provides for an address supported by a two third majority of the House of Assembly of the State.

In the United State of Connecticut, for example, Judges generally may be removed by the Governor on the address of two thirds of each houses of the General Assembly comprising both the House of Representatives and the Senate.²⁸ In the State of Arkansas, the Governor may remove Judges for good cause upon the joint address of two thirds of the members of both Houses of the General Assembly.²⁹ The same procedure is applicable in the United States of Maine, Maryland, Mississippi, South Carolina, Wisconsin and Texas, where it is sufficient for the Governors in those States to remove any judge upon an address supported by the General Assembly of the states concerned.³⁰ While in the State of Florida, one of the ways by which judges may be removed is upon recommendation of the *Judicial Qualification Committee*³¹ to the Supreme Court. It is pertinent to stress that the removal by the Governors upon the address is not restricted to the Chief Judges in those States; it affects all Judges.

From the definition and exposition of the word “address” above, it submitted that the use of the word by the drafters of the Nigerian Constitution is deliberate, and intentional, as it is historical; it is to obviate the necessity of having recourse to the National Judicial Council (NJC) when a Chief Judge of a State is to be removed from office. If the intention of the

²⁷ See: Black’s Law Dictionary, 8th Edition, page 42

²⁸ http://www.judicialselection.com/judicial_selection/methods/removal_of_judges-cfm?state, accessed on 9th August, 2021.

²⁹ Ibid.

³⁰ Ibid.

³¹ An independent agency created by the Florida Constitution solely to investigate alleged misconduct by Florida State Judges.

drafters of the Nigerian Constitution had been that the National Judicial Council be involved in the removal of Chief Judges of the federating states, it is posited that it would have expressly stated so in the Constitution, as is in the case of the Constitution of the United State of Florida discussed above where one of the ways by which judges may be removed is upon recommendation of the *Judicial Qualification Committee*, which, it may be safely assert to be the equivalent of the Nigerian National Judicial Council (NJC)

5.0 Conclusion

From the reasoning of the Court in the case under review, it is clear that the law as it stands, at least for now, is that a Chief Judge of a State cannot be removed without the input or involvement of the National Judicial Council (NJC). This very much was affirmed in the case of *A.G. Cross River State v FRN*³², particularly in the dissenting judgment of Peter Odili, J.S.C³³, wherein the Learned justice also referred to the decision of the Court of Appeal in *Nganjiwa v FRN*³⁴. on the issue in question. However, what this paper has set out to achieve is to show that the decision of the Supreme Court, with respect, cannot be based on proper interpretation of the law; at best it may be judgement laid down according to justice or public policy.³⁵

As far as the law is concerned, however, it is posited that a Chief Judge of a State can be removed without any recourse to the National Judicial Council. This is the intendment of the legislature with regard to section 292 (1) (a) (ii) of the Constitution. And is respectfully submitted that the law is trite that the duty of the court is to interpret and or expound the law but not to expand the law.³⁶ Furthermore the intention of the legislature can only be ascertained through the words used to frame the statutory/constitutional provision in question. In *Amaechi v. I.N.E.C*³⁷, the Supreme Court itself, Per Aderemi, J.S.C., while reiterating this trite law stated, inter alia:

The fundamental duty of the judge is to expound the law and not to expand it. He must decide what the law IS and not what it might be. Where the words used in couching the provisions are clear and unambiguous as the provisions of section 34 aforesaid, they must be given their ordinary and grammatical meanings, no more. Yes, it is true that it is said, that the judex must always have a resort to the intention of the legislators; that intention can only be found in the words used to frame the provisions and nowhere else.³⁸

³² supra

³³ See pages 481-486 of the judgment

³⁴ {2018} 4 NWLR (Pt1609) 301

³⁵ There are some who believe that the interest of justice would not be served if Governors, in concert with State Legislatures are allowed to remove Chief Judges at will.

³⁶ See, among a plethora of cases: *Amadi v. I.N.E.C.* {2013} 4 NWLR (Pt. 1345) 595; *Dickson v. Sylva* (2017) 8 NWLR (Pt.1567) 167; and *Marwa v. Nyako* (2012) 6 NWLR (Pt. 1296) 199.

³⁷ (2008) 5 NWLR (Pt.1080) 227 @ 437.

³⁸ Underlining mine, for emphasis.

It is unfortunately surprising that, in ascertaining the intention of the legislature in the case under review, the Supreme Court failed to consider or take cognizance of the word “*address*” used by the legislature in section 292 of the Constitution. It is therefore hoped that the Supreme Court will have another opportunity to overrule itself on the judgement in this case. And while we persist in that hope, it is strongly suggested that the provisions of the Constitution on removal of Judges be harmonised, amended and/or overhauled to avoid the unnecessary controversy which is likely to continue to engulf it, as we already had in the case of removal of Honourable Justice Walter Samuel Nkanu Onnoghen³⁹ by President Muhammadu Buhari without any recourse to the National Judicial Council (NJC).

³⁹ Former Chief Justice of Nigeria.