

COURT OF APPEAL
LAGOS DIVISION
7TH JULY, 1999. CA/L/260/96
CORAM:- G.A. OGUNTADE, S. GALADIMA, P.O. ADEREMI, JJCA.

CHIMA UBANI APPELLANT
AND
1. DIRECTOR OF STATE SECURITY SERVICES RESPONDENTS
2. ATTORNEY-GENERAL OF THE FEDERATION

FUNDAMENTAL RIGHTS - Detention under Decree 2 of 1984 - Without trial before a court of law - Is an infraction of art. 6 & 7 (1) (d) of Cap. 10 (African Charter).

FUNDAMENTAL RIGHTS - Ouster Clause - Presumption of innocence - Under African Charter on Human and Peoples rights - Violation thereof by Cap. 44 - Ouster clause in Cap. 414 is inoperative - Trial court should have assumed jurisdiction.

LEGISLATION - Amendment to a Decree - Mistake or blunder therein - Does not make the amendment a nullity - As the intention of the law makers was clear.

LEGISLATION - Decree No. 2 of 1984 - Detention order therein - Contention that it is ineffectual for amounting to a legislative judgment - Is untenable.

RULE OF LAW - Criminal allegation - Rule of law demands - That the suspect be brought before a court of law.

STATUTES - Conflict of laws - African Charter on Human and Peoples rights Cap. 10 - Is superior to all municipal Laws of Nigeria including Decrees - So that Decree 12 of 1994 and the ouster clause therein - Is ineffectual for violating the African Charter.

FACTS

Subject to a detention order issued by the Inspector General of Police, the appellant was arrested at his residence in July, 1995, and detained at the State Security Services detention cell, Lagos. The Federal High Court granted leave to the appellant pursuant to the Fundamental Right (Enforcement Procedure) Rules, 1979, to pursue the reliefs he sought which included his immediate release from detention. Respondents filed a Notice of Preliminary Objection wherein they objected to the jurisdiction of the lower court, placing reliance on ss. 1 and 4 of the State Security (Detention of Persons) Act Cap 414 Laws of the Federation of Nigeria, 1990 as amended. The appellant had relied on ss. 31, 32 and 33 of the 1979 Constitution as amended, and the African Charter on Human and Peoples Right (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria, 1990.

The trial court heard arguments on the Notice of Preliminary Objection and upheld the respondents' preliminary objection and dismissed the appellants' application for want of jurisdiction. Being aggrieved, the appellant has now appealed to the Court of Appeal raising a lone issue.

ISSUE FOR DETERMINATION

'Whether the learned judge was right to say that the detention orders issued by the IGP validly ousted the court's jurisdiction to determine whether the appellants detention was lawful or not lawful'.

HELD (Unanimously allowing the appeal per lead judgment of **OGUNTADE JCA**)

Amendment to a Decree

1. Given the fact that at the time the amendment was effected, the Chief of General Staff had in the hierarchical set up in Nigeria been re-named the Vice-President, it is easy to recognize that a mistake or blunder was made but I do not see the mistake as one which should result in the conclusion that the amendment as made amounted to a nullity. In any case, it was made clear enough that the intention of the lawmakers was to grant the power to detain persons to the Inspector-General of Police.

I therefore agree with the approach of the lower court that the right thing to do was to ascertain the true intention of the lawmakers. This was the more so since the words used did not convey that the power to detain was being granted to other persons than the two mentioned of which the IGP who signed appellant's detention order was one. (p. 974 H & 975 B)

Decree No. 2 of 1984

2. How could a decree recognized as superior to the 1979 Constitution be at the same time ineffectual on the ground that the same Decree amounted to a legislative judgment? In any case the Supreme Court in its recent decision yet unreported would appear to have reversed the decision in *Guardian Newspapers Ltd. v. A.G. Federation*. The argument by Appellant's counsel that because a detention order amounted to legislative judgment it could not enjoy the protection of an ouster provision in Decree No.2 of 1984 as amended is untenable. I reject it. (p. 976 E)

Detention under Decree 2 of 1984

3. It is obvious that Cap. 414 in Decree No. 2 of 1984 which permits a public official to detain a person said to have committed some acts without such person being first tried before a court of law is an infraction of articles 6 and 7 (1) (d) of Cap. 10. In the affidavit in support of the application before the lower court it was deposed to that the applicant was arrested at about 5. a.m. on 18-7-95 and subsequently subjected to "many forms of inhuman and degrading treatments". This deposition was never challenged or countered. (p. 980 E)

Rule of Law - Criminal allegation

4. In a society governed by the Rule of Law, when it is perceived that a person has committed an act which is recognized as a crime under the laws of the society, the right or decent thing to do is to have the person concerned brought before a court of law so that it may be determined whether or not, the person concerned has committed the offence alleged against him. (p. 980 G)

Ouster clause - Presumption of innocence

5. In this connection, Article 7(1) (d) of the African Charter on Human and Peoples Rights Cap. 10, provides that every individual shall have "the right to be presumed innocent until proved guilty by a competent court or B tribunal." At it was, the State Security (Detention of persons) Act Cap. 414, which permitted a person to be first detained without trial is another way of saying that a person upon whom the public official concerned decided to exercise his power under the Act was presumed guilty. That C being the position created by the Act, it is inevitable that the ouster provision in the State Security (Detention of Persons) Act, Cap. 414 must be pronounced inoperative. The lower court should have assumed the jurisdiction to examine the basis of the appellant's complaints. (p. 980 H)

D Conflict of laws

6. In view of my conclusion, that the African Charter on Human and Peoples' Rights Cap. 10 Laws of the Federation, 1990 is superior to all municipal laws of Nigeria including the Decrees of the Military Govern- E ment, I do not need to consider separately whether or not the provisions of Decree No. 12 of 1994 avail the respondents on the improper and unlawful detention of the appellant. Suffice it say that Decree No. 12 of 1994 and the ouster therein are ineffectual for the purpose of preventing F the lower court from assuming jurisdiction in the case of an infraction of the rights recognized and protected under the African Charter on Human and Peoples' Rights Cap. 10 Laws of Nigeria. (p. 981 D)

NOTABLE POINTS OF INTEREST

G OGUNTADE JCA

1. Ouster clauses in Decrees - Need for the courts to intervene

I also think that the time has come in the light of our recent experience with Military Government in this country that the court should have the H power to determine whether or not reasons exist for the detaining authority to exercise the power to detain granted it. Even when the power has been exercised, the court should be able to determine whether reasons exist for the continued detention of a person. But the decision of

the Supreme Court in *Nwosu v. Imo State Environmental Authority & Ors* (supra), *Agwuna v. A-G, Federation & Anor* (supra) A-General v. Sode (1990) 1 N.W.L.R. (pt. 128) 500 *Osadebay v. A.G, Bendel State* (1991) 1 N.W.L.R. (pt.166) 525 at 571, all incline to the view that where the intention to exclude the jurisdiction of the court is clear from the language of an enactment, the court should not assume jurisdiction. (p. 982 A)

ADEREMIJCA

2. *Superiority of the African Charter - Does not mean loss of sovereignty*
If I may say, the African Charter on Human and Peoples' Rights is in a class of its own and does not fall into classification of the hierarchy of our local legislations in the sense of order of superiority. I should just add that to the extent to which any of our local legislations infringes its provisions that local legislation to that extent is null and void. This does not mean the surrender by a nation of its sovereignty to legislate for the good governance of the country. Perhaps, that voluntary subscription may simply be explained in the Maxim *Volenti Non Fit Injuria*. The African Charter being a fundamentally superior law of our land there is just the need to remind all organs of the sacred duty to respect its provisions. See *Adefulu v. Okulaja* (1996) 9 NWLR (pt.475) 668. (p. 984 C)

REPRESENTATION

O. Agbakoba, SAN with, 1. Amadi, N. Njoku (Miss)) - for the Appellant
O. Nwamba, Legal Officer, Federal Ministry of Justice - for the Respondents

CASES REFERRED TO

A-General v. Sode (1990) 1 N.W.L.R. (pt. 128) 500
Osadebay v. A.G, Bendel State (1991) 1 N.W.L.R. (pt.166) 525 at 571
Adefulu v. Okulaja (1996) 9 NWLR (pt.475) 668
Williams v. Akintunde (1995) 3 N.W.L.R (pt.381) 101
Edinburgh Street Tramways v. Torbain (1877) 3 App Cas. 58 at p. 68
Attorney-General for Canada v. Hallett & Carey Ltd. (1952) A.C. 427

STATUTES & RULES REFERRED TO

Fundamental right (Enforcement Procedure) Rules 1979

Constitution of Nigeria 1979 ss. 31, 32, 33, 38

African Charter on Human and Peoples Right (Ratification and Enforcement) Act Cap. 10 LFN 1990 Art. 12, 6, 7(1) (d)

International Covenant on Civil and Political Rights (ICCPR)

Universal Declaration of Human Rights 1948

State Security (Detention of Persons) Decree No. 2 of 1984 as amended

Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 as amended

Decrees No. 107 of 1993, No. 12 of 1994.

LEAD JUDGMENT BY OGUNTADE JCA

D On 26-7-95, the Federal High Court in Lagos granted leave to the appellant pursuant to the Fundamental Right (Enforcement procedure) Rules, 1979 to pursue the reliefs he sought arising from his detention by the Inspector-General of Police under a Detention Order. The reliefs sought by the appellant were these:

"1. A declaration that the arrest on 18th July, 1995 of the applicant at his residence and his subsequent detention at the State Security Services detention cell at Shangisha, Lagos without being charged to court is unconstitutional, null and void.

2. A declaration that the continuous detention of the applicant by the respondents at the said detention cell is a flagrant violation of the application's right to freedom of movement and is unconstitutional, null and void.

3. An order releasing the applicant from the said detention forthwith.

4. An order that the Respondents pay compensation to the applicant for the violation of his fundamental rights in the sum of Five Hundred Thousand Naira (N500,000.00)"

The grounds upon which the above reliefs were sought were stated to be the following:

"1. The arrest and detention of the applicant by the Respondents

aforesaid is not in accordance with the procedure permitted by law and constitutes by reason thereof violent infringement of his right to personal liberty, dignity of his person, right to fair hearing guaranteed by Sections 31, 32 and 33 of the Constitution of the Federal Republic of Nigeria as amended and the African charter on Human and People's Right (Ratification and Enforcement) Act Cap 10 laws of the Federation of Nigeria 1990.

2. The restriction of the movement of applicant is a violation of his right to freedom of movement guaranteed by Section 38 of the Constitution of the Federal Republic of Nigeria as amended, Article 12 of the aforesaid African Charter on Human and Peoples Right, the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights, 1948.

3. The applicant is entitled to the protection of their (sic) fundamental liberty and freedom of movement as well as damages for violation of the aforesaid rights."

There was an affidavit filed in support of the application. It was deposed to by one Mr. Kolawole Ogunbiyi, a litigation assistant with the Civil Liberties Organization, Lagos. Paragraphs 2 to 10 thereof read thus:

"2. That I have the authority of the applicant to depose to this affidavit.

3. I was informed by the applicant and I verily believe him that he was arrested at about 5.00 a.m. in his home at No. 50 Akorohunfayo Street, Fadeyi. Lagos on 18th July, 1995 by some plain-cloth operatives of the State Security Services (SSS).

4. That before his arrest the occupants of the premises were harassed and held spell bound for some hours.

5. That his apartment was thoroughly searched and some valuable properties carted away including his books documents and international passport.

6. The said properties were loaded into a waiting 504 Station Wagon with registration number LA 9257 SF.

7. Thereafter, the operation ordered the applicant into the said

car and sped off.

8. The said car was driven to the State Security Services at Shangisha and the applicant ordered to be detained since then.

9. That the applicant informed me and I verily believe same that
B unless this court makes an order releasing him from detention, he may continue to languish in detention without having committed any offence as there is no indication as when he would be charged or released.

10. Applicant informed me and I verily believe him that he has
C been subjected to many forms of inhuman and degrading treatments since his arrest and that his rights still stands (sic) to be violated if the court does not intervene expeditiously."

On 29-8-95, the respondents in a Notice of Preliminary Objection wherein they described themselves as applicants objected to the jurisdiction of the lower court in these words:

"TAKE NOTICE that the applicants at or before the hearing of this matter intend to raise the following preliminary Objection on point of law, notice whereof is hereby given to you viz:-

E 1. That this honourable court lacks jurisdiction to entertain this matter.

2. That the order made ex-parte by this Honourable Court dated the 26th July, 1995 was made without jurisdiction.

F 3. Any decision of this Honourable Court granting the reliefs sought in this matter by the Respondent shall be null and void and of no effect whatsoever.

AND TAKE FURTHER NOTICE that the grounds are as follows:-

G 1. That upon reading the motion on notice, the Statement pursuant to order 1 Rule 2 (3) of the Fundamental Rights (Enforcement procedure) Rules, 1979 and the affidavit of urgency in support filed by the Respondent the reliefs sought would not avail him by virtue of:-

H (a) A Detention order dated the 18th day of July, 1995 signed by the Inspector-General of Police in respect of the Respondent.

(b) Sections I and 4 of the State Security (Detention of Persons) Act Cap 414 Laws of the Federation of Nigeria, 1990 as amended.

(c) Section 1 of the Federal Military Government (Supremacy

and Enforcement of Powers) Decree No. 12 of 1994 as amended.

2. *That this Honourable Court lacks jurisdiction to entertain this matter."*

An affidavit was filed in support of the Notice of Preliminary Objection. It was deposed to that the applicant had been detained under a Detention order signed by the Inspector-General of Police. The applicant deposed to a counter-affidavit through one Obiagwu Esq., Legal Practitioner on 18-1-96.

The lower court heard arguments on the Notice of preliminary Objection, and on 13th May, 1996 delivered its ruling wherein it upheld the respondents' Preliminary Objection. The application was accordingly dismissed. Aggrieved by the dismissal of this application, the applicant brought this appeal wherein he raised Four Grounds of Appeal. The issue for determination formulated by the appellant's counsel in his brief is:

'Whether the learned judge was right to say that the detention orders issued by the IGP validly ousted the court's jurisdiction to determine whether the appellants detention was lawful or not lawful'.

The respondents in their brief formulated three issues for determination. These issues are:

"1. Whether the Federal High Court was right when it held that the Inspector-General of Police can properly sign in law a Detention order pursuant to the powers vested in him by the State Security (Detention of Persons) Decree No. 2 of 1984 as amended.

2. Whether the African Charter on Human and Peoples Rights (ratification and Enforcement) Act overrides Decrees of the Federal Military Government in view of the revolutionary nature of Decrees 107 of 1993, No. 12 of 1994 and Decree No.2 of 1984.

3. Whether the Federal High Court was right when it held that the ouster clause provisions in Section 4 of the State Security (detention of persons) Decree No.2 of 1984 as amended ousted its jurisdiction to hear the appellant's application?"

The issue formulated by the appellant in my view fully entraps the essence of the matter for consideration. The respondents have for-

mulated their issues in the light of the approach to the argument which the appellant followed. The appellant's counsel in his argument attempted to show three reasons why the lower court was in error in its conclusion that it had no jurisdiction to entertain the matter. I shall be guided by the issue formulated by the appellant. I shall however discuss each of the reasons relied upon by the appellant's counsel in showing that the lower court was in error.

It was common ground that Decree No.2 of 1984 had been amended on several occasions. The amendments relevant to this appeal relate to the public officials who had the power to exercise the power to sign a detention order under the decree. Under Decree No. 3 of 1990, the public official who could sign Detention order was The chief of General Staff'. However, under Decree No. 24 of 1990. "The Vice-President" was substituted for the "Chief of General Staff. Again, Decree No. 24 of 1990 was further amended by Decree No. 11 of 1995 under which the power to sign a detention order was vested in "Chief of General Staff" or the Inspector-General of Police".

It is apparent that since the public official who could sign a Detention Order Under Decree No. 24 of 1990 was the "Vice-President", an obvious mistake was made by the draftsman who drafted Decree No.11 of 1995. The persons who could sign a Detention Order Under Decree No.11 of 1995 going by the tenor of Decree No.24 of 1990 should have been the "Vice President" or the "Inspector-General of Police" and not the "Chief of General Staff" or the "Inspector-General of Police" as erroneously stated in the Decree.

Appellant's counsel has argued that this error is fatal to the validity of the power to sign a detention order which Decree No.11 of 1995 intended to grant to the Inspector-General of Police (hereinafter abbreviated as IGP). It was argued that the legislature or the lawmaker could not have intended the impossible, the absurd or the illogical. It was further argued that a court did not have the power to rectify mistakes and omissions. Counsel relied on *Vickers, Sons & Maxim Ltd. v. Evans* (1910) A.C. 444 at 445 where Lord Loreburn L.C. said:

"The appellant's contention involves reading words into this

clause. The clause does not contain them and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

Also referred to is a passage in Maxwell on Interpretation of Statutes 12th Edition where the learned authors at page 33 write:

"A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted and the omission appears in consequence to have been unintentional."

Counsel also relied on Halsbury's Laws of England, 4th Edition paragraphs 864 at page 527; Williams v. Akintunde (1995) 3 N.W.L.R. (Pt. 381) 101 at 114; G.C. Thortan on 'Legislative Drafting' at page 303; Onuzulike v. C.S.D, Anambra State (1992) 3 NWLR (pt.232) 791 at 820-822; Madike v. IGP (1992) 3 N.W.L.R (pt 227) 70 at p. 112-113. The judicial authorities were relied on to show that an amendment to an enactment that does not fit into the existing enactment would have no effect.

The Respondent's counsel on the other hand took the view that the duty of the court in the interpretation of statute was to ascertain the intention of the lawmaker from the language of the enactment and to give effect to such intention Counsel relied on Nwosu v. Imo State Environmental Sanitation Authority & Ors. (1990) 2 N.W.L.R. (pt.135) 688 at 724; Agwuma v. Attorney-General of the Federation & Anor (1995) 5 N.W.L.R. (pt.396) 418; Gani Fawehinmi v. General Sani Abacha & Ors (1996) 9 N.W.L.R. (pt. 475) 710 at 742.

The lower court in its reaction to the same submission said in its ruling at page 51 of the record of proceedings.

"On whether the failure of the Federal Military Government to take cognizance of the change in the designation of the 2nd in command from Chief of General Staff to the Vice President and to consider the said change in the process of amending Decree No. 24 of 1990 by Decree No. 11 of 1995 amounts to a legislative blunder as posited by learned counsel for the Respondent, I am of the view that such blunder, even if it was, is cured by the time honoured attitude of the courts in determining the general object of the legislature or the meaning of its language in any par-

tical passage. The courts have always strived (sic) to give effect to the intention which appears to be most in accord with convenience, reason, justice and legal principle. Therefore, reference to illogicality, impossibility and absurdity engendered by this so called blunder in the view of
 B *Mr. Amadi is indeed a misconception of the real situation See Ayoola J.C.A. in Williams v. Akintunde (1995) 3 N.W.L.R (pt.381) 101."*

Now in *Edinburgh Street Tramways v. Torbain* (1877) 3 App Cas. 58 at p. 68 Lord Blackburn said'

C *"I quite agree that in construing an Act of Parliament we are to see what is the intention which the legislature has expressed by the words; but then the words again are to be understood by looking at the subject-matter they are speaking of and the object of the legislature, and the words used with reference to that may convey an intention quite different*
 D *from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced."*

Speaking in the same view, Lord Radcliffe in *Attorney-General for Canada v. Hallett & Carey Ltd.* (1952) A.C. 427 at 449 said:

E *"There are so many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention."*

F When I look at Decree No. 11 of 1995 again, I am not in any doubt as to the mention of the lawmakers. The relevant provision reads:

"(1) The State Security (Detention of Persons) Decree 1984 as amended by State Security (Detention of persons) Amendment Decree 1984, 1986, 1988 and 1990 is further amended.

G *(2). By inserting immediately after the words "Chief of General Staff" the words "or IGP" wherever they occur in the Decree."*

It is manifest that the intention of the lawmakers in the words used was to grant the power to sign a detention order on two officials,
 H namely (a) The Chief of General Staff and (b) Inspector General of Police. **Given the fact that at the time the amendment was effected, the Chief of General Staff had in the hierarchical set up in Nigeria been re-named the Vice-President, it is easy to recognize that a**

mistake or blunder was made but I do not see the mistake as one which should result in the conclusion that the amendment as made amounted to a nullity. Even if I conclude that there was officially only a Vice-President at the time of the promulgation of the amendment, I would still, need to determine which public official answers the description "Chief of General Staff" in 1995. **In any case, it was made clear enough that the intention of the lawmakers was to grant the power to detain persons to the Inspector-General of Police. I therefore agree with the approach of the lower court that the right thing to do was to ascertain the true intention of the lawmakers. This was the more so since the words used did not convey that the power to detain was being granted to other persons than the two mentioned of which the IGP who signed appellant's detention order was one.**

The appellant's counsel has also argued that a detention order is a legislative judgment reliance was placed on *Lakanmi v. Attorney-General (west)* 1977 1 UILR (pt.201); *Uwaifo v. Attorney-General, Bendel State & Ors* (1982) 12 NSCC 221 and *Guardian Newspaper Ltd v, A-G Federation* (1995) 5 NWLR (pt.398) 703; *Wana China Yao v. Chief of General Staff, Nigerian Law of Habeas Corpus*, Gani Fawehinmi page 437; *United State v. Lovett* 328 US 303 90 Law Ed. 1252; *Polyukhovich v. The Commonwealth* (1991) 172 CLR 501 at 536 and *Guardian Newspaper Ltd. v. Attorney-General of the Federation* (supra). It was then contended that since a detention order was a legislative judgment, it could not also be a Decree such as to oust the jurisdiction of the court as decided by this court in the *Guardian* case.

There can be no doubt that several courts in Nigeria depending on the judicial personnel who manned them did a Yeoman's job in the attempt to wrest judicial authority from our erstwhile military rulers in the recent past. It was a clear manifestation of gallantry and judicial innovativeness to be able to assert jurisdiction over matters which the military rulers had tried to shield the judiciary away from. However, several judicial decisions too also proclaimed the necessity to accept that the Decree of the Military rulers were to be accorded full respect and validity. These cases include *Nwosu v. Imo State Environmental Sanita-*

tion Authority (supra) Attorney-General v. Sode. (1990) 1 N.W.L.R. (pt.128) 500.

In Labiyi v. Anretiola (1992) 8 NWLR (pt.258) 139 the hierarchy of the laws in Nigeria was pronounced upon. It was acknowledged
B that the Decrees of the Federal Military government were superior to the unsuspended provisions in the 1979 Constitution of the Federal Republic of Nigeria.

If as it was generally acknowledged the Decree of the Federal
C Military Government were the Supreme Laws of the land (as they were superior to the 1979 Constitution) it seems to me that the argument that because a decree amounted to legislative judgment and ceased for that reason to be a Decree and is ineffectual is grossly weak and a clear attempt to escape the consequences of the acknowledgment that Decree
D were the Supreme Laws of the land. I think that the decision in Guardian Newspapers Ltd v. A.C. Federation (supra) must be seen as a bold attempt by the judiciary to curb the excesses of the Military Government and neutralize some of its oppressive manifestations. When you how-
E ever attempt to reconcile that decision with other decisions by the Supreme Court which acknowledged the Supremacy of Decree over the 1979 Constitution a difficulty arises. **How could a decree recognized as superior to the 1979 Constitution be at the same time ineffectual on the ground that the same Decree amounted to a legislative judgment? In any case the Supreme Court in its recent decision yet unreported would appear to have reversed the decision in Guard-
F ing Newspapers Ltd. v. A.G. Federation. The argument by Appellant's counsel that because a detention order amounted to
G legislative judgment it could not enjoy the protection of an ouster provision in Decree No.2 of 1984 as amended is untenable. I reject it.**

There is the Appellant's argument that the African Charter on
H Human and people Right Cap 10 laws of the Federation 1990 is superior to the Municipal Laws of Nigeria including the Decrees of the Federation Military Government. The extension of this argument is that the Ouster provisions or clause in local or Municipal Legislation including a Decree

do not take away the jurisdiction of a Court when it is considering whether rights created by the Charter have been violated. In support of the argument, appellant's counsel relied on *Ogugu v. State* (1994) 9 NWLR (pt.366) at 1; *Mc Whirter v. Attorney-General* (1972) CMLR 882; *Simmenthel* (1978) ECR 629; *R V. Secretary of State for Transport v. Exp. Factortame Ltd (No.2)* 1990 3 WLR 818; *McCarthy v. Smith* (1979) 1 CR 785 and *Oshevire v. British Caledonian Airways Ltd.* (1990) 7 N.W.L.R. (Pt.163) 50. B

The respondent's counsel had argued to the contrary. We were invited to overrule *Gani Fawehinmi v. General Sanni Abacha* (1996) 9 N.W.L.R. (Pt.475) 710 at 747. Where this court held that the African Charter on Human and Peoples' Rights Ratification and Enforcement Act was superior to the Decrees of the Federal Military Government. The respondents placed reliance on *Trendex Trading Corporation v. Central Bank of Nigeria* (1977) 1 All E.R. 881; *Chung chi Cheung v. R.* (1939) AC 160 at 168; *Collco Dealings Ltd. v. IRC* (1962) AC 1; *Cherokee Tobacco Co. v. United State* (1870) 11 Wall 616; *Republic v. Muchiyi* and *Republic v. Ombisi* (film N.31x) (1970) P.556. D E

The answer I give to counsel's argument is to refer to the recent decision of this court in CA/L/27/90 - *Comptroller of Prisons & 2 Ors. v. Dr. Femi Adekanye* (Unreported) of 15-6-99, where we held:

"It follows therefore that the High Court when called upon to consider issues bordering on the infraction of the fundamental Human Rights as protected under Cap 10 Laws of the Federation ought not to throw up its hands in state of surrender and helplessness in the face of the ouster provisions in the Decrees of the Military Government. The true position is that in questions or issues concerning the fundamental Human Rights protected under Cap 10 Laws of the Federation, the provisions of Cap 10 were superior to the Decrees of the Federal Military Government." F G

(Italics mine)

In coming to the above conclusion we had followed the reasoning of this court in *Fawehinmi v. Abacha* (1996) 9 NWLR (pt.475) 710 at pp. 746-747 where Musdapher J.C.A. said:- H

"The member countries - parties to the protocol - recognized that Fundamental Human Rights stem from the attributes of human beings which justify their international protection and accordingly by the promulgation of Cap. 10, the Nigerian State attempted to fulfill its international obligation. It is an international obligation to which the nation voluntarily entered and agreed to be bound. The arrest and detention of the appellants on the facts adduced clearly breached the provisions of the Charter and can be enforced under the provisions of the Charter. The contracting States are bound to establish some machinery for the effective protection of the terms of the Charter and when the local procedure is exhausted or when delay will be occasioned, the matter will be taken to the International Commission. All these indicate that the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws of Nigeria in order of superiority as enunciated in *Ladiyi v. Anretiola* (1992) 8 NWLR (pt.258) 139. See *Equal Opportunity Commission and Anor v. Secretary for State for Employment* (1994) 1 All ER 910. See also *Ogugu and Oshevire* (cases) *supra*.

It seems to me that the learned trial Judge erroneously acted when he held that the African Charter contained in Cap 10 of the Laws of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military government. It is commonplace that no Government will be allowed to contract out by local legislation, its international obligations. It is my view that notwithstanding that Cap 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No.12 of 1994 cannot affect its operation in Nigeria. I agree with the submissions of the learned counsel for the Appellant. In England, where there is no written Constitution and the parliament is Supreme, it could legislate on any issue. But that sovereignty is now some what limited through the impact of European Community Act, of 1972. Although the British Parliament passed the E.C. Law, and can in theory, repeal it, but there are constraints and limitations and thus the Parliament in Britain is no longer Supreme. Parliamentary supremacy has been surrendered, by implication, by the signing of the Union Laws. It is for the above that I hold

that the provisions of Cap 10 of the Laws of the Federation 1990 are provisions in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the Court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by International Law and the Federal Military Government is not legally permitted to legislate out of its obligations." B

In the light of the above, what I should do next is to determine whether there was anything in the State Security (Detention of Persons) Act, Cap. 414, Laws of the Federal 1990 (otherwise described as Decree C 2 of 1984) as amended which conflicts with or was inconsistent with the African Charter on Human and Peoples' Right Section 1 and 4 of the Act provides:-

"(1). If the Chief of General Staff is satisfied that any person is D or recently has been concerned in acts prejudicial to State Security or has contributed to the economic adversity of the nation, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may by order in writing direct that that E person be detained in a civil prison or police station or such other place specified by him; and it shall be the duty of the person or persons in charge of such place or places, if an order is made in respect of any person delivered to him, to keep that person in custody until the order is F revoked.

(2). An order made under subsection (1) of this section shall be full authority for any police officer or any member of the armed forces or any of the security agencies to arrest the person to whom an order relates G and to remove him to a civil prison or police station or such other place as specified by the Chief of General Staff.

4.(1) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act.

(2) Chapter IV of the Constitution of the Federal Republic of H Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act

shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question."

The above provisions confer the power on the named official to
B detain a person who has not been charged to court whilst at the same
time excluding the right of the person concerned to approach the court
for redress.

Now, article 6 of the African Charter on Human and Peoples'
C Rights provides:

*"Every individual shall have the right to liberty and the security
of his person. No one may be deprived of his freedom except for reasons
and conditions previously laid down by law. In particular, no one may be
arbitrarily arrested or detained."*

D and article 7 (1) (d) provides:

*"Every individual shall have the right to have his cause heard.
This comprises:*

*(d) The right to be tried within a reasonable time by a impartial
E court or tribunal:*

It is obvious that **Cap.414 in Decree No. 2 of 1984 which
permits a public official to detain a person said to have committed
some acts without such person being first tried before a court of
F law is an infraction of articles 6 and 7 (1) (d) of Cap. 10. In the
affidavit in support of the application before the lower court it was
deposed to that the applicant was arrested at about 5. a.m. on 18-7-
95 and subsequently subjected to "many forms of inhuman and
degrading treatments".**

G This deposition was never challenged or countered. In a
society governed by the Rule of Law, when it is perceived that a
person has committed an act which is recognized as a crime under
the laws of the society, the right or decent thing to do is to have the
H person concerned brought before a court of law so that it may be
determined whether or not, the person concerned has committed
the offence alleged against him.

In this connection, Article 7(1) (d) of the African Charter

on Human and Peoples Rights Cap. 10, provides that every individual shall have "the right to be presumed innocent until proved guilty by a competent court or tribunal."

At it was, the State Security (Detention of persons) Act Cap.414, which permitted a person to be first detained without trial is another way of saying that a person upon whom the public official concerned decided to exercise his power under the Act was presumed guilty.

That being the position created by the Act, it is inevitable that the ouster provision in the State Security (Detention of Persons) Act, Cap. 414 must be pronounced inoperative. The lower court should have assumed the jurisdiction to examine the basis of the appellant's complaints.

In view of my conclusion, that the African Charter on Human and Peoples' Rights Cap. 10 Laws of the Federation, 1990 is superior to all municipal laws of Nigeria including the Decrees on the Military Government, I do not need to consider separately whether or not the provisions of Decree No. 12 of 1994 avail the respondents on the improper and unlawful detention of the appellant. Suffice it say that Decree No. 12 of 1994 and the ouster therein are ineffectual for the purpose of preventing the lower court from assuming jurisdiction in the case of an infraction of the rights recognized and protected under the African Charter on Human and Peoples' Rights Cap. 10 Laws of Nigeria.

Finally is the argument by the appellant that the lower court ought to have investigated whether or not the IGP had reason to believe that the appellant was a person who was "recently has been concerned in acts prejudicial to State Security or has contributed to the economic adversity of the nation or in the preparation or instigation of such acts." According to counsel; the court should be able to review the basis of such belief by the IGP. Counsel argued that the reasoning in *Liversidge v. Anderson* (1942) A.C. 206 which was that a court ought not to interfere with the discretion vested in public officials is now obsolete in England.

Counsel relied on Attorney-General of St. Christopher, Nevis

and Anguilla (1980) A.C. 637 at 656.

I also think that the time has come in the light of our recent experience with Military Government in this country that the court should have the power to determine whether or not reasons exist for the detaining authority to exercise the power to detain granted it. Even when the power has been exercised, the court should be able to determine whether reasons exist for the continued detention of a person. But the decision of the Supreme Court in *Nwosu v. Imo State Environmental Authority & Ors* (supra), *Agwuna v. A-G, Federation & Anor* (supra) *A-General v. Sode* (1990) 1 N.W.L.R. (pt. 128) 500 *Osadebay v. A.G, Bendel State* (1991) 1 N.W.L.R. (pt.166) 525 at 571, all incline to the view that where the intention to exclude the jurisdiction of the court is clear from the language of an enactment, the court should not assume jurisdiction.

In the final conclusion, this appeal succeeds. The Ruling of Gummel J on 13-5-96 declining jurisdiction in this matter is set aside. It is ordered that the application be heard on its merits by another judge of the Federal High Court, Lagos. The appellant is awarded N3,500.00 costs against the respondents.

GALADIMA JCA

I read in advance the lead judgment just delivered by my learned brother Oguntade, J.C.A.

I agree with him entirely that the ruling of Gumel J. on 13/5/96 declining jurisdiction on this matter be set aside. I also agree that the application should be heard on its merits by another judge of the Federal High Court, Lagos. I abide by the costs of N3,500.00 against the Respondents.

ADEREMI JCA

I have had the opportunity to read before now the judgment just delivered by my learned brother Oguntade J.C.A. Having expounded in a most lucid manner the issues of law arising from this appeal in a manner

that covers the field, I feel tempted not to add a word. But being a matter touching on fundamental rights of man I do not think that I should let go without adding a word on matters relating to freedom which is the greatest heritage of mankind. Pursuant to Decree No. 11 of 1995 the appellant was detained under the detention order signed by the Inspector-General of Police. Undoubtedly, that decree is fraught with some error; the effect of which has been given a very lucid treatment in the leading judgment. I only need to add that the principles on which the courts have acted from time immemorial when dealing with any law which seeks to deprive a person of his right to freedom is to construe it "fortissime contra proferentes"; of course the provisions of the statute must be read dispassionately and effect given to the spirit and intent of the legislation. Having done this, the court would have discharged its duties under the law. During the era of military government in Nigeria which came to an end of 29th May, 1999 it was sacrosanct that a decree was superior to any other law of the land including the unsuspended provisions of the Constitution. See *Labiya v. Anretiola* (1992) 8 NWLR (Pt.258) 139. Therefore if a court had given effect to the spirit and intent of such decree and also ascertained that the operators had done everything the law would require done under that decree, the court would have no other thing to do than to give effect to the decree. It must be realized that the duty of court ceases where legislative duty begins. Legislative functions per se must never be usurped by the judiciary; it must be left for the legislators. However, judicial pronouncements go a long way in influencing the making of laws

In the instant case, if there were no other law applicable and which law was superior in hierarchy to the provisions of Decree No. 11 of 1995 the appellant would have been faced with *fait accompli*. But, Nigeria is one of the countries that subscribed to African Charter on Human and Peoples' Rights. The Charter has been incorporated into our corpus juris and christened African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990, Articles 5, 6, and 7 thereof emphasize or command respect for human dignity, right to liberty and security of his person and right to

have his cause heard which right includes inter alia right to be presumed innocent until proved guilty, right to defence and right to be tried within a reasonable time etc. These rights conform with those laid down in civilized world. Having voluntarily subscribed to the Charter, Nigeria cannot opt out; she cannot approbate and reprobate. This court in Chief Gani Fawehinmi v. General Sanni Abacha (1996) 9 NWLR (Pt.475) 710 and the unreported case of Comptroller of Prisons & 2 Ors. v. Dr. Femi Adekanye CA/L/27/90 delivered on 15/6/99 has pronounced the superiority of the Charter over any other Nigeria Municipal Laws category of which includes decrees of the Military Government. If I may say, the African Charter on Human and Peoples' Rights is in a class of its own and does not fall into classification of the hierarchy of our local legislations in the sense of order of superiority. I should just add that to the extent to which any of our local legislations infringes its provisions that local legislation to that extent is null and void. This does not mean the surrender by a nation of its sovereignty to legislate for the good governance of the country. Perhaps, that voluntary subscription may simply be explained in the Maxim Violent Non Fit Injuria. The African Charter being a fundamentally superior law of our land there is just the need to remind all organs of the sacred duty to respect its provisions. See Adefulu v. Okulaja (1996) 9 NWLR (pt.475) 668.

Having made this little contribution I wish to say that I agree with reasons and conclusions reached in the lead judgment. I allow the appeal, set aside the order of the court below dated 13/5/96 declining jurisdiction in this matter. I abide by all other consequential orders including order as to cost made in the leading judgment.

H