

**SUPREME COURT OF NIGERIA**  
13TH JULY, 2001. SC. 45/2000  
**CORAM:- A. G. KARIBI-WHYTE, A. B. WALI,**  
**U. MOHAMMED, A. I. IGUH, A. I. KATSINA-ALU, O. ACHIKE,**  
**E. O. AYOOLA, JJSC.**

LT. GENERAL ISHAYA RIZI BAMAIYI (RTD.) ..... APPELLANT  
AND

1. A-G OF THE FEDERATION
2. LT. GEN. ALIYU GUSAU (RTD.) NSA
3. BRIG. GEN. ALEXANDER MSHEBWALA ..... RESPONDENTS  
(Commander, Brigade of Guards)
4. INSPECTOR GENERAL OF POLICE

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***CONSTITUTIONAL LAW*** - Case stated - Questions referred to the Court of Appeal - If they do not arise from proceedings before the trial court - Will not be entertained as a mere academic exercise (H3)

***CONSTITUTIONAL LAW*** - Case stated - Questions referred to the court of Appeal - S. 295(2)1999 Constitution - It is not mandatory for the court of Appeal to answer every such question (H 1)

***CONSTITUTIONAL LAW*** - Interpretation - S. 295(2) 1999 Constitution - Meaning of 'decision' as used in the section (H 2)

***CONSTITUTIONAL LAW*** - Reference of questions to appeal court - The right to refer - Arises only if there is a substantial question of law - Before the High Court (H 4)

***CONSTITUTIONAL LAW*** - Question referred - That amounted to putting the cart before the horse - The Court of Appeal is right - To refuse to answer the question (H 5)

**FACTS**

The appellant who was Chief of Staff of Nigerian army during

the regime of General Sani Abacha was invited by the National Security Adviser the 2nd respondent for questioning. He was alleged to have conspired in the attempted murder of Mr. Alex Ibru by facilitating the provision of arms used in the attempted murder. He was detained at forte 1BB Barracks on 13th October 1999. On 5th November 1999 the appellant sought leave to enforce his fundamental rights challenging his detention and applied to the Federal High Court for certain reliefs. The reliefs were mainly declaration as to the illegality of the detention as contravening his fundamental human rights, and as to the competence of the Attorney General to set up an investigation panel for the investigation of alleged commission of crime. Other reliefs included injunctions and monetary compensation for the violation of his human rights.

The trial judge granted most of the prayers but the appellant was not released but rather arraigned before a chief magistrate in Lagos on counts of conspiracy and attempted murder and was remanded at the Kirikiri maximum security prison. His counsel filed some applications for his release and committal of the Attorney General for contempt while the respondents filed an appeal to the Court of Appeal against the ruling of the High Court to release him from house detention at Abuja.

At the trial court hearing of the interlocutory application of the appellant, appellant's counsel applied to the court to refer a question on the interpretation of S. 174 of the 1999 Constitution to the Court of Appeal. The Court of Appeal refused to answer the question and sent back the case to the High Court for continuation. As the appellant was dissatisfied with the decision of the Court of Appeal, he has appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal has any discretion under Section 295(2) of the 1999 Constitution to refuse to answer the question referred to it.*

*2. Whether the Court of Appeal is entitled in a reference under Section 295 (2) of the 1999 Constitution to review a decision on facts made by the trial court not appealed against.*

*3. Whether the Court of Appeal was right to have determined*

*the substantive issue pending before the Federal High Court in a matter of reference.*

4. *Whether an applicant seeking to enforce his fundamental rights requires any additional leave over and above that prescribed in Order 1 Rule 2 of the Fundamental Right (Enforcement Procedure) Rules for reliefs sought in the Statement accompanying his application.*

5. *Whether the reason given by the Court of Appeal in refusing to answer the question is justified in law."*

**HELD** (Unanimously dismissing the appeal per lead judgment of **MOHAMMED JSC**)

***Case stated - Questions referred to Court of Appeal***

1. I should pause here to ask, *"Is it mandatory for the Court of Appeal to answer any question referred to it by the High Court pursuant to the provision of section 295(2) of the Constitution, even if the question is irrelevant to the proceedings before the High Court?"* The answer is definitely NO. (p. 2950 A)

***Interpretation - S. 295(2) 1999 Constitution***

2. I agree with Rotimi Jacobs, learned counsel for the respondents, that it is wrong to construe the words, "shall give its decision upon the question" under S. 295(2), to mean "shall answer the question." The provision of the Constitution is clear and not ambiguous. "Decision" as interpreted in the 1999 Constitution means, in relation to a court, "any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation", see Section 318 of 1999 Constitution. In Black's Law Dictionary "Decision is explained as follows:

*"A determination of a judicial or quasi judicial nature. A judgment, decree, or order pronounced by a court in settlement of a controversy submitted to it and by way of authoritative answer to the questions raised before it. The term is broad enough to cover both final judgments and interlocutory orders".*

A decision is therefore a pronouncement made by a court which stands as its final verdict to a question brought before it for determina-

***Questions referred - If they do not arise***

3. If the question referred to the Court of Appeal for its determination did not arise from the proceedings before the trial court, it will be an academic exercise. Courts have no jurisdiction to deal with hypothetical or academic questions not grounded in reality or on facts. The reality of this case is that the question referred to the Court of Appeal for interpretation did not arise from the proceedings before the trial High Court. The provision of the Constitution under Section 295(2) is very clear. From the wordings of this provision it is not just every question requiring constitutional interpretation that should be referred to the Court of Appeal. Before such a question can be so referred, the issue must arise in the proceedings before the High Court. See Obayogie V. Oyewe (1994) 5 NWLR (pt. 346) 637 at 643. (p. 2951 B)

***Reference of questions - When the right arises***

4. Even if the issue is relevant to the proceedings, the constitutional provision does not give parties free ticket to the Court of Appeal. There must be a substantial question of law so found by the court before a reference demanded by a party can be made by the High Court - Senator Victor Akan and Anor. V. Attorney-General of Rivers State & 7 Ors. (1982) 3 NCLR P.881. (p. 2951 D)

***Question referred - That amounted to putting the cart before the horse***

5. The Court of Appeal is therefore quite right to refuse to answer the question referred to it for interpretation. I think the appellant's counsel has put the cart before the horse. It is when the proceedings have commenced and a matter arises which, by the argument of counsel, invites more than one interpretation that a reference can be made to the Court of Appeal or the Supreme Court, as the case may be. (p. 2951 F)

**NOTABLE POINTS OF INTEREST**

**KARIBI-WHYTE JSC**

1. *When and who can invoke provisions of S. 295(1) of the Constitution*

The section has also prescribed when and by whom the provision can be invoked. The court is vested with discretion to invoke the provision *suo motu* and also if the parties to the proceedings so request. Thus the Court may *suo motu* and must make the reference on the parties' request. (p. 2957 F)

2. *Meaning of the phrase "Substantial question of law"*

The phrase "*a substantial question of law*," is difficult to define exhaustively. What amounts to a "substantial question of law" has been stated to be a matter "on which arguments in favour of more than one interpretation might reasonably be adduced." It must also be one which is capable of being formulated with precision." In Olawoyin & others v. Police (No.2) (1961) All NLR. At p.625, the Federal Supreme Court has formulated a guide and provided the test as follows.

*"It will be difficult to attempt an exhaustive definition of what is a substantial question of law. A useful guide is determining whether an issue of law is substantial is provided in a number of Indian decisions dealing with a similar phrase in the Indian Constitution. There it has been held that in order to be substantial, the issue must be such that there may be some doubt or difference of opinion as to what the law is. When no such doubt exists, or the law is well established by a final Court of Appeal, or by an overwhelming consensus of judicial decisions, the mere application of it to a particular set of facts does not constitute a substantial question of law, however important the issue may be for the decision of the particular case."*

I adopt this dictum of the Federal Supreme Court, which is a correct interpretation of the expression "*substantial question of law*." (p. 2958 E)

3. *Shall - Ordinarily means a mandatory command*

It is true that the word shall in the ordinary meaning of the word, connotes a command, and that which must be given a compulsory meaning. It has a peremptory meaning, which is generally imperative and manda-

tory. It has the significance of excluding the idea of discretion to impose a duty. Where a provision provides that a thing shall be done, the natural meaning is that a peremptory mandate is enjoined – See Achineku v. Ishagba (1988) 4 NWLR (pt.89) 411. (p. 2959 G)

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*4. Unambiguous words - Should be given their ordinary meaning*

It is an elementary but fundamental principle of interpretation of the words of a statute that the words used where clear and unambiguous should be given their ordinary meaning. It is not in such situations to infer from the words used meanings other than that used in the provision. It is clear from the use of the words “*any question*” and “*decision*” in section 295(2) that they are neither interchangeable, synonymous nor meant to refer to the same thing or situation. (p. 2960 B)

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**REPRESENTATION**

Mike Okoye, with him are O. Okoroji, Dele Adeogun, Ibezim Okoli and E. Obot, for the Appellant.

E Rotimi Jacobs for the Respondents.

**CASES REFERRED TO**

UNTHMB v. Nnoli (1994) 8 NWLR

F Akande and Ors. v. Adesanwo and Ors. (1962) ALL NLR 1135

Lomi Aduke v. Daniel Longe (1962) ALL NLR 1130

Olawoyin v. Commissioner of Police (1961)1 ALL NLR 622

Obayogie v. Oyewe (1994)5 NWLR (Pt.346) 637 at 643

G Senator Victor Akan and Anor. v. Attorney-General of Rivers State & Ors. (1982)3 NCLR P.881

Gamioba v. Ezezi 11 & Ors (1961) NSCC 238

Weed v. Ward (1889)40 Ch.D 565

Achineku v. Ishagba (1988)4 NWLR (Pt.89) 411

H Niger Progress Ltd. v. N.E.I. Corp. (1989)3 NWLR (Pt.107) 68

Garba v. Federal Civil Service Commission (1988)1 NWLR (Pt.71) 449

Nkwocha v. Governor of Anambra State (1984)6 S.C. 302

Governor of Kaduna State v. Dada (1986)4 N.W.L.R. (Pt.38) 687

Richard Ezeanya and Ors. v. Gabriel Okeke & Ors. (1995)4 N.W.L.R. (Pt.388) 142

**STATUTE REFERRED TO**

Constitution of Nigeria 1999 S.295 (1)(a)(b) and (2)

B

**LEAD JUDGMENT BY MOHAMMED JSC**

The main issue in this appeal is whether the Court of Appeal has any discretion under Section 295(2) of the 1999 Constitution of the Federal Republic to refuse to answer a question referred to it by the Federal High Court.

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The background facts of this case briefly are in the following narrative. The appellant who was Chief of Staff of Nigeria Army during the regime of late General Sani Abacha was invited by the National Security Adviser, the 2nd Respondent, for questioning. He was alleged to have facilitated the provision of arms that were used in the attempted murder of Mr. Alex Ibru. The appellant was detained in a house at Forte IBB Barracks, Abuja on 13th October, 1999.

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On 5th November 1999 the appellant sought leave to enforce his fundamental right challenging his detention. He also applied to trial Federal High Court for the following declaratory reliefs and orders:

"A. Declaration that arrest of the Applicant on 13th October 1999 by the respondents, their officers, servants, privies is without justification, illegal, unlawful and consequentially, a violation of the applicants fundamental rights as secured to the applicant by Section 35 and 41 of the 1999 constitution and Articles 4,5,6 and 12 of the African Charter on Human and peoples Rights (Ratification and Enforcement) Acts Cap. 10 Laws of the Federation of Nigeria 1990 .

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B. A declaration that the detention, house arrest, restriction of movement of the applicant since the 13th of October, 1999 by the respondents at Chief of Arm Staff's Guest House, forte IBB, Abuja, is illegal, unlawful and consequentially, a violation of the applicant's fundamental rights as secured to the applicant by Sections 35 and 41 of the 1999 Constitution and Articles 4,5,6 and 12 of the African Charter on Human

H

*and peoples Rights (Ratification and Enforcement) Act Cap.10 Laws of the Federation of Nigeria 1990.*

*C. A declaration that the Attorney-General of the Federation (1st Respondent) is without power to constitute a Special Investigation Panel (S.I.P.) to investigate an alleged commission of a crime by the applicant.*

*D. A declaration that the Attorney-General's Special Investigation Panel (S.I.P) constituted to investigate alleged commission of a crime by the applicant is illegal, unconstitutional, null and void and consequentially a usurpation of the statutory powers of the Nigeria police Force.*

*E. A declaration that the proceedings, report and the recommendation of the Attorney General's Special Investigation Panel (S.I.P) dated 26th October 1999 is illegal, void and cannot form the basis upon which the Attorney General of the Federation (1st Respondent) or any other authority can lay a charge against the applicant.*

*F. A declaration that the conduct of the Attorney General's Special Investigation Panel in its proceedings, utterances, deeds and leakages of misleading information to the media is illegal, unlawful, reprehensible, ultra vires, malicious and constitutes a gross violation of the applicant's fundamental rights as guaranteed under Section 36 of the 1999 Constitution and Articles 4,5, and 7 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Acts Cap 10 laws of Federation of Nigeria 1990.*

*G. An order of mandatory injunction compelling the respondents whether by themselves or their officers, servants, privies or otherwise however, to forthwith release the applicant.*

*H. An order of injunction restraining the respondents whether by themselves, servants, privies or otherwise howsoever from further arresting, arraigning the applicant in any court of law upon, the findings of the Attorney General's Special Investigation Panel or in any other manner infringing on the fundamental rights of the applicant.*

*I. An order quashing the establishment, proceedings, reports, and findings and recommendation of the Attorney General's Special In-*



*vestigation panel.*

*J. Such Consequential or other orders including the payment of N100.000.00 (one hundred million Naira) as fundamental rights under the 1999 Constitution, to which the applicant may be entitled to".*

The learned trial judge granted most of the prayers except C and D. The appellant was however not released. He was instead flown from Abuja to Lagos where he was arraigned before a Chief Magistrate on a two counts charge of conspiracy and attempted murder. The Chief Magistrate remanded him in Kirikiri Maximum Security Prison, Lagos. Meanwhile, learned counsel for the applicant, Mr. Mike Okoye, filed an application before the High Court seeking an Order of committal of the 1st respondent, the Attorney General of the Federation to prison for contempt of the court's Order. Learned counsel also filed another application requesting for release of the appellant from Kirikiri Maximum Security Prison. He also prayed for the stay of proceedings in charge No. MIK/A/912/99 between Commissioner of Police V. Lt. General Ishaya Bamaiyi (Rtd) & 4 Ors. Pending the hearing of the appellant's application for the enforcement of his Fundamental Rights. The respondent filed an appeal to the Court of Appeal against the ruling of the High Court in which the court ordered for immediate release of the appellant from the House detention at No 12 Forte IBB Barracks, Abuja.

On 3rd December, 1999, when the suit came before the learned trial judge for argument of various interlocutory applications, learned counsel for the appellant orally moved the court to refer the following constitutional question for the interpretation of the Court of Appeal.

*"Whether by the provision of Section 174 of the Constitution or any provision, the Federal Attorney General has the power to constitute the special investigation panel that investigated the applicant and the report which forms the basis of the charge against them (sic) before the Magistrate Court?"*

The Court of Appeal, Coram, Akpabio, Muntaka-Coommassie H & Oduyemi JJCA, considered the submission of the counsel and refused to answer the question because it did not arise from the proceedings before the High Court. The case was thereafter sent back to the High

Court for the continuation of hearing of the applications brought by the parties for the court's determination. Dissatisfied with the decision of the Court of Appeal, the appellant filed this appeal.

B Five issues have been identified by the appellant's counsel for the determination of this appeal. The issues formulated by learned counsel for the respondents although couched differently can be subsumed in this issues identified by the appellant's counsel. The issues raised by the appellant's counsel are as follows:-

C *"1. Whether the Court of Appeal has any discretion under Section 295(2) of the 1999 Constitution to refuse to answer the question referred to it.*

D *2. Whether the Court of Appeal is entitled in a reference under Section 295 (2) of the 1999 Constitution to review a decision on facts made by the trial court not appealed against.*

*3. Whether the Court of Appeal was right to have determined the substantive issue pending before the Federal High Court in a matter of reference.*

E *4. Whether an applicant seeking to enforce his fundamental rights requires any additional leave over and above that prescribed in Order 1 Rule 2 of the Fundamental Right (Enforcement Procedure) Rules for reliefs sought in the Statement accompanying his application.*

F *5. Whether the reason given by the Court of Appeal in refusing to answer the question is justified in law."*

G The only issues, in my respectful view, which are germane to the question referred to Court of Appeal for its interpretation are issues 1 and 5. I will consider the two issues together. The submission on the issues can be better understood if section 295 1 (a) (b) and 2 of the Constitution, 1999, is reproduced. It reads as follows:

H *"295.-(1) Where any question as to the interpretation or application of this Constitution arises in any proceedings in any court of law in any part of Nigeria (other than in the Supreme Court of Appeal, the Federal High Court or a High Court) and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any of the parties to the proceedings so requests, refer the ques-*

*tion to the Federal High Court or a High Court having judrisdiction in that part of Nigeria and the Federal High Court or the High Court shall*

*(a) If it is of opinion that the question involves a substantial question of law, refer the question to the Court of Appeal or*

*(b) If it is opinion that the question does not involve a substan- B  
tial question of law, remit the question to the court that made the refer-  
ence to be disposed of in accordance with such directions as the Federal  
High Court or the High Court may think fit to give.*

*(2) Where any question as to the interpretation or application of C  
this Constitution arises in any proceedings in the Federal High Court,  
and the court is of opinion that the question involves a substantial ques-  
tion of law, the court may, and shall if any party to the proceedings so  
request, refer the question to the Court of Appeal; and where any ques-  
tion is referred in pursuance of this subsection, the court shall give its D  
decision upon the question and the court in which the question arose  
shall dispose of the case in accordance with that decision".*

Looking at the Section of the Constitution reproduced above it is manifestly clear that only subsection 2 is relevant for the determination E of this appeal. Learned counsel for the opinion submitted that under subsection 2 there in no provision for the opinion of the Court of Appeal to which the matter is referred. The said section is mandatory and does not give room for any exercise of discretion to refuse to answer the question. Counsel further argued that under subsection 2 the court shall F give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision. He cited, in support, the case of UNTHMB V. Nnoli (1994) 8 NWLR in which this court held that the word "shall" in sections 9(1) and 13 of the G University Teaching Hospitals Reconstitution of Boards etc.) Act, Cap. 463, Laws of Federation of Nigeria 1990 was mandatory and did not permit of any discretion, variation or circumvention of the clear procedure to be followed. Learned counsel Mr. . Mike Okoye submitted further that going by the clear provisions of section 295(2), the Court of H Appeal cannot in law, refuse to answer the question referred to it. Counsel emphasised that it would amount to clear abdication of Constitutional

responsibility of the Court of Appeal to refuse to answer a question as to the interpretation or application of the Constitution referred to it.

**I should pause here to ask, "Is it mandatory for the Court of Appeal to answer any question referred to it by the High Court pursuant to the provision of section 295(2) of the Constitution, even if the question is irrelevant to the proceedings before the High Court?" The answer is definitely NO. I agree with Rotimi Jacobs, learned counsel for the respondents, that it is wrong to construe the words, "shall give its decision upon the question" under S. 295(2), to mean "shall answer the question." The provision of the Constitution is clear and not ambiguous. "Decision" as interpreted in the 1999 Constitution means, in relation to a court, "any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation", see Section 318 of 1999 Constitution. In Black's Law Dictionary "Decision is explained as follows:**

*"A determination of a judicial or quasi judicial nature. A judgment, decree, or order pronounced by a court in settlement of a controversy submitted to it and by way of authoritative answer to the questions raised before it. The term is broad enough to cover both final judgments and interlocutory orders".*

**A decision is therefore a pronouncement made by a court which stands as its final verdict to a question brought before it for determination. See Akande and Ors. V. Adesanwo and Ors. (1962) All NLR 1135 and Lomi Aduke V. Daniel Longe (1962) All NLR 1130.**

In the case in hand, the Court of Appeal considered the question referred to it by the Federal High Court and , in a very well considered ruling held that the subject matter of the reference had not arisen in the proceedings before the court and for the same reason the court declined to interpret the question referred to it. Mr. Rotimi Jacobs referred to the case of Olawoyin v. Commissioner of police (1961) 1 All NLR 622 where this court refused to answer a question on the issue concerning fair trial referred to it by High Court of Northern Nigeria as guaranteed by the Federal Constitution of 1960. The Supreme Court declined to answer the question in the following words:

*"As we are of the opinion that the question put to us do not arise under Section 108 (2) of the Constitution we shall send the matter back to the High Court of the Northern region for it to proceed with the appeal before it".*

**If the question referred to the Court of Appeal for its determination did not arise from the proceedings before the trial court, it will be an academic exercise. Courts have no jurisdiction to deal with hypothetical or academic questions not grounded in reality or on facts. The reality of this case is that the question referred to the Court of Appeal for interpretation did not arise from the proceedings before the trial High Court. The provision of the Constitution under Section 295(2) is very clear. From the wordings of this provision it is not just every question requiring constitutional interpretation that should be referred to the Court of Appeal. Before such a question can be so referred, the issue must arise in the proceedings before the High Court. See *Obayogie V. Oyewe (1994) 5 NWLR (pt. 346) 637 at 643*. Even if the issue is relevant to the proceedings, the constitutional provision does not give parties free ticket to the Court of Appeal. There must be a substantial question of law so found by the court before a reference demanded by a party can be made by the High Court - *Senator Victor Akan and Anor. V. Attorney-General of Rivers State & 7 Ors. (1982) 3 NCLR P.881*. The Court of Appeal is therefore quite right to refuse to answer the question referred to it for interpretation. I think the appellant's counsel has put the cart before the horse. It is when the proceedings have commenced and a matter arises which, by the argument of counsel, invites more than one interpretation that a reference can be made to the Court of Appeal or the Supreme Court, as the case may be.**

This decision has determined this appeal. The other matter raised in the other issues cannot be considered now because they are all related to the question which the Court of Appeal has declined to interpret. This appeal is therefore dismissed. The ruling of the Court of Appeal is hereby affirmed. I award N10,000.00 costs in favour of the respondents.

KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother Uthman Mohammed, JSC, in this appeal. I agree with his conclusion that this appeal should be dismissed. I only wish to add my own contribution in amplification of the reasoning leading to the conclusion.

The only issue in this appeal is whether there is a discretion in the Court of Appeal whether or not to answer a question of the interpretation of a provision of the Constitution referred to it by the Federal High Court. The question sought to be answered was whether the Attorney-General has power by section 174 of the Constitution 1999 to constitute a special panel that investigated the Appellant and the Report of which was the basis of the prosecution of the Appellant before the Magistrates Court.

The facts of the case are undisputed, simple and short. Appellant was alleged to have facilitated the procurement of arms used in the attempted murder of Mr. Alex Ibru. He was accordingly detained in a house at Forte IBB Barracks, Abuja on 13<sup>th</sup> October, 1999. On the 5<sup>th</sup> November, 1999, Appellant by application to enforce his fundamental right challenged his detention and sought the following declaratory reliefs and orders in the Federal High Court.

*“A. A Declaration that the arrest of the Applicant on 13 October, 1999 by the Respondents, their Officers, servants, privies is without justification, illegal, unlawful and consequentially, a violation of the Applicant’s fundamental rights as secured to the Applicant by Section 35 and 41 of the 1999 Constitution and Articles 4, 5, 6, and 12 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Acts. Cap 10 Laws of the Federation 1990.*

*B. A Declaration that the detention, house arrest, Restriction of movement and continued detention and restriction of movement of the Applicant since the 13<sup>th</sup> of October, 1999 by the Respondents at the Chief of Army Staff’s Guest House, Forte IBB, Abuja, is illegal, unlawful and consequentially, a violation of the Applicant’s fundamental rights as secured to the Applicant by Section 35 and 41 of the 1999 Constitution and Articles 4, 6, 6, and 12 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap 10 Laws of the*

*Federation of Nigeria 1990.*

C. *A Declaration that the Attorney General of the Federation (1<sup>st</sup> respondent) is without power to Constitute a Special Investigation Panel (S.I.P.) to Investigate an alleged commission of a crime by the Applicant.*

D. *A Declaration that the Attorney General's Special Investigation Panel (S.I.P) constituted to investigate Alleged commission of a crime by the Applicant is illegal, Unconstitutional, null and void and consequentially a Usurpation of the statutory powers of the Nigeria Police Force.*

E. *A Declaration that the proceedings, report and the recommendation of the Attorney General's Special Investigation Panel (S.I.P) dated 26 October, 1999 is illegal, void and cannot form the basis upon which the Attorney General of the Federation (1<sup>st</sup> Respondent) or any other Authority can lay a charge against the Applicant.*

F. *A Declaration that the conduct of the Attorney General's Special Investigation Panel in its proceedings, utterance, deeds and leakage of misleading information to the media is illegal, unlawful, reprehensible, ultra vires, malicious and constitutes a gross violation of the Applicant's fundamental rights as guaranteed under Section 36 of the 1999 Constitution and Articles 4, 5, and 7 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Acts Cap 10 Laws of the Federation of Nigeria 1990.*

G. *An Order of mandatory injunction compelling the Respondents whether by themselves or their officers, Servants, privies or otherwise howsoever, to forthwith Release the Applicant.*

H. *An Order of Injunction restraining the Respondents whether by themselves, servants, privies or otherwise howsoever from further arresting, detaining, arraigning the Applicant in any court of law upon the findings of the Attorney General's Special Investigation Panel or in any other manner infringing on the fundamental rights of the Applicant.*

I. *An Order quashing the establishment, proceedings, reports, and findings and recommendation of the Attorney General's Special In-*

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*vestigation Panel.*

*J. Such Consequential Or Other Orders including the Payment of N100,000,000.00 (One hundred million Naira) as compensation to the Applicant for the Purpose of securing his fundamental rights under the*  
B *1999 Constitution, to which the Applicant may be entitled to.*

GROUND'S UPON WHICH THE RELIEFS ARE SOUGHT

*A. The arrest of the Applicant on 13 October, 1999 by the Respondent is an infringement of the Applicant's constitutional rights and therefore Ultra vires, illegal, and unlawful within the meaning of*  
C *Sections 35 and 41 of the 1999 Constitution, and Articles 4, 5, 6, and 12 of the African Charter.*

*B. The continuous detention, house arrest and custody of the Applicant by the Respondents is an infringement of the Applicant's constitutional rights and therefore Ultra vires, illegal, and unlawful within*  
D *the meaning of Sections 35, 36 and 41 of the 1999 Constitution and Articles 4, 5, 6, and 12 of the African Charter.*

*C. The Attorney General of the Federation is without power to*  
E *establish a Special Investigation Panel for the purpose of investigating an alleged commission of a crime.*

*D. The establishment of the Special Investigation Panel is Illegal, unlawful and unconstitutional."*

F After the hearing of the application, the learned trial Judge refused prayers C and D. Appellant was still not released, but was instead arraigned before a Chief Magistrate in Lagos on a two count charge of conspiracy and attempted murder. Appellant was remanded in Kirikiri  
Maximum Security Prison, Lagos.

G Relying on the ruling of the learned trial Judge with respect to Appellant's application for the enforcement of his fundamental rights, Mr. Mike Okoye learned Counsel filed an application before the Federal High Court seeking to commit the 1<sup>st</sup> Respondent, the Attorney-General of the  
H Federation, to prison for contempt of the order of the Court. He also filed an application seeking release of the Appellant from Kirikiri Maximum Security Prison. He brought an application for stay of proceedings in charge No. MIK/A/912/99 Commissioner of Police v. Lt. General Ishaya



Bamaiyi (rtd.) & 4 ors. pending the hearing of Appellant's application for the enforcement of his fundamental rights.

Respondents filed an appeal to the Court of Appeal against the ruling of the Federal High Court ordering the immediate release of the Appellant from the House detention at No.12 Forte IBB Barracks, Abuja. B

On the 3<sup>rd</sup> December, 1999, the suit came before the learned trial Judge of the Federal High Court for argument of the various interlocutory applications. Counsel for the Appellant relying on section 295 of the Constitution, 1999 made an oral application to refer the following constitutional question aforesaid for the interpretation of the Court of Appeal. C

*"Whether by the provisions of section 174 of the Constitution or any provisions, the Federal Attorney-General has the power to constitute the special investigation panel that investigated the applicant and the report which forms the basis of the charge against them (sic) before the Magistrate Court."* D

The learned trial Judge considering that a substantial question of interpretation of the provision of the Constitution was involved, referred the question to the Court of Appeal for interpretation in compliance with the provisions of section 295(1) of the Constitution 1999. E

The Court of Appeal, after arguments of Counsel of the parties, considered their submissions on the question and declined to answer the question on the ground that it did not arise from the proceedings before the Federal High Court. They sent back the case to the Federal High Court for continuation of hearing and determination of the application before it. Appellant dissatisfied has appealed to this Court. This is the appeal now before us. F

Appellant has challenged the decision of the Court of Appeal, alleging six grounds of errors of law. Learned Counsel for the Appellant has formulated five issues, as against four by the Respondents' Counsel, from the grounds of appeal. The Appellant's issues would seem to me to be comprehensive and adequate for the purpose, covering the grounds of H appeal. They are as follows –

*"1. Whether the Court of Appeal has any discretion under Section 295(2) of the 1999 Constitution to refuse to answer the question*

referred to it.

2. *Whether the Court of Appeal is entitled in a reference under section 295(2) of the 1999 Constitution to review a decision on fact made by the trial Court not appealed against.*

B 3. *Whether the Court of Appeal is right to have determined the substantive issue pending before the Federal High Court in a matter of reference.*

C 4. *Whether an applicant seeking to enforce his fundamental rights requires any additional leave over and above that prescribed in Order 1 Rule 2 of the Fundamental Right (Enforcement Procedure) Rules for reliefs sought in the statement accompanying his application.*

5. *Whether the reason given by the Court of Appeal In refusing to answer the question is justified in law.”*

D Although issues 1, 2, 3, and 5 and more particularly 1 and 5 are directly concerned with the question referred to the Court of Appeal. Issue 4 is completely outside the question and irrelevant. For the determination of the question, only directly related issues 1 and 5 are relevant. Issue 2 and  
E 3 though obliquely relevant to the consideration of the question are not necessary for the determination of the question. The question was referred to the court below by virtue of section 295(1) (a) (b) and (2) (3) of the Constitution 1999, which provides as follows:

F “295.-(1) *Where any question as to the interpretation or application of this Constitution arises in any proceedings in any court of law in any part of Nigeria (other than in the Supreme Court, the Court of Appeal, the Federal High Court or a High Court) and the court is of the opinion that the question involves a substantial question of law, the*  
G *court may, and shall if any of the parties to the proceedings so requests, refer the question to the Federal High Court or a High Court having jurisdiction in part of Nigeria and the Federal High Court or the High Court shall –*

H (a) *if it is of opinion that the question involves a substantial question of law, refer the question to the Court of Appeal; 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 Federal High Court or the High Court may think fit to give.*

*(2) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Federal High Court or a High Court, 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 Court of Appeal; and where any question is referred in pursuance of this subsection, the 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.*

*(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal 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 and give such directions to the Court of Appeal as it deems appropriate.”*

The scope and ambit of the constitutional provisions above reproduced is as clearly stated in section 295(1). The section can only be correctly relied upon in proceedings in any Court of law in Nigeria, where

(i) any question of interpretation or application of the Constitution, has arisen, and

(ii) the court is of opinion that the question involves a substantial question of law.

The section has also prescribed when and by whom the provision can be invoked. The court is vested with discretion to invoke the provision *suo motu* and also if the parties to the proceedings so request. Thus the Court may *suo motu* and must make the reference on the parties' request. An important element is that the question must arise in the proceedings before the court, and it must involve a substantial question of law. This last mentioned ingredient is the overriding factor in determining whether a reference of a constitutional question should be made. In recognition of the crucial importance and utility of the provision, it has formed part of every Constitution since 1960. It was section 108(2) of

the 1960 Constitution, Section 259 of the 1979 Constitution and section 295 of the 1999 Constitution. With minor and insubstantial verbal differences, the provisions have in substance remained the same as they are intended to achieve the same objective, namely interpretation of difficult provisions of the Constitution in the adjudication of a pending litigation before the Court for the benefit of the parties. The purpose is to solve a difficult, constitutional interpretation impeding the continuation of the proceedings before the trial Court. This is the rationale for the reference back of the decision of the Court to which the question was referred. It is necessary for a proper appreciation of the import of the provision to understand the meaning of the expression “*substantial question of law*” within the section.

A construction of the section shows that the expression covers the situation and applies whether the Court acts *suo motu* or at the instance of a party to the action. It is an essential condition for the exercise of the power in the constitutional provision that the question must genuinely arise in the proceedings. For the question to arise genuinely, it must be one, which must necessarily be decided in the cause or matter and not a matter, which may prove unnecessary to be decided. – See Gamioba & ors. v. Ezezi II & ors. (1961) All NLR.584 at p.588.

The phrase “*a substantial question of law*,” is difficult to define exhaustively. What amounts to a “substantial question of law” has been stated to be a matter “on which arguments in favour of more than one interpretation might reasonably be adduced.” It must also be one which is capable of being formulated with precision.” See Gamioba & ors. v. Ezezi II & ors. (supra) at p.588. In Olawoyin & others v. Police (No.2) (1961) All NLR. At p.625, the Federal Supreme Court has formulated a guide and provided the test as follows.

“*It will be difficult to attempt an exhaustive definition of what is a substantial question of law. A useful guide is determining whether an issue of law is substantial is provided in a number of Indian decisions dealing with a similar phrase in the Indian Constitution. There it has been held that in order to be substantial, the issue must be such that there may be some doubt or difference of opinion as to what the law is. When*

no such doubt exists, or the law is well established by a final Court of Appeal, or by an overwhelming consensus of judicial decisions, the mere application of it to a particular set of facts does not constitute a substantial question of law, however important the issue may be for the decision of the particular case. Oheara v. C. P. Syndicate, (1949) 4 D.L.R. 20 B  
Abdur Rahman v. Raghbir, (1951), 6 D.L.R. 107 (Simla)."

I adopt this dictum of the Federal Supreme Court, which is a correct interpretation of the expression "substantial question of law"

Learned Counsel to the Appellant at whose instance the reference was made in his submission contended that the provisions of Section 295(2) is mandatory on the Court to which a question has been referred to answer the question. It was submitted that the Court had no discretion not to answer a question referred to it. The contention of Counsel was that section 295(2) required that the Court shall give its D  
decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision. Learned Counsel relied on the construction of the word "shall" in Sections 9 (1) and 13 of the University Teaching Hospitals Reconstitution of Boards, etc.) Act, E  
Cap.463 Laws of the Federation of Nigeria 1990 in UNTHMB v. Nnoli (1994) 8 NWLR where the word "shall" was held to be mandatory and did not allow for the exercise of any discretion, variation or circumvention of the prescribed procedure to be followed. It was the contention of F  
learned Counsel that the clear and unambiguous words of section 295(2) did not allow any discretion in the court below to refuse to answer the question referred to it. In his view to refuse to answer a question referred is tantamount to abdication of constitutional responsibility to refuse to answer a question as to the interpretation or application of the Constitution before it. G  
It is true that the word shall in the ordinary meaning of the word, connotes a command, and that which must be given a compulsory meaning. It has a peremptory meaning, which is generally imperative and mandatory. It has the significance of excluding the idea of discretion to impose a duty. Where a provision provides that a thing shall be H  
done, the natural meaning is that a peremptory mandate is enjoined – See Achineku v. Ishagba (1988) 4 NWLR (pt.89) 411.

The issue raised by learned Counsel for the Appellant is more appropriately expressed in the provisions of Sub-section (2) of Section 295 already reproduced in this judgment. It is pertinent to observe the words used in the section, which provides that,

B *where any question is referred in pursuance of this sub-section, the 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."*

C It is an elementary but fundamental principle of interpretation of the words of a statute that the words used where clear and unambiguous should be given their ordinary meaning. See *Niger Progress Ltd. v. N.E.I. Corp.* (1989) 3 NWLR (pt.107) 68, *Garba v. Federal Civil Service Commission* (1988) 1 NWLR (pt.71) 449. It is not in such situations to infer from the  
D words used meanings other than that used in the provision. It is clear from the use of the words "any question" and "decision" in section 295(2) that they are neither interchangeable, synonymous nor meant to refer to the same thing or situation.

E It is obvious therefore that the intention of the provision was to refer to two different situations. I agree with the submission of Mr. Rotimi Jacobs, learned Counsel for the Respondent that it is wrong to construe the expression, "shall give its decision upon the question" under section  
F 295(2) to mean shall answer the question. What the express words of section 295(2) requires the Court to do is to give its decision on the question. It did not require the Court to which a question is referred to answer the question. If that was the intention it should have had no difficulty in saying so.

G The word "*decision*" as defined in Section 318 of the Constitution 1999, "*means in relation to a Court, any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.*" This definition is very wide and encompasses every judicial  
H determination pronounced in the settlement of a controversy made by way of authoritative answer to the questions raised before it. It is therefore accepted to postulate that any pronouncement made by a court which stands as its verdict whether final or interlocutory to a question brought

before it for determination is a decision. – See Akande & ors. v. Adesanwo & ors. (1962) All NLR.1135, Aduke v. Longe (1962) All NLR.1130 I think the expression merely means giving a determination on the reference. It does not mean answering the question. The mandatory nature of the constitutional provision applies only where parties resort to it and request a reference. It does not apply when the court applies the provision *suo motu*.

I have stated the facts of the case in the Federal High Court leading to the reference in this case of the question to be determined in the Court of Appeal. It is not disputed that the issue before the learned trial Judge of the Federal High Court was for declaratory reliefs and orders, A-J in which the following reliefs “C” and “D” were refused. The reliefs refused are as follows

“C. A declaration that the Attorney-General of the Federation (1<sup>st</sup> Respondent) is without power to constitute a special Investigation Panel (S.I.P) to investigate an alleged commission of a crime by the applicant.

D. A declaration that the Attorney-General’s Special Investigation Panel (S.I.P) constituted to investigate alleged commission of a crime by the applicant is illegal, unconstitutional null and void and consequently a usurpation of the Nigeria Police Force.”

These two prayers having been refused were not part of reliefs in respect of which the claims of the Appellant were granted, and were not part of the claims and reliefs granted from the material on which the question for reference to the Court of Appeal could have been formulated.

These were the facts and the material on which the Court of Appeal was asked to answer the question referred to it by the Federal High Court. In a well considered ruling, the Court in my considered opinion correctly answered that the subject matter of the reference having not arisen from the proceedings before the referring Court, there was no basis to interpret the constitutional question before it.

Mr. Rotimi Jacobs referred us to Olawoyin v. Commissioner of Police (No.2) (1961) All NLR.622, where the Federal Supreme Court

refused to answer a question on the issue of fair trial guaranteed under the 1960 Constitution, referred to it by the High Court of Northern Nigeria. In that case, the Federal Supreme Court stated at p.625,

“As we are of the opinion that the questions put to us do not arise under section 108(2) of the Constitution, we shall send the matter back to the High Court of Northern Nigeria for it to proceed with the appeal before it.”

In the instant case the proceedings before the Federal High Court which was seeking declaratory reliefs relating to the human rights of the Appellant did not concern the question of the interpretation of section 174 of the 1999 Constitution, Section 174 of the Constitution 1999 which relates to the powers of the Attorney-General of the Federation, which was not an issue before the trial Judge in the Federal High Court. The question referred to the Court of Appeal for interpretation therefore did not arise from the proceedings before the Federal High Court, but rather relates to proceedings before the Magistrate’s Court. It is therefore not a question which arises from the proceedings within the meaning of section 295(2) of the Constitution – See Obayogie v. Oyewe (1994) 5 NWLR (pt.346) 637 at p.643. The Court of Appeal was therefore right in declining to answer the question referred to it. The Court correctly referred the question back to the referring trial Federal High Court for continuation of the proceedings before it. In the circumstances where the reliefs relating to the constitutional questions referred was founded on issues no longer part of the declaratory reliefs and the proceedings before the learned trial Judge, it will be completely inappropriate to formulate a question unsupported by any material before him, and not constituting any of the issues in dispute before him – See Olawoyin v. Police (1961) All NLR.203.

The above reasons have determined the issues Nos. 1 and 5 formulated from the grounds of appeal and is a complete answer to the appeal of the Appellant. The appeal of Appellant is accordingly dismissed.

Appellant shall pay N10,000 as costs to the Respondents.



**WALI JSC**

I am privileged to have read in advance, the lead judgment of my learned brother Uthman Mohammed JSC, and I agree with his reasoning and conclusion for dismissing the appeal.

For the same reasons ably sated in the lead judgment, I also hereby dismiss this appeal and affirm the Ruling of the court of Appeal. I award N10,000.00 costs to the Respondents.

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**IGUH JSC**

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Mohammed, J.S.C. and I am in complete agreement with him that this appeal is without substance and ought to be dismissed.

It cannot be disputed that the question referred to the court of Appeal for the resolution of the appeal did not arise from the proceedings before the trial court. Any consideration of the same would therefore amount to an exercise in academics which no court of law should concern itself with.

In this regard, this court has repeatedly made the point that where a question before the court is entirely academic, speculative or hypothetical, the appellate court in accordance with well established principles must decline to decide such a point. See Nkwocha v. Governor of Anambra State (1984) 6 S.C. 302, Governor of Kaduna State v. Dada (1986) 4 N.W.L.R. (part 38) 687, Richard Ezeanya and others v. Gabriel Okeke & ors (1995) 4 N.W.L.R. ( part 388) 142 etc. It is therefore clear to me that the court of Appeal was quite right by declining to give any consideration to the question before it. This appeal is devoid of merit and it is hereby dismissed by me with costs as assessed in the leading judgment.

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**KATSINA-ALU JSC**

I have had the privilege of reading in draft the judgment of my

learned brother, UTHMAN MOHAMMED, JSC. in this appeal. I entirely agree with it.

The main question for determination is whether the Court of Appeal has any discretion under section 295(2) of the 1999 Constitution to refuse to answer a question referred to it by the Federal High Court. B The section is as follows:

*"Where any question as to the interpretation of this Constitution arises in any proceedings in the Federal High Court, or a High Court, 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 request, refer the question to the Court of Appeal; and where any question is referred in pursuance of this sub-section, the 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."* (Underlining for emphasis). C D

I cannot imagine any language more explicit. The sub-section says "the court shall give its decision upon the question" so referred to the court. It is to be observed that this is not the same as saying "the court shall answer the question". The condition for referring any question to the Court of Appeal is that the question must arise in the proceedings before the Federal High Court or the High Court as the case may be. E

Now in the present case, the Court of Appeal had considered the question referred to it by the Federal High Court and given its decision. Its decision was that the subject matter of the reference had not arisen in the proceedings before the Federal High Court and as a result refused to answer it. In Olawoyin v. Commissioner of Police (1961) 1 ALL NLR 622 this court refused to answer questions referred to it by the High Court of Northern Nigeria on the ground that the questions did not arise under section 108(2) of the 1960 Constitution, which is in pari materia with S.295(2) of the 1999 Constitution. F G

For this reason and the fuller reasons given by my learned brother UTHMAN MOHAMMED, JSC. I, too, would dismiss this appeal with N10,000.00 costs to the Respondents. H

**ACHIKE JSC**

I have had the privilege of reading the leading judgment of my learned brother, Uthman Mohammed, JSC. I agree with his reasoning and the conclusion that the appeal lacks merit and the same ought to be dismissed. Accordingly, I, too would dismiss the appeal with N10,000.00 cost in favour of the respondents. B

**AYOOLA JSC**

I have had the privilege of reading in draft the judgment just delivered by my brother, Uthman Mohammed, J.S.C. I agree that this appeal lacks merit and should be dismissed. C

Subsection 2 of section 295 of the Constitution predicated the exercise of the power of the High Court to refer a question as to the interpretation or application of the Constitution on: D

(i) The question as to interpretation or application of the Constitution arising in the proceedings; and

(ii) The court begin of opinion that the question involves a substantial question of law. E

Where question of interpretation or application of the Constitution does not arise in the proceedings a consideration of the second condition does not arise. A question arises in any proceedings where the question must necessarily be decided in the proceedings. In Gamioba v. Ezezi 11 & Ors (1961) NSCC 238 this court, per Brett, JSC, said at p. 241: F

*"As to when a question arises for the purpose of exercising the power of reference, we would adopt the reasoning and the conclusion of the Court of Appeal in England in Weed v. Ward, (1889) 40 Ch. D 565, where it was held, to cite the headnote, that 'The power given by the Judicature Act, 1873, S.56, to refer' any question arising in any cause or matter' to an official or Special Referee applies only to questions which must necessarily be decided in this cause or matter, and not to questions which it may prove unnecessary to decide."* G H

Section 108 of the 1960 constitution which was considered in

the Gamioba case is in identical terms with section 295 (2) of the Constitution. The provision of section 295 (2) that "*the court shall give its decision upon the question*" does not remove from the Court of Appeal the power to decide whether in the first place there was such question fit to be referred pursuant to section 295(2). The Court of Appeal exercises power under section 295(2) to give its decision "*upon the question*" that arises in the proceedings and not on any question that may have been referred to it at large, whether it arose from the proceedings or not, or, referred to it on an erroneous view held by the High Court that it has arisen. A question which has not arisen in the proceedings cannot be question properly "*referred in pursuance of this subsection*" fit to evoke an answer from the Court of Appeal. The Court of Appeal is as much a judge of whether a question as to interpretation or application has arisen in the proceedings as the High Court.

The consequence of any decision of the Court of Appeal pursuant to s. 295(2) being that "*the court in which the question arose shall dispose of the case in accordance with that decision,*" any interpretation of section 295(2) that would compel the Court of Appeal to give a decision in accordance with which the High Court cannot dispose of the case, because the question and answer would have no consequence to the proceedings, is erroneous and absurd. Courts do not answer academic question Section 295(2) does not provide an exception to that rule.

My learned brother, Uthman Mohammed, JSC, has dealt more extensively and in greater details with these points in his judgment. I am in entire agreement with his reasoning and his conclusion in the matter. In the result, I too would dismiss the appeal and award ₦10,000 costs in favour of the respondents.

H