

**SUPREME COURT OF NIGERIA**  
FRIDAY 16TH MAY, 2003. SC. 73/1999  
**CORAM:- S. M.A. BELGORE, S. U. ONU, U. A. KALGO,**  
**S. O. UWAIFO, A. O. EJIWUNMI, JJSC**

THE STATE

AND

1. PROF. L.O. NWAOBOSHI
2. C.O. NWANZE (ODOGWU OF IBUSA) ..... APPELLANTS
3. W.O. IKOLODO (NWOKOLO OF IBUSA)
4. J.I. OKONICHA (IYASE OF IBUSA)
5. CHIEF AUGUSTINE IZAGBO

AND

1. THE MILITARY ADMINISTRATOR  
OF DELTA STATE
2. A-G & COMMISSIONER FOR  
JUSTICE, DELTA STATE ..... RESPONDENTS
3. EX PARTE OBI (PROF.) CHIKE  
ONWUACHI ..... APPLICANT/  
RESPONDENT

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COURT PROCESSES - Prerogative writs - Certiorari - Purpose - It is a writ available to High Court - In exercise of its supervisory control - To ensure that inferior courts do not exceed jurisdiction - Or commit irregularities (H1)

COURT PROCESSES - Prerogative writs - Certiorari - Scope - It lies only against bodies exercising judicial authority - In respect of acts performed by them in that capacity - Not against executive or legislative acts (H2)

**FACTS**

Following the approval of the Declaration by the Governor of Delta State, some persons purporting to be kingmakers in Ibusa town wrote to the Government requesting that the selection and appointment of one Prof. L.C Nwaoboshi (1<sup>st</sup> appellant) be approved and the staff of office given to him. The Government replied by directing that 1<sup>st</sup> appellant ought to be installed first before bringing the appli-

cation for presentation of staff of office to him. Applicant felt dissatisfied and thus commenced this action at the High Court of Delta State.

The action was commenced by prerogative writ of certiorari seeking for the court to quash the declaration made by the government on the ground that same did not comply with the Traditional Rulers and Chiefs Edict 1979. After hearing, the trial court found for the applicant and granted his claims accordingly. 1<sup>st</sup> - 4<sup>th</sup> and 7<sup>th</sup> respondents (parties to the certiorari proceedings) being aggrieved appealed to the Court of Appeal, Benin City principally challenging the propriety of the certiorari order to quash what they regarded as a legislative or subsidiary legislative act. The court by a majority decision dismissed the appeal. Hence appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

(i) *Were the learned Justices right in holding that a writ of certiorari may issue against the Delta State Executive Council in its legislative or administrative function in this case?*

(ii) *Were the learned Justices right in holding that in making subsidiary legislation published as Delta State Legal Notices Nos. 6, 7, 8 and 9 of 1995, the Delta State Executive Council (a) was either determining or adjudicating on any question or (b) was required to act judicially?*

(iii) *Were the learned Justices right in law in holding that Delta State Legal Notices Nos. 6, 7, 8 and 9 of 1995 were not acts done or purported to have been done within the meaning and intendment of Decree No. 13 of 1984?*

**HELD** (Unanimously allowing the appeal per **UWAIFO JSC**)

*COURT PROCESSES - Prerogative writs - Certiorari - Purpose*

**1. It is elementary that certiorari is a prerogative writ of common law origin available to the High Court in the exercise of its supervisory control over an inferior tribunal or court to ensure that it does not exceed its jurisdiction or commit irregularities making its decision bad on its face:**

**The writ is issued in order that the issuing court may bring the**

***proceedings of the inferior tribunal or court before it for inspection and if there is due cause disclosed, to quash them.***  
(p. 1350 E)

*COURT PROCESSES - Prerogative writs - Certiorari - Scope*

**2. It lies only against bodies exercising judicial or quasi-judicial authority and in respect of acts performed by them in that capacity. It does not lie against executive or legislative acts, or mere administrative acts.**

***In the present case what was brought by writ of certiorari for the purpose of being quashed and which indeed the High Court quashed, and was upheld by the court below, was a declaration stating the customary law regulating succession to the title of Obuzor of Ibusa. The declaration was made under the Traditional Rulers and Chiefs Edict, 1979, as contained in the Legal Notice No. 6 of Delta State followed by consequential orders in Legal Notices Nos. 7, 8 and 9, all of 1995. It was then published in the Gazette No. 28 Vol. 5 dated 21 June, 1995, of the State. The process by which the declaration in question was made was without doubt, as I understand it, legislative. The declaration has the force of law and qualifies as a subsidiary legislation, since it derived its existence from the said Edict of 1979, and was made by the appropriate authority.*** (p. 1350 G / 1351 G)

## NOTABLE POINT OF INTEREST

### **UWAIFO JSC**

***1. The state is the authority on whose prerogative the writ is issued***

Not to have regarded The State other than as a symbolic party is misleading. The state in certiorari proceedings represents primarily the authority on whose prerogative the writ of certiorari proceeded to issue. That is what makes it a prerogative writ. The State is not expected to be represented as if a party litigant, and has no real part to play other than as the symbol of authority. I had therefore to state the parties in the proper manner of certiorari proceedings with the title the appeal now bears. (p. 1348 G)

**REPRESENTATION**

T. J. Onomigbo Okpoko, SAN with C.A. Ajuyah, Esq., for Appellants  
C.J. Chukura, Esq, for the Applicant/Respondent

Other Respondents not represented

B

**CASES REFERRED TO**

R. v. Electricity Commissioners (1924) 1 KB 171

Fasade & Ors. v. Babalola & Anor. (2003) 4 S.C. (Pt. 1) 157

C Obiyan v. Military Governor of Midwestern State (1972) NSCC 290

Amaka v. Lt. Governor Western Region (1956) SCNLR 122

Ayoade v. Mil. Governor Ogun State (1993) 8 NWLR (Pt. 309) 111

R. v. District Officer for Kutia People (1961) All NLR 51

R. v. Director of Audit, Western Region (1961) ANLR 659

D State v. Akalako (1959) WRNLR 294

R. v. Governor of Eastern Region (1959) 3 ENLR 9

Ex Parte Obiyan (1973) 12 S.C. 23

**STATUTES REFERRED TO**

E Traditional Rulers and Chiefs Edict 1979, s.8

Church of England Assembly (powers) Act 1919, s.3(1)

**BOOK REFERRED TO**

F Judicial Review of Administrative Act - S.A. de Smith 2nd Ed. pp.398-399

**LEAD JUDGMENT BY UWAIFO JSC**

G The Delta State Government approved a Chieftaincy Declaration stating the customary law regulating succession to the title of Obuzor of Ibusa as per Legal Notices Nos. 6, 7, 8 and 9 of 1995 published in the Delta State of Nigeria Extra-Ordinary Gazette No. 28 Vol. 5 of 21 June, 1995. Persons who called themselves kingmakers wrote to the Government requesting that the selection and appointment of one Professor Louis Cheluno Nwaoboshi (now H 1st appellant) be approved and the staff of office presented to him.

A letter dated 20th June, 1995, from the Government to the Chairman, Kingmakers Committee appeared to have conveyed the nod given by the Military Administrator of the State to the selection

of Professor Nwaoboshi as the Obuzor of Ibusa. The letter which seemed to have been on the directive of the Military Administrator proceeded to say in paragraphs 2 and 3 as follows:

*“2. As regards the presentation of Staff of Office, I wish to inform you that this is normally done after the traditional ruler has been installed in accordance with the custom and tradition of the people. Accordingly, you may wish to install Professor Louis Cheluno Nwaoboshi as the Obuzor of Ibusa and thereafter reapply for the presentation of Staff of Office.*

*3. Once more, accept our congratulations on the appointment of the first Obuzor of Ibusa.”*

The Declaration made under Section 8 of the Traditional Rulers and Chiefs Edict, 1979 of the defunct Bendel State, applicable in Delta State, stated that there are three Ruling Houses (Otus) in Ibusa Clan, which, in order of seniority, are (i) Otu Odogwu Ruling House, (ii) Otu Uwolo Ruling House and (iii) Otu Iyase Ruling House. It also stated the three groupings of villages attached to each Ruling House and that succession shall rotate among the three Ruling Houses. Furthermore, the method of selection of the Obuzor of Ibusa was copiously narrated. The 1st appellant belongs to Otu Odogwu Ruling House.

In July, 1995, one Obi (Professor) Chike Onwuachi (now applicant/respondent) commenced certiorari proceedings in which he stated in paragraphs 1 and 2 of the affidavit in support as follows:

*“1. That I am the applicant in the above matter*

*2. That my application is for an order of certiorari directed to the respondents namely:*

*1. Professor L. O. Nwaoboshi*

*2. C. O. Nwanze, Odogwu of Ibusa*

*3. W. O. Ikolodo, Uwolo of Ibusa*

*4. J. I. Okonicha, Iyase of Ibusa*

*5. The Military Administrator Delta State*

*6. Attorney-General & Commissioner for Justice, Delta State.*

*7. Chief Augustine Izagbo.”*

The purpose was to bring up the said Declaration stating the customary law regulating succession to the title of Obuzor of Ibusa, Delta State as contained in Delta State Legal Notice No. 6 of 1995 published in the aforementioned Gazette to the Court to be quashed.

Other reliefs also sought were a declaratory order, permanent injunction, and stay of proceedings. Notwithstanding the inclusion of these other reliefs, it is not in dispute that the action was essentially commenced by the common law prerogative writ of certiorari.

On 20 December, 1995, Odita, J., sitting in the High Court holden at Asaba, in a rather lengthy ruling, held that the Executive Council of Delta State Government acted without jurisdiction in making the Declaration because it failed to comply with the Traditional Rulers and Chiefs Edict 1979. He therefore made an order quashing the said Declaration stating the customary law regulating succession to the title of Obuzor of Ibusa. He also granted the declaration and the perpetual injunction sought in the writ of certiorari.

The 1st-4th and 7th respondents to that application for certiorari appealed to the Court of Appeal on six grounds of appeal principally raising issues challenging the propriety of the certiorari order to quash what they regarded as a legislative or subsidiary legislative act. Other issues canvassed by the appellants related to the locus standi of the applicant and ouster of jurisdiction created by Decree No. 13 of 1984. I find it appropriate at this stage to remark that this appeal was not properly titled as an action by writ of certiorari should. The parties were erroneously stated thus:-

- |   |                                    |                   |
|---|------------------------------------|-------------------|
|   | 1. PROF. L.O. NWAOBOSHI            |                   |
|   | 2. C.O. NWANZE, ODOGWU OF IBUSA    | ..... APPELLANTS  |
|   | 3. W.O. IKOLODO, NWOKOLO OF IBUSA  |                   |
| F | 4. J.I. OKONICHA, IYASE OF IBUSA   |                   |
|   | 5. CHIEF AUGUSTINE IZAGBO          |                   |
|   | AND                                |                   |
|   | 1. The STATE                       |                   |
| G | 2. THE MILITARY ADMINISTRATOR      |                   |
|   | OF DELTA STATE                     | ..... RESPONDENTS |
|   | 3. ATTORNEY-GENERAL & COMMISSIONER |                   |
|   | 4. OBI (PROF.) CHIKE ONWUACHI      |                   |

Not to have regarded The State other than as a symbolic party is misleading. The state in certiorari proceedings represents primarily the authority on whose prerogative the writ of certiorari proceeded to issue. That is what makes it a prerogative writ. The State is not expected to be represented as if a party litigant, and has no real part to play other than as the symbol of authority. I had therefore to state

the parties in the proper manner of certiorari proceedings with the title the appeal now bears.

On 14 July, 1998, in a majority decision by Akintan and Rowland JJCA., Achike, JCA., dissenting, the appeal was dismissed, Akintan, JCA., observed inter alia:

*“It is now settled law that the writs of certiorari and prohibitions may issue where any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority.... It is not in doubt that the Delta State Executive Council is made up of a body of persons having legal authority to determine questions affecting the rights of subjects within its area of jurisdiction, that is, Delta State of Nigeria. The body is also charged with the duty to act judicially.”*

The learned Justice did not go further to support or justify the assertion that the Delta State Executive Council is a body which, in the performance of its function, should act judicially. Curiously enough, the learned Justice acknowledged, at least impliedly, the State Executive Council as a legislative body which could make and amend an Order (a subsidiary legislation), when he said:

*“What the Executive Council did in respect of D.S.L.N. No. 7 of 1995 was that it amended the (sic) of Prescribed Authority Order 1979 by deleting ‘Senior Diokpa of Ibusa’ and substituting ‘Obuzor of Ibusa’ in its place. There is no doubt that it has the power under Section 21 of the law under which it claimed to act, to amend an order it previously made.”*

The dissenting judgment of Achike, JCA., on this particular issue of the appropriateness of certiorari in this case captures the salient point which seemed to have eluded the learned Justices who gave the majority judgment. I refer to a passage of that judgment which reads as follows:-

*“It is worthy of note that each of the D.S.L.N. Nos. 6, 7, 8 and 9 made by the Executive Council prefaces the order made as having been done in exercise of power conferred on the Executive Council by express provisions of specific sections of the Traditional Rulers and Chiefs Edict, 1979. It may well be that the purported exercise was irregularly done in the sense that violated material steps or requirements necessary for their validity. But that is not the point posed under this issue. The question posed under this issue really is whether*

*the lower court could question or quash such undoubted legislative acts of the Executive Council by certiorari proceedings.”*

That is the relevant question, which Achike, JCA., unmistakably identified. It leads to a proper resolution of this appeal if answered correctly, without in any way touching on whatever merit the applicant/respondent may feel his grievance has. It is that very answer the appellants seek in this appeal from two of the three issues they have raised for determination as follows:

(i) *Were the learned Justices right in holding that a writ of certiorari may issue against the Delta State Executive Council in its legislative or administrative function in this case?*

(ii) *Were the learned Justices right in holding that in making subsidiary legislation published as Delta State Legal Notices Nos. 6, 7, 8 and 9 of 1995, the Delta State Executive Council (a) was either determining or adjudicating on any question or (b) was required to act judicially?*

(iii) *Were the learned Justices right in law in holding that Delta State Legal Notices Nos. 6, 7, 8 and 9 of 1995 were not acts done or purported to have been done within the meaning and intendment of Decree No. 13 of 1984?*

Issues (i) and (ii) may conveniently be taken together. **It is elementary that certiorari is a prerogative writ of common law origin available to the High Court in the exercise of its supervisory control over an inferior tribunal or court to ensure that it does not exceed its jurisdiction or commit irregularities making its decision bad on its face:** see *R v. District Officer for Kutia People Ex Parte Eti Atem* (1961) All NLR 51 at 56 per Ademola, CJF. **The writ is issued in order that the issuing court may bring the proceedings of the inferior tribunal or court before it for inspection and if there is due cause disclosed, to quash them. It lies only against bodies exercising judicial or quasi-judicial authority and in respect of acts performed by them in that capacity. It does not lie against executive or legislative acts, or mere administrative acts.** Learned Senior Advocate for the appellants has canvassed argument along the lines of the above statements of principle, relying on *Amaka v. Lt. Governor Western Region & Anor.* (1956) SCNLR 122 which seems, incidentally, to be most relevant to the present case.

In that case the proceeding which was sought to be removed by certiorari was an Order made under the Native Authority Ordinance by the then Lieut. Governor of the Western Region declaring that a recommendation that the native law and custom of Owo be modified by the abolition of the Ojomo title, submitted to him by the Owo District Native Authority acting under a section of the Ordinance, should be the Native Law and Custom of the area concerned. The Order in question was published in the Official Gazette of the Western Region as Public Notice No. 135 on 22 October, 1953. The High Court declined to make the order of certiorari. On appeal, the Federal Supreme Court upheld the High Court saying that the writ of certiorari does not lie to remove mere ministerial, administrative or executive acts. Foster-Sutton, FCJ., delivering the judgment of the court observed inter alia at pages 123-124:

*“Certiorari, as has often been pointed out, is a remedy of a very special character, and it only lies to remove judicial acts. Native law and custom is part of the law of this country, and the Legislature in its wisdom has, by subsections (1) and (2) of Section 30 of the Ordinance, conferred upon a Native Authority the power, firstly, to declare what in its opinion is the native law and custom applying throughout the area of its authority, and secondly, to recommend a modification of any native law or custom in the area of its authority..*

*The provisions I have referred to permit the authorities mentioned to amend one branch of the law prevailing in the area of their authority, an act which, in my opinion cannot be said to be a judicial one, although the Legislature wisely laid down certain matters which the Lieut. Governor must be satisfied upon before, so to speak, confirming the act of the Native Authority; but I have no difficulty in concluding that this does not alter the nature of the functions exercised. They are, so it seems to me, clearly administrative or executive.”*

**In the present case what was brought by writ of certiorari for the purpose of being quashed and which indeed the High Court quashed, and was upheld by the court below, was a declaration stating the customary law regulating succession to the title of Obuzor of Ibusa. The declaration was made under the Traditional Rulers and Chiefs Edict, 1979, as contained in the Legal Notice No. 6 of Delta State followed by conse-**

**quential orders in Legal Notices Nos. 7, 8 and 9, all of 1995. It was then published in the Gazette No. 28 Vol. 5 dated 21 June, 1995, of the State. The process by which the declaration in question was made was without doubt, as I understand it, legislative. The declaration has the force of law and quali-**  
**B** **fies as a subsidiary legislation, since it derived its existence from the said Edict of 1979, and was made by the appropriate authority;** see *Ayoade v. Military Governor Ogun State* (1993) 8 NWLR (Pt. 309) 111; *Fasade & Ors. v. Babalola & Anor.* (2003) 4 S.C. (Pt. 1) 157.

**C** No legislative or executive act is subject to the controlling jurisdiction of the writ of certiorari on the ground that it was not an act performed or expected to be performed judicially. It will be a contradiction in terms and offensive to the idea underlying the doctrine of  
**D** separation of powers to hold otherwise since certiorari lies against only judicial or quasi-judicial acts. And a legislative or executive act cannot by any rational thinking come within acts which are to be performed judicially: see *Obiyan v. The Military Governor of Mid-western State* (1972) NSCC 290. I will, however, like to refer to *R. v.*  
**E** *Governor-in-Council, Western Region, Ex parte Laniyan Ojo* (1962) 1 All NLR (Pt. 1) 147. In that case, the Governor-in-Council gave approval for the appointment of one Lawani Kehinde as the Bale of Lanlate, Ibarapa District Council and published in the Gazette. An  
**F** application was brought for an order of certiorari against the Governor-in-Council for the purpose of quashing the approval. The trial Judge refused the application on the ground of lack of jurisdiction because Section 3 of the Administration of Justice (Crown Proceedings) Law, 1959, provided that the High Court shall not have jurisdiction to issue an order of mandamus, an order of prohibition or an  
**G** order of certiorari to the Governor or the Governor-in-Council in respect of the approval or setting aside of the appointment of any chief etc. The appeal against that refusal came before the Federal Supreme Court.

**H** The issues the Federal Supreme Court had to decide were confined to the grounds of appeal and were also strictly in line with the grounds upon which the certiorari was sought at the trial court. They had nothing to do with whether a writ of certiorari could lie against an executive act under common law. Although the appeal was dis-

missed, it was without any consideration as to whether or not the Governor-in-Council was expected to act judicially. That case completely stands on its own, deciding nothing about the functionality of certiorari, or as to the appropriateness of seeking it as a remedy upon the facts and circumstances of the case. Whereas, in *Amaka v. Lt. Governor Western Region* (supra), *R. v. District Officer Ex parte Eti Atem* (supra) and *Obiyan v. The Military Governor of Midwestern State* (Supra), the central condition recognised by them for resorting to certiorari is that the body against whom it is sought must have a duty to act judicially. In *R. v. Electricity Commissioners* (1924) 1 KB 171 at 204-205, Atkin, LJ., giving an overview of the functions of the writs of certiorari and prohibition, said:

*“The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King’s Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King’s Bench Division, to have its legality inquired into, and, if necessary, to have its legality inquired into, and if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King’s Bench Division exercised in these writs.”*

As it relates directly to legislative acts, I find the authority of *R. v. Legislative Committee of the Church Assembly* (1928) 1 KB 411 apt and useful. There, both writs of prohibition and certiorari were sought. The writ of prohibition was sought to prohibit the Legislative Committee of the Church Assembly, under the Church of England Assembly (Powers) Act, 1919, from further proceeding with the matter of a certain measure entitled, “Prayer Book Measure, 1927.” It

was also sought that a writ of certiorari should issue, directed to the Church of Assembly itself and to the Legislative Committee of the Church Assembly to remove into the High Court the records of the Prayer Book Measure, 1927, was not a measure passed by the Church Assembly within the meaning of Section 3(1) of the Act of 1919 and  
 B (2) that that measure was not passed by the Church Assembly in accordance with the requirements of Section 14 (1) of the Constitution of the Church in as much as it was never debated by each House separately. In reaction to the application for the writs, Lord Hewart, C.J., said at page 416:

C “The opening words of the Constitution, recognized and given the force of law by the statute, are these: ‘There shall be a National Assembly of the Church of England ... to deliberate on all matters concerning the Church of England, and to make provision in respect  
 D thereof.’ As part of the appropriate machinery, it is required that the Assembly shall appoint a Legislative Committee, including members of all three Houses, to whom any measure which it is desired to pass into law shall be referred; and it is provided further that the Legislative Committee shall thereupon take such action as may be autho-  
 E rized by statute in order that such measure may become law. In other words, the topic is the machinery, and the internal economy of a deliberative Assembly, the function of which, so far as the present matter is concerned, is to deal with the earlier stages of that which, if  
 F the whole programme is carried out to the end, may become a statute. That does not seem to me to be a judicial body. It seems to me to be a deliberative or legislative body, and I do not think that either the Assembly itself or its Legislative Committee is a body of the kind to which it would be appropriate to issue a writ, whether of prohibition  
 G or of certiorari.”

I think enough has been said to show that it was inappropriate to order certiorari to control the Governor-in-Council (i.e. the Military Administrator) of Delta State acting in a legislative or executive capacity. Certiorari can do no more than to quash a decision in a  
 H proper case. The other reliefs sought in the writ of certiorari here were upon a misconception of the scope and use of certiorari in obtaining a remedy.

It is unnecessary to consider the third issue raised in this appeal since the inevitable conclusion is that the action was incompetent.

This appeal accordingly succeeds and is allowed. The majority judgment of the Court of Appeal is set aside together with the order for costs made by that court and the High Court. The action is struck out. I award N2,000.00 as costs in the trial court, N5,000.00 as costs in the Court of Appeal and N10,000.00 as costs in this court against the applicant/respondent in favour of the appellants. B

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### **BELGORE JSC**

The writ of certiorari as an executive writ, just like its sister, prohibition, is a tool to curb excessive use by an inferior judicial body of its jurisdiction. Certiorari is to control inferior tribunals from exercising their mandate or jurisdiction wrongly, and no more. The body to be curbed by certiorari must be one by its instrument empowered to act judicially. Therefore it is a total misconception to apply via certiorari to crush an entirely administrative or executive exercise of power. D

Declaration made under Traditional Rulers and Chiefs Edict 1979 of Bendel State culminating in issuance of Legal Notices 7, 8 and 9 of Delta State in 1995 are obviously administrative in nature as well as executive and can by no means be judicial acts. [Ayoade v. Military Governor of Ogun State (1993) 8 NWLR (Pt. 309) 11; Obiyan v. Military Governor of Midwestern State (1972) NSCC 290]. E

While a body exercising judicial powers as inferior judicial body seems to exceed its mandate or jurisdiction, certiorari comes in handy, as superior Court of law can be prayed to ask inferior tribunal to bring its record for investigation. If it is found by inquiry by the superior court to have exceeded its jurisdiction, the proceedings will be quashed. This appeal has therefore great merit as what is prayed of the lower courts is the quashing of administrative and executive decisions not judicial decisions. Certiorari in this instance is not relevant remedy to employ. I therefore allow this appeal and agree with Uwaifo JSC., that this appeal has merit. I make same order as to costs. F G

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### **ONU JSC**

I agree with the reasons and conclusions arrived at by my learned brother, Uwaifo, JSC., in his judgment just delivered that this appeal succeeds. I therefore allow it and subscribe to the consequen-

H

tial orders inclusive of costs made therein.

### **KALGO JSC**

I have had the privilege of reading in draft the judgment of my  
 B learned brother, Uwaifo, JSC., in this appeal. I agree entirely with the  
 reasoning and conclusion reached therein.

The Military Administrator of Delta State with his Executive  
 Council, in making the Delta State Legal Notices Nos. 6, 7, 8 and 9,  
 C under the Traditional Rulers and Chiefs Edict 1979 of Bendel State  
 on succession to the title of Obuzor of Ibusa were not exercising any  
 judicial functions. They were merely exercising administrative/legisla-  
 tive function bestowed on them by law and so certiorari cannot be a  
 proper remedy in questioning their acts as was done in this case. See  
 D *R. v. Director of Audit Western Region- Ex-parte Oputa* (1961) ANLR  
 659; *State v. Akalako* (1959) WRNLR 294; *R. v. Governor of East-*  
*ern Region* (1959) 3 ENLR 9. It is also very clear that by virtue of the  
 provisions of Section 1 (2) (b) (i) of Decree No. 13 of 1984, the  
 jurisdiction of the trial court to entertain this case was completely  
 E ousted. That court is clearly incompetent to try the case.

In the circumstances, this appeal is meritorious and it is accord-  
 ingly allowed. I set aside the decision in the majority judgment of the  
 Court of Appeal and strike out the case in the trial court. I abide by  
 F the orders of costs made in the leading judgment.

### **EJIWUNMI JSC**

I have had the opportunity of reading the draft of the judg-  
 G ment just delivered by my learned brother, Uwaifo, JSC. I agree en-  
 tirely with his resolution of the questions raised in this appeal. It is  
 apparent from the record and the discussion of the issues in the said  
 judgment that the main question that has to be determined in this  
 appeal is whether the court below was right per the majority judg-  
 H ment in upholding the judgment of the trial court.

In the appellant's brief, the following are the issues identified  
 for the determination of the appeal.

“(i) *Were the learned Justices right in holding that a writ of  
 certiorari may be issued against the Delta State Executive Council in*

*its legislative or administrative function in this case?*

5(ii) *Were the learned Justices right in holding that in making subsidiary legislation published as Delta State Legal Notices Nos. 6, 7, 8 and 9 of 1995, the Delta State Executive Council.*

*(a) was either determining or adjudication on any question or*

*(b) was required to act judicially?*

5(iii) *Were the learned Justices right in law in holding that Delta State Legal Notices Nos. 6, 7, 8 and 9 of 1995 were not acts done or purported to have been done within the meaning and intendment of Decree No. 13 of 1984?"*

In the brief of argument filed for the appellants, their learned counsel, in my humble view put across succinctly the facts that fall for consideration in this appeal when he argued thus:-

"10. *What was sought to be quashed and what the learned trial Judge ordered to be quashed were Delta State Legal Notices Nos. 6, 7, 8 and 9 of 1995 published in Delta State Gazette No. 28 of 1995. See page 236. Now the Delta State Legal Notices Nos. 6, 7, 8 and 9 of 1995 were each made and were stated to have been so made in the exercise of the specific powers conferred on the Executive Council by ss. 8, 21, 39(3) and 28(4) respectively of the Traditional Rulers and Chiefs Edict 1979. (See pages 20, 27, 28 and 29 respectively of the Traditional Rulers and Chiefs Edict 1979. (See pages 20, 27, 28 and 29 respectively of the records). There is no doubt that what the Delta State Executive Council did in Legal Notices Nos. 6, 7, 8 and 9 of 1995 were done in the exercise of the powers specifically conferred on the Executive Council under the Traditional Rulers and Chiefs Edicts of 1979. Applicant for the writ of certiorari did not found his action on absence of such powers by the Delta State Executive Council. Neither the trial court nor the court below doubted that the State Executive Council has such powers under the enabling Law.*

11. *As to the nature of the act of the Executive Council in Delta state Legal Notices Nos. 6, 7, 8 and 9, there is clearly no doubt whatsoever that the Executive Council in making the said legal notice was exercising a subsidiary legislative power or at worse, an administrative power under powers conferred on it by the specific provisions of the Traditional Rulers and Chiefs Edict 1979. Applicant for certiorari did not suggest that in making Legal Notices Nos. 6, 7, 8 and 9,*

*the State Executive Council was carrying out adjudicatory functions. Neither the trial court nor the Court of Appeal found that the powers conferred on the Executive Council by Ss. 8, 21, 39(3) and 28 (4) of the Traditional Rulers and Chiefs Edict were in any way adjudicatory. So, the Executive Council did not adjudicate on any matter. The powers shown to have been exercised in DSLN Nos. 6, 7, 8 and 9 under the enabling Laws stated in the notices are not judicial or quasi-judicial proceedings. They show executive acts of subsidiary legislation pursuant to the provision of an enabling Law."*

In support of this contention, he referred to several cases and authorities which included, *Ojomo Amaka v. Lieutenant Governor, Western Region & Anor.* (1 FSC 571); *R. v. Electricity Commissioners* (1924) 1 KB 171 at 204 - 205; *S.A. de Smith, Judicial Review of Administrative Act*, 2nd Edition, pp. 398-399; *R. v. Director of Audit, Western Region - Ex-parte Oputa* (1961) ANLR 659; *State v. Akalako* (1959) WRNLR 294; *R. v. Governor of Eastern Region* (1959) 3 ENLR 9 and *Ex Parte Obiyan* (1973) 12 S.C. 23 at 35.

It is evident from the facts disclosed in this proceedings that what the Delta State Executive Council did was to make declaratory orders per Delta State Notices Nos. 6, 7, 8 and 9. It seems clear to me that the declaratory orders were made pursuant to the functions delegated to the Council. I agree entirely with the contention of learned counsel for the appellants that in the performance of this duty, the Delta State Executive Council was not acting judicially. The Council was only performing its legislative functions. And as that was the duty entrusted to it, and which resulted in Delta State Notices Nos. 6, 7, 8 and 9, an order of certiorari cannot be available to the respondent to quash the exercise of the legislative acts of the Delta State Executive Council. The order of certiorari is a remedy of a very special character and only lies to quash judicial acts; it does not lie to quash mere ministerial, administrative or executive acts. See *Ojomo Amaka v. Lieut. Governor, Western Region & Anor.* (supra). In the result, the court below was wrong to have held contrary to this settled principle of law. This appeal is therefore also allowed by me for the above reasons and the fuller reasons given in the leading judgment of my brother, Uwaifo, JSC. I also abide with the order made as to costs.