Privy Council Appeal No. 42 *of* 1930.

Eshugbayi Eleko - - - - - - - - *Appellant*

v.

The Officer Administering the Government of Nigeria and another - *Respondents*

FROM

THE SUPREME COURT OF NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH, 1931.

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

This is an appeal from a decision of the Full Court of the Supreme Court of Nigeria, which dismissed the appellant's appeal from the judgment of Tew J., discharging what by consent of the parties was deemed to be a rule *nisi* for a writ of *habeas corpus* addressed to the respondents. The case has an unfortunate history. The appellant was ordered into custody on August 8th, 1925, and though within a few hours he took every legal step to question the validity of his detention, the matter is still before the Courts, and, as will appear from this judgment, has still to be heard *ab initio* by the Supreme Court of the Colony. The case has already been before this Board on a refusal by one of the Judges, affirmed by the Supreme Court to hear an application for a rule *nisi* for *habeas corpus* on the ground that a similar application had already been heard and determined by another Judge. The Board then decided that the well-established rule that applications in *habeas corpus* may be made to successive Judges existed in Nigeria, and remitted the case to the Supreme Court. The early history of the applicant's abortive attempts to establish his right to liberty are narrated in the judgment of this

Board delivered by Lord Hailsham on June 19th, 1928, [1928] A.C. at p. 462, and need not be repeated. The application so remitted was originally made by notice of motion dated December 8th, 1925. In pursuance of the Order in Council it came on for hearing before Tew J. on January 15th, 1929, when it was agreed that the motion should be treated as if an order to show cause had been made. Their Lordships have recently had occasion to say in the case of *The Commissioner for Local Government, etc.* v. *Kaderbhai* (27th February, 1931), that in applications for such writs as mandamus and *habeas corpus* it is important that the proper procedure should be maintained, and that the actual rule or order asked for or made should be formulated. The rights of the parties are, however, not affected in any way in this case by the departure from strict form.

It is now necessary to state the nature of the appellant's complaint, and the circumstances in which it arose. He is the successor of Docemo, who was the ruling chief of Lagos in 1861, when he by treaty ceded Lagos to Her Majesty Queen Victoria. His precise position at the time of the order of which he complains in August, 1925, is in dispute : but it is plain that in 1901 the Governor of Lagos recognised him as head of the family of Docemo in succession to one Oyekan, and it is also plain that in 1920 the Governor of Lagos regarded him with less cordiality, and by announcement in the "Nigeria Gazette" intimated what would be in future the relation of the applicant to the Government. In 1917 there was passed the Deposed Chiefs Removal Ordinance, which as amended in 1925 is so far as is material in the following terms :—

1. This Ordinance may be cited as the Deposed Chiefs Removal Ordinance.

2.—(1) When a native chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor, whether such deposition or removal shall have been before or after the commencement of this Ordinance, the Governor may :—

(*a*) If native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office ; or

(*b*) If the Governor shall be satisfied that it is necessary for the re-establishment or maintenance of peace, order and good government in such area that the deposed chief or native shall leave such area or any part of Nigeria adjacent thereto,

by an order under his hand direct that such chief or native shall, within such time as shall be specified in the Order, leave the area over which he had exercised jurisdiction or influence and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the Governor.

For the purposes of this section the following parts of Nigeria (and no others) shall be deemed to be adjacent to an area over which a deposed chief or native exercised jurisdiction or influence by virtue of his chieftaincy or office :—

(I) If the area is situated in the Colony :—

The Colony and the Provinces of Abeokuta, Ijebu and Ondo.

(II) If the area is situated in one of the Provinces of Ilorin, Oyo, Abeokuta, Ijebu and Ondo :—

The Colony and all provinces next adjacent to the province in which the area is situated.

(III) If the area is situated in any other province :—

All provinces next adjacent to the province in which the area is situated.

(2) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid, as directed by the Governor, or who having left such area or part of Nigeria shall return thereto without the consent of the Governor, shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such order direct.

(3) An order of deportation under Subsection (2) may be expressed to be in force for a time to be limited therein or for an unlimited time, and shall have the same force and effect as an order of deportation made under the Criminal Code.

By the Interpretation Ordinance, 1923, Section 3,

"In every ordinance, unless there be something repugnant in any subject or context (18) 'Chief' or 'Native Chief' means any native whose authority and control is recognized by a native community."

On August 5th, 1925, some of the members of the house of Docemo met together and purported to depose the applicant from his position as head of the house of Docemo. That they were the majority of the house of Docemo, or entitled by native law and custom to depose the applicant, or that the meeting was valid, was and apparently is contested by the applicant and other members of his house, as appears by a letter of protest, dated August 14th, 1925, purporting to record resolutions adopted at a meeting of 150 members of the house held on August 12th. However, the validity of the proceedings does not appear to have been regarded as doubtful by the Government, for on August 6th the following announcement was made in the "Nigeria Gazette" :—

LAGOS, *Thursday, August 6th*, 1925.

It is hereby announced for general information that His Excellency the Officer Administering the Government has by the instrument set out below sanctioned the deposition of Eshugbayi from his position as head of the House of Docemo also known as the house of Docemo-Oyekan and has sanctioned his removal from the office of Eleko.

It is further notified that His Excellency the Officer Administering the Government by an order made under Section 2 of the Deposed Chiefs Removal Ordinance has ordered Eshugbayi to leave the Colony and the Provinces of Abeokuta, Ijebu and Ondo within twenty-four hours of the service of the Order upon him.

His Excellency the Officer Administering the Government has been pleased to direct that a compassionate allowance of £20 a month be paid to Eshugbayi so long as he be of good behaviour.

T. S. A. THOMAS,
Acting Chief Secretary to the Government.

Chief Secretary's Office, Lagos.
6th August, 1925.

WHEREAS by a notice dated the 8th day of December, 1920, and published in an Extraordinary Gazette dated the 8th day of December, 1920, His Excellency the Governor announced that as from the 1st day of December, 1920, the Government of Nigeria had ceased to recognise Eshugbayi, commonly known as " Eleko," as head of the house of Docemo or as holding any position which might entitle him to official recognition from the Government or any of its officers.

And whereas on the 5th day of August, 1925, a majority of the representative members of the families descended from Addo (hitherto commonly referred to as the house of Docemo or the house of Docemo-Oyekan) deposed Eshugbayi from his position as head of the house of Docemo, also known as the house of Docemo-Oyekan, and removed him from the office of Eleko ;

And whereas His Excellency the Officer Administering the Government is satisfied that the persons who have so deposed Eshugbayi and removed him from the office of Eleko are the persons who by native law and custom are entitled so to depose the said Eshugbayi and to remove him from the office of Eleko ;

Now therefore His Excellency the Officer Administering the Government hereby sanctions the deposition of Eshugbayi from his position as head of the house of Docemo, also known as the house of Docemo-Oyekan, and his removal from the office of Eleko.

By His Excellency's Command,

J. DAVIDSON,

Lagos, 6th August, 1925. *Acting Administrator.*

On the same day, August 6th, the Acting Governor made the order referred to in the above notice :—

WHEREAS Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his Office ;

And whereas Native Law and Custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his Office :

Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta, Ijebu and Ondo within twenty-four hours of the service of this Order and that he shall not return to any of the said areas without my consent.

Given under my hand this 6th day of August, 1925.

(Signed) F. M. BADDELEY,

Officer Administering the Government.

On August 8th, as the order had not been obeyed, the Acting Governor made the order of deportation under which the applicant is now detained :—

WHEREAS Eshugbayi, a Native Chief holding the Office of " Eleko " in the Colony was by an Order made under my hand on the 6th day of August, 1925, ordered to leave the Colony and the Provinces of Abeokuta, Ijebu and Ondo within twenty-four hours of the service upon him of the said Order ;

And whereas the said Eshugbayi has refused or neglected to leave the said Colony and the Provinces of Abeokuta, Ijebu and Ondo :

Now therefore I do hereby order that the said Eshugbayi be deported forthwith to Oyo in the Province of Oyo.

Given under my hand and the seal of the Colony and Protectorate of Nigeria at Government House, Lagos, this 8th day of August, 1925.

(Signed) F. M. BADDELEY,

Officer Administering the Government

The applicant contests the validity of both orders, though the main attack is necessarily directed to the first. He says :—

(1) He was not a native chief, and did not hold an office.

(2) He was not deposed or removed from this office, and the Governor's sanction was therefore irrelevant.

(3) There was no native law and custom which required him, or any chief or native, whether deposed in the manner alleged against him or in any other way, to leave the area in question.

He says that these are three conditions precedent to any authority to make an order of withdrawal, and their existence can and must be investigated by the Court whenever the validity of the order or a deportation order founded on it is the subject of contest in judicial proceedings.

These were in substance the contentions of the applicant's Counsel on the hearing of the motion. Counsel for the Government maintained that the Court had no power to enter upon an investigation as to any of these points : the order of the Governor must be taken as equivalent to the order of a court of competent jurisdiction determining within its powers all matters necessary to give jurisdiction ; the order was analogous in its independence of the Courts to a committal by the House of Commons for contempt ; and in any case the election or deposition of chiefs was an Act of State not cognizable by the Courts.

On these contentions the learned Judges in Nigeria have taken a variety of views. Tew J. held that with points (1) and (2) the Court could not deal. He referred to the definition of native chief and thought it would be absurd for a Court to attempt to decide whether a person came within this definition. It was within the province of the Executive alone to decide what measure of authority or control would be necessary to make a person a chief. The question of native law and custom, he thought, was cognizable by the Court, and he proceeded at a further hearing to hear evidence, and eventually he decided that the custom existed entitling the Governor to make the order of August 6th. Their Lordships will revert to this finding. In the result he discharged the rule with costs as from the time the matter was remitted by the Privy Council. On appeal there was a division of opinion. Lloyd J. thought that by the ordinance the Governor, whether technically a Court or not, was given power to decide whether the necessary conditions had been fulfilled, and he had so decided, and the Court could not now enquire whether that decision was right. He quite logically thought on this principle that the trial Judge should not have investigated the question of native custom. Berkeley J. appears to have thought that the Court could determine at any rate the first two questions, for he proceeded to decide that the applicant was a chief and that he had been deposed. What his opinion was as to native custom does not appear from his judgment, for he does not refer to it. Petrides J. was of opinion that all the questions could be inquired

into; but he was satisfied with Tew J.'s finding as to custom. The appeal was therefore in accordance with the judgment of the majority dismissed with costs.

Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Deportation Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive. The analogy of the powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in question, if the Home Secretary deported a British subject in the belief that he was an alien, the subject would have the right to question the validity of any detention under such order by proceedings in *habeas corpus*, and that it would be the duty of the Courts to investigate the issue of alien or not. The case of *Rex* v. *Governor of Brixton Prison, ex parte Sarno* [1916] 2 K.B. 742, turned first on the question whether the regulation under which the order was made was *ultra vires*, which was a question of law. It further turned on the question whether the Secretary of State was abusing the powers given to him under the order by using them to deport a mere criminal, who, it was suggested, was no danger to the State. The Court expressly held they had power to consider this question and resolved it against the applicant. The question whether the applicant was an alien or not did not arise. He admittedly was; but their Lordships agree with the opinion of Low J. that, had the matter been in dispute, the Court would have had to decide it. A suggestion was made by one of the learned Judges that the order in this case was an Act of State. This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act.

Their Lordships, in view of the importance of the topic, have thought it necessary to call attention to these well-established principles. On the argument of this case they were relieved from a prolonged discussion of them, for the Solicitor-General, on behalf of the respondents, threw over the suggestion

that the conditions were not cognisable by the Courts. He admitted that they were, but contended that on the inquiry by the Courts the evidence of the Governor was conclusive that the facts were as stated. Native chiefs were, he said, appointed and deposed by the Crown. Chieftaincy was either a title of dignity or an office, or it might be both. In either case the Crown gave and the Crown took away, and evidence by the representative of the Crown that he had either given or taken away was evidence which the Court was either bound to accept or ought to consider so strong that no other evidence could reasonably displace it. It was true, he said in substance, that the ordinance referred to deposition or removal from office by or with the sanction of the Governor; but those words amounted to the same thing. If to conciliate native prejudices or for other reasons the Government affected to leave the right of appointment or removal to native custom, subject to the sanction of the Governor, that was mere diplomacy. In fact the Governor appointed and removed in every case, and when he said that he had done so, it was so.

It is obvious that contentions such as these may seriously affect the rights of natives in Nigeria. Their validity depends upon the powers of the Crown and the Governor and upon constitutional usage in Nigeria and possibly other African colonies, which have never been investigated in this case in the appropriate original tribunal, the Courts of the Colony. Their Lordships have a difficulty in finding in the Letters Patent or the Instructions to the Governor any express authority given to the Governor to act on his own initiative as to the appointment or deposition of chiefs, and they see the necessity of reconciling the existence of the suggested powers with the rights of the native communities laid down by Lord Haldane in giving the judgment of the Privy Council in *Amodu Tijani* v. *The Secretary S. Nigeria* [1921], 2 A.C. 399. *Prima facie* deposition with the sanction of the Governor would appear to point to deposition by some authority other than the Governor which would only become effective when sanctioned by the Governor: in which case it would appear that a valid deposition by the appropriate authority would be necessary as well as the sanction by the approving authority. And this appears to be the view adopted by the Crown Advisers in the Colony so far as one may judge from the affidavits filed by them. It may be, however, that the contention made by the Solicitor-General before their Lordships, if adopted by the Crown advisers in the Colony, will on investigation by the Courts be found to be correct. It is only necessary for this Board to decide that it is the duty of the Courts to investigate the whole of the questions raised and come to a judicial decision.

It is desirable to add that the first two points involve questions of fact upon which statements made by the executive are by no means conclusive. In particular, their Lordships cannot accept the opinion that the Courts of Nigeria are incapable of deciding the question whether the authority or control of a native

is recognised by a native community. Compared with many judiciable issues with which Courts of the Empire are from time to time faced, the question appears simple. The questions whether an office or a dignity exists, whether a person has been appointed to it or removed from it are all issues which the Courts will have to decide after hearing the relevant evidence tendered by either side.

It is necessary to include in the further hearing the question raised as to native custom. It seems obvious that it is difficult to ascertain whether there is a native custom applicable to a chief deposed without taking into consideration the manner of the deposition. Native custom may require the departure of a chief deposed according to native custom; but conceivably it may not apply to a chief alleged to be deposed, but in violation of native custom, or deposed by some external power newly brought into existence and never contemplated by native custom. Since the trial Judge thought that the fact of deposition was not cognizable by the Court the application of the native custom to the actual deposition in this case does not appear to have been investigated, and the whole question must be determined anew. An interesting question arose at the hearing as to the modification of an original custom to kill into a milder custom to banish. Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilisation become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of the native community *inter se*. In other words, the Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to "natural justice, equity and good conscience." It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.

One of the contentions of the applicant their Lordships are able to determine. It was said that it was a condition precedent to the power of the Governor to make a deportation order that the native chief alleged to have disobeyed the withdrawal order should first have been charged and convicted before a magistrate. It was said that this was the construction of section 18 (9) (*d*) of the Criminal Code, and that Section 2 (3) of the Deportation Ordinance provides that a deportation order is to have the same force and effect as an order of deportation under the Criminal Code. Whether the section in the Criminal Code has the suggested effect or not, their Lordships do not find it necessary to decide. Here the powers are expressly given by Section 2 (2) of the ordinance, and their Lordships entertain no doubt that the powers of deportation given to the Governor are executive powers quite independent of the question whether the

native has committed a criminal offence. This contention of the applicant therefore fails.

The matter should be remitted to the Supreme Court to be heard on the motion of December 4th, 1925.

Their Lordships think it desirable to indicate the procedure proper now to be adopted. The parties agreed when the case was formerly remitted that it should be heard as though a rule *nisi* had been granted. The rule should be drawn up and in the circumstances it had better be dated as of January 15th, 1929, the day when the agreement was made, being the first day of the hearing, and it should be treated as though argument were directed forthwith. The affidavits to be recited as read will be the affidavits filed by the applicant up to August 29th, 1928, not including the affidavits of the Crown and those filed by the applicant in reply. The rule *nisi* will therefore take the following form :—

Tuesday, the 15th day of January, 1929.

IN THE SUPREME COURT OF NIGERIA.

DIVISIONAL COURT NO. 2.

Before HIS HONOUR JUSTICE M. L. TEW.

Nigeria.

Upon reading the several affidavits of Eshugbayi, Eleko [and others, stating them],

It is ordered that this day, the 15th day of January, 1929, be given to the Officer administering the Government of Nigeria and the District Officer of Oyo to show cause why a writ of *habeas corpus* should not issue directed to them to have the body of Eshugbayi, Eleko, immediately before this Court at Lagos to undergo and receive all and singular such matters and things as the Court shall then and there consider of concerning him in this behalf.

Upon the ground that

1. The said Eshugbayi, Eleko, was not on August 6th, 1925, or thereafter a native chief and did not hold any office.

2. That the said Eshugbayi, Eleko, had not on August 6th, 1925, or thereafter been deposed or removed from any office.

3. That Native Law and Custom did not require that the said Eshugbayi, Eleko, should leave any area over which he exercised influence by virtue of any office or at all.

4. That by reason of the premises the order under the hand of the Officer Administering the Government, dated the 6th day of August, 1925, and the order under the hand of the said Officer and Seal of the Colony and Protectorate of Nigeria dated the 8th day of August, 1925, concerning the said Eshugbayi, Eleko, are invalid.

Upon notice of the said order given to the said Officer Administering the Government and the said District Officer by their counsel this day.

Upon the motion of Mr. Wells Palmer.

The rule may be modified if necessary to adjust the formal terminology, and the applicant is to have liberty to modify or add to the grounds if so advised. Their Lordships give no directions as to the Judge by whom the rule is to be heard : this will be decided by the Supreme Court in accordance with its practice. The affidavits filed are to be treated as in evidence ; the Court will give such directions as it thinks fit as to the production of other evidence, whether written or oral, and by cross-examination of deponents or otherwise. The oral evidence already given to the Court will not be available unless and to the extent that both parties consent. It was given originally when the issue as to deposition and the nature of it was not before the Court. On the argument of the rule Counsel for the respondents to the motion should show cause, and Counsel for the applicant should then, if required, reply in support of the rule.

In the result, therefore, the appeal should be allowed and the judgments of Tew J. of February 5th, 1929, and May 9th, 1929, and the judgment of the Full Court dated March 3rd, 1930, should be discharged, and the case remitted for hearing to the Supreme Court, in accordance with the directions given above and their Lordships will humbly advise His Majesty accordingly. The respondents must pay to the applicant his costs of this appeal and of the appeal to the Full Court. The costs of the hearings before Tew J. will be reserved to the Court which re-hears the rule *nisi*, and, failing such re-hearing, to the Supreme Court.

In the Privy Council.

ESHUGBAYI ELEKO

v.

THE OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA AND ANOTHER.

DELIVERED BY LORD ATKIN.

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