

102/93 Constitutional Rights Project / Nigeria

The Facts as submitted by the Author

1. On 12th June 1993 a presidential election was held in Nigeria. Both foreign and local election elections was [sic] free and fair.
2. Three days later, the National Electoral Commission began announcing the election results. The National Electoral Commission announced the results from 14 States including the Federal Capital Territory, Abuja, before it was restrained by an Abuja High Court from announcing the election results. On June 23rd the Federal Military Government announced the annulment of the June 12th election results. Various reasons were given for this action. The communication alleges that these reasons included the fact that the military government was not happy that Abiola, the Social Democratic candidate, appeared to have won the election.
3. Dissatisfied with the decision of the Federal Military Government to annul election results, Abiola, together with the Governors of all the States controlled by the Social Democratic Party, went to the Supreme Court to seek redress. Shortly thereafter the Federal Military Government promulgated several Decrees ousting the jurisdiction of the courts and restating the decision of the Nigerian government to annul the election results.
4. Decree No. 41 of 1993 states in part: Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act or any other enactment, no proceeding shall lie or be instituted in any court for, or on account of any act matter or thing done or purported to be done in respect of this Decree.
5. The other Decrees promulgated are *Presidential Election (Basic Constitutional and Transitional Provisions) (Repeal) Decree No. 39, 1993*; *Transition to Civil Rule (Disqualification and Prohibition of Certain Presidential Aspirants) (Repeal) Decree No. 42, 1993*. These Decrees gave legal backing to the annulment of 12th June election results and ensure that the two presidential candidates were banned from contesting any presidential elections in the country.
6. When activists and journalists protested the annulment of the elections, the government arrested and detained many persons, several of whom are named in the communication.
7. The government also seized thousands of copies of magazines. *The News Magazine* was proscribed by military decree in June 1993. Even prior to its proscription, copies of the magazine were seized by security agents and four of its editors declared wanted by the police. 50,000 copies of *Tempo*, a weekly news magazine, were seized by security agents and the police.

The State party's response and observations

8. The government has made no written submission in respect of this case. In an oral submission before the Commission (31st March 1996, Ouagadougou, Burkina Faso, Chris Osah, Head of Delegation), the government stated that the elections were held in circumstances that "the government felt were not propitious". The representative of the government stated that "[A]nnulling the election and setting up a government, as was done, to all intents and purposes, was a coup". The government admitted that many people were arrested and detained at the time the elections were annulled, but that "many have now been released".
9. The government contends that it was within its own constitutional rights to make laws for the order and good governance of the country, which it did in annulling the election results. The government felt that there were irregularities which may not have been detected by the observers and that although the elections may have been adjudged to be free and fair by all, there were fundamental problems which the government could not brush aside. In such circumstances the government decided that rather than put in place a government that was going to create more problems, it should form a different government. The government formed was in any case not a military government but an interim national government in which people from both parties were appointed to serve.
10. The government maintains that these actions were justified because some people abandoned their offices and went to their villages, creating a chaotic situation. "What the government did was to salvage a situation that was bad. And whatever laws it made at that time, I want this Commission to look at it in terms of [the government] holding a solution to the problem, not as if this were geared to any particular group of

people or human rights activities...The government felt that it had to avoid chaos and it restored an interim government, rather than even perpetuating its own regime. I think the Commission should look rather carefully into that because it was not an ordinary situation. I could say it was just a military coup." (See above statement of Chris Osah).

Complaint

11. The Complainant alleges violation of the following Articles 6 and 13 of the Charter.

Procedure before the Commission

12. The communication was received on 29th July 1993.

13. On 6th January 1994 the Secretariat of the Commission notified the government of Nigeria.

14. On 22nd September 1994 the Secretariat of the Commission sent a reminder to the Ministry of Foreign Affairs.

15. At the 16th Session, the Commission reiterated the need to send a mission to Nigeria. The Commission also decided to invoke Article 58 of the Charter by writing to the Chairman of the OAU, drawing his attention to the grave violations of human rights in Nigeria.

16. At its 16th session, the Commission has decided that the communication should be added to the other files that its Members going to Nigeria were to discuss with the military authorities of this country.

17. At the 17th Session, held in March 1995, it was decided that the communication should be added to the cases to be taken up with the authorities by members of the mission to Nigeria.

18. On 20th April 1995 the Secretariat of the Commission sent letters to both Complainants to inform them of this decision.

19. On 7th June 1995 the Secretariat to the Commission sent a letter to this effect to the Ministry of Foreign Affairs.

20. At the 18th Session, held in Praia, Cape Verde, the Commission renewed its decision to join this file with those to be considered by the mission to Nigeria.

21. On 20th December 1995 the Secretariat of the Commission sent a letter to each Complainant to this effect.

22. On 20th December 1995 a letter was sent to the government of Nigeria to this effect.

23. At the 19th Session, held in March 1996, these cases were due for a decision on admissibility. The Commission heard M Chidi Anselm Odinkalu who was duly instructed to appear for the Complainants in all the cases except the International PEN, and heard Mr Osah and Mr Bello for the Nigerian Government in reply.

24. At the end of the hearing the Commission took a general view on the cases and deferred taking final decision in each case pending the accomplishment of its proposed mission to Nigeria.

25. The Commission declared the communication admissible. It further decided that all the ten files on Nigeria in respect of which the parties were heard during this session should be entrusted to its mission to Nigeria for consideration during the proposed visit.

26. On 9th May 1996 a letter was sent to the Nigerian Government informing it that at the 19th session it renewed the decision taken at the 17th Session to send a mission to the country. It also stated that the communication would be considered on the merits at the 20th Session in October 1996.

27. On 9th May 1996 letters were sent to both Complainants informing them that the communication had been declared admissible at the 19th Session and that the Commission had decided to undertake a mission to Nigeria. The merits of the case would be examined at the 20th Session.

28. At the 20th Session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the final decision on the merits of the case to the next session, awaiting the result of the planned mission to Nigeria.

29. On 10th December 1996 the Secretariat sent a Note Verbale to this effect to the government.

30. On 10th December 1996 the Secretariat sent letters to this effect to the Complainants.

31. On 29th April, the Secretariat received a letter from Mr Olisa Agbakoba entitled 'Preliminary objections and observations' to the Mission of the Commission which visited Nigeria from March 7th-14th 1997. The document was submitted on behalf of INTERIGHTS with regard to 14 communications, including this one.

32. Among the objections raised and or observations made were: "the neutrality, credibility and relevance; and composition of the mission".

- 33.** At its 21st Session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the submission of scholarly articles and court case by the Complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.
- 34.** On 22nd May 1997, the Complainants were informed of the Commission's decision, while the State was informed on May 28th 1997.
- 35.** At the 22nd Ordinary session, the Commission postponed taking a decision to the next session pending a discussion of the Nigerian Mission report.
- 36.** At the 23rd Ordinary session held in Banjul, The Gambia from 20th-29th April 1998, the Commission postponed consideration of this case due to lack of time.
- 37.** On 25th June 1998, the Secretariat of the Commission sent letters to the parties involved informing them of the status of the case.
- 38.** During the 24th Ordinary session, the Complainants furnished the Commission with a "supplementary submission on pending communications on Nigeria", basically urging the Commission to continue consideration of communications against Nigeria including the instant one because the violations have not abated, and the change in government following the death of General Sani Abacha has not changed any State responsibility of Nigeria.

Law

Admissibility

- 39.** Article 56 of the African Charter reads:

Communications...shall be considered if they:

Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged...

- 40.** The annulment of the elections was brought before various Nigerian courts by various parties, as was the seizure of the magazines. None of these actions resulted in a remedy of the prejudice alleged, either reinstatement of the election results or compensation for the confiscated magazines.

41. Additionally, the jurisdiction of the courts to entertain these actions in the first place is in serious question. Decree No. 43, like almost all decrees promulgated by the military government, contains ouster clause which specifies that the Decree cannot be challenged in the national courts. The ouster clauses create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district have occasionally found that they have jurisdiction; in 1995 the Court of Appeal in Lagos, relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is "offensive and utterly hostile to rationality" (Reprinted in Constitutional Rights Journal). In a unanimous opinion the Court of Appeal holden at Lagos on December 12th 1996 in the case of *Chief Gani Fawehinmi v General Sani Abacha, Attorney-General of the Federation, State Security Services, Inspector General of Police*, held that the African Charter being the joint effort of States, no legislative body in Nigeria could oust its operation and application in Nigeria. Dr A.H. Yadudu, Special Adviser (Legal Matters) to the Head of State of Nigeria underscored the importance of this case in a written address to the members of the Commission to Nigeria on Friday, March 14th 1997. However, it is fair to state that at the time the case came before the Commission no effective legal remedy existed in Nigeria of which the appellants could avail themselves.

42. Furthermore, the Constitution (Modification and Suspension) specifies that even decrees that may lack an internal ouster clause cannot be challenged. Thus, Nigerians face huge legal obstacles in challenging any new law.

43. The Commission, in its decision on communication 129/94, decided that in this situation, "it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results." (ACHPR\S1\129/94:9).

44. For these reasons the Commission declared the communication admissible.

Merits

45. In his presentation at the 19th Session, the representative of the Complainants expressed his view that an amicable resolution of the alleged violation of Article 13, concerning the annulled elections, was impossible because the government had already indicated that the issue was not negotiable. The representative of the Complainant requested the Commission to clarify the legal situation by indicating if there had been a violation of the Charter.

46. The Government of Nigeria, through its official representative, referred to "irregularities that may not have been detected by the [international] observers." and that "though the elections may have been adjudged free and fair by all.", they were held in "circumstances that the government felt were not propitious." (See statement of Osah, above.)

47. The government stated that "[A]nulling the elections and setting up a government, as was done, to all intents and purposes, was a coup." These statements accord with the Complainant's argument that the question of the election can no longer be the subject of meaningful negotiation. Although the present government contends that there were "irregularities" in the elections, it fails to explain what these were. The government acknowledges that international observers of the elections, applying international standards, judged them to be free and fair. Yet it discounted the judgement of these international observers and substituted its own, unsupported, judgment.

48. A basic premise of international human rights law is that certain standards must be constant across national borders, and governments must be held accountable to these standards. The criteria for what constitutes free and fair elections are internationally agreed upon, and international observers are put in place to apply these criteria. It would be contrary to the logic of international law if a national government with a vested interest in the outcome of an election, were the final arbiter of whether the election took place in accordance with international standards. In the case the government does not even attempt to defend its decision to overrule the judgement of international observers

49. Article 13(1) of the Charter reads:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

50. To participate freely in government entails, among other things, the right to vote for the representative of one's choice. An inevitable corollary of this right is that the results of free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless. In light of this, the annulment of the election results, which reflected the free choice of the voters, is in violation of Article 13(1).

51. Article 20(1) of the Charter provides:

[All peoples] shall freely determine their political status...according to the policy they have freely chosen.

52. The right of a people to determine their "political status" can be interpreted as involving the right of Nigerians to be able to choose freely those persons or party that will govern them. It is the counterpart of the right enjoyed by individuals under Article 13.

53. The election at issue here, held in conditions adjudged to be free and fair by international observers, was an exercise of the right of Nigerians to freely determine this political status. The subsequent annulment of the results by the authority in power is a violation of this right of the Nigerian people.

54. Article 6 of the African Charter guarantees that:

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

55. The government does not dispute that many people, including human rights activists and journalists, were detained without having charges brought against them and without the possibility of bail. The government maintains that "many" of these individuals have since been released. Where individuals have been detained without charges being brought, particularly since the time of the elections, a period of now over three years, this constitutes an arbitrary deprivation of their liberty and thus violates Article 6.

56. In the words of Article 9 of the African Charter: 1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law .

57. The government justifies its actions with regard to the journalists and proscription of publications by reference to the "chaotic" situation that transpired after the elections were annulled. The Commission decided, in its decision on communication 101/93, with respect to freedom of association, that "competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards" (ACHPR/A/101/93:16).

58. With these words the Commission states a general principle that applies to all rights, not only freedom of association. Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.

59. Given that Nigerian law contains all the traditional provisions for libel suits, a governmental proscription of a particular publication, by name, is of particular concern. *Ad hominem* legislation, that is laws made to apply to specifically one individual or legal entity raise the acute danger of discrimination and lack of equal treatment before the law guaranteed by Article 2. The proscription of *The News* thus constitutes a violation of Article 9. Equally, the seizure of 50,000 copies of *Tempo* and *The News Magazine* justified in the face of Article 9 of the Charter.

Holding

For the above reasons, the Commission

Holds a violation of Articles 13.1, 6, and 9 of the African Charter;

Appeals to the Government of Nigeria to release all those who were detained for protesting against the annulment of the elections; and to preserve the traditional functions of the court by not curtailing their jurisdiction.

Banjul, 31st October 1998.