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THE UNCONSTITUTIONALITY OF ADMINISTRATIVE BAIL AS A FAR CRY FROM LEGAL REALITY: A REVIEW OF THE COURT OF APPEAL DECISION IN EFCC V. EMEM UBOH (2022) LPELR – 57968 (CA)[1]

Introduction

Any person arrested without a warrant in Nigeria for an offence other than an offence punishable with death can be admitted to bail by the law enforcement agency[2] saddled with the task of investigating the criminal complaint made against such a person.[3] This legal reality, popularly referred to as "Administrative Bail", is activated once it is impracticable for the requisite law enforcement agency to arraign a suspect within 24 hours[4] or 48 hours[5] of arrest or detention, depending on whether there is a court of competent jurisdiction within a radius of 40 kilometers from the *locus criminis*[6] or from where the suspect is detained.

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2 Although Sections 30 – 32 of the Administration of Criminal Justice Act (ACJA) 2015 expressly refers to "*Police*", "*Police Officer*" and "*Police Station*", Section 494(1) of the ACJA expands the frontiers of Administrative Bail to include "*any law enforcement agency established by an Act of the National Assembly*". This invariably means that the Police and other law enforcement agencies in Nigeria can grant Administrative Bail.

3 See, Sections 30(1) & (2), 31(1) and 32(1) & (3) of the ACJA; and Section 62(1) & (2) of the Nigeria Police Act 2020.

4 See, Sections 30(2) and 32(1) of the ACJA; and Sections 62(1) & (2) and 63(1) & (2) of the Nigeria Police Act 2020.

5 See, Section 35(4) & (5) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended).

6 The term, *"locus criminis"* is a Latin term for the place where a crime was committed. See, Oladapo Olanrewaju v. The State (2022) LPELR – 57788 (SC) at p. 14, paras. C – E.

Surprisingly, the Court of Appeal, Calabar Judicial Division, in the case of **EFCC v. Emem Israel Uboh**[7] made far-reaching pronouncements on the constitutionality of the Administrative Bail Procedure by holding, *inter alia*, that the Constitution of the Federal Republic of Nigeria 1999 (as amended) did not contemplate Administrative Bail; that an arresting authority has no business in granting bail to a suspect; and that all the claims of Administrative Bail have no backing of any law because of the clear provisions of Section 35(4) and (5) of the Constitution.

As Ministers in the Temple of Justice, lawyers owe the legal profession a sacred duty to raise their voices in aid of the development of the law and this duty encompasses every respectable step taken towards the betterment of the law and expansion of its frontiers.[8] In this wise, this Article queries the aforementioned conclusions of the Court of Appeal on the legality of Administrative Bail in **Uboh's Case** and goes a step further to challenge the legal basis for such conclusions.

Case Summary of EFCC v. Emem Israel Uboh

Emem Israel Uboh (the Respondent, on appeal) filed an action in 2018 at the Federal High Court, sitting at Uyo, Akwa Ibom State for the enforcement of his fundamental rights against the Economic and Financial Crimes Commission (EFCC) [the Appellant, on appeal]. The facts of the case are that the EFCC received a written petition against the Respondent from one Bridget Bassey and on this basis invited the Respondent for investigation. The Respondent honoured the scheduled investigation by the EFCC and was arrested and detained on the 15th day of February, 2018. The Respondent claimed that he was refused bail by the EFCC and that he was not charged to Court for any offence within the period laid down by the Constitution.

On the part of the Appellant (EFCC), a strong denial was made concerning the allegation of infringement of the fundamental rights of the Respondent. The EFCC claimed that the Respondent was granted bail on liberal terms but he was unable to fulfill the conditions for the bail. The EFCC further claimed that the Respondent failed to approach them to vary the bail conditions. Upon careful consideration of the affidavits in support and in opposition to the application of the Respondent and the Written Addresses of the parties, the learned trial Judge found in favour of the Respondent and held that the Respondent established an

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7 (2022) LPELR – 57968 (CA), coram: Honourable Justice Raphael Chikwe Agbo, JCA; Honourable Justice Muhammed Lawal Shuaibu, JCA; and Honourable Justice Balkisu Bello Aliyu, JCA.

8 See the views of Honourable Justice Pats Acholonu, JCA (as he then was), in the case of Williams v. Akintunde (1995) 3 NWLR (Pt. 381) 101 (CA) at p. 115.

evisceration of his fundamental rights to freedom of movement. Dissatisfied with the said decision, the EFCC exercised its right of appeal to the Court of Appeal.

Addressing the issue whether Administrative Bail is provided for in the Constitution, the Learned Jurist, Honourable Justice Balkisu Bello Aliyu, JCA, opined as follows:

> *His Lordship was absolutely right because* ***the Constitution did not contemplate the so called 'administrative bail'****, and the reason for that is obviously that it did not contemplate the arresting authority… to flagrantly disobey its provisions….* ***Once the provisions are strictly adhered to, it becomes the duty of the Court to release the suspect for bail****….* ***The arresting authority has no business in granting bail to a suspect****.* ***If they genuinely need to have him detained for further investigation, then they must approach the Court with facts sworn in affidavit explaining why they must further detain such a suspect****, period. There is no other way about it. ….* ***All the claims of administrative bail have no backing of any law in view of the clear provisions of Section 35(4) and (5) of the Constitution****. …. The Courts must be involved where the need arises to detain a suspect beyond the time provided by the constitutional provisions aforementioned, after the suspect has been taken before the Courts or on an application stating the reasons for his further detention.*[9] *(Emphasis mine)*

Commentary

The law has always anticipated and heartily accommodated situations where the decision of a Judge may be impugned for error, either of law or fact.[10] To amplify and give life to this position, it is necessary to reproduce a commentary made elsewhere on this point:

> *The Judge on the bench is not imbued with infallibility. …. Little wonder that Grounds of Appeal in our various courts exercising appellate jurisdiction are replete*

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9 Uboh's Case at pp. 12 – 14, paras. F – E.

10 This was made certain by the Learned Jurist, Honourable Justice Kayode Eso, JSC, in the case of Architects Registration Council of Nigeria (No. 2) In Re: O. C. Majoroh v. Professor M. A. Fassassi (1987) LPELR – 539 (SC) at p. 6, para. D, in the following carefully chosen words: *"The Maxim is De fide Et officio non recipitur quaestio, sed de scientiative error juris sive facti – The honesty and integrity of a Judge cannot be questioned, but his decision may be impugned for error, either of law or of fact."* Furthermore, the Law Lord, Honourable Justice Chukwudifu Akunne Oputa, JSC, in the celebrated case of Adegoke Motors Limited v. Dr. Babatunde Adesanya & Anor. (1989) LPELR – 94 (SC) at p. 24, paras. C – E, equally supported the view of the fallibility of judicial officers and the need to call for the overruling of a decision reached *per incuriam* when he held as follows: *"Justices of this Court are human-beings, capable of erring. It will certainly be short sighted arrogance not to accept this obvious truth. It is also true that this Court can do inestimable good through its wise decisions. Similarly, the Court can do incalculable harm through its mistakes. When therefore it appears to learned counsel that any decision … has been given per incuriam, such counsel should have the boldness and courage to ask that such a decision be over-ruled."*

> *with the professional jargon that the learned trial Judge 'erred in law'. This reasoning is predicated on the age long maxim of law: 'De fide et officio judicis non recipitur quaestio; sed de scientia, sive error juris, sive facti' which literally translates: 'the honesty and integrity of a judge cannot be questioned but his decision may be impugned of error, either of law or fact.'* [11]

Drawing strength and purpose from the foregoing observation, it is contended in this paper that the decision reached by the penultimate court in **Uboh's Case** on the lawfulness of Administrative Bail was reached *per incuriam*.[12]

Due to the delicate nature of the issue under consideration, there is a need to shed light on what the Administrative Bail Procedure truly entails. Far from being an acquittal mechanism, the Administrative Bail Procedure is and remains a liberty-conscious mechanism designed by law to give a suspect the opportunity of temporal or momentary release from arrest or detention on the understanding and undertaking that the said suspect will be readily available whenever he is required by a law enforcement agency for investigation or further inquiry. Put differently, the Administrative Bail Procedure lays down a golden rule for law enforcement agencies in Nigeria that when an investigating authority cannot complete the investigation within 24 hours of arrest or detention of a suspect to enable the suspect to be brought before a court having jurisdiction concerning the offence alleged, the said suspect must be released conditionally or unconditionally.[13]

When the Penultimate Court held that "*the Constitution did not contemplate the so called 'administrative bail'"* and that *"the arresting authority has no business in granting bail to a suspect",* an impression was given that the Constitution ought to have expressly provided for "Administrative Bail" for same to be operative and that in the absence of such contemplation, the Administrative Bail Procedure is unconstitutional and unknown to law. As a springboard of legal possibilities,[14] the Constitution cannot, as a matter of practical impossibility, provide for every minute detail or cover every aspect of the Nigerian Criminal Justice System.[15] This

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[11] See, David Andy Essien, 'Role of Judges in the Due Administration of Justice in Nigeria' (*The Nigeria Lawyer*, 20 October 2021) <https://thenigerialawyer.com/role-of-judges-in-the-due-administration-of-justice-in-nigeria/> accessed 22 March 2024.

[12] *Per incuriam*, in law, means a Judge giving a judgment in ignorance or forgetfulness of an enabling statute or some binding authority on the Court. See, State v. Alli (2020) 18 NWLR (Pt. 1755) 69 at p. 103, paras. B – F.

[13] See Section 8(3) of the ACJA.

[14] The Constitution is the organic law; it is to be given purposive interpretation. See the following cases: Nafiu Rabiu v. Kano State (1981) 2 NCLR 293 at p. 326; PDP v. INEC (2001) 1 WRN 1 at pp. 32 – 33; and Director of SSS v. Agbakoba (2003) 10 WRN 93 at pp. 153 – 154.

[15] The Nigerian Constitution is meant to play the "framework" or "substructure" role. This position was validated by the erudite jurist, Honourable Justice Udo Udoma, JSC, in the case of Nafiu Rabiu v. Kano State (1981) 2 NCLR 293 at p. 326, thus: "*…the function of the Constitution is to*

legal reality explains why the draftsman of the Constitution ceded law-making powers to the National Assembly and State Houses of Assembly concerning any criminal offence and the administration of criminal justice in Nigeria.[16] Validating this position, a Learned Commentator has also observed:

> *The ACJA can also be viewed as unifying legislation on the criminal justice system in Nigeria. It must be acknowledged, however, that the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN), is the foundation on which the ACJA and other enactments and subsidiary legislation on the criminal justice sector draw strength.*[17]

Again, when the penultimate Court held that "*all the claims of administrative bail have no backing of any law in view of the clear provisions of Section 35(4) and (5) of the Constitution*", the Court gave the impression that the extant laws governing the Administrative Bail Procedure in Nigeria are *ex facie* at loggerheads or in conflict with Section 35(4) and (5) of the Constitution. Respectfully, this is not the case. Perhaps, since the Court of Appeal in the 1982 case of **Augustine Eda v. C. O. P. Bendel State**[18] struck down Section 17 of the Criminal Procedure Law and Section 27 of the Police Act which empowered law enforcement agencies to charge a suspect to Court "*as soon as practicable*" and held same to be in open conflict with Section 32(4) and (5) of the 1979 Constitution,[19] the Court of Appeal in this instance regarded every subsequent legislation that made provision for Administrative Bail, however differently worded, as unconstitutional. Instructively, a case is only authority for what it actually decides,[20] and Sections 30 – 32 of the ACJA, dealing with Administrative Bail, are differently worded;[21] in sync with the letters and spirit of Section 35(4)

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establish a framework and principles of government, broad and in general terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society….".

16 See, Section 4 of the CFRN 1999 (as amended) and more specifically, subsections 1, 2, 6, 7 and 9 of the said Section.

17 Cordelia Uwuma Eke, *Criminal Justice in Nigeria: A Practical Guide* (Pear Publishers International Limited, 2022) 3.

18 (1982) 3 NCLR 219 (CA). Honourable Justice Balkisu Bello Aliyu, JCA, at p. 14, para. E of *Uboh's Case* cited *Eda's Case* and commented that it "*did not legalize 'administrative bail' by the police or any other law enforcement agency*".

19 An equivalent of Section 35(4) and (5) of the CFRN 1999 (as amended).

20 See the case of Uwua Udo v. The State (2016) LLJR – SC, per Honourable Justice Kudirat Kekere-Ekun, JSC.

21 It has been repeatedly held by Courts in Nigeria that where the statute and/or facts upon which a Court is to predicate its decision in a subsequent case is different from that which informed its decision in the earlier case, the earlier case cannot and should not serve as an authority or precedent to the subsequent case. See the following cases: PDP v. INEC & Ors. (2018) LPELR – 44373 (SC); Skye Bank Plc & Anor v. Chief Moses Bolanle Akinpelu (2010) JELR 51415 (SC);

and (5) of the Constitution; and in harmony with the presumption of innocence guaranteed every person by the Constitution.

Furthermore, it is an act of approbation and reprobation for the Court to hold in one breath that "*the Constitution did not contemplate the so called 'administrative bail'"* and, in another breath, hold that the law enforcement agency ought to have approached the Court "*with facts sworn in affidavit explaining why they must further detain such a suspect*".

The Administrative Bail Procedure, on the one hand, and Remand Proceedings, on the other hand, are not unconstitutional machinations and remain viable options at the beck and call of a law enforcement agency when an inquiry or investigation cannot be completed forthwith. Corroborating this view, Honourable Justice Adebukunola Banjoko, JCA, in the case of **Livister Chijioke Mbaeyi v. EFCC & 2 Ors**[22] stated that in the course of detaining the suspect in that case, the EFCC also had the option of presenting him "*before a Magistrate for a Remand Order or the option to grant him an Administrative bail, and both options are valid courses of action to take in the circumstance.*"

Case law has outrightly authenticated and "legalized" the Administrative Bail Procedure. Driving the point home in **Mbaeyi's Case,**[23] Honourable Justice Adebukunola Banjoko, JCA, further clarified:

> *Once a prosecutorial agency realizes that an arraignment before a Court of law must be effected within twenty four hours of detention, and once they also realize the fact that an investigation ought to be completed before an arraignment in Court,* ***they ought to release him on administrative bail pending the completion of their investigation****. The question is did they do so? Had they fulfilled all righteousness? (Emphasis mine)*

Recently, Honourable Justice Uzo Ifeyinwa Ndukwe-Anyanwu, JCA, in the case of **Abudullahi Muhammad v. EFCC & 2 Ors**[24] commented on the Administrative Bail Procedure and gave it a stamp of validity in the following carefully selected words:

> *Where a person is arrested upon reasonable suspicion of having committed a criminal offence, if not entitled to bail and having not been charged before a competent court within one day shall be released either conditionally or*

Godwin Ugwuanyi v. NICON Insurance Plc (2013) LPELR – 20092 (SC); and Chief Adebiyi Olafisoye v. FRN (2004) JELR 45042 (SC).

22 (2022) LPELR – 57515 (CA) at p. 41. See also the views of Honourable Justice Ugochukwu Anthony Ogakwu, JCA, in the case of Obla v. EFCC (2017) LPELR – 45340 (CA) at pp. 14 – 18, paras. D – A, on how a Remand Order helps to ensure that the purpose of Section 35(5) of the Constitution is achieved.

23 *Ibid*. pp. 41 – 42, paras. C – D.

24 (2023) LPELR – 60645 (CA) at pp. 19 – 20, paras. A – C.

unconditionally. See OSHUNAYA VS. COP (2004) 17 NWLR PT 901 PG 1. …. In this appeal, the Appellant was admitted on an administrative bail. However, he apparently could not fulfill the bail conditions that would foster his release. This as I said earlier is not the fault of the Respondents, rather it is the ineptitude of the Appellant in meeting the conditions for his bail.

Conclusion

Administrative Bail is not unconstitutional. However, the said procedure should not be bastardized or abused by law enforcement agencies. It is contended that once Administrative Bail is offered to a suspect and such a suspect is unable to meet the said conditions within the period prescribed in Section 35(4) and (5) of the Constitution, the law enforcement agency should either charge the suspect to Court or commence Remand Proceedings against the said suspect and obtain a Remand Order.[25]

For further information on this article and area of law,
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[25] This view finds support in Mbaeyi's Case, at pp. 41 – 42.