

No. _____

In the Supreme Court of the United States

CHINYERE U. NWOKE,

Petitioner,

v.

CONSULATE OF NIGERIA,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the practice of Respondent, CONSULATE OF NIGERIA, NY, that requires consulate officials to leave the New York Consulate office to advertise and conduct national passport issuing exercises in Chicago for extra cash-only fees, violates the Commercial Activity Exception to Sovereign Immunity under the FSIA of 28 U.S.C. § 1603 and 1605(a)(2)?
2. Whether the FSIA grants the Respondent immunity when Respondent, after collecting payments and fingerprints from applicants, declares the Nigerian passports missing and irreplaceable?
3. Whether Respondent's receipt and response to Petitioner's Complaint; and the district court's ruling that "the circumstances are sufficient to show proper service," conform to proper service under 28 U.S.C. § 1608?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit and the district court in this case.

OPINIONS BELOW

The order and judgment of the Seventh Circuit Court of Appeals were issued on July 2, 2018, App. A. The District Court's opinion and order were issued on February 27, 2018, App. B. These opinions and orders are unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Seventh Circuit decided my case was July 2, 2018. No petition for rehearing was filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case arises under the Foreign Sovereign Immunities Act, FSIA of 1976. The FSIA provides the exclusive basis and means to bring a lawsuit against a foreign sovereign in the United States.

STATEMENT OF THE CASE

A. Facts Giving Rise To The Case

1. In December 2015, a web site, adamazievents.com, published an advertisement for a Nigerian e-Passport exercise. The web site informed readers that a Nigerian e-Passport exercise would be

held at 6200 South Drexel Avenue, Chicago, IL 60637, on February 19, 2016 and February 20, 2016. The web site claimed that Respondent, The Consulate of Nigeria, New York, which issues national passports to Nigerian-Americans in the U.S., organized the Nigerian e-Passport exercise.

2. The web site listed the following items for passport applicants to bring to the venue:

- (a) Old passport for verification;
- (b) \$100 Post Office money order (administrative fee) per applicant payable to the Consulate;
- (c) Express Flat Rate Envelope per applicant with appropriate postage of \$22.95 to ensure delivery of the passport;
- (d) \$25 venue fee per applicant cash only payment.

3. On the web site of the Nigerian Consulate of New York, applicants were asked to pay \$106 per applicant for processing of the passport. This amount was payable to the Consulate of Nigeria, NY Miscellaneous Account. This \$106 was separate from the administrative fee of \$100 and the venue fee of \$25 described in ¶ 2 above.

4. Thus, before an applicant for a Nigerian Passport was interviewed at the Chicago venue, the applicant had to pay a total amount of $\$106 + \$100 + \$25 = \231 . Each applicant also had to bring a self-addressed envelope with \$22.95 worth of stamps.

5. On February 18, 2016, Petitioner, Chinyere U. Nwoke paid \$212 to the Consulate of Nigeria Miscellaneous Account. This was the passport processing fee for two applicants, Ms. Chinyere Nwoke and her son Mr. Nwafor Nwoke.

6. On February 20, 2016, Petitioner and her son arrived at 6200 South Drexel Avenue, Chicago. Petitioner paid additional \$200 to the Consulate of Nigeria officials as administrative fee and \$50 as venue cash payment for two applicants. At that point a total amount of \$462 had been paid to the Consulate of Nigeria, NY, for two passports.

7. After the payment mentioned in ¶ 6, the Consulate officials took fingerprints and photographs of Ms. Nwoke and her son. Ms. Nwoke then handed over the two stamped, self-addressed Priority Mail envelopes to the Consulate officials for the mailing of the processed passports to Ms. Nwoke and her son.

8. By June 15, 2016, almost four (4) months after the e-Passport exercise, Petitioner had not received the new passports. About this date Petitioner made phone calls to the Consulate of Nigeria to inquire about the passports. A lady named Mrs. Dibia at the other end of the line said: "Ms. Nwoke, stop disturbing me". On 06/15/2016, Ms. Nwoke sent a certified mail to the Consulate General of New York, Mr. Sa'ad Muhammad Bello to inquire about the passports. Mr. Bello did not respond to Ms. Nwoke's letter.

9. On January 09, 2017, Ms. Nwoke filed a Complaint against the Consulate of Nigeria NY, at the United States District Court, Northern District of Illinois, Eastern Division. In the Complaint, Ms.

Nwoke asked the court to order the Consulate to issue the processed passports or refund the \$462 plus Court cost.

B. District Court Proceedings

10. After the Complaint was filed, Mr. Bello, the Consulate General, wrote a letter to Judge Chang, the presiding judge. In the letter, Mr. Bello acknowledged receipt of the Complaint but claimed that the Consulate had immunity. Judge Chang gave Bello a deadline to get an attorney and file an appearance. After Mr. Bello missed the deadline, Ms. Nwoke filed a motion for default judgment. Judge Chang gave Mr. Bello another deadline. Mr. Bello then hired an attorney for the Consulate who filed an appearance. Judge Chang asked both parties to settle. The attorney for the Consulate and the Consulate General failed to produce the new passports for Ms. Nwoke and her son.

11. The attorney for the Consulate filed a motion to dismiss in which he claimed that the Consulate had sovereign immunity, and that service of process was not proper. Ms. Nwoke responded by asserting that the Consulate advertised the passport exercise, leased a property in Chicago, collected venue fees in cash (paper money), and declared the passports missing. As for service of process, Ms. Nwoke cited the Consular General who admitted in a letter that the Consulate General received the Complaint.

12. On February 27, 2018, Judge Chang dismissed the Complaint, siding with the Consulate.

C. Appellate Court Proceedings

13. On April 30, 2018, Plaintiff Nwoke filed an Appeal at the United States Court of Appeals for the Seventh Circuit. After the Plaintiff-Appellant and the Defendant-Appellee filed their briefs, which mirrored their arguments in the District Court, the Appellate Court entered a judgment for the Consulate of Nigeria on July 2, 2018.

14. In the judgment, see Appendix A, the Appellate Court ruled that the Consulate had sovereign immunity and that service of process was not proper under 28 U.S.C. § 1608(a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the mysterious disappearance of Nigerian passports processed in Chicago by the Consulate of Nigeria in New York.

15. Petitioner disagrees with the Appellate Court's interpretation of the Commercial Activity clause in FSIA 28 U.S.C. § 1603.

16. Commercial conduct by a foreign state is determined by reference to "the nature" of the conduct, transaction, or act, rather than by reference to "its purpose." 28 U.S.C. § 1603(d). Thus, if the nature of the conduct is commercial, it is irrelevant that it may be serving an inherently sovereign purpose.

17. The Consulate of Nigeria has tried successfully prior to this stage, to persuade the District and Appellate Courts to believe that the Consulate is engaged in a passport issuing exercise. This is far from

the truth. Behind the veneer of the passport exercise lies the real scheme of personal enrichment and embezzlement by the Consul General.

18. In a breach of contract claim, *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), Justice Antonin Scalia held that Argentina was not entitled to sovereign immunity, stating: “*When a foreign government acts...in a manner of a private player within it, the foreign sovereign actions are ‘Commercial’*”.

19. Ms. Nwoke cites a previous breach of contract case against the Consulate of Nigeria heard in the U.S. Court of Appeals for the 9th Circuit, in which the Consulate’s claim of sovereign immunity was reversed. In *Joseph v. Office of the Consulate of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), the Court held that

“[t]he tortuous acts performed by the Nigerian Consul were not within his consular functions.”

The Court concluded that

“[t]he district court has jurisdiction under the FSIA over Joseph’s breach of contract and tort claims against Nigeria and the Consulate.”

The Court reversed the “district court’s determination that Joseph’s breach of contract claims cannot be heard pursuant to the waiver or commercial activity exceptions.”

The Court affirmed the “district court’s determination that Joseph’s tort claims can be heard pursuant to the tortuous activity exception.”

The Court also concluded that “the waiver exception is applicable to Joseph’s tort claims.”

Therefore, *Joseph v. Office of the Consulate of Nigeria* sets precedence for Nwoke’s case. On page 2 of the Order by the U.S. Court of Appeals for the 7th Circuit (see Appendix A), the 7th Circuit wrote:

“Private parties cannot issue national passports, so the Consulate was engaged in sovereign activity.”

Ms. Nwoke disagrees with the 7th Circuit in this regard. Sovereign States issue national passports to their citizens except when the passport of any citizen is denied or revoked for security reasons. The Nigerian passports mentioned in this suit were declared missing by Respondent. To prove this point, the Consul General in his letter to the district court wrote,

“The Consulate General of Nigeria, New York has been informed that a proceeding has commenced in the United States District Court, Northern District of Illinois, Eastern Division, against the Consulate and two of its officials, by an individual over an *alleged missing passport*.” (Emphasis added.)

See Appendix D, App. 22. The attorney for Respondent, Mr. Ike Agwuegbo, also stated on page 3 of his Appellee’s brief, that

“[t]he passports were sent to the Plaintiff, who brought suit claiming not to have received same.”

The passports are no longer in the possession of the Consulate, but in the possession of the postal carrier. Therefore, tracking and finding the passports no longer encroach on the sovereign immunity invoked by the Consulate.

20. The Consulate of Nigeria, NY, advertises on the internet and conducts passport issuing exercises in Chicago. The Consulate leases a private building along Drexel Avenue in Chicago. In addition to the processing fee, the Consulate charges an administrative fee, plus a venue fee in cash (paper money). Three months after the exercise, the Consulate declares the passports missing; claims that the passports were sent to the applicants who claim not to have received the passports. The Consulate does not provide the passport numbers of the “missing” passports. The Consulate does not provide the name of the postal agency or courier service that handled the mailing. The Consulate invokes sovereign immunity. This is exactly what 28 U.S.C. § 1603(d) addresses, as described in ¶ 16 above. The U.S. Department of State, which issues passports to Americans, including Nigerian-Americans, does not engage in similar activities.

21. The story of the “missing” passports of Ms. Nwoke and her son is not an isolated one. By June 2017, after Nwoke filed her Complaint against the Consulate, Mr. S.M. Bello, the Acting Consul General in New York, was replaced by Mr. N. A. Ella before Bello’s term ended. The Nigerian Consulate of New York, thereafter, published a list of “Unclaimed Passports” on its website. The total number of names on the unclaimed passports list was 315, and they were listed in alphabetical order with the dates of birth of

the applicants and dates of issue of the passports. The dates of issue ranged from 2009 to 2011. Between 2009 and 2011 alone, the Consul General embezzled 315 times \$231, which is \$72,765. The web site is: www.nigeriahouse.com on page 2 of Latest News.

22. Respondent and the circuit courts argued on Respondent's immunity to deny passports, but failed to address whether Respondent had immunity on the practice of advertising, collecting extra payments, and conducting passport exercises in Chicago, outside the premises of the Consulate, and declaring the passports missing and irreplaceable.

23. The next issue to be addressed is that of service of process. On page 3, paragraph 1 of the Order of the Appellate Court, the judges wrote: "Nwoke failed to effectuate proper service under 28 U.S.C. § 1608(a)." See Appendix A, App. 2.

24. 28 U.S.C. § 1608(a)(3) states that service in the courts of the United States shall be made upon a foreign state by mailing a copy of the summons and complaint in any form requiring a signed receipt to be addressed and dispatched by the clerk of the court to the minister of foreign affairs of the foreign state concerned.

25. 28 U.S.C. § 1608(a)(4) states that if service cannot be made within 30 days under 28 U.S.C. § 1608(a)(3), then service can be made by sending two copies of the summons and complaint and a notice of suit by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, DC, to the attention of the Director of Special Consular Services-

and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

26. From ¶¶ 24 and 25 above, the Clerk of the District Court is expected to make service of process in this Complaint through the US Secretary of State. It is not the duty of the Plaintiff to make the service of process to the Consulate. The service of process is the duty of the Clerk of the District Court.

27. 28 U.S.C. § 1608(b)(3)(B) states that service can be made by any form of mail requiring a signed receipt to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served.

28. 28 U.S.C. § 1608(b)(3)(C) states that service can be made as directed by the order of the court consistent with the law of the place where service is to be made.

29. From ¶¶ 27 and 28, the clerk of the court can make service by mail directly to the Consulate, and the District Court Judge can direct that service be made on the Consulate.

30. The Appellate Court selectively cited 28 U.S.C. § 1608(a), to make its ruling. However, there are various other means in which service of process on a foreign state can be made as described in 28 U.S.C. § 1608(b). The Appellate Court ignored subsection 28 U.S.C. § 1608(b). Petitioner would use the following analogy to describe the ruling of the Appellate Court: There are two routes to travel from Chicago to New York, routes A and B. Route A is blocked by a sink hole. Route B is passable. The lower court rules that since

route A is blocked, there is no way that a motorist can travel to New York from Chicago. The lower court forgets that route B is open and a motorist can elect to travel through route B and get to New York from Chicago.

31. Indeed, on May 30, 2017, Honorable Edmond E. Chang correctly ruled that

“[o]n review of the return of service as to Defendant Nigerian Consulate, R. 11, the circumstances are sufficient to show proper service, at least on the face of the process server affidavit. On further review of the Plaintiff’s supplement R. 21, the Consulate must answer or move to dismiss the complaint”. See Appendix C.

32. In *Harris Corp. v. Nat’l Iranian Radio & Television*, 691 F.2d 1344 (11th Circuit, 1982), the court ruled that circumstances showed that service was sufficient, holding that

“[t]he failure to follow precisely these steps in Sec. 1608 designed to insure that actual service be made should not override and invalidate the fact that in this case, notice was actually received.”

33. On July 12, 2017, Attorney Ike Agwuegbo, from New York, filed Motion for leave to appear pro hac vice for the Consulate. Agwuegbo subsequently filed a motion to dismiss the Complaint.

34. One wonders how service of process was not proper, after the District Court Judge ruled that service was proper and the Clerk of the District Court mailed the said order to the Consulate.

35. On March 31, 2017, Mr. S. M. Bello, the Acting Consul General in NY, sent a letter to Judge E. Chang. Mr. Bello correctly quoted the docket number of the case and the names of the Plaintiff and Defendant in the case. Mr. Bello went on to write:

“The Consulate General has been informed that a proceeding has commenced in the United District Court, Northern District of Illinois, Eastern Division against the Consulate and two of its officials, by an individual over a missing passport”. See Appendix D.

36. On August 06, 2017, Attorney Ike Agwuegbo filed a motion to dismiss Plaintiff’s Complaint. In the motion Agwuegbo tried to rebut the allegations made by the Plaintiff in the Complaint. One wonders how Mr. Agwuegbo was able to write the motion if the Complaint and Summons were not served upon the Consulate. Of course the service of process was proper. The District Court ruled so on May 30, 2017.

37. This petition provides this Court the opportunity to provide guidance to the lower courts as to when the subject-matter jurisdiction is met under FSIA.

This petition also provides this Court the opportunity to provide guidance to the lower courts as to the duty of the Clerk of Court to serve foreign states with the summons and complaint under FSIA.

38. Failure to grant this petition for writ of certiorari would embolden the commercialization and mysterious disappearance of national passports, and lead to irreparable damages and loss of citizenship to applicants of passports across the U.S.

CONCLUSION

The Petition for Writ of Certiorari should be granted. This Court may wish to consider summary reversal of the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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