



CASE REVIEW:

Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v National Identity Management Commission: A Milestone towards a Human Right-Based Approach to Data Protection in Nigeria

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**INCORPORATED TRUSTEES OF DIGITAL RIGHTS LAWYERS
INITIATIVE & ORS V NATIONAL IDENTITY MANAGEMENT
COMMISSION: A MILESTONE TOWARDS A HUMAN RIGHT-BASED
APPROACH TO DATA PROTECTION IN NIGERIA**

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Abstract

On 24 September 2021 the Court of Appeal (CA) delivered judgment in Incorporated Trustees of Digital Rights Lawyers Initiative & Ors v National Identity Management Commission (ITDRLI & ORS v NIMC or the Case), in which the CA resolved the conflict on the status of data protection rights in Nigeria. Prior to the decision in the Case, there were conflicting decisions of high courts on whether data protection rights qualified as fundamental right to privacy in section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN). The decision of the CA in the Case is that the fundamental right to privacy under section 37 of the CFRN includes data protection rights. This decision of the CA is a milestone in data protection in Nigeria, even though it is relatively late as conversations at the global stage have progressed beyond recognition of data protection rights as part of right to privacy, to advocating for the creation of data protection right, independent of the right to privacy. In this review, we present the facts, arguments, and decision in the Case, summarise previous conflicting decisions on the point, and make our comments on the decision of the CA in the Case, and the global trends of human right-based approach to data protection. We end the review with a conclusion.

Keywords: Data privacy, data protection, data protection right, and privacy right.

1. ITDRLI & ORS v NIMC: ¹ The Facts, Arguments, and Decision

1.1 The Facts

The 2nd Appellant registered with the Respondent for the issuance of national identity card and was given a National Identification Number Slip with error in his date of birth. The 2nd Appellant subsequently applied to the Respondent to correct his date of birth and the Respondent demanded for ₦15,000 for the correction and the Appellant objected on the ground that the demand was in violation of his fundamental right to private and family life in section 37 of the CFRN. The Respondent insisted on the ₦15,000 for the correction.

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¹ [2021] LPELR-55623(CA).

The Appellants commenced an action against the Respondent by way of originating summons for the determination of (i) whether by the construction of section 37 of the CFRN the Respondent's act of demanding for payment for correction of personal data is likely to interfere with the 2nd Applicant's right to private and family life, and (ii) whether by the provisions of article 3.1(1)(7)(h) of the Nigeria Data Protection Regulation, 2019 (NDPR), the 2nd Appellant could request the correction of his personal data from the Respondent free of charge. The Appellants sought for (x) a declaration that the demand for the 2nd Appellant to pay for correction of his personal data was likely to violate his fundamental rights to private and family life in section 37 of the CFRN and article 3.1(1)(7)(h) of the NDPR, (y) a declaration that the correction of 2nd Appellant's personal data by the Respondent ought to be without payment by virtue of section 37 of the CFRN and article 3.1(1)(7)(h) of NDPR, (z) an order mandating the Respondent to correct the personal data of the 2nd Appellant pursuant to section 37 of the CFRN and article 3.1(1)(7)(h) of the of NDPR, and (xx) an order of perpetual injunction restraining the Respondents from demanding payment for correction of the personal data of the 2nd Appellant and those of other data subjects pursuant to section 37 of CFRN and article 3.1(1)(7)(h) of NDPR.

In response to the suit, the Respondent filed a counter-affidavit and a notice of preliminary objection, challenging the jurisdiction of the High Court of Ogun State (the lower court). The lower court heard the parties², upheld the preliminary objection, and struck out the originating summons. Dissatisfied with the judgment, the Appellants appealed to the CA. The decision of the CA is the subject of this review.

The Appellants and Respondent submitted three issues for determination and the Court adopted the issues submitted by the Appellants for the determination of the appeal.³ For our purpose, we limit this review to the first and second issues adopted by the Court⁴.

Issue: Whether or not the trial Court was right when it held that rectification of date of birth has nothing to do with right to private and family life guaranteed under section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Issue 2 Whether or not the trial Court was right when it held that the Appellants' suit which bordered on data protection did not disclose a cause of action

² The trial Court heard both the preliminary objection and the originating summons.

³ An appellate court is permitted to prefer issue(s) formulated by any of the parties to those formulated by the other party. The court can even formulate issues which it considers germane on its own. See *Dasuki v FRN & Ors* [2018] LPELR-43897(SC), 29-30, paras C-C.

⁴ The third issue relates to the propriety of filing a joint application for an enforcement of fundamental rights under the Fundamental Rights Enforcement Procedure Rules, 2009.

under section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and thereby occasioned a miscarriage of justice to the Appellants.

1.2 Arguments of Parties

Appellants' counsel referred the CA to the finding of the lower Court that the right of privacy in section 37 of the CFRN extends to the protection of personal information and argued that the finding was an endorsement by the lower Court that protection of personal data is contemplated in section 37 of the CFRN, but that the lower Court surprisingly concluded that the demand for the payment of ₦15,000 for the correction of 2nd Appellant's date of birth had nothing to do with his right to privacy. Counsel relied on *Nwali v EBSIEC & Ors*⁵ and submitted that 'privacy of citizens' used in section 37 of the CFRN is broad and should be interpreted liberally to cover data protection.

Appellants' counsel argued further that the lower Court ought to have considered the provisions of the NDPR in determining whether the right to rectification of data falls within section 37 of the CFRN instead of simply holding that the NDPR cannot confer jurisdiction on a court where the CFRN has not conferred such jurisdiction. He submitted also that the lower Court was wrong in holding that the NDPR which was made in furtherance of the right to privacy in section 37 of the CFRN cannot confer jurisdiction on a court which has concurrent jurisdiction to hear fundamental rights matters. Counsel argued that rectification of personal data is a right and the Respondent cannot validly ask the 2nd Appellant to pay before exercising that right. He cited *Abba Aji v Bukar Abba*⁶ for the proposition that a right is something due to a person by just claim, legal guarantee or moral principle.

The Respondent's counsel submitted that the case of the Appellants before the lower Court was not a fundamental right action because there were no facts in the supporting affidavit that suggest a breach or likely breach of the Appellants' rights in section 37 of the CFRN. He argued that the action of the Appellants at the trial Court which was about statutory fee to be paid to the Federal Government, ought to have been commenced before the Federal High Court ("FHC") in line with section 251(1)(a) of the CFRN⁷, or since it was about the administrative decision of the Respondent, the Appellants should have

⁵[2014] LPELR-23682(CA), 27-29, paras E-E. The Court of Appeal held that 'Privacy of Citizens is general and is not limited to any aspect of the person or life of citizens. It is not expressly defined by the Constitution and there is nothing in the Constitution or any other statute for which it's exact meaning or scope can be gleaned.'

⁶[2014] LPELR-24362(CA).

⁷The section confers exclusive jurisdiction on the FHC to determine matters of revenue of the Federal government when the Federal government or any of its agencies sues or is sued.

challenged same at the FHC in line with section 251(1)(r)⁸, or because it touched on interpretation of the CFRN as it relates to an agency of the Federal Government, the Appellants ought to have challenged it before the FHC in line with section 251(1)(q).⁹

Respondent's counsel argued further that the Appellants' case before the lower Court did not disclose any reasonable cause of action against the Respondent because the case of the Appellants was not that the Respondent refused the 2nd Appellant's request for correction of his date of birth, but rather that the Appellants wanted the request to be granted free of charge, and that article 3.1 (1)(7) of the NDPR does not state that modification should be done without payment of prescribed fees. He added that the NDPR is a regulation while the National Identity Management Commission Act, 2007 (NICM Act) is an act of the National Assembly which supersedes the NDPR, and the NICM Act empowers the Respondent in section 31(d)(i) and (ii) thereof to impose fee for correction of personal data.

1.3 Decision of the CA

The CA upheld the finding of the lower Court that the right to privacy of citizens in section 37 of the CFRN includes the right to protection of personal information and personal data and added that the scope and limitations of the fundamental rights guaranteed in Chapter IV of the CFRN are better understood from statutes, laws, and regulations.

The CA referred to the preamble to the NDPR which states that the NDPR was made due to concerns and contributions of stakeholders on privacy and protection of personal data, article 1.1(a) of the NDPR which provides for one of the objectives of the NDPR as safeguard of rights of natural persons to data privacy, and art 2.9 of the NDPR which provides that privacy right of data subjects shall be interpreted for the purpose of advancing and not restricting the safeguards of data subjects under any data protection instrument made in furtherance of fundamental rights and Nigerian laws.

The CA held that the NDPR must be construed as one of the instruments that protects or safeguards the right to privacy of citizens in relation to their personal information and data, and that apart from article 2.9 of the NDPR which links the NDPR to the fundamental rights provided in Chapter IV of the CFRN, article 1.2(c) of the NDPR provides that the NDPR shall not operate to deny any Nigerian or any natural person privacy rights he is entitled to under

⁸The section confers exclusive jurisdiction on the FHC to determine any action or proceeding for a declaration or injunction which affect the validity of any executive or administrative action or decision of the Federal government or any of its agencies.

⁹The section confers exclusive jurisdiction on the FHC to determine matters relating to the operation and interpretation of the CFRN in so far as it affect the Federal government or any of its agencies.

law, regulation, policy, and contract in force in Nigeria or any other foreign jurisdiction. The Court then held that personal data protection in the NDPR generally falls under the fundamental right to privacy guaranteed in section 37 of the CFRN.

On whether the Appellants' case had anything to do with right to private and family life guaranteed in section 37 of the CFRN, the CA observed that article 3.1(8) of the NDPR relied upon by the Appellants was not applicable as it relates to transfer of personal data to a foreign country or to an international institution. The Court instead referred to article 2.8(b) of the NDPR which provides thus:

The right of a data subject to object to the processing of his data shall always be safeguarded. Accordingly, a Data Subject shall have the option to:

...

- (c) be expressly and manifestly offered the mechanism for objection to any form of data processing free of charge.

The Court also referred to article 3.1(3) and (4) of the NDPR which provides thus:

(3) Except as otherwise provided by any public policy or Regulation, information provided to the Data Subject and any communication and any actions taken shall be provided free of charge. Where requests from a Data Subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

- a) charge a reasonable fee considering the administrative costs of providing the information or communication or taking the action requested; or
 - b) write a letter to the Data Subject stating refusal to act on the request and copy the agency on every such occasion through a dedicated channel which shall be provided for such purpose.
- (4) The Controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

The Court held that although the above provisions make data processing and rectification generally free of charge except where the request for it is unfounded, excessive, and repetitive, but the provisions are subjected to public policy or regulation which may impose fees for the provision of those services. The Court then referred to section 31(d)(i) and (ii) of the NIMC Act which empower the Respondent to impose fees for modification of entries in the National Identities Database.

The CA upheld the finding of the lower Court that the case of the Appellants is not about refusal to register the 2nd Appellant or grant of unauthorised access to any of the Appellants' personal data to a third party. The CA also upheld the finding of the lower Court that the case of the Appellants was a challenge of an executive/administrative decision of the Respondent which the Appellants sought to masquerade as a fundamental right action.

In all, the CA held that the action of the Appellants was not principally a fundamental right enforcement action but a challenge of Respondent's decision to charge fees for rectification of personal data, and the action ought to have been instituted at the FHC in line with section 251(1)(r) of the CFRN.

2. Comments

2.1 Previous Conflicting Decisions

Prior to the decision in the Case, there were conflicting decisions of the lower Court and the FHC on whether data privacy right qualified as right to privacy in section 37 of the CFRN and could be enforced under the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules).

In *Incorporated Trustees of Digital Rights Lawyers Initiative v LT Solutions & Multimedia Limited*¹⁰ (*ITDRLI v LTSM*), the lower Court *coram* Ogunfowora, J held that the right to private and family life under section 37 of the CFRN includes data privacy right, and the rights of data subjects under the NDPR could be enforced under the FREP Rules. In the case LTSM tweeted, offering over 200 million Nigerian and international mailing lists for sale. ITDRLI commenced an action against LTSM under the FREP Rules, claiming that there was no legal basis for LTSM to process personal data in the manner it did. The main issue for determination before the Court was whether LTSM breached or was likely to breach the right of ITDRLI to private and family life. The Court held that the right to private and family life under section 37 of the CFRN ought to be interpreted broadly to include protection of personal data.

A later decision of the FHC took a different view from *ITDRLI v LTSM*. In *Incorporated Trustees of Laws and Rights Awareness Initiative v The National Identity Management Commission*¹¹ (*ITLRAI v NIMC*) the FHC *coram* Watila, J held that a breach of the rights of a data subject under the NDPR is not necessarily a breach of right to private and family life under section 37 of the CFRN, and an action for the interpretation of the provisions of the NDPR cannot be brought under the FREP Rules. In the case, the Federal Government of Nigeria made to establish a national identity database and ITLRAI sued (under the FREP) for and on behalf of one Daniel John, claiming that the processing of personal data by NIMC necessary to carry out the project was likely to breach Daniel's right to privacy in section 37 of the CFRN and article 1.1(a) of the NDPR. ITLRAI sought for an injunction against further release of digital identity cards pending the independent report of external cyber security experts on how safe the application was.

In concluding that the claim for breach or likely breach of the provisions of the NDPR was not properly brought under the FREP Rules and lumped with the claim for breach or likely breach of the right in section 37 of the CFRN, the FHC

¹⁰ High Court of Ogun State, 9 November 2020.

¹¹ Federal High Court, 9 December 2020.

held that (x) an action brought under the FREP Rules must have one of the fundamental rights in Chapter IV of the CFRN as the principal claim, (y) the view in *ITDRLI v LTSM* ignored the implication of article 3.2.2 of the NDPR which provides that a breach of the provisions of the NDPR is to be considered as a breach of the NITDA Act, (z) a breach of the NITDA Act can only be remedied in accordance with section 18 of the NITDA Act which provides for fine and/or imprisonment for breach of the provisions of the NITDA Act, (xx) article 2.10 of the NDPR already provides for penalties for the breach of the rights of data subject under the NDPR, and (yy) it is unlikely that the sanctions provided under section 18 of the NITDA Act and article 2.10 of the NDPR can be enforced against a respondent in an action commenced under the FREP Rules.

2.2 Our Support for the Decision in the Case

We support the decision of the CA on the status of data protection *vis-a-vis* fundamental right to privacy in section 37 of the CFRN for at least two reasons. First, the reasons for the decision of the CA are legally sound. Second, the decision improves data protection right in Nigeria and provides the foundation for data protection rights enthusiasts to subsequently advocate for recognition of data protection right independent of right to privacy.

A holistic read of the NDPR, especially article 2.9 of the NDPR on advancement of right to privacy provides a basis for the view that the NDPR was issued in furtherance of the right to privacy in section 37 of the CFRN. Fundamental rights in Chapter IV of the CFRN are general and it takes other legislation and judicial authorities to define their extent and limitations.

A community reading of the provisions of the NDPR presents the reasoning of the court in *ITDRLI v LTSM* that a breach of the rights under the NDPR is a breach of the provisions of the NITDA Act for which sanctions have been provided by the NITDA Act, as restrictive. We hold the view that there is no legal basis to limit a right because an incidence of its breach is sanctioned under a different statute. An assault could amount to a breach of the right to dignity of human person, for an instance.

It has been argued in support of the decision in *ITLRAI v NIMC* that the FHC was right in holding that a breach of a data subject's rights under the NDPR cannot be remedied through an action under the FREP Rules because that position agrees with the basis for the FREP Rules which provides for specialised procedures for enforcement of fundamental rights under Chapter IV of the CFRN or the African Charter¹². This argument is no longer tenable as the

¹²Sadiku Ilegieuno and others, 'Enforcing Data Subject Rights Under Nigeria's Data Protection Regulation: The Wrong Way (and the Right Way)' (2021) <<https://www.templars-law.com/enforcing-the-data-subjects-rights-under-nigerias-data-protection-regulation-how-not-to-go-about-it/>> accessed 20 November 2021.

decision in the Case has conferred on the rights under the NDPR the status of fundamental rights under the CFRN.

The Data Protection Bill, 2020¹³ released by the Nigerian National Identification Management Commission (the Bill) contained provisions more likely to be linked to the fundamental rights under Chapter IV of the CFRN. The general objective of the Bill included to "... regulate the processing of information relating to data subjects, and to safeguard their fundamental rights and freedom as guaranteed under the Constitution of the Federal Republic of Nigeria, 1999." However, the Federal Government of Nigeria has abandoned the Bill and sought for experts to draft a new Data Protection Bill, making further discussion of the provisions of the Bill unhelpful to our purpose in this piece.¹⁴

In the preamble to the NDPR, cognizance is taken of "emerging data protection regulations within the international community geared towards security of lives and property and fostering the integrity of commerce and industry in the volatile data economy."¹⁵ At the global stage, countries are going past recognising data protection right as a privacy right to creating a data protection right that is independent of the right to privacy. Article 8 of the Charter of Fundamental Rights of the European Union provides for data protection as a right, and article VI of the Hungary's Constitution of 2011 guarantees the rights of individuals to the protection of their data.

In support of trends in pushing for distinct data protection right, Maria argues that although privacy may be the main value behind data protection, data protection legislation advance further interests other than privacy such as data security which seeks to keep data secured against risk and accessed by unauthorized persons and data quality which speaks to the accuracy, relevance, and up-to-datedness of personal information.¹⁶

3. Conclusion

The decision of the CA in the case has promoted the rights of data subjects under the NDPR to the level of fundamental rights protected in the CFRN.¹⁷ There are

¹³ Data Protection Bill, 2020, National Identification Management Commission, (2020-2021).

¹⁴ Tosin Omoniyi, 'Data Protection: Indignation as FG abandons draft bill, seeks 'consultants' for fresh process.' *Premium Times* (Abuja, 17 November 2021) <<https://www.premiumtimesng.com/news/top-news/495768-data-protection-indignation-as-fg-abandons-draft-bill-seeks-consultants-for-fresh-process.html>> accessed 23 November 2021

¹⁵ Paragraph 3 of the preamble to the NDPR.

¹⁶ Dr Maria Tzanou, 'Data Protection as a Fundamental Right Next to Privacy? Reconstructing a Not So New Right' (2013) 3(2) *International Data Privacy Law* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076415> accessed 18 November 2021.

¹⁷ See *El-Rufai v Senate of the National Assembly* [2016] 1 NWLR (Pt 1494) 504 at 533.

data protection rights which cannot be protected within the spectrum of privacy right. Teresa¹⁸ argues that the right to be forgotten¹⁹ is not exactly a right to privacy but rather a right tied to the right to self-actualise and to redefine oneself to the world; the right to data portability²⁰ is not simply a right to privacy, it is a right of individuals to control their personal data; and the right to transparency and explanation of the process of automated decision making²¹ is not exactly a privacy right, but the right of individuals to protect themselves against potential bias and injustice.

By clothing data protection rights under the NDPR with constitutionality, the decision of the CA in the Case provides the basis to further push for a higher standard of data protection by recognition of data protection right as a right distinct from the right to privacy.

It remains only for this milestone in data protection in Nigeria to be consolidated by legislation as the decision in the Case is a judicial authority that could be upturned on appeal or departed from in subsequent cases.

¹⁸Teresa Scassa, 'A Human Rights-Based Approach to Data Protection in Canada: A Research and Policy Agency' (2020) *University of Ottawa Press, Ottawa Faculty of Law Working Paper* 2020 (26) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3620450> accessed 21 November 2021.

¹⁹Art 3.1(9) of the NDPR.

²⁰Art 3.1(7)(h) of the NDPR.

²¹Art 3.1(7)(l) of the NDPR.