

UGANDA / JUDGMENT

Namugerwa v Attorney General

[2013] UGSC 20 (19 June 2013)

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COURT

Supreme Court of Uganda

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THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA AT KAMPALA**(CORAM: ODOKI, C. J.; KATUREEBE; KITUMBA; TUMWESIGYE AND KISAACKYE;JJSC.)****CIVIL APPEAL NO. 04 OF 2012 BETWEEN****NAMUGERWA HADIJAH:::::::::::::::::::::::::::::::: APPELLANT****AND D. P. P. AND ATTORNEY GENERAL ::::::::::RESPONDENTS****[Appeal from the judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine,****D. C. J., Nshimye and Arach-Amoko, JJ. A) dated 14th June 2012 in Civil Appeal No. 10 of 2012]****JUDGMENT OF TUMWESIGYE, JSC**

This appeal by Namugerwa Hadijah (the appellant) originates from her application in the High Court for a writ of habeas corpus for the release of her brother Ssali Mohamed from Kigo Government prison. The appellant claimed in her application to the High Court that her brother was a civilian and that, therefore, the General Court Martial had no jurisdiction over him, and that he was being unlawfully held. The High Court dismissed her application, and her appeal to the Court of Appeal was also dismissed. She then appealed to this court.

Background facts.

The appellant's brother, Ssali Mohamed, along with two others, was on 14th January 2011 arrested and charged before the general Court Martial with Aggravated Robbery and two other offences relating to the Firearms Act. He was thereafter taken to Kigo Government Prison where he was held. The charge sheet drawn up against him had three counts. Count 1 was Aggravated Robbery contrary to Section 285 and 286(2) of the Penal Code Act. The particulars of this count were that Ssali Mohamed and two others on the 14th day of January 2011 at about 22.30 hours at Makindye in Kampala District robbed one Edison Nuwamanya of a motorcycle and at or immediately before or immediately after the said robbery used a deadly weapon, to wit, a Back Star Pistol S/No. P99A on the said victim, the said Pistol being ordinarily a 20 monopoly of the Defence Forces.

The second and third counts of the charge sheet relate to unlawful possession of a firearm and unlawful possession of ammunitions contrary to section 3(1) (2)(a) and (b) and section 25 3(1) (3) and (4) of the Firearms Act respectively. The particulars of the two offences are almost similar except that one relates to unlawful possession of a firearm while the second relates to unlawful possession of ammunitions. The particulars of the second count of the charge sheet, for example, state that Ssali Mohamed and two others on the 14th day of January 2011 at about 22.30 hours at Makindye in Kampala District were found

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in possession of a firearm, to wit, a Black Star Pistol S/No. P99A, without holding a firearms certificate, the said Firearm being ordinarily the monopoly of the Defence Forces.

Following Ssali Mohammed's remand at Kigo Government Prison, the appellant on behalf of her brother applied to the High Court for a writ of habeas corpus ad subjiciendum for an order to have the body of Ssali Mohamed before court. The writ applied for was to be issued to the officer-in-charge of Kigo Government Prison, the Commander of the Uganda Peoples Defence Forces (hereinafter referred at as "UPDF") and the Attorney General. It was based on Article 23(a) of the Constitution of Uganda, Section 34(a) of the Judicature Act and Rules 1, 2 and 3 of the Judicature (Habeas Corpus) Rules. It was registered as High Court Miscellaneous Cause No. 0152 of 2011.

On 23rd November 2011 the High Court issued the initial order applied for and on 2nd December 2012 heard the application for the respondents to show cause why Ssali Mohamed should not be released. At the hearing of the application, Mr. Ladislaus Rwakafuuzi, counsel for the applicant, contended that Ssali Mohamed being a civilian was not subject to military law. Mr. Batanda Gerald, State Attorney and counsel for the respondents, submitted that the prisoner's incarceration was lawful under section 119(1) (h) of the UPDF Act. The High Court (Zehurikize, J) ruled that the Black Star Pistol of which the accused persons were alleged to have been in possession and with which they were

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alleged to have committed the robbery was ordinarily the monopoly of the Defence Forces and that, therefore, Ssali Mohamed was a person subject to military law by virtue of section 119(1) (g) and (h) of the UPDF Act, and consequently the General Court Martial had jurisdiction to try him. He accordingly

dismissed the application. Dissatisfied with the ruling of the High Court the appellant appealed to the Court of Appeal which upheld the decision of the High Court and dismissed the appellant's appeal.

Grounds of Appeal and counsel's submissions

The appellant's memorandum of appeal to this court contains two grounds which were framed as follows.

1. That the learned justices of Appeal erred in law when they found that the General Court Martial has

jurisdiction to try civilians for offences outside the

UPDF Act. 2. That the learned Justices of Appeal erred in law when they held that the General Court Martial has jurisdiction to try civilians for non-service offences.

In her memorandum of appeal the appellant asked the court to find that Ssali Mohamed was in illegal custody having been remanded by the General Court Martial for committing non-service offences outside the UPDF Act and grant a writ of habeas

corpus to the appellant. She also prayed for the award of costs for this appeal.

In this appeal Mr. L. Rwakafuuzi represented the appellant while Mr. Batanda Gerald, State Attorney, represented the respondents. They both made oral submissions.

Learned counsel for the appellant submitted that Ssali Mohamed was charged with the offence of unlawful possession of a firearm and the offence of aggravated robbery before the General Court Martial; that he was a civilian and the offences he was charged with were in the Penal Code Act and the Firearms Act; that being in the said Acts the offences were civil offences and, therefore, the General Court Martial did not have jurisdiction to try him.

He further argued that the jurisdiction of the General Court Martial as far as service offences were concerned was in Section 179 of the UPDF Act which provides that a person who does or omits to do an act in Uganda (or outside Uganda) which constitutes an offence under the Penal Code Act or any other enactment, commits a service offence. Therefore, he argued, the military courts' jurisdiction for service offences was limited to only military personnel. The definition of "service offence" contained in Section 2 of the UPDF Act shows that it is only those who serve in the UPDF that can be charged with service offences, he contended. According to him, the Constitutional Court held in the case of Uganda Law Society vs. Attorney General (Constitutional Petition No. 18 of 2005) that the General

Court Martial's jurisdiction over civil offences was limited to only military personnel.

He argued further that although section 119(1) (g) and (h) of the UPDF Act was not declared to be unconstitutional in the Supreme Court case of Attorney General vs. Uganda Law Society (Constitutional Appeal No. 1 of 2006), that section did not in itself create an offence. Accordingly, he submitted, the fact that a civilian was being charged in a military court under a civil law was unconstitutional.

He argued that a civilian can only be subject to military law when he commits offences that bring him under the ambit of the UPDF Act, but Ssali Mohamed was being charged under civil law, not the UPDF Act. He argued that under the Firearms Act there were different definitions of "arms of war" and "firearms" and that, therefore, there should be a clear distinction between what is an arm ordinarily the monopoly of the UPDF and firearms; that a pistol which is a firearm cannot fall within arms ordinarily the monopoly of the UPDF; that since the Firearms Act gives power to

the Police to licence those who wish to possess them, firearms cannot be a monopoly of the UPDF, and that moreover if the pistol which Ssali Mohamed was alleged to have been in unlawful possession of was a monopoly of the UPDF, it would have a mark as provided for under section 166 of the UPDF Act and the mark would be gazetted but that this was not so in this case.

The learned State Attorney, Mr. Batanda, strongly opposed this appeal. He first raised an objection about the manner in which the appellant's grounds of Appeal were framed, arguing that the grounds of appeal offended rule 82 of the Judicature (Supreme Court Rules) Directions. He submitted that rule 82 of the Supreme Court Rules requires that a memorandum of appeal should set forth concisely and under distinct heads the grounds of objection to the decision being appealed against, specifying the points which are alleged to have been wrongly decided; that the appellant's grounds did not reflect the points which were alleged to have been wrongly decided because the points mentioned in the grounds of appeal were not the findings of the Court of Appeal; that the Court of Appeal did not find that the General Court Martial had jurisdiction to try civilians for offences outside the UPDF Act, nor did it find that the General Court Martial had jurisdiction to try civilians for non-service offences. Therefore, he submitted, the grounds were misconceived.

Learned counsel further contended that learned counsel for the appellant failed to state the correct decision reached by both the Constitutional Court and the Supreme Court in *Uganda Law Society vs. Attorney General* (supra) and in *Attorney General vs. Uganda Law Society* (supra) respectively. He argued that the two courts did not hold anywhere in the above judgments that the jurisdiction of the General Court Martial was limited to only military personnel. He stated that the reasons why it was held in *Attorney General vs. Uganda Law Society* (Supra) that the 22 persons who were in remand prison and who were civilians were

unlawfully before the General Court Martial was because the Anti-Terrorism Act under which they were charged vested jurisdiction exclusively in the High Court and that in addition, the Supreme Court found that the prosecution had not shown that the 22 persons on remand were subject to military law as is required by Section 119(1) (g) and (h) of the UPDF Act. In counsel's view, therefore, the facts in the instant case and the Constitutional case of *Uganda Law Society vs. Attorney General* (supra) were quite distinguishable.

Learned counsel conceded to counsel for the appellant's argument that Section 119(l)(g) and (h) of the UPDF Act did not in itself create an offence, but he argued that the section extended the jurisdiction of the military courts to include civilians who bring themselves under the operation of the UPDF Act.

On the question as to whether the pistol Ssali Mohamed was alleged to have been found in possession of was a weapon which was ordinarily the monopoly of the UPDF, learned counsel argued that that was a question to be decided at the trial and not in this court. On what constitutes a service offence, learned counsel argued that a service offence was defined by this court on page 6 of the judgment in *Attorney General vs. Uganda Law Society* (supra) which means in his view that a civilian can be tried by the General Court Martial for an offence outside the

UPDF Act as long as that civilian is subject to military law.

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Lastly learned counsel submitted that the purpose of a habeas corpus application, according to *Grace Stuart Ibingira vs. Uganda* [1966] E. A. 445, was to produce before court someone who was in unlawful detention, and in his view there was sufficient evidence to show that Ssali Mohamed was not in unlawful detention.

Consideration of the grounds of appeal

The appellant filed two grounds of appeal which are (1) that the learned Justices of Appeal erred in law when they found that the General Court Martial had jurisdiction to try civilians for offences outside the UPDF Act and (2) that the learned Justices of Appeal erred in law when they held that the General Court Martial had jurisdiction to try civilians for non service offences.

I will consider both grounds together because I do not see much difference in substance between them. However, before considering the grounds of appeal, I will first consider the objection raised by learned counsel for the respondent that the grounds of appeal offend rule 82 of the Judicature (Supreme Court Rules) Directions because they do not reflect the points which are alleged to have been wrongly decided. Rule 82 aforesaid provides:

“A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision

appealed against, specifying the points which are

alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make.”

According to the Record of Appeal (page 28) one issue was framed for determination by the Court of Appeal, and it was “Whether the General Court Martial has jurisdiction to try civilians for offences alleged to have been committed with the use of 15 ammunition ordinarily being the monopoly of UPDF.” In their judgment, after considering Section 119(1) (g) and (h) of the UPDF Act, the learned Justices of Appeal stated:

“The language of the statute clearly indicates that Ssali Muhammed’s charges, including the possession of a firearm and ammunition that is ordinarily the monopoly of the UPDF, fall within the jurisdiction of the GCM. Because of the clarity of the Act, the only way then to prevent this exercise of jurisdiction is for the statute to be found to be unconstitutional. The only court considering this issue has been the Constitutional Court in *Uganda Law Society vs. Attorney General*... In this case, the court upheld the constitutionality of this provision. When this case was further appealed to the Supreme Court in Constitutional Appeal No.1 of 2006, this issue was

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not addressed. Therefore, current law clearly puts

Ssali Muhammed within the jurisdiction of the General Court Martial. The learned trial judge was correct in his findings."

From their judgment, it is clear that the learned Justices of Appeal confined themselves to Section 119(1) (g) and (h) of the UPDF Act in so far as that section brings civilians under the military court's jurisdiction. They did not specifically state in their judgment, as learned counsel for the respondents rightly argued, that the General Court Martial had jurisdiction to try civilians for offences outside the UPDF Act or non-service offences. However, they held that the General Court Martial had jurisdiction to try Ssali Mohamed for possession of a firearm and ammunition ordinarily being the monopoly of UPDF. Since these offences do not appear in the UPDF Act, by implication the learned Justices of Appeal held that the General Court Martial had jurisdiction to try civilians for offences outside the UPDF Act or non-service offences. Therefore, in my view, the appellant's grounds of appeal arise from the judgment of the Court of Appeal and do not offend rule 82 of the Rules of this court.

Returning to the grounds of appeal, in his submissions learned counsel for the appellant admitted that military courts by virtue of Section 119(1) (g) and (h) of the UPDF Act have jurisdiction to try civilians in certain circumstances for security reasons. His contention, however, is that S. 119(1) (g) and (h) only grants

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jurisdiction to the General Court Martial to try civilians for offences specifically provided for in the UPDF Act but that court does not have jurisdiction to try civilians for offences outside the UPDF Act or for civil offences. Surprisingly his authority for this assertion is the Constitutional case of Uganda Law Society vs. Attorney General (supra) in which, according to him, it was held that the General Court Martial's jurisdiction over civil offences was limited to only military personnel.

Learned counsel for the respondents submitted that learned counsel for the appellant's understanding of the Constitutional Court's decision in that case was mistaken, and I respectfully agree. The Constitutional Court did not hold in that case that the General Court Martial did not have jurisdiction to try civilians for civil offences, as counsel for the appellant submits. That court held that the trial of the 23 accused persons by the General Court Martial for the offences of terrorism and unlawful possession of firearms was unconstitutional because for the offence of terrorism the Anti-Terrorism Act under which they were charged vested exclusive jurisdiction in the High Court. For the offence of being in unlawful possession of firearms, that court held that it had to be shown that the accused persons being civilians, were subject to military law by, for example, showing in the charge sheet that the weapons they were alleged to have been found in possession of were ordinarily the monopoly of the Defence Forces. In the above-cited case Mukasa-Kikonyogo, D. CJ., stated in her judgment:

"I concede that an accused person including

civilians who are subject to military law under Section 2 of the UPDF Act may be tried by the Court Martial for being in unlawful possession of arms and ammunitions ordinarily the monopoly of the Defence Forces. In such a case ... the charge

sheet must disclose the acts which contravened the provisions of the UPDF Act or any other law ... In the instant case the aforementioned requirement was not complied with. The acts of the is accused which contravened the law were not

mentioned. Neither is it shown that the arms found in possession of the accused were the monopoly of the UPDF ...”

Section 119(1) of the UPDF Act provides as follows.

“119. Persons subject to military law

(1) The following persons shall be subject to military law

(a)

(b)

1.)

2.)

3.)

4.)

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(g) Every person, not otherwise military, who aids and

abets a person subject to military law in the commission of a service offence; and

(h) Every person found in unlawful possession of -

i. arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces; or

ii. other classified stores as prescribed.”

Therefore, according to this provision, civilians who find themselves in the circumstances described in the above Section will be subject to military law. Section 2 of the UPDF Act defines the expression “subject to military law” to mean being subject to Parts V to XIV of the UPDF Act. This consists of Sections 118 to 257 of the Act.

Section 179(1) of the UPDF Act provides:

“(1) A person subject to military law, who does or omits to do an act -

(a) In Uganda, which constitutes an offence under the Penal Code or any other enactment;

(b) Outside Uganda, which would constitute an

offence under the Penal Code Act or any other enactment if it had taken place in Uganda, commits a service offence and is, on conviction, liable to a punishment as prescribed in subsection so (2)."

Section 197 of the Act establishes a General Court Martial and confers on it, among other things, unlimited original jurisdiction to try offences "under this Act". Offences under this Act include service offences under Section 179 of the Act committed by persons subject to military law. These persons, in my view, will include civilians subject to military law under Section 119(l)(g) and (h) of the UPDF Act. Section 2 of the Act defines a "service offence" as "an offence under this Act or any other Act for the time being in force committed by a person while subject to military law". Therefore, in my view, any civilian who is subject to military law can commit a service offence whether under the UPDF Act or any other Act.

From the above cited provisions, it is clear to me that civilians in Uganda can become subject to military law and once they become subject to military law they will be tried by the General Court Martial. I am unable to see any exemption of civilians from the application of Section 179 of the Act once they become subject to military law under Section 119(l)(g) and (h) of the Act. Ordinarily civilians who are not involved in fighting wars should be tried by civilian courts, not military courts. Therefore, Section 119(l)(g) and (h) of the UPDF Act is rather unusual. However, the constitutionality of this Section was upheld by the Constitutional Court in *Uganda Law Society vs. Attorney General* (supra) and when its decision was appealed to this court the constitutionality of the section was not raised and argued by the cross- appellant (Uganda Law Society), and so this court did not address it.

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Therefore, until Section 119(l)(g) and (h) of the UPDF Act is repealed or declared to be unconstitutional by a competent court, it will remain valid, effective and enforceable regardless of the misgivings of human rights advocates about it.

Ssali Mohamed, the subject of the application for habeas corpus, was charged with being in unlawful possession of a firearm contrary to Section 3 (1) (2)(a) and (b) of the Firearms Act. The firearm of which he was alleged to have been in unlawful possession is described in the particulars of the offence as a Black Star Pistol S/No. P 99 "the said arm being ordinarily a monopoly of the Defence Forces". He is alleged to have used this pistol to rob a motorcycle and was on that account charged with Aggravated Robbery contrary to Sections 285 and 286(2) of the Penal Code Act. Therefore, the alleged facts show that Ssali Mohamed is subject to military law by virtue of Section 119 (1) (h) of the Act.

In *Attorney General vs. Uganda Law Society* (supra) Mulenga, JSC, correctly stated:

"For an offence under an Act other than the UPDF

Act to be within the jurisdiction of the General Court Martial, it must have been committed by a person subject to military law. In the instant case it was not alleged, let alone shown, that the accused persons committed either of the two offences while they were subject to military law.

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Without that link neither of the two offences can be called a service offence within the meaning of the said definition.”

The instant case is different from the above cited case because in this case the State established a link between the accused and Section 119(l)(g) and (h) of the UPDF Act by stating in the charge sheet that Ssali Mohamed was found in possession of a firearm being ordinarily the monopoly of the Defence Forces. The truth of this allegation is, of course, subject to proof in the trial court.

Learned counsel for the appellant argued that Ssali Mohamed was charged with being in unlawful possession of a pistol and that a pistol is not ordinarily the monopoly of the Defence Forces and that, therefore, this could not bring him under Section 119 (1) (h) of the UPDF Act. However, the charge sheet states that the pistol was a Black Star Pistol S/No. P 99 being ordinarily the monopoly of the Defence Forces. It is my view that without evidence this court cannot determine whether a Black Star Pistol S/No. P 99 is an arm ordinarily the monopoly of the Defence Forces or not. It is a triable issue which should be resolved by the trial court.

The appellant’s grounds of appeal must therefore, fail. I find that the learned Justices of Appeal were correct to find that Ssali Mohamed was subject to the jurisdiction of the General Court

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Martial and to uphold the decision of the High Court which found that he was being lawfully held in prison and refused to grant the appellant the application for habeas corpus. I would, therefore, dismiss this appeal. However, as this appeal concerns a matter of public interest, I would make no order as to costs in this court and in the two courts below.

Dated at Kampala this .19th...day of June 2013

JOTHAM TUMWESIGYE JUSTICE OF THE SUPREME COURT

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI CJ, KATUREEBE, KITUMBA*,. *TUMWESIGYE AND

E. KISAAKYE, JJ. S. C.)

CIVIL APPEAL NO. 04 OF 2012 BETWEEN

NAMUGERWA HADIJAH::::::::::::::::::::::::::::::::: APPELLANT

AND

D. P. P AND ATTORNEY GENERAL::::::::::::RESPONDENTS

[Appeal from the decision of the Court of Appeal at Kampala (Mpagi- Bahigeine ,DCJ, Nshimye and Arach-Amoko JJ. A) dated 14th June 2012

in Civil Appeal No. 10 of 2012]

TUDGMENT OF KITUMBA, TSC.

I have had the advantage of reading in draft the lead judgment of my brother Tumwesigye JSC. I concur with it and the orders proposed therein.

Dated at Kampala, this 19th day of June 2013

C. N. B. KITUMBA JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, C. J., KATUREEBE, KITUMBA, TUMWESIGYE &

KISA AKYE, JJ. S. C.)

CIVIL APPEAL NO. 04 OF 2012

BETWEEN

**NAMUGERWA HADIJAH ::::::::::: APPELLANT AND D. P. P. AND ATTORNEY
GENERAL ::::::::::: RESPONDENT**

{Appeal from the Judgment of the Court of Appeal at Kampala (Mpagi- Bahigeine,D. C. J., Nshimye and Amoko, JJ. A.) dated 14th June 2012, in Civil Appeal No. 10 of 2012}

JUDGMENT OF DR. KISA AKYE, JSC.

I have had the benefit of reading in draft the judgment of my learned brother, Justice Tumwesigye, JSC.

I concur with him that this appeal should be dismissed with no order as to costs in this court and in the two courts below.

Dated at Kampala this 19th day of.... June 2013.

DR. ESTHER KISA AKYE

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA, AT KAMPALA

(CORAM: ODOKI, CJ., KATUREEBE, KITUMBA, TUMWESIGYE AND KISA AKYE,

JJ. SC).

CIVIL APPEAL NO. 04 OF 2012

BETWEEN

**NAMUGERWA HADIJAH ::::::::::: APPELLANT AND D. P. P. AND ATTORNEY
GENERAL ::::::::::: RESPONDENTS**

[Appeal from the judgment of the Court of Appeal at Kampala: (Mpagi-Bahigeine, D. C. J., Nshimye and Arach-Amoko, JJ. A) dated the 14th June 2012, in Civil Appeal No. 10 of 2012].

JUDGMENT OF KATUREEBE, JSC.

I agree with the Judgment of my learned brother, Tumwesigye, JSC, that this appeal be dismissed.

I also agree with the orders he proposed as to costs.

Dated at Kampala this 19th day of .. June...2013.

Bart M. Katureebe **JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI C. J; KATUREEBE, KITUMBA, TUMWESIGYE AND KISAAKYE, JJ. SC)

***[Appeal from the judgment of the Court of Appeal at Kampala (Mpagi-Bahigeine DCJ, Nshimye*
*& Arach Amoko JJ. A) dated 14 June 2012 in Civil Appeal No.10 of 2012]***

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother Tumwesigye, JSC, and I agree with the judgment and the orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with no orders as to costs in this Court and Courts below.

CIVIL APPEAL NO. 04 OF 2012

BETWEEN

NAMUGERWA HADIJAH

APPELLANT

AND

1. P. P AND ATTORNEY GENERAL

RESPONDENTS

CHIEF JUSTICE

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