IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - AD 2020

CORAM: YEBOAH, CJ (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
MARFUL-SAU, JSC
AMEGATCHER, JSC
KOTEY, JSC

25TH JUNE, 2020

CONSOLIDATED WRITS

SUIT NO. J1/9/2020

NATIONAL DEMOCRATIC CONGRESS ..... PLAINTIFF

VRS

1. ATTORNEY-GENERAL
2. ELECTORAL COMMISSION OF GHANA ..... DEFENDANTS

AND

SUIT NO. J1/12/2020

MARK TAKYI-BANSON

H/NO. BN34, BREMAN KOKOSO ..... PLAINTIFF

ASIKUMA-ODOBEN-BRAKWA

VRS

1. ELECTORAL COMMISSION OF GHANA
2. THE ATTORNEY-GENERAL ..... DEFENDANTS

JUDGMENT

PROF. KOTEY, JSC:-

1. Introduction

On 25th June 2020, we gave judgment in these consolidated suits but deferred our reasons, which we now give.

We unanimously dismissed the principal reliefs of the plaintiffs in the two consolidated suits. We denied the claims of the plaintiffs for a declaration of unconstitutionality regarding the non-inclusion of the current voter identification card and birth certificate for the purpose of identification of a person who applies for registration as a voter in the voter registration process to be undertaken by the Electoral Commission (2nd Defendant). We also dismissed the reliefs of the plaintiffs challenging the constitutionality of the compilation of a new register of voters by the Electoral Commission. We finally upheld the constitutionality of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I.126) and ordered all stakeholders and Ghanaian eligible voters to comply with the terms thereof.

We partly granted two reliefs of the plaintiff in Writ No. J1/9/2020 subject to the operation of C.I.126. Those two reliefs, effectively, were a statement of the meaning and effect of the constitutional provisions stated therein and did not convey substantive rights enforceable by the plaintiffs.

The antecedent facts of the case are that the 2nd Defendant had indicated that in preparation for the 2020 presidential and parliamentary elections it would compile a new register of voters. In preparation for the compilation of the new register of voters, the 2nd Defendant gave gazette notification for the making of Regulations intituled Public Elections (Registration of Voters) (Amendment) Regulations on 3 March 2020. This Instrument did not provide for the inclusion of the current voter identification card as a document for the identification of persons who apply for registration as voters.

On 19th March, 2020, the National Democratic Party (1st Plaintiff), a major political party, issued a writ against the Attorney General (1st Defendant) and the Electoral Commission (2nd Defendant) invoking the original jurisdiction of this court to interpret and enforce the Constitution under articles 2 (1) and 130 (1) thereof.

The 1st Plaintiff sought the following reliefs:

1. A declaration that upon a true and proper interpretation of Article 45(a) of the 1992 Constitution, 2nd Defendant has the constitutional power to, and can compile a register of voters only once, and thereafter revise it periodically, as may be determined by law. Accordingly, 2nd Defendant can only revise the existing register of voters, and lacks power to prepare a fresh register of voters, for the conduct of the December 2020 Presidential and Parliamentary Elections.

OR IN THE ALTERNATIVE

2. A declaration that upon a true and proper interpretation of the provisions of the Constitution, specifically article 51, read conjointly with article 42 of the Constitution, the power of the 2nd Defendant to compile and review the voters' register must be exercised subject to respect for and the protection of the right to vote;

3. A declaration that on a true and proper interpretation of the provisions of the Constitution, particularly article 42, upon the registration of and issuance of a voter identification card to a person, that person has an accrued right to vote which cannot be divested in an arbitrary and capricious manner;

4. A declaration that, upon a true and proper interpretation of the provisions of the Constitution, particularly article 42, of the Constitution, all existing voter identification cards duly issued by the 2nd Defendant to registered voters are valid for purposes of identifying such persons in the exercise of their right to vote;

5. A declaration that upon a true and proper interpretation of the Constitution, specifically Article 42, the 2nd Defendant's purported amendment of regulation 1 sub-regulation 3 of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 to exclude existing voter identification cards as proof of identification to enable a person apply for registration as a voter, is unconstitutional, null and void and of no effect whatsoever;

6. A declaration that the 2nd Defendant, in purporting to exercise its powers pursuant to article 51 of the 1992 Constitution to exclude the existing voter identification cards from

the documents required as proof of identification to enable a person register as a voter without any justification, is arbitrary, capricious, unreasonable and contrary to article 296 of the 1992 Constitution;

7. A declaration that upon a true and proper interpretation of the Constitution, specifically Article 42 of the 1992 Constitution, proof of identification for registration as a voter should not be limited by the provisions of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020;

8. An order directed at the 2nd Defendant to include all existing voter identification cards duly issued by the 2nd Defendant as one of the documents serving as proof of identification for registration as a voter for the purposes of public elections;

9. Any other order or orders as this Honourable Court would deem fit in the circumstances.

In compliance with the relevant rules of the court, the parties subsequently filed their respective Statements of Case. No Joint Memorandum of Agreed Issues was filed by the parties as required by the rules and the practice of the Court. On the contrary, the 1st and 2nd Defendants filed a "proposed joint memorandum of issues" on 20 May 2020 and the 1st Plaintiff filed its memorandum of issues on 4 June 2020. On 4 June 2020, the Court directed the 2nd Defendant to file a supplementary Statement of Case to provide the legal basis for the non-inclusion of the current voter identification card as a document to be used for the identification of a person who applies to be registered as a voter in the compilation of a new register of voters. Option was given to the other parties to file supplementary Statements of Case if they so desired. All the parties duly filed supplementary Statements of Case. On 10 June 2020, the Public Elections (Registration of Voters) (Amendment) Regulations,2020 (C.I 126) came in force. On the 11th June 2020, after being put to its election by the Court, the 1st Plaintiff abandoned its relief 1 and the same was struck out as withdrawn. The said relief 1 was for:

1. A declaration that upon a true and proper interpretation of Article 45(a) of the 1992 Constitution, 2nd Defendant has the constitutional power to, and can compile a register of voters only once, and thereafter revise it periodically, as may be determined by law. Accordingly, 2nd Defendant can only revise the existing register of voters, and lacks power to prepare a fresh register of voters for the conduct of the December 2020 Presidential and Parliamentary Elections.

On 12 June 2020, a day after the 1st Defendant had abandoned its relief 1, a new writ was issued by Mark Takyi-Banson (2nd Plaintiff) against the 1st and 2nd Defendants seeking the following reliefs:

i. A declaration that upon a true and proper interpretation of article 45(a) of the 1992 Constitution of the Republic of Ghana, the Electoral Commission's constitutional and statutory mandate to compile the register of voters for the conduct and supervision of all public elections and referenda is spent, saving only the power reserved in the Commission to revise and expand the register of voters at such periods as may be determined by law.

ii. A declaration that the Electoral Commission's decision to compile a new register of voters is inconsistent with and in violation of article 45(a) of the 1992 Constitution of the Republic of Ghana.

iii. A declaration that Regulation 1 (3) of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I 126) is inconsistent with and violates the provisions of article 42 and 45 (e) of the 1992 Constitution to the extent that it excludes Birth Certificates issued to Ghanaians as a mode of identification and/or establishment of qualification to be registered in the register of voters.

iv. A declaration that Regulation 1 (3) of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I. 126) is inconsistent with and violates the provisions of article 42 and 45 (e) of the 1992 Constitution to the extent that it excludes

the existing Voter Identification Card as a mode of identification and/or establishing qualification to be registered in the register of voters.

v. An order directed at 1st Defendant to include under Regulation 1 (3) of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I 126), the existing voter Identification Card issued by 1st Defendant as evidence of identification.

vi. An order directed at 1st Defendant to include under Regulation 1 (3) of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I. 126) birth certificates as evidence of identification.

vii. Any other order or orders as to this Honourable Court may deem fit.

On 19 June 2020, upon an application by the 1st Defendant for the consolidation of the two suits, this court upon determining that the two suits raised substantially the same issues, made an order for the consolidation of the two suits. The court also made an order for the abridgement of time for filing of the respective Statements of Case of the parties. All the parties complied with the order and filed their respective Statements of Case.

On 19 June 2020, an application for leave to file an amicus brief was filed by four (4) applicants, namely; Imani Centre for Policy and Education, Conservative Policy Research Centre, Alliance for Social Equity and Public Accountability (ASEPA) and Institute for Liberty and Policy Innovation. In view of the lateness of the application and the fact that the draft amicus brief attached to the application did not provide any new, relevant information, this Court refused the application.

From the reliefs indorsed on the two Writs and after a careful consideration of the facts, the processes filed by the parties and the relevant law, two (2) issues arise for determination in this action. These are:

i. Whether or not the compilation of a new register of voters by the 2nd Defendant would be inconsistent with or in violation of the Constitution, and

ii. Whether or not the non-inclusion of the current voter identification card and birth certificate as documents for the identification of persons who apply for registration as voters under C.I.126, is inconsistent with or in contravention of the Constitution.

2. The Constitutionality or Otherwise of the Compilation of a New Register of Voters

As has been noted, the first relief indorsed on the Writ of the 1st Plaintiff is for;

"A declaration that upon a true and proper interpretation of Article 45 (a) of the 1992 Constitution, 2nd Defendant has the Constitutional power to, and can compile the register of voters only once and thereafter revise it periodically, as may be determined by Law. Accordingly, 2nd Defendant can only revise the existing register of voters, and lacks the power to prepare a fresh register of voters for the conduct of the December 2020 Presidential and Parliamentary Elections".

This relief, as has been noted, was abandoned by the 1st Plaintiff and struck out as abandoned by the Court. But this issue was resurrected by the 2nd Plaintiff. Reliefs 1 and 2 indorsed on the 2nd Plaintiff's Writ are as follows:

i. A declaration that upon a true and proper interpretation of article 45(a) of the 1992 Constitution of the Republic of Ghana, the Electoral Commission's constitutional and statutory mandate to compile the register of voters for the conduct and supervision of all public elections and referenda is spent saving only the power reserved in the Commission to revise and expand the register of voters at such periods as may be determined by law.

ii. A declaration that the Electoral Commission's decision to compile a new register of voters is inconsistent with and a violation of article 45(a) of the 1992 Constitution of the Republic of Ghana.

The relevant provision of the Constitution is article 45(a), which provides as follows:

"The Electoral Commission shall have the following functions –

(a) To compile the register of voters and revise it as such periods as may be determined by law."

The 2nd Plaintiff contends that on a true and proper interpretation of article 45 (a), the 2nd Defendant's power to compile a new register of voters can be exercised only once and that after the compilation of a new register, the register can subsequently only be revised. The 2nd Plaintiff submitted that the words "compile" and "revise" in article 45 (a) "do not mean the same thing" or "have the same effect or result". He concludes, "that the purposive interpretation and effect of Article 45 (a) of the 1992 Constitution, as restated in section 2(a) of the Electoral Commission Act, 1993 (Act 451), is that the constitutional statutory mandate of the 1st Defendant (The Electoral Commission) to compile the register of voters for elections and referenda is spent save the mandate to revise the register of voters."

The 1st and 2nd Defendant take issue with the 2nd Plaintiff on his interpretation of article 45 (a) of the Constitution. They both contend that under and by virtue of article 45 (a), the 2nd Defendant has power to compile a new register of voters, and that the authority to compile a new register is not a one-off power, but is a power that may be exercised periodically as and when determined by the 2nd Defendant and in accordance with law. Counsel for the 1st Defendant submitted that the 2nd Plaintiff's interpretation of article 45 (a) is strained and farfetched. He contended that on a plain reading of article 45 (a), the 2nd Defendant may "compile the register of voters and revise it as such periods as may be determined by law". He submits that the phrase "at such periods as may be determined by law" applies both to the compilation of a new register and its revision. He noted the absence of any punctuation in article 45 (a) and submitted, "Quite clearly therefore without any difficulty, the words must be read together. There's no need to disaggregate them". Counsel for the 1st Defendant further submitted that by article 297 (b) of the Constitution, where a power to do an act is conferred on a person, that

power or duty may be exercised or discharged from time to time as necessary and that the power of the 2nd Defendant to compile a new register of voters may be exercised from time to time, and not only once.

The 2nd Defendant also submitted that article 45 (a) does not confer a single-use mandate but provides for a role of a continuing nature. It further submitted that the Constitution must be read as a whole and that when article 45 (a) is read together with article 297 (c), it is clear that the power of the 2nd Defendant to compile a new register of voters is not a one-off power but can be exercised as and when determined by the 2nd Defendant and in accordance with law.

We have carefully considered the contentions of the parties, the submissions of counsel and the relevant provisions of the Constitution on this issue and are of the considered opinion that there is no merit in the contention of the 2nd Plaintiff that the power of the 2nd Defendant to compile a new register of voters can only be exercised once and that thereafter it only has power to revise the register from time to time, but not to compile a new one.

We uphold the submissions of counsel for the 2nd Defendant that the power vested in the 2nd Defendant by article 45 (a) "to compile the register of voters and revise it at such periods as may be determined" is clear and unambiguous and means that the 2nd Defendant may compile a new register of voters or revise it from time to time as it deems necessary and in accordance with law. The interpretation urged by the 2nd Plaintiff is strained and farfetched and is rejected.

The Constitution must be read as a whole. As this Court stated in **J.H. Mensah v. Attorney-General [1996-97] SCGLR 320,** by Acquah JSC (as he then was);

"I think it is now firmly settled that the better approach to the interpretation of the 1992 Constitution is to interpret the provision in relation to the other provisions of the Constitution so as to render the interpretation consistent with the other provisions and

the overall spirit of the Constitution. An interpretation based solely on a particular provision without reference to the other provision is likely to lead to a wrong appreciation of the true meaning and import of the provision."

In this case, the related constitutional provision which we believe will enhance the appreciation of the true import of article 45(a) is article 297(b), which makes provision for implied powers and other matters relating to the scope and implications of powers conferred under the Constitution. Article 297(b) of the Constitution provides that, "in this Constitution and in any other law, (b) where a power is inferred or duty is imposed, the power may be exercised and duty shall be performed, from time to time, as occasion requires".

We therefore hold that when article 45 (a) is read together with article 297 (b), as it must, it is clear that the power of the 2nd Defendant to compile a new register of voters may be exercised from time to time as occasion requires and in accordance with law.

Additionally, the power of the 2nd Defendant to compile a new register is recognized by the Public Elections (Registration of Voters) Regulations, 2016 (C.I. 91) which has just been amended by C.I.126. Regulation 33 of C.I. 91, on revocation and saving, provided as follows:

"33. (1) The Public Elections (Registration of Voters) Regulations, 2012 (C.I. 72) is hereby revoked.

(2) Despite the revocation under sub regulation (1), the existing register of voters is saved under these Regulations *until the new one is compiled by the Commission* (emphasis supplied).

Lastly, we note that as a matter of fact, this is not the first time that a new register of voters would be compiled since the coming into force of the 1992 Constitution. A new register of voters was in fact compiled by the 2nd Defendant in 2012 under C.I. 72.

In light of the foregoing, we hold that the compilation of a new register of voters by the 2nd Defendant is not inconsistent with or in contravention of the Constitution or any other law.

We now proceed to examine whether the non-inclusion by C.I 126 of the current voter identification card and birth certificate as documents for the identification of a person who applies for registration as voter is inconsistent with or in contravention of the Constitution.

3.0 The Constitutionality or Otherwise of Non-Inclusion of the current Voter Identification Card and Birth Certificate as Identification Documents

Regulation 1 of C.I. 126 provides as follows:

"1. The Public Elections (Registration of Voters) Regulations, 2016 (C.I. (91) is amended in regulation 1

(a) by the substitution for subregulation (3), of

> "(3) A person who applies for registration as a voter shall provide as evidence of identification one of the following:
> (a) a passport;
> (b) a national identification card issued by the National Identification Authority; or
> (c) one voter registration identification guarantee form as set out in Form One of the Schedule that has been completed and signed by the two registered voters."; and

(b) by the substitution for subregulation (4), of

"(4) Despite paragraph (c) of subregulation (3), a registered voter shall not guarantee the identity of more than ten persons.""

C.I. 126 does not therefore include the current voter identification card and birth certificate as one of the documents to be used for the identification of a person who applies for registration as a voter.

The 1st and 2nd Plaintiffs contend that the non-inclusion of the voter identification card as a document of identification violates the Constitution, while the 2nd Plaintiff contends, additionally, that the non- inclusion of birth certificate contravenes the Constitution.

We will now examine these contentions beginning with the non-inclusion of the voter identification card.

3.1 Non-Inclusion of Voter Identification Card

Reliefs (4), (5) and (6) indorsed on the 1st Plaintiff's Writ provide as follows:

4. A declaration that, upon a true and proper interpretation of the provisions of the Constitution, particularly article 42, of the Constitution, all existing voter identification cards duly issued by the 2nd Defendant to registered voters are valid for purposes of identifying such persons in the exercise of their right to vote;

5. A declaration that upon a true and proper interpretation of the Constitution, specifically Article 42, the 2nd Defendant's purported amendment of regulation 1 subregulation 3 of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 to exclude existing voter identification cards as proof of identification to enable a person apply for registration as a voter is unconstitutional, null and void and of no effect whatsoever;

6. A declaration that the 2nd Defendant, in purporting to exercise its powers pursuant to article 51 of the 1992 Constitution to exclude the existing voter identification cards from the documents required as proof of identification to enable a person register as a voter without any justification is arbitrary, capricious, unreasonable and contrary to article 296 of the 1992 Constitution;

Relief 4 indorsed on the 2nd Plaintiff's Writ is for;

A declaration that Regulation 1(3) of the (Amendment) Regulations, 2020 (C.I.126) is inconsistent with and violates the provisions of article 42 and 45(e) of the 1992 Constitution to the extent that it excludes the existing Voter Identification Card as a mode of identification to be registered in the register of voters.

By Relief 5 he seeks;

An order directed at the 1st Defendant to include under Regulation 1(3) of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I.126), the existing voter Identification Card issued by the 1st Defendant as evidence of Identification.

In support of its contention, counsel for the 1st Plaintiff made a number of submissions.

First, counsel submitted that the non-inclusion of the current voter identification card is a violation of the right to vote as enshrined in article 42 of the Constitution. Counsel argued that embedded in the right to vote is a correlative right of every Ghanaian of eighteen years of age and above and of sound mind to register as a voter. Counsel relied on **Abu Ramadan and Another v. The Electoral Commission and Another [2013-2014] 2 SCGLR 1654 (Abu Ramadan (No1)**; where Wood C.J stated at page 1670 as follows:

"If the right to vote is important in participatory democracy, the right to register as even more fundamental and critical. It is the golden key that opens the door to exercising the right to vote."

Counsel also cited **Abu Ramadan and Another v. Electoral Commission and Another [2015-16] 1 SCGLR 1(Abu Ramadan (No2); Tehn-Addy v. Electoral**

Commission [1996-9] SCGLR 589; and **Apaloo v. Electoral Commission [2001-2002] SCGLR 1** in support of this submission.

Second, counsel for the 1st Plaintiff submitted that previous Regulations such as the Public Elections (Regulations of Voters) Regulations, 2012 (C.I. 72) and the Public Elections (Registration of Voters) Regulations, 2016 (C.I. 91) had included the existing voter identification card as one of the documents for the identification of a person who applies for registration as a voter.

Counsel for the 2nd Plaintiff submitted that once a person has been registered as a voter and holds a voter identification card, the 2nd Defendant has no constitutional right to introduce a new regulation which does not include the current voter identification card as one of the documents that may be used in the identification of a person who applies to be registered as a voter.

Not surprisingly, Counsels for the 1st and 2nd Defendants disagreed with Counsels for the 1st and 2nd Plaintiffs.

Counsel for the 1st Defendant submitted that non-inclusion of the current voter identification card as one of the documents for the identification of a person who applies for registration as a voter is not in violation of the right to vote as enshrined in article 42 of the Constitution. Counsel argued that in determining which documents would be used in identifying applicants, the 2nd Defendant must be guided by article 42 and the need to establish a credible and reliable register and structures, systems and processes that would guard, protect and preserve the sanctity and credibility of the right to vote. Counsel relied on **Abu Ramadan (No2)** supra, for this submission.

Counsel for the 1st Defendant also argued that the Electoral Commission is an independent constitutional body and that the power of the Courts to review its decisions is circumscribed and limited to clear cases of unconstitutionality or illegality. Counsel submitted that non-inclusion of the current voter identification card as an identification document is not patently unconstitutional or illegal, but the exercise of a discretion vested in the 2nd Defendant. Counsel therefore submitted that this exercise of discretion

is not in violation of article 296 of the Constitution and should not be overturned by this Court. Counsel relied on **Abu Ramadan (No2)**, supra for his submission.

Lastly, counsel for the 1st Defendant submitted that the onus of proving unreasonableness, capriciousness or arbitrariness rests only on the Plaintiffs, and not on the 2nd Defendant.

Counsel for the 2nd Defendant, the Electoral Commission, contended that the 2nd Defendant had legitimate reasons for not including the current voter identification card as a document to be used for the identification of a person who applies for registration as a voter. Counsel submitted that the processes that resulted in the issuance of the current voter identification card were fundamentally flawed and in violation of the right to vote as enshrined in article 42 of the Constitution.

We now proceed to evaluate the submissions of counsel and make a determination on the constitutionality or otherwise of the non-inclusion of the current voter identification card as a document for the identification of a person who applies for registration as a voter.

We will do this under two subheadings, which are:

i. the non-inclusion of the current voter identification card and the right to vote, and
ii. the non-inclusion of the current voter identification card and the exercise of discretionary power.

3.2 Non-Inclusion of the Current Voter Identification Card and the Right to Vote

Article 42 of the Constitution provides that;

"Every citizen of Ghana of eighteen years and above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."

Therefore, persons with the right to vote and entitled to be registered must be;

i. citizens of Ghana,
ii. eighteen years of age or above, and
iii. of sound mind.

It is clear that to be registered as a voter, an applicant must provide evidence of his identity, i.e. that he or she is who he or she claims to be. The applicant must also provide evidence that he or she is a citizen of Ghana. Thirdly, an applicant must provide evidence that he or she is eighteen years or above. Lastly, an applicant must not be obviously of unsound mind.

In **Abu Ramadan (No 1)**, supra, at page 1673, this Court emphasized that "these criteria must be jealously guarded and protected if we must succeed in protecting the constitutionally-entrenched right to vote".

In seeking to actualize article 42, C.I 126 provides that;

"1. The Public Elections (Registration of Voters) Regulations, 2016 (C.I. (91) is amended in regulation 1

(a) by the substitution for subregulation (3), of

"(3) A person who applies for registration as a voter shall provide as evidence of identification one of the following:

(d) a passport;
(e) a national identification card issued by the National Identification Authority; or

(f) one voter registration identification guarantee form as set out in Form One of the Schedule that has been completed and signed by the two registered voters."; and

(b) by the substitution for subregulation (4), of

"(4) Despite paragraph (c) of subregulation (3), a registered voter shall not guarantee the identity for more than ten persons.""

This Court has held that in actualizing and giving effect to article 42, the 2nd Defendant is, of necessity, called upon to make certain vital decisions and choices on how to guarantee the right of all Ghanaian citizens of eighteen years of age and above to vote whilst keeping out those not qualified to vote.

In **Abu Ramadan (No 1)** supra, the Court speaking through Wood C.J. stated the position as follows at page 1671;

"A meaningful actualization of article 42 rights requires, inter alia, that the 2nd Defendant Electoral Commission establishes credible and reliable structures, systems, processes and procedures for translating the constitutionally-guaranteed rights into reality. These mechanisms, structures, systems, processes and procedures guard and protect and preserve the sanctity and credibility of the rights guaranteed thereunder. A perfect electoral system is obviously utopian; hence the notion that the structure should on balance, not undermine, detract from, dilute nor whittle down the right to qualify to be registered, the first crucial step that would enable that citizen to vote."

Chief Justice Wood continued at pages 1672 to 1673;

"Voter registration is crucial to the success of the entire electoral process for it establishes the eligibility of citizens to the franchise. It is the gateway to the right to vote - the open door to participation in the governance process. Safeguarding the entire registration process, which process includes the qualification criteria, is therefore key to securing the legitimacy of the entire electoral process and by logical reasoning the

sovereignty of the state. The registration process must therefore be protected from under-age persons, non-citizens and voter-fraudsters alike."

In choosing the three modes of identification, this Court believes that C.I 126 is seeking the most effective way of actualizing article 42, ensuring that those with the right to vote are able to register whilst keeping out those without the right to vote and who are not entitled to register.

Additionally, there is evidence before us that there are serious questions about the legitimacy of the processes which led to the issuing of the current voter identification cards.

First of all, the Public Elections (Registration of Voters) Regulations, 1995 (C.I.12) did not require that any identification document be provided by a person who applies for registration as a voter. Subsequent Constitutional Instruments, the Public Elections (Registration of Voters) Regulations, 2012 (C.I.72) and the Public Elections (Registration of Voters) Regulations, 2016 (C.I.91), have sought to correct this anomaly.

Regulation 1(5) of C.I.72 provided that;

"A person who applies for registration as a voter shall provide as evidence of identification one of the following.

(a) a passport;

(b) A driver's licence;

(c) National Identification card;

(d) A National Health Insurance Card;

(e) An existing voter identification card; or

(f) One voter registration identification guarantee form as set out in Form One of Schedule that has been completed and signed by two registered voters.

Similarly, regulation 1(3) of C.I.91 provided that;

"A person who applies for registration as a voter shall provide as evidence of identification one of the following;

(a) a passport;

(b) a driver's licence;

(c) a national identification card;

(d) an existing voter identification card; or

(e) One voter registration identification guarantee form as set out in form completed and signed by two registered voters."

However, there is evidence before us that the registration exercises undertaken under the Regulations of C.I. 72 and C.I. 91 did not comply with the requirements imposed by these Regulations. It is noted that the Registration Officials Manual used by the 2nd Defendant in the registration exercise in 2012 contained this startling statement at page 16: "Presenting a proof is however not mandatory, even though it will help speed up the process."

Therefore, though C.I.72 had provided that a person who applies for registration must provide an identification document or guarantor form, the registration officials were guided by the instruction that proof of eligibility was not mandatory. This had the effect of subverting the right to vote as enshrined article 42 of the Constitution.

These anomalies in the 1995 and 2012 registration exercises were carried through into the 2016 registration exercise, because both C.I.72 and C.I.91 provided for the use of the existing voter identification card as a document for the identification of a person who applies for registration as a voter. It is the resultant situation which led to the **Abu Ramadan** series of cases. The issue in controversy in these cases was the constitutionality of the use of National Health Insurance (NHI) card as evidence of

identification of a person who applies for registration as a voter. In **Abu Ramadan (No1)** supra, this court held that upon a true and proper interpretation of the right to vote as enshrined in article 42, the use of the NHI card as an identification document by Regulation 1(3)(d) of C.I. 72 was inconsistent with and in contravention of article 42. Additionally, the court granted an order of perpetual injunction restraining the Electoral Commission from using the NHI card for the identification of persons who apply for registration as voters. The reason for the decision of the Court was that the NHI card was based on residence and does not provide evidence of citizenship, a fundamental requirement of article 42.

After the Plaintiffs in **Abu Ramadan (No1)** had failed to get the Electoral Commission to compile a new register of voters or clean up the existing register by removing the names of persons who had registered with the NHI card, they instituted another action, **Abu Ramadan (No2),** seeking compliance with the decision of the court in **Abu Ramadan (No1)**. **Abu Ramadan (No2)** was therefore about the production of "a reasonably accurate or credible" register.

This Court held at page 43, "that the current register of voters which contains names of persons who have not established qualification to be registered is not reasonably accurate or credible". It further held "that the current register of voters which contains the names of persons who are deceased is not reasonably accurate or credible".

It therefore ordered that;

"(a) that the Electoral Commission takes steps immediately to delete or as popularly known "clean" the current register of voters to comply with the provisions of the Constitution and applicable laws of Ghana".

The Electoral Commission did not comply with the orders of the Court. This necessitated the plaintiffs to bring a post-judgment application in this Court for clarification and further directions in respect of the orders given by the Court. In the course of the hearing of the application in **Abu Ramadan and Nimako (No.3) v Electoral Commission and Attorney General(No.3) [2015-2016] 1 SCGLR 77** (**Abu**

Ramadan (No.3), this Court by an interim order, directed the Electoral Commission to provide in writing to the court the full list of persons who had utilised the NHI card as a means of identification to register and also to submit in writing to the court the modalities it intended to apply to ensure full compliance with the court's consequential orders made in **Abu Ramadan (No.2)**. The Electoral Commission submitted to the court the names of 56,739 as the list of persons on the register of voters who had used the NHI card as a document of identification. The plaintiffs/applicants in **Abu Ramadan (No.3)** challenged and raised objections to the accuracy and credibility of the list filed by Electoral Commission as the total number of persons who had used the NHI card. This Court held (holding 5) as follows:

"(5) After due consideration of the objections by the applicants tendered in the list of persons being NHI registrants on the electoral roll submitted by the first defendant Electoral Commission, in compliance with the court's order, the Supreme Court would hold that it was precluded in the instant post-judgment application for clarification from veering into issues that were not immediately covered by the application…

Per curiam: We are of the opinion that an inquiry into the authenticity and credibility of the list submitted might result in the modification or alteration of the substance of the judgment**."**

All these events demonstrate that the Electoral Commission could not or was disabled from conducting a thorough cleaning of the voters register in 2016. Overall, there are serious questions and doubts about the legitimacy of the processes which led to the issuing of the current voter identification cards. In recognition of this fact, we are satisfied that the 2nd Defendant, in deciding not to include the current voter identification card as a document to be used in identifying applicants for voter registration, was guided by the need to establish a credible and reliable voters register that would guard, protect and preserve the sanctity and credibility of the right to vote.

We therefore hold that the non-inclusion of the current voter identification card as one of the documents to be used for the identification of a person who applies for

registration as a voter is not in violation of the right to vote as enshrined in article 42 of the Constitution.

3.3 Non-Inclusion of the Current Voter Identification Card and Discretionary Power

The 1st Plaintiff contends that the non-inclusion of the current voter identification card as a basic document for the identification of a person who applies for registration as a voter by C.I. 126 and the 2nd Defendant Electoral Commission is unreasonable, arbitrary and capricious and is in violation of article 296 of the Constitution.

Counsel argued that the non-inclusion of the voter identification card in C.I. 126 is unreasonable, arbitrary and capricious and in violation of article 296 of the Constitution. Counsel submitted that even though the 2nd Defendant is entrusted by the Constitution with the power to make Regulations for the conduct of public elections, it must act in accordance with the Constitution. Counsel further submitted that the onus of proving the reasonableness and fairness of the non-inclusion of the voter identification card as a basic document for the identification of a person who applies for registration as voter is on the 2nd Defendant.

Lastly, counsel for the 1st Plaintiff submitted that previous Regulations such as the Public Elections (Regulations of Voters) Regulations, 2012 (C.I. 72) and the Public Elections (Registration of Voters) Regulations, 2016 (C.I. 91) had included the existing voter identification card as one of the documents for the identification of a person who applies for registration as a voter. Counsel contended that the non-inclusion of the current voter identification card would result in the disenfranchisement of many eligible voters.

Counsel for the 2nd Plaintiff submitted that once a person has been registered as a voter and holds a voter identification card, the 2nd Defendant has no constitutional right to introduce a new regulation which does not include the current voter identification card

as one of the documents that may be used in the identification of a person who applies for registration as a voter.

Counsel for the 2nd Plaintiff also submitted that once a person has been registered as a voter and issued with a voter identification card, the non-inclusion of the card for the identification of a person who applies for registration "for the revision of the register is unconstitutional, illegal, arbitrary and unreasonable."

Article 296 of the Constitution provides that:

"Where in this Constitution or in any other law discretionary power is vested in any person or authority;

(a) that discretionary power shall be deemed to imply a duty to be fair and candid;

(b) the exercise of the discretionary power shall not be arbitrary, capricious and biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and

(c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."

Attention is also drawn to article 46 of the Constitution, which provides for the independence and autonomy of the 2nd Defendant Electoral Commission as follows;

"Except as provided in this Constitution or in any law not inconsistent with this Constitution, in the performance of its functions, the Electoral Commission shall not be subject to the direction or control of any person or authority."

The issue under consideration, the circumstances in which the exercise of discretion by the 2nd Defendant Electoral Commission may be declared unconstitutional by this Court, is not novel and has been dealt with in a number of cases including **Ransford France**

(No 3) v. Electoral Commission & Attorney General [2012] 1 SCGLR 705; Abu Ramadan (No 1), supra; and Abu Ramadan(No2) supra.

This Court has consistently held that it would be loath to declare the decisions and actions of the 2nd Defendant Electoral Commission unconstitutional and would only do so in clear cases of patent unconstitutionality or illegality. This Court would be even more reluctant where the decision and actions of the repository of the power take the form of subsidiary legislation, such as C.I. 126.

First, in **Abu Ramadan (No2)** supra, this Court held that the burden of establishing unreasonableness, arbitrariness or capriciousness is on the Plaintiffs. Benin JSC stated the position thus at page 50;

"With these regulations in place, the Plaintiffs assume the initial burden of convincing the court that the 1st Defendant Electoral Commission has taken any step in the process of cleaning up the register which is not governed by the repealed C.I. 72 but now by C.I. 92.

The Plaintiffs also have to satisfy this Court that the 1st Defendant has abused the discretionary power vested in it by article 296 of the Constitution 1992 by taking steps which are arbitrary, capricious or unwarranted by the law of regulations."

This Court has also held that where a number of choices are open to 2nd Defendant Electoral Commission, the decision as to which option(s) to choose is one for the 2nd Defendant, and this will not be interfered with by this Court unless it is patently unconstitutional or unlawful. In **Abu Ramadan (No2)**, supra, this court stated per Gbadegbe JSC at page 39 as follows;

"…where the Constitution intended the exercise of any of the functions conferred on the Electoral Commission to be subject to any other person or law, it is so provided. Accordingly, where no such provisions have been specifically made, the effect is that the Constitution intended the Electoral Commission to exercise its discretion without the control or direction of any person or authority. This Court being the ultimate judicial

authority in the country must endeavor to respect the boundaries of the jurisdiction conferred on it in order to give effect to the supremacy of the Constitution."

Benin JSC, stated the law as follows at page 51;

"…. the court has no power to compel or even direct the first defendant as to how to exercise its constitutional mandate to produce a credible register; it is the end that justifies the means. I must emphasize that even if there is provision in the law and/or regulations for validation, the Court cannot compel the first defendant to follow that method unless it is the only mode that is sanctioned by the law or regulations. If the law provides for alternative ways of performing the task, the discretion is vested in the actor in deciding within the limits imposed by article 296 of the Constitution as to which one of them would best suit the task on hand…. As long as the process it has chosen to clean up the register is authorized by the law or regulations, they cannot be faulted, even if it is considered that a more efficient mode exists."

The 1st and 2nd Plaintiffs have failed to discharge the burden of establishing unreasonableness, arbitrariness or capriciousness. In addition to a passport or national identification card issued by the National Identification Authority, C.I. 126 provides for the guarantor system as a mode of identification. Under the guarantor system an applicant for registration may be identified by a voter identification form signed by two registered voters. Furthermore, the evidence before this court provided by the National Identification Authority is that, as at 2nd June 2020, the national identity card had been issued to 10,026,276 citizens of Ghana of eighteen years of age and above. The Government Statistician also provided evidence to the court that from the projections of his office the total population of Ghananians as at June 2020 is 30,201,691. Of this total number, the population of Ghanaians of eighteen years and above is projected as 16,650,476. These pieces of evidence were not contradicted or challenged by the 1st and 2nd Plaintiffs and are of decisive effect in the determination of the matters before us.

We have also demonstrated in section 3.2 of this judgment that there are serious legitimate questions about the utility of the current voter identification card as a means of identification of persons qualified to be registered as voters.

Thus, the 2nd Defendant's decision not to include the current voter identification card as a document to be used for the identification of an applicant for registration as a voter by C.I.126 is clearly guided by the need to ensure a credible voters register and we are satisfied that this decision is fair and reasonable.

The 1st and 2nd Plaintiffs have therefore failed to satisfy this Court that the non-inclusion of the current voter identification card as a document for the identification of a person who applies for registration is, in all the circumstances of this case, unreasonable, arbitrary or capricious. We therefore hold that the non-inclusion by C.I. 126 of the current voter identification card as basic document for the identification of a person who applies for registration as a voter is not inconsistent with article 296 of the Constitution or any other Law.

3.4 The Constitutionality or Otherwise of the Non-Inclusion of Birth Certificate

The 2nd Plaintiff contends that the non-inclusion by C.I.126 of birth certificate as one of the documents to be used for identification of a person who applies for registration as a voter is in contravention of and inconsistent with the Constitution.

Reliefs iii and vi indorsed on the 2nd Defendant's Writ are for;

iii. A declaration that Regulation 1 (3) of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I. 126) is inconsistent with and violates the provisions of article 42 and 45 (e) of the 1992 Constitution to the extent that it excludes Birth Certificates issued to Ghanaians as a mode of identification and/or establishment of qualification to be registered in the register of voters.

vi. An order directed at 1st Defendant to include under Regulation 1 (3) of the Public Elections (Registration of Voters) (Amendment) Regulations, 2020 (C.I. 126) birth certificates as evidence of identification.

We find no merit whatsoever in the 2nd Defendant's contention. It flies in the face of article 42 of the Constitution and the decisions of this court in **Abu Ramadan (No1), supra** and **Abu Ramadan (No2), supra**. A birth certificate is not a form of identification. It does not establish the identity of the bearer. Nor does it link the holder with the information on the certificate. Quite obviously, it provides no evidence of citizenship. It therefore does not satisfy the requirements of the article 42 of the Constitution. In fact, as a form of identification, it is worse than the NHI card which was held to be unconstitutional as evidence of identification of a person who applies for registration as a voter in **Abu Ramadan (No1)**, supra and **Abu Ramadan (No.2)**, supra.

In **Abu Ramadan (No1)**, supra this Court per Wood C.J at page 1674, held in respect to the NHI card as follows;

"…the term 'evidence for identification' as used in regulation 1(3) is referable, not in the strict and narrow sense as advocated by the defendants, to a person's mere 'identity' by name and face only, but the more important constitutional criteria that qualify a person for registration as provided under the primary source, i.e. article 42 of the Constitution and repeated under regulation of C.I. 72."

Chief Justice Wood continued at page 1675;

"… among the lot that does not provide undoubted information on the holder's nationality, …It identifies the holder by the name and face alright, but makes no disclosure about the holder's identification… and thus fails to meet the citizenship restriction test."

In **Apaloo v. Electoral Commission [2000-2001] SCGLR 1**, Atuguba JSC underscored the importance of the identification of a voter in the following words;

"The ascertainment of the identity of a prospective voter is part of the conduct of public elections and as the Constitution places that duty on the Electoral Commission, it can only do so by itself and its proper agents… to surrender the judgment of the presiding officer as to the identity of a voter to the candidate's polling agents, is in effect, to delegate that function to those agents, contrary to articles 45 (c) and 46 of the Constitution."

It is little wonder that a birth certificate has never been included as one of the documents to be used as evidence of identification by a person who applies to be registered as a voter. We have quoted the relevant provisions of C.I. 72 and C.I. 91 in this judgment. None of these specify a birth certificate as an identification document. Its introduction would be a retrograde step.

We, therefore, hold that non-inclusion of birth certificate as a document for the identification of a person who applies for registration as a voter by C.I. 126 is not inconsistent with or in contravention of the Constitution, or any other law.

4.0 Conclusion

It is for the above reasons that we substantially dismissed the claims of the 1st and 2nd Plaintiffs and upheld the constitutionality of the compilation of a new register of voters and of the Public Elections (Registration of Voters) (Amendments) Regulations, 2020 (C.I. 126) and the latter's non-inclusion of the current Voter Identification card and birth certificate as documents for the identification of persons who apply for registration as voters.

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ANIN YEBOAH
(CHIEF JUSTICE)

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