IN THE HIGH COURT OF JUSTICE, LAW COURT COMPLEX, HUMAN RIGHTS DIVISION COURT 2, ACCRA GHANA HELD ON MONDAY, THE 18TH DAY OF DECEMBER 2017 BEFORE HIS LORDSHIP ANTHONY K. YEBOAH, J

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SUIT NO. HR/0003/2017

1. **KOFI A. BOATENG, PHD**
2. **AGYENIM BOATENG, SJD** - **APPLICANTS**
3. **NELLIE KEMEVOR**
4. **OBED DANQUAH**
5. **CHRISTIAN SILLIM**

VRS.

1. **THE ELECTORAL COMMISSION** - **RESPONDENTS**
2. **THE ATTORNEY-GENERAL**

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PARTIES : **1ST & 3RD APPLICANTS PRESENT**
1ST APPLICANT REPRESENTS ALL THE OTHER APPLICANTS
1ST RESPONDENT REPRESENTED BY WATSON TISOR
2ND RESPONDENT ABSENT

COUNSELS: **SAMSON LARDY ANYENINI, ESQ. WITH ROSELINE KALEDZI (MS.) FOR APPLICANTS PRESENT**
BAFFOUR GYAWU BONSU AHYIA, ESQ. FOR THADDEUS SORY, ESQ. FOR 1ST RESPONDENT PRESENT
ATTORNEY-GENERAL ABSENT

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JUDGMENT

This is the final judgment in the application for the enforcement of the fundamental human right to be registered and to vote abroad, as Ghanaian citizens ordinarily resident abroad, in national elections and referenda, that are conducted by the Electoral Commission of Ghana.

Parties

The Applicants are citizens of the Republic of Ghana by birth, dual citizenship or both, and they are all ordinarily resident in the USA. They have exhibited to their joint affidavit in support of their application photocopies of their Dual Citizenship ID cards and extracts from their passports in proof of their Ghanaian citizenship status. And, as such citizens, they have brought the present application for the enforcement of their right to diaspora voting.

The 1st Respondent, the Electoral Commission is the constitutional body charged, among others, with the responsibility of compiling and revising the register of voters and conducting and supervising public elections and referenda. The 2nd Respondent is the Attorney-General of the Republic of Ghana, the principal legal adviser to the Government.

Reliefs

As reliefs, the Applicants have brought the present application for the enforcement of their fundamental human right pursuant to articles 17(2), 42, 33(5) of the Ghana Constitution, 1992, the provisions of the Representation of People (Amendment) Act, 2006, Act 699, article 13 of the African Charter on Human and People's Rights, article 21 of the Universal Declaration of Human Rights and Protocol 1 and article 3 of the European Convention on Human rights. They seek the following numerous reliefs from the court to enable them and others similarly circumstanced to meaningfully participate in the governance and political life of their country, Ghana:

"A Declaration that Applicants have fundamental human rights… :

a) to be registered as voter[s]" while resident abroad and being outside the jurisdiction of the Republic of Ghana, and doing so from/at their places of residence abroad or designated centers close to their places of residence abroad or from/at the Ghana Mission/Embassy within their jurisdiction abroad;

b) to be issued voters Identity Cards "to enable" them "to vote in public elections and referenda" (to wit Presidential elections) while resident abroad and being outside the jurisdiction of the Republic of Ghana at the time of such elections, and doing so from/at their places of residence abroad or from/at the Ghana Mission/Embassy within their jurisdiction abroad;

c) to vote in public elections and referenda" particularly Presidential elections while resident abroad and being outside the jurisdiction of the Republic of Ghana at the time of such elections, and doing so from/at their places of residence abroad or designated centers close to their places of residence abroad or from/at the Ghana Mission/Embassy within their jurisdiction abroad;

d) A Declaration that the non-compliance of 1st Respondent in particular to operationalize the Act 699 since same became law on the 24th day of February 2006 is a breach of Applicants' fundamental rights under said various laws and legal instruments;

e) A Declaration that 2nd Respondent's failure, neglect or refusal to uphold/ensure full compliance/ operationalization of the Act 699 since same became law on the 24th day of February 2006 is a breach of Applicants' fundamental rights under said various laws and legal instruments;

f) A Declaration that each of the Applicants' "right to vote and entitle[ment] to be registered as a voter for the purposes of public elections and referenda" in light of the Act 699 and said various laws and legal instruments is not subject to any condition precedent aside the article 42 citizenship, age and sanity of mind criteria;

g) A Declaration that it is discriminatory for Respondents particularly 1st Respondent to continue to register abroad and ensure that a category of citizens studying abroad or working in Ghana's Missions/Embassies abroad vote in public elections and referenda while living abroad to the exclusion of Applicants.

h) An Order of mandamus directed at Respondent particularly 1st Respondent to forthwith, uphold/ensure full compliance/operationalization of the Act 699 by taking steps to register Applicants for the purposes of voting in the 2020 presidential elections and subsequent ones:

i) Any further or other orders that the Court may deem fit."

Relevant Law

By article 42 of the Ghana Constitution, 1992, "[e]very citizen of Ghana of eighteen years of age or 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." And, by the provisions of the Representation of People (Amendment) Act, 2006, Act 699, citizens of Ghana who are ordinarily resident abroad are entitled to vote in elections and referenda that are conducted in Ghana whilst they reside abroad. For the purpose, the Representation of People Law, 1992, PNDCL 284 as amended by Act 699 provides in part as follows:

> "8. (1) A person who is a citizen of Ghana resident outside the Republic, is entitled to be registered as a voter, if the person satisfies the requirements for registration prescribed by law, other than those relating to residence in a polling division.
>
> (2) The Commission may appoint the Head of a Ghana Mission, or Embassy abroad, or any other person, or institution designated in writing by the Commission, as a registration officer to register a person, to be a voter for an election....
>
> Modalities for the implementation of the Act.
>
> 2. The Electoral Commission shall, by Constitutional Instrument, prescribe the modalities for the implementation of this Act."

That the right to vote is a fundamental human right or, as the Electoral Commission contends, rather a constitutional right under the Constitution, 1992 was firmly established in the Supreme Court cases of *Tehn Addy v Electoral Commissioner* [1996-97] SCGLR 589 and *Ahumah Ocansey v. Electoral Commission; Center for Human Rights and Civil Liberties (CHURCIL) v. Attorney-General* [2010] SCGLR575. Thus, the issue as to whether the Applicants and other Ghanaians similarly circumstanced are entitled, as a fundamental human right, to be registered and to vote in elections and referenda conducted in Ghana, is beyond doubt as a matter of law.

Evidence

All the same, and as the affidavit evidence clearly shows, the Electoral Commission of Ghana has not made it possible since 2006 for the citizens of Ghana in the circumstances of the Applicants to be registered and to vote during such public elections. In fact, in paragraphs 12, 13 and 14 of the Electoral Commission's affidavit in opposition, the Commission concedes and deposes in part as follows:

> "12. … [T]he laws of the Republic of Ghana guarantee the right of its citizens of voting age to vote and be voted for in all elections organized and conducted by the 1st Respondent… 13. [T]he Representation of People (Amendment) Act, 2006, (Act 699) was enacted to give effect to [the] right [of citizens abroad] to vote… 14. [T]he process of implementing the Representation of the People (Amendment) Act, must be executed cautiously and in stages for which reason the 1st Respondent has in its plan the intention of putting the aforesaid Act to practical effect."

Obviously and by their own showing, notwithstanding the fact that the law has vested Ghanaian citizens resident abroad with the right to be registered and to vote whilst they reside abroad, the Electoral Commission, through default or omission to "prescribe the modalities for the implementation of […] Act [699]", has denied them the opportunity to enjoy this vested right for over a decade.

As challenges to the implementation of Act 699, the Electoral Commission refers to the 'huge financial costs to the state", the requirement of "careful planning and methodical execution", the placing of "officials in the various and diverse countries in which many Ghanaians find themselves and […] designating a place as a registration centre", the inconvenience to the Ghana embassies if any were to be used as registration or voting centers, the

procurement of visas for the "officials to be present to monitor such registration and subsequent voting", and the 'legal effect of committing an electoral offence in the jurisdictions where the registration and voting are carried out…" These challenges are, according to the Commission, the justification for the inability to bring into existence the modalities for the implementation of Act 699.

And, for over a decade and as regards diaspora voting, it does appear from the available evidence that the Electoral Commission is only good at reciting such challenges and giving assurances as to the Commission's "intention of putting the aforesaid Act to practical effect" and not finding solutions to these challenges. For example, the Electoral Commission's own sub-committee recommended in September 2011 that the Electoral Commission should refer the jurisdictional issue as to how to prosecute electoral offenses committed abroad to the Attorney-General, but there is no evidence or indication that for six years this reference was made. I shall revisit these challenges and their implications later in this judgment.

Suffice it to note, however, that Act 699 came into force on 24th February 2006 and it is to compel the Electoral Commission, as the Applicants put it, to operationalize Act 699 that the Applicants have brought the present application. The fundamental issue then will be what the justification is, if any, for the delay in implementing the provisions of Act 699. And, in the absence of such credible and reasonable justification, the Applicants seek an order of mandamus to compel the Electoral Commission to operationalize the Act to enable the Applicants enjoy their fundamental human right to participate in such elections even as they reside abroad as citizens of Ghana.

To the Electoral Commission's affidavit in opposition to the application filed on 24th March 2017, they exhibited three documents

labelled as 'D', 'E' and 'F'. Two of the documents labelled exhibits E and F do not appear to be official and authentic; they do not bear any official logo, stamp or seal; and they are unsigned and undated. As documents purportedly emanating from the Ghana Public Service, they leave a great deal to be desired. [1] Their authenticity is suspect or, to say the least, unsatisfactory as official documents in official custody purporting to be a record of official act or event required or authorized by law to be kept.

Unlike exhibits E and F, the exhibit labelled D is duly signed and dated and has information on the cover page showing its source as the Office of the Electoral Commission. It is dated September 2011 and it is the report of the Sub-Committee of the Electoral Commission on "ROPAA and Political Parties Act on the Implementation of the Representation of the People (Amendment) Act, (ROPAA)". The terms of reference of the sub-committee was "to make recommendations on how best the ROPAA can be implemented." The sub-committee comprised distinguished persons such as Mr. K. Sarfo Kantanka as the chairman, Mr. E. Aggrey Fynn, Dr. Kwesi Jonah, Alhaji Huudu Yahaya, T. N. Ward Brew, Mr. Esq., MDan Botwe, Mr. Bernard Mornah and Mr. C. Owusu-Parry. The Sub-Committee recommended limiting the implementation of Act 699 to presidential elections.

This report (exhibit D) is comprehensive and reasonably thorough. Besides, coming as it does from the office of the Electoral Commission and considering the fact that three of the members of the sub-committee were staff members of the Electoral Commission, it cannot be that the Commission was unaware of this report. All the same, exhibits E and F do not advance the discourse that was initiated in exhibit D; exhibits E and F merely rehash the challenges that exhibit D had long resolved.

Curiously, unlike exhibit D, the exhibits E and F have an unnamed person purportedly advising the Electoral Commission in the following words with respect to the elections of 2016: "Finally I am of the view that, the implementation should be shelved until after the 2016." This fictitious person did not disclose his or her name and did not appear to have worked with any other persons as a team. The picture that exhibits E and F paint of the Electoral Commission is one of a body that self-indulgently relies on recitation of challenges as excuses for not performing its constitutional function [2] as assigned under Act 699 rather than creatively and self-assuredly finding the appropriate solutions to the challenges.

Issues

At the case management stage of the proceedings, the parties agreed the following issues. Almost all of the issues are collateral to the fundamental issue of rational justification. I shall accordingly and briefly dispose of these collateral issues seriatim before moving on to the fundamental issue (at page 22 infra):

- Have the Applicants properly invoked the jurisdiction of this court? In terms of standing to sue, as citizens of Ghana, the Applicants have the legal capacity to bring the application. *Federation of Youth Associations of Ghana (FEDYAG) v. Public Universities of Ghana & Others* [2010] SCGLR 547 [3].

- Is the right to vote a human right or a constitutional right? The learned counsel for the 1st Respondent challenges the jurisdiction of the Human Rights division of the High Court to entertain an application brought under articles 17, 42 and 33 of the Ghana Constitution, 1992, because the right to vote is not a fundamental human right but a

constitutional. The following three answers to this submission will suffice:

First, there is only one High Court in Ghana with a number of fora [4]. A forum of the High Court does not lose its jurisdiction as High Court by becoming a division with specialized responsibility for purposes of efficiency derivative from division of labour. [5] All courts in Ghana have jurisdiction and power to enforce both constitutional and fundamental human rights. *British Airways & Another v Attorney-General* [1997-98] 1 GLR 55.

Second, the fundamental human right to vote and stand for elections is protected in numerous instruments [6] such as Article 21 of UDHR, Article 25 of ICCPR, the General Comment 25 of the Human Rights Committee, Article 7 of CEDAW, Article 3 of the First Protocol ECHR, Article 23 of ACHR and Article 13 ACHPR. The fundamental human right to vote does not become any less a fundamental human right by reason only of the fact that it was also provided for under article 42 of the Ghana Constitution, 1992 and not under Chapter 5 of the self-same Constitution. In any case, under Ghana's constitutionalism, a constitutional right under article 42, for example, appears to be more secure and definite than an unenumerated fundamental human right under article 33(5) of the Constitution, 1992 in view of article 75 and the principle of dualism.

Third, the Supreme Court of Ghana has long put paid to the issue as to how to characterize the right to vote. I need only quote a few dicta as answer to the submission:

- *Ahumah Ocansey v Electoral Commission; Center for Human Rights and Civil Liberties (CHURCIL) v Attorney-General* [2010] SCGLR575 per Wood (Mrs.), CJ:

"Admittedly, article 42 does not fall under either Chapter Five or Six of the Constitution, which deals with Fundamental Human Rights and Freedoms and The Directive Principles of State Policy, respectively. It falls under Chapter 6. *But there is no doubt, that voting rights constitute a fundamental right of such significance or importance it does qualify as a fundamental human right."* [i.s.]

- *Abu Ramadan & Evans Nimako Vrs. The Electoral Commission & The Attorney General*; Writ. No. J1/14/2016 of 5th May 2016 per Gbadegbe JSC:

"The concern, which fairly emerges from the allegation of the violation of the *fundamental* right provided under article 42, is that it erodes its availability to only Ghanaians with the requisite qualifications. Of this fundamental right, Wood (Mrs.) CJ observed in the Abu Ramadan case (supra) as follows:

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

…. The pivotal nature of the right to vote has been pronounced upon by this court in a collection of cases including *Tehn Addy v Electoral Commissioner* [1996-97] SCGLR 589; *Ahumah Ocansey v Electoral Commission; Center for Human Rights and Civil Liberties (CHURCIL) v Attorney-General* [2010] SCGLR575."

- *Tehn Addy v Electoral Commissioner* [1996-97] SCGLR 589 at 52-53 per Acquah JSC

"Whatever be the philosophical thought on the right to vote, article 42 of the Constitution, 1992 of Ghana makes the right to vote, a constitutional right conferred on every Ghanaian citizen of eighteen years and above. The article reads:

"42. Every citizen of Ghana of eighteen years of age or 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."

As a *constitutional* right therefore, no qualified citizen can be denied of it, since the Constitution, 1992 is the supreme law of the land."

- Learned counsel for the Electoral Commission submits again that " the allegation on the basis of which a party may legitimately invoke the jurisdiction of this court as the Human Rights Division of the Court must arise in relation to an allegation that the violation relates to 'a *provision* of this Constitution on the fundamental human rights and freedoms' that is to say Chapter five of the Constitution…[paragraph 7.6 of Submissions]. … The right to vote is recognised as 'inherent in a democracy and intended to secure the freedom and dignity of man' but the framers of our constitution have decided to exclude it as a fundamental human right and provide for it as a political right. [paragraph 7.11 of submissions]." This submission is flawed, with the greatest deference to learned counsel for the Electoral Commission. [i. s.]

The argument relative to "'a *provision* of this Constitution on the fundamental human rights and

freedoms', that is to say, Chapter five of the Constitution" can only be sustained, if one defines or understands '*provision*' to exclude article 33(5) of the Constitution which provides for unenumerated fundamental human rights. But, article 33(5) is unquestionably a part of chapter 5 of the Constitution. It cannot, therefore, be properly contended that other fundamental human rights which are not expressly provided for in chapter 5 are for that reason excluded by the framers of the Constitution. If that were the case, article 33(5) would not provide that: "33(5) The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter *shall not be regarded as excluding others not specifically mentioned* which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man." [i. s.] And, plausibly, the unenumerated fundamental human rights may be found (1) outside chapter 5 of the Constitution but within the Constitution, or (2) completely outside the Constitution, but present in other democracies and some international human rights instruments.

It seems incongruous to accept a fundamental human right that exists completely outside the Constitution via article 33(5) by reason of its being "inherent in a democracy and intended to secure the freedom and dignity of man" and then to deny inclusion as a fundamental human right to a right that is expressly proved for in other parts of the same constitution such as article 42. Rhetorically speaking, why would the framers of the constitution welcome an extra-constitutional human right onto the Ghanaian human rights landscape via article 33(5) while denying entry

onto the same landscape to an intra-constitutional human right created under article 42 for the reason that the latter was not tagged as a chapter 5 right?

Finally, I do not understand learned counsel to argue that the right to vote being political is any less a fundamental human right for that reason. The right to vote is a political right and a fundamental human right at the same time. This is clearly borne out by Article 25 of International Covenant on Civil and Political Rights:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c)…" [7]

The right to vote albeit a constitutional right under article 42 of the Ghana Constitution, 1992 enjoys a pride of place as part of our constitutional law on fundamental human rights by reason of article 33(5) of the Constitution and *Tehn Addy v Electoral Commissioner* [1996-97] SCGLR 589 and *Ahuma Ocansey v Electoral Commission; Center for Human Rights and Civil Liberties (CHURCIL) v Attorney-General* [2010] SCGLR 575.

- The discontinuance of the first application with liberty to apply cannot in law be a legal bar to the commencement of the present action. *Amoako v. Kwan* [1975] 1 GLR 25;

John Atta Owusu v. Fosuhene (Civil Appeal No. J4/36/2009 of 19th May 2010, unreported.)

- Can mandamus lie to compel the Electoral Commission to perform its functions under Act 699 "in a particular way, form or manner"? Mandamus certainly will lie to compel a constitutional or statutory body to perform its mandate or public duty assigned to it by law and in the "particular way, form or manner" prescribed by the law. Where, as in the present case, Act 699 provides that the Electoral Commission *shall* make regulations in the form of constitutional instrument setting out the modalities for the registration and voting of Ghanaians resident abroad, a judicial order compelling compliance with this law cannot be said to amount to compelling the Electoral Commission to act "in a particular way, form or manner" other than the "way, form or manner" prescribed by Act 699. I shall re-visit this issue later in the course of this judgement; suffice it to note here that this application in effect, in my candid view, mainly seeks to compel the Electoral Commission to comply with the law without any further delay as any further delay may be tantamount to continuing infringement of their fundamental human rights.

In fact, on this issue of judicial review and the independence of the Electoral Commission, Gbadegbe JSC clearly and unequivocally stated the position of the Supreme Court in the following words in the case of *Abu Ramadan* (supra):

> "This leads to issue (5), which concerns the question whether the court has jurisdiction to make orders compelling the first defendant [that is, the Electoral

Commission] to discharge its functions in a particular way.… By article 46, the first defendant is endowed with independence in the performance of its functions including the initiation, regulation and conduct of elections in the country as follows:

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

In our opinion and as part of our function to declare what the law is, the above words which are unambiguous insulate the Electoral Commission from any external direction and or control in the performance of the functions conferred on it under article 45 in the following words:

"The Electoral Commission shall have the following functions-

(a) to compile the register of voters and revise it at such periods as may be determined by law;
(b) to demarcate the electoral boundaries for both national and local government elections;
(c) to conduct and supervise all public elections and referenda;
(d) to educate the people on the electoral process and its purpose
(e) to undertake programmes for the expansion of the registration of voters; and
(f) to perform such other functions as may be prescribed by law."

…. We think that in the circumstances when a specific complaint is made regarding the performance of any of the functions of the Commission, it is our duty to inquire into it and ask if there is by any provision of

the constitution or any other law which detracts from the presumption of independence that article 46 bestows on it. If there is no such constitutional or statutory provision then what it means is that the matter is entirely within its discretion and not subject to the control of any other authority including the court. As the plaintiffs have not disclosed any vitiating circumstances such as illegality, irregularity, unfairness or failure to satisfy an essential pre-requisite to the making of a decision that may justify our intervention to set any such discretion aside, the decision as to what to do is properly in the domain of the first defendant….

Although the said constitutional provisions have not used the words "judicial review", their cumulative effect is to confer on us the jurisdiction to declare what the law is and to give effect to it as an essential component of the rule of law. The nature of the court's obligation is to measure acts of the executive and legislative bodies to ensure compliance with the provisions of the constitution, but the jurisdiction does not extend beyond the declaration, enforcement of the constitution and where necessary giving directions and orders that may be necessary to give effect to its decision as contained in article 2(2) of the constitution….

However, before we end the consideration of the independent status of the Electoral Commission, we wish to say that *the independent status of the first defendant does not make it immune from action for the purpose of declaring that it has exceeded its authority or acted in a manner that having regard to its unreasonableness, irrationality or*

unfairness cannot be accorded the sanction of legality in view of articles 23 and 296 of the constitution. [i. s.] We do not agree with the contention pressed on us by the first defendant that the 1992 Constitution "forbids any control or direction of the 1st defendant as to how to accomplish its work." Plainly, the said statement is erroneous as article 46 itself recognises that its independence may be derogated from either in the constitution or by any other law including but not limited to the instances referred to in regard to articles 48(1), and 49(1). There is also the point that as a creature of article 43, the Electoral Commission is subject to the constitution; to deny that it is so subject is to misconstrue the nature of the independence bestowed on it in relation to our exclusive jurisdiction, which is critical to effectuating the supremacy of the law….

The correct position is that the courts as constituted under the 1992 constitution may intervene in acts of the first defendant to ensure that it keeps itself within the boundaries of the law and also to give effect to provisions of the constitution. This is a jurisdiction that our courts have always exercised in relation to the first defendant of which the recent decision in the Abu Ramadan case (supra) is an example….

The first defendant's independence is also subject to the High Court's exercise of its supervisory jurisdiction under article 141 of the constitution and actions in which questions may be raised whether in carrying out its functions, it has exceeded the authority conferred on it in specified statutes; in such cases the High Court has the jurisdiction to determine whether it has acted intra vires." [8] [i. s.]

- Learned counsel for the Electoral Commission further argues that the right to vote is a political right and not a fundamental human right and, therefore, the jurisdiction of the court under Order 55 rather than Order 67 of C. I. 47 ought to have been invoked. I have demonstrated, I hope successfully, that the right to vote is at once (1) a constitutional right, (2) a fundamental human right and (3) a political right. I need not over-flog the issue.

  As regards jurisdiction, Order 55 is the procedure for judicial review and Order 67 is the procedure for fundamental human rights adjudication. Order 55 provides for the procedure leading to remedies for administrative injustice; Order 67 also provides for the procedure leading to remedies for breaches of fundamental human rights. Arguably, if all the rights under chapter five of the constitution pass for fundamental human rights as the learned counsel for the Electoral Commission concedes, then the right under article 23 of chapter five of the Constitution is a fundamental human right. It provides that: "Administrative bodies and administrative officials shall act *fairly and reasonably* and *comply with the requirements imposed on them by law* and *persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court* or other tribunal." Thus, where a citizen is aggrieved that the Electoral Commission is not acting fairly and reasonably, that citizen should be able to proceed under article 33(1) of the Constitution and Order 67 of C. I. 47 and obtain remedies via article 33(2) of the Constitution which provides that: "The High Court may, under clause (1) of this article, issue such directions or orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warrant as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the

fundamental human rights and freedoms to the protection of which the person concerned is entitled." In other words, the law right to seek administrative justice has been converted into a fundamental human right under article 23 of chapter 5 of the Constitution and made, for that matter, prosecutable under Order 67 of C. I. 47. The learned counsel's submission is, therefore, unsustainable, with respect. The aggrieved citizen is entitled to proceed in the case of article 23 right under either Order 55 or 67 of C. I. 47.

- Is the Electoral Commission bound by suggestions from the applicants and other stakeholders in the discharge of its constitutional functions? Certainly, not; but the Electoral Commission is certainly not entitled to act arbitrarily or capriciously or unreasonably in view of Articles 23 and 296 of the Ghana Constitution, 1992. In fact, this is not the first time the Electoral Commission has self-indulgently and patronizingly raised this issue. On one such occasion in the Supreme Court per Gbadegbe JSC had this caution for the Commission:

> "While conceding that there is no law that obliges the first defendant [that is, the Electoral Commission], it seems to us that in order to render its work acceptable to Ghanaians, it may engage in consultation and collaboration with citizens and stakeholders that are intended to deepen the participation of the citizenry in the electoral process. Listening to others takes nothing from the Electoral Commission but on the contrary, it has the effect of engendering public confidence in the electoral process and trust in the outcome." *Abu Ramadan & Evans Nimako Vrs. The Electoral Commission & The Attorney-General*; Writ. No. J1/14/2016 of 5th May 2016.

- Is the inability of the Electoral Commission to implement the Act 699 willful? The affidavit evidence on the record before the court does attest to such willfulness on the part of the Electoral Commission. Although, it is not easy to affix such a highly subjective behavioural attribute to such an artificial entity as the Commission, an institution with dynamic or changing membership or composition, but a decade of inaction can only suggest deliberateness, a tag that the Commission cannot escape from.

  Deliberateness is the same as willfulness. There is indisputably deliberateness in the Commission's handling of their obligation under Act 699. The affidavit evidence suggests that the Commission (1) was always aware of its obligation under Act 699 and its perceived challenges, (2) always knew that it had had no solutions to the challenges, (3) was unconcerned about the adverse effect of delay on the human rights of such citizens as the Applicants, (4) did not consider time to be of the essence and (5) always thought that Parliament erred in not taking funds and national interest into account when foisting such an obligation on a constitutionally independent body like the Electoral Commission that thinks that it is not bound to take counsel from any person or entity even where it evidently suffers from epistemic deficiency.

  But, I am of the respectful view that the fundamental question should be whether the inability or failure to perform this statutory and public duty is *rationally justifiable*, given the overall circumstances? The test now is as has been popularized by the renowned South African human rights lawyer Etienne Mureinik which calls forth "a culture in which every exercise of power is expected to

be justified." Arguably, deliberate *non*-exercise of power should also be expected to be justified.

- And, finally, whether the inability of the Electoral Commission to implement Act 699 has resulted in discrimination adversely affecting the Applicants? Obviously, in a setting where military officers, police officers, diplomats, staff of Ghana foreign missions/ embassies, and some selected Ghanaians serving abroad may be allowed to vote abroad unlike the Applicants, the allegation of discrimination ought to be taken seriously. This issue will be considered later in this judgment by taking a close look at the grounds of the allegation.

Analysis

As indicated above, unresolved is the fundamental issue as to the rational justification for the failure, willful or otherwise, of the Electoral Commission to "by Constitutional Instrument, prescribe the modalities for the implementation of this Act." The case for rational justification being a fundamental issue is outlined as follows. First, both sides agree that under the Representation of People Law, 1992, PNDCL 284 as amended by Act 699, the Applicants and other similarly circumstanced Ghanaians are entitled to be registered and to vote abroad when they are ordinarily resident abroad. Second, both sides agree that the Electoral Commission has the obligation to have legislated into existence the modalities for giving effect to the right to be registered and to vote abroad. Finally, both sides agree that for a decade, the constitutional instrument required to be enacted at the instance of the Electoral Commission has not been passed. The inexorable issue will, therefore, be the rational justification for the delay in putting in place the necessary modalities for giving effect to the fundamental human right to be registered and to vote abroad.

This fundamental issue dovetails other sub-issues such as "when does the Act 699 require the Electoral Commission to put the Constitutional Instrument prescribing the modalities for the implementation of this Act before Parliament?" Is the Act silent as to the time for doing so? Or, is the time at large? If the Act is silent, is the Electoral Commission's interpretation or working understanding of the time reasonable? What is the reasoning process of the Electoral Commission? [9] Is the Commission's interpretation arbitrary, capricious, an abuse of discretion, or unlawful? Is the Electoral Commission's delay reasonably justifiable? To address these issues, the court drew the attention of both sides to the Supreme Court case of *Abu Ramadan & Evans Nimako v. The Electoral Commission & The Attorney-General*, Writ No. J1/14/2016 of 5th May 2016 (unreported), particularly to the opinion of Benin, JSC.

In the Abu Ramadan case (supra), His Lordship Benin, JSC delivered himself of an insightful and commendable concurring opinion in which His Lordship laid down an instrumental test that we shall use to resolve this fundamental issue. It is not a new test, but it is the first time that a Justice of the Supreme Court of Ghana has forcefully recommended its application within our jurisdiction. It is the Chevron test with US origin. And, this is how Benin JSC stated his position:

> "The courts do apply the presumption of regularity to the acts of state officials, but being a presumption it does not preclude the court from probing the act to find out if it was performed in accordance with the law; see the case of *Citizens To Preserve Overton Park, Inc vs. Volpe*, 401 US 402 (1971). This presumption has been legislated by section 37(1) of the Evidence Act, 1975 (NRCD 323) which says there is a presumption in favour of official acts that they have been regularly performed. So a party who thinks

otherwise, assumes the burden of displacing that presumption by evidence.

In order to overcome the problems associated with judicial review of executive and administrative actions, the US enacted into law the Federal Administrative Procedure Act and this provides the scope of review. I am aware that this Act is not applicable here, yet a lot of its provisions were the result of court decisions and these decisions, though not binding, are of persuasive influence. But more importantly some of these provisions do find expression in our Constitution, 1992. Section 706 of the Act sets out grounds for a reviewing court to determine the validity of any order or action of the authority, these are:

1. *to compel agency action unlawfully withheld or unreasonably delayed*; and

2. to hold unlawful and set aside agency action, findings, and conclusions found to be---

(a) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*;

(b) *contrary to constitutional right*, power, privilege or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(d) without observance of procedure required by law.

(e) unsupported by substantial evidence….

(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The long and short of all these is that the state institution must act within the confines of the law, and must exercise discretion in accordance with law. For this reason Article 296 of the Constitution, 1992, assumes prominence in the conduct of the affairs of all state actors. It reads:

"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 or biased either by resentment, prejudice or personal dislike and shall be in accordance with the process of law; and
(c) Where the person or authority is not a Justice or other judicial officer, there shall be published by constitutional instrument or statutory instrument, Regulations that are not inconsistent with the provisions of the Constitution or that other law to govern the exercise of the discretionary power."

Clause (b) of Article 296 uses expressions like arbitrary and capricious. These are not terms of art but must bear a legal meaning by which the exercise of discretionary power will be judged. When considered in context of Article 296 a person will be in violation of use of arbitrary discretion if he applies his own discretion in disregard of the law. In this respect it has the same meaning as applied in New Zealand, for as stated by Gallen J. in the case of *RE M* (1992) 1 NZLR 29 at 41: "Something is arbitrary when it is not in accordance with law or which is not in accordance with the principles which the law regards as appropriate for a discretion to be operated within."

And capricious exercise of discretion when used in relation to an individual person relates to individual behavior of impulsiveness and unpredictability. And in reference to corporate bodies it is applicable when they fail to consider rules of evidence or rules of law, *or if they act without principles or reason*." [i.s.]

For the purpose of the present application, the notable principles or norms to extract from the opinion of Benin JSC and assemble as the test for resolving the fundamental issue will be following:

- Is the agency action unlawfully withheld or unreasonably delayed?
- Is the agency action arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?
- Is the agency action contrary to constitutional right?
- Has the agency acted without principles or reason?

These principles or norms will influence our application of step two of the Chevron test.

Basically, the *Chevron* test is as follows: Where the administrative decision, action [10] or interpretation conforms to the prescription of the relevant law, then the reviewing court ought to defer to the administrative decision-maker or body, because that will be what the legislature intends. Where, however, the relevant law is silent or ambiguous, thus requiring interpretation to ascertain the meaning of the statutory provision or the law, then the reviewing court must review the administrative decision, action or interpretation to determine whether the administrative decision, action or interpretation is unreasonable, arbitrary, capricious, abuse of discretion or unlawful.

In step one of the test, we ask and answer the following questions:

Step One

Is the statute *silent* or *ambiguous* with respect to the issue at stake?
(If not, then there is no need for statutory interpretation.)
If yes, is the agency's interpretation of the statute *reasonable*?

If yes, the court *defers* to the agency's interpretation.

If not, the court proceeds to step two of the Chevron test.

And, in coming to the decision to defer to the agency's interpretation, the court considers:

- the agency's *reasoning* process;
- statutory *materials*.

In step two, we consider the following issues:

Step Two

At step two of the Chevron test,

1. the court conducts the following '*arbitrary and capricious*' standard test:

   Is the agency's interpretation
   arbitrary,
   capricious,
   an abuse of discretion, or
   unlawful?

2. The court determines whether the agency's interpretation is *reasonable* or *permissible* based on the statutory materials. [11]

To run the Chevron test in the present proceedings, we note the relevant statutory provision which requires that "[t]he Electoral Commission *shall*, by Constitutional Instrument, prescribe the modalities for the implementation of… Act [699]." This statutory provision imposes an *obligation* on the Electoral Commission to perform. But *when* must this obligation be performed? On this issue of time, the statutory provision is *silent*. There is, therefore, the need to interpret the provision to account for time. The question now is how the Electoral Commission interprets the statutory provision? Or, in a more practical sense, how has the Commission understood the idea of time in the statutory provision over the past decade?

The conduct of the Electoral Commission for the past decade shows that it has not set itself any time limit for performing the statutory obligation. The Electoral Commission contends that "the

Applicants' right to be registered as voters, is a right which must be executed progressively the reason being that it is essential to preserve and safeguard the integrity of the electoral process." [para. 4.1. of Submission]. This contention can certainly not be found in Act 699; it is the interpretation or working understanding of the Commission. But, is the Commission's passiveness or indifference as to time reasonable?

The learned counsel for the Commission submits that "the implementation of Act 699 requires careful planning and methodical execution [para. 6.3.26 of Submissions]…. [The] 1st Respondent must be careful in its drafting of policies and the laws required to implement Act 699. 1st Respondent must also well structure the implementation of Act 699. [6.3.30 of Submissions]." The Commission has nothing save exhibit D in 2006 to show that there has been any 'careful and methodical planning' toward the execution of Act 699, at least not from the affidavit evidence before the court. This leads us to the step two of the test where we ascertain what the Electoral Commission's reasoning process is in not setting a time frame for the performance of the obligation? Is the conduct or passiveness or indifference of the Electoral Commission arbitrary, capricious, an abuse of discretion, or unlawful?

The test requires that we ascertain whether the position taken by the Electoral Commission is arbitrary, capricious, an abuse of discretion, or unlawful. As Benin JSC pointed out, "[w]hen considered in context of Article 296 a person will be in violation of use of arbitrary discretion if he applies his own discretion in disregard of the law." To article 296 of the Ghana Constitution, 1992, I add article 23. Thus, if the exercise of the discretion of the Electoral Commission not to expedite the operationalization of Act 699 for a decade amounts to defeating the legislative intent of Act 699, and impairs the fundamental human right of some citizens of Ghana, then the burden is squarely on the shoulders of the Electoral

Commission to demonstrate that the Commission's exercise of discretion is not an abuse of discretion, arbitrary and capricious. The presumption of regularity will no longer avail the Electoral Commission. The excuse of the Commission that "the process of implementing the Representation of the People (Amendment) Act, must be executed cautiously and in stages for which reason the 1st Respondent has in its plan the intention of putting the aforesaid Act to practical effect" can only be self-serving and self-indulgent.

An interpretation that proposes that a delay or inaction for a decade is not concerning and reflects the intention of the legislature can only be outrageous in terms of Wednesbury's unreasonableness. [12] To suggest that where the statute is silent as to time, the Electoral Commission has almost forever to put the modalities in place where failure or inaction impairs the fundamental human right of the Applicants is also certainly outrageous. It certainly would amount to 'administrative repeal' of a legislation for the Electoral Commission to simply disregard Act 699 for a decade, because there are challenges? Besides, it cannot be reasonable for some Ghanaians to be registered to vote abroad by reason of their occupation or status while others equally resident abroad are denied the same opportunity. Finally, an interpretation that ultimately defeats the intent of Parliament and, for that matter, Act 699 is simply illegal.

In the attempt to justify the Electoral Commission's inaction or delay, learned counsel for the Commission submits that the right to be registered and to vote abroad is restricted by article 12(2) of the Constitution, 1992 which subjects the right to the public interest. He cautions this court, where it is invited to enforce a particular right, "to have regard to the public interest especially where the performance of the public duty is involved, before granting or refusing the prayer." With the greatest respect to learned counsel for the Electoral Commission, what Parliament said in their legislative conversation with the Commission was simply that the Commission

should prepare a constitutional instrument and have it passed by Parliament setting out the modalities for the implementation of the right to vote abroad. Parliament never asked the Commission to subject Act 699 to the public interest. Parliament must be presumed to have known the public interest before vesting the right to be registered and to vote abroad in Ghanaian citizens resident abroad. When Parliament speaks this way and definitively, it is idle if not unlawful for the Commission or a court to suggest that Parliament failed to consider the public interest when legislating into existence such a fundamental right.

The general categories of public interest are public order, public safety, security, public health and public morality. Certainly, in designing the modalities, the Commission is entitled to consider public interest; but in these proceedings, the law requires that the Commission demonstrates to what extent and in what way public interest justifies the delay or inaction for the unreasonable period of a decade. Which of the categories of public interest does Act 699 offend? Which of them adversely constrain the passing of the constitutional instrument? On the affidavit evidence, the Commission has no answers.

For example, in citing finance as one of the challenges, is it the case of the Commission that Parliament that controls the national purse did not take finance into account in passing Act 699, or that the Commission placed a budget for the implementation of Act 699 that the Executive or Parliament rejected? I find no answers in the Commission's affidavit in answer. But, as learned counsel for the Commission rightly notes, "[i]n this suit before this court, the question does arise as to the purpose of the law. It has to do with the way of ensuring the realization of the purpose of the law," that is the modalities for the implementation of Act 699. (para. 6.3.12 of Submissions).

The available data in the public domain show that "[i]ncreasingly, countries of origin grant double nationality, dual citizenship and voting rights to non-resident citizens, bolstering diaspora participation in political life. Since 1991, the number of countries that have facilitated the ability to cast absentee votes has multiplied four-fold, rising from almost 30 to more than 100 by the end of the 2000s. In Africa alone, more than half of the countries allow citizens living abroad to vote in national elections." [13] There is a wealth of information in the public domain on diaspora voting to assist the Electoral Commission in meeting the so-called challenges, unless the Commission is obstinately desirous of re-inventing the wheel.

It appears outrageous for the Electoral Commission to justify its delay and inaction on the ground of want of solutions to the so-called challenges in the face of the available wealth of information on the law and practice of diaspora voting. Just as the Electoral Commission expects the court to defer to it in matters that are peculiarly within its competence, it is expected that the Electoral Commission would defer to Parliament on issues relative to the propriety of Act 699. It is not in law given to or within the constitutional mandate of the Electoral Commission to challenge Act 699. It may unfortunately and rather patronizingly refuse to take account of suggestions from stakeholders, but under no conceivable circumstances is the Electoral Commission empowered to disobey or disregard Act 699.

To further demonstrate the unreasonableness of the action or inaction of the Electoral Commission in not setting itself a deadline to comply with Act 699, we may be guided by the following principles:

> "An agency's delay in completing a pending action as to which there is no statutory deadline may not be held unlawful unless the delay is unreasonable in light of such

considerations as the agency's need to set priorities among lawful objectives, the challenger's interest in prompt action, and any relevant indications of legislative intent. In considering such challenges courts are deferential to agencies' allocation of their own limited resources." [14]

On the facts of the present case, the Electoral Commission has not shown that there are competing lawful priorities justifying the omission to give effect to Act 699; or that the intention of Parliament justifies the inordinate delay of a decade. The Electoral Commission has failed to convincingly justify the position that limited resources is a plausible excuse. What is indisputably clear, however, is that the Applicants' interest or right to vote demands prompt action.

Still on the principles or guidelines, Daniel T. Shedd draws attention to the D.C. Circuit case of *Telecommunications Research & Action Center v. FCC ("TRAC")* [15], which:

> "established guidelines to consider when determining whether an agency delay warrants mandamus compelling the agency to act. The court stated that "[i]n the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus." The court then enumerated several factors, known as the TRAC factors, to consider when answering this question:
> (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when

> human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Of relevance to the present case are the 'time', 'effect' and 'interest' factors. On this score, the Electoral Commission has woefully failed to discharge the burden to justify the decade delay; it has also failed to demonstrate that compelling the Commission to expedite compliance has the effect of disrupting its priorities, if any; but, for its part, a court must also take into account the prejudicial effect of the decade delay on the right or interest of the aggrieved complainants. And, in this regard, I am of the considered view that the egregious effect on the right to vote due to the inordinate delay in complying with Act 699 cannot be said to be proportionate to any good that might have been or may be derived from the delay.

Having run the *Chevron* test, applied the relevant *TRAC* principles and considered the evidence before me against the backdrop of the relevant and applicable law, I am unable to escape the conclusion that the Electoral Commission's decade delay in complying with Act 699 is egregious, unreasonable and unjustifiable.

With regard to discrimination, Article 17 of the Ghana Constitution, 1992 provides in part as follows:

> "(1) All persons shall be equal before the law.
> (2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or *social or economic status*.

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, *occupation*, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description."

Notable is the fact that the alleged discrimination must be on one of the following grounds: gender, race, colour, ethnic origin, religion, creed or *social or economic status*.

The provision of article 17(3) of the Constitution, 1992 defines '*discriminate*' to include '*occupation*' as one of the grounds. And, 'occupation' clearly fits into the broad category of "*social or economic status"*. Therefore, unequal treatment on account of 'occupation' can be a basis for a claim for breach of article 17. The Applicants contend that the grant of the right to be registered and to vote abroad to a select group of Ghanaian citizens abroad and not to the Applicants and similarly circumstanced Ghanaians amounts to discrimination, but the Commission disputes this contention. Contrariwise, the Commission argues that the Applicants have failed to bring themselves under any of the constitutional grounds of race, place of origin, political opinions, colour, gender, social or economic status, religion or creed.

The *Black's Law Dictionary* defines the word 'occupation' as "(1st ed.) A trade; employment; profession: business; means of livelihood… (9th ed.) An activity or pursuit in which a person is engaged; esp., a person's usual or principal work or business." In other words, the means of livelihood is one's occupation and includes the work one is engaged in whether it is diplomatic or not. The undisputed contention of the Applicants is that whilst they and

other Ghanaians abroad are denied the benefit under Act 699, a select group of Ghanaians who work in Ghanaian Missions abroad are permitted to be registered and to vote abroad, unlike others like the Applicants. If occupation means employment and occupation is a constitutional ground for alleging discrimination, then the Applicants do have a point. The Commission's counter-argument is not convincing to the court. Unlike the Commission, the court looks to the effect of the arrangement whereby by reason of the occupation, some Ghanaians are allowed to vote abroad and others are not so allowed, on the principle of equality of treatment. The legal effect is simply discrimination on the ground of occupation.

While the Electoral Commission bites its fingernails and scratches it head dreamingly looking for solutions to the challenges probably forgetting how fast time runs and the fact that a decade has just gone by since the Applicants and others jumped for joy when Act 699 was passed by parliament, this reviewing court must allow the following principles or norms to kick in by pointedly asking and answering the following questions:

- Is the Commission's action [14] unlawfully withheld or unreasonably delayed?
- Is the Commission's action arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?
- Is the Commission's action contrary to constitutional right?
- Has the Commission acted without principles or reason?

Clearly, Act 699 and articles 23 & 296 of the Constitution, 1992 do not justify the delay or inaction of the Electoral Commission in not rolling out the modalities for the registration of Ghanaian voters abroad and the provision of facilities to enable such citizens as the Applicants to vote abroad. Even, in these proceedings, the Electoral Commission has failed to give any comfort to the Applicants as to how soon they should expect to enjoy this right to vote abroad. The

closest the Commission goes in assuring them can be found in the following words: "[T]he process of implementing the Representation of the People (Amendment) Act, must be executed cautiously and in stages for which reason the 1st Respondent has in its plan the intention of putting the aforesaid Act to practical effect." In their plan, they have the intention to operationalize the Act, but when? Meanwhile, the delay or inaction impairs the constitutional right or fundamental human right of the Applicants. And the Electoral Commission has failed to legally and rationally justify their delay or inaction.

At paragraph 6.3.30 of the Written Submissions of learned counsel for the Electoral Commission, he submits as follows:

> "6.3.30. A key point that this Court must consider in deciding whether or not to grant the reliefs sought is better made by posing the following interrogatories; should this Court grant the reliefs prayed for in this suit, will it make consequential orders,
>
> i. For funds to be made available to 1st Respondent and where necessary the representatives of political parties to observe the registration or voting process abroad?
>
> ii. for a constitutional instrument to be placed before Parliament to give effect to Act 699 regardless of its quality?
>
> iii. Directing that which places should be designated as registration centres?
>
> iv. Directing as to how the challenge process will be effective in another jurisdiction?

v. Directing Parliament to amend the provisions of Section 56 of the Courts Act so that electoral offences committed abroad can be prosecuted here in Ghana?"

I need only remark that if these are the insurmountable challenges that, in the view of the Commission, have stultified the implementation of Act 699 for a decade, then the Commission that insists on its absolute independence and, for that reason, unpreparedness to be bound by the proposals of stakeholders, is the poorer in terms of institutional capacity for not having been able to find solutions to such simple issues: funds, designation of registration centres, challenge process, amending section 56 of the Courts Act and having 'quality' [16] constitutional instrument passed.

In fact, one needs only read the Commission's own exhibit D to note that all these issues were addressed by the Commission's own sub-committee, except (1) the issue of fund that is constitutionally within the powers of the Commission and the Executive and (2) the issue of amendment to relevant laws that are within the constitutional powers of the Attorney-General upon promptings from the Commission. What has the Commission done in this direction for the past decade? A rhetorical question.

An administrative body established by law and funded with the resources of the State cannot be allowed to be whistling down the lane, kicking an empty can and telling itself that a decade is not enough to figure out how to comply with Acts 699. The following 'anti-circumvention' and 'anti-abdication' principles must certainly kick in: (1) where the administrative body's failure or inaction amounts to a circumvention of the express or implied statutory requirement; or (2) the failure or inaction amounts to the administrative body's abdication to promote and enforce policies

established by Parliament [17], the reviewing court or Parliament may intervene. I would add that where the inaction of the administrative body infringes the fundamental or constitutional right of the citizen, the court may also intervene to provide a remedy. And, on the facts of the present application, it is legitimate that this court intervenes.

Learned Counsel for the Electoral Commission submits that "where the performance of the public duty the subject matter of the mandamus application could not be realized through no fault of the public official sought to be compelled or cannot be performed, a mandamus will not lie against the public official." For this submission, he cites as authority the case of *Republic v. High Court, Koforidua; ex parte Affum (subt. by) Akomeah Frimpong Manso IV and Registrar of Eastern Regional House of Chiefs Interested Parties)* [2012] 1 SCGLR 78. He submits further that "This is the one instance that an order of mandamus will not lie because the 1st respondent on whom the order of mandamus is being sought is already working assiduously to see to the effective implementation of Act 699." By these submissions, the Electoral Commission concedes that the duty placed on it by Act 699 is a public duty which it must perform. I am not convinced that the duty is impossible to perform or that it is not the fault of the Commission that it has not been performed. The Commission rather contends that it is assiduously seeing to its performance. And, this has been the situation for the past one decade because of the challenges enumerated above. Obstinately jealous of it independence, the Commission has not been desirous in seeking assistance from stakeholders and the public.

Mindful of the Commission's unhelpful and undesirable obstinacy in blocking its ears with ear-muffs to shut out wise counsel from stakeholders and the public, I shall refer the individual Commissioners to Haemon's apt counsel in *The Theban Plays* (*Oedipus the King*) that since no person has absolute wisdom, the next best thing is to seek wise advice. This is how Haemon puts it:

"Therefore, my father, cling not to one mood,
And deemed not thou art right, all others wrong.
For whoso thinks that wisdom dwells with him,
That he alone can speak or think aright,
Such oracles are empty breath when tried.
The wisest man will let himself be swayed
By others' wisdom and relax in time….
For, if one young in years may claim some sense,
I'll say 'tis best of all to be endowed
With absolute wisdom; but, if that's denied,
(And nature takes not readily that ply)
Next wise is he who lists to sage advice." [18] [i. s.]

Indeed, the next best thing to absolute wisdom is wise advice. Accordingly, I strongly recommend that notwithstanding the constitutional independence of the Electoral Commission, the Commissioners, being human and not being absolutely wise presumably, be prepared to generate public discourse on the modalities and challenges, and learn from memoranda and suggestions that may come forth from stakeholders and the public some whom may be highly knowledgable in matters of diaspora voting.

Findings/Holdings

Having reviewed the relevant law and the available affidavit evidence on the record, I have come to the following conclusions:

1. The Electoral Commission is under a statutory duty or obligation to comply with the provisions of Act 699 by ensuring the passage of the constitutional instrument to provide for modalities for the implementation of Act 699.

2. For over a decade, reckoned from the passage into law of Act 699 in 2006, the Electoral Commission has failed to implement Act 699.

3. The delay, default, omission or inaction is egregious and willful.

4. The Electoral Commission has failed to rationally justify the delay, default, omission or inaction.

5. The Applicants made a prior demand which the Electoral Commission failed to answer positively.

6. Mandamus lies to compel the performance of the statutory duty or obligation under Act 699 and is discretionary.

Accordingly, this court is of the considered view that in the circumstances of the present application, mandamus must lie to compel the Electoral Commission (1st Respondent) to perform the statutory duty to comply with the provisions of Act 699 by ensuring the passage of the constitutional instrument to provide for modalities for the implementation of Act 699.

Orders

I agree with the learned counsel for the Electoral Commission that the court has no jurisdiction to compel the Commission to act in a way, form or manner that is not prescribed by the relevant law. The constitutional independence of the Commission limits the operative orders that the court can make. Accordingly, I agree with learned counsel for the Commission that some of the reliefs prayed for by the Applicants cannot properly be granted as the court would be asking the Commission to act in a particular way, form or manner that is not expressly prescribed by Act 699.

Accordingly, the application is granted in terms that:

1. The Applicants have a fundamental human right under Article 42 of the 1992 Constitution of the Republic of Ghana;

2. The Applicants are entitled under Act 699 to be registered and to vote abroad in public elections and referenda conducted by the Electoral Commission;

3. The non-compliance of 1st Respondent to operationalize the Act 699 since same became law on the 24th day of February 2006 is a breach of Applicants' fundamental rights under article 42 of the Constitution, 1992;

4. It is discriminatory for 1st Respondent to continue to register abroad and ensure that a category of citizens studying abroad or working in Ghana's Missions/ Embassies abroad vote in public elections and referenda while living abroad to the exclusion of Applicants and other similarly circumstanced Ghanaian citizens;

5. An Order of mandamus is hereby made and directed at all the Commissioners of the 1st Respondent and the Electoral Commission itself to uphold/ensure full compliance/operationalization of the Act 699 within calendar twelve (12) months reckoned from 1st January 2018 by having the constitutional instrument for the modalities for the implementation of Act 699 passed into law by Parliament and ensuring that the Applicants and similarly circumstanced Ghanaians are

registered to vote in the 2020 national elections and subsequent such elections and referenda.

6. Pursuant to Article 21(1)(f) of the Constitution, 1992 [19] on the right of the public to information, it is hereby ordered that, in the event where the Commissioners and the Electoral Commission, for any legitimate reason have been unable to comply the orders herein made, the Commissioners shall publish, within thirty (30) days of the expiry of the twelve (12) calendar months, for the information of the public the reasons for their failure to so comply.

Application is granted.

[SGD]
ANTHONY K. YEBOAH, J
HIGH COURT JUDGE

ENDNOTES

[1] The Evidence Act, 1975, Act 323:
"162. Copies of writings in official custody
A copy of a writing is presumed to be genuine if it purports to be a copy of a writing which is authorised by law to be recorded or filed, and has in fact been recorded or filed in an office of a public entity or which is a public record, report statement or data compilation if
(a) an original or an original record is in an office of a public entity where items of that nature are regularly kept, and
(b) the copy is certified to be correct by the custodian or other person authorised to make the certification where the certification must be authenticated."

[2] Article 45(f) of the Constitution, 1992: "The Electoral Commission shall have the following functions- …. (f) to perform such other functions as may be prescribed by law."

[3] Republic v. Korle Gonno District Magistrate Grade I; Exparte Amponsah [1991] 1 GLR 353, CA; In re Appenteng (Decd): Republic v. High Court, Accra Ex parte Appenteng [2005-2006] SCGLR 18 and Republic v. High Court, Ho: Ex parte Diawuo Bediako II & Anor (Odum & Ors Interested Parties [2011] 2 SCGLR 704; Republic v. High Court, Ho Exparte Awusu (No.1) (Nyonyo Agdoada(Sri III) Interested Party)[2003-2004] SCGLR. 864; Awuni v. West African Examination Council [2003-4] SCGLR 471; The Republic v. The HIGH COURT ACCRA; EX PARTE: THE CHARGE D'Affaires, BULGARIAN EMBASSY, ACCRA; (THE LAND TITLE REGISTRY & ORS. - INTERESTED PARTIES); CIVIL MOTION NO.J5/34/2015 of 24th February 2016 per PWAMANG, JSC.

[4] REPUBLIC v HIGH COURT, KUMASI; EX PARTE ACKAAH [1995-96] 1 GLR 270 - 277

SUPREME COURT, ACCRA; TSATSU TSIKATA v. ATTORNEY-GENERAL [26/06/2002] CIVIL MOTION NO. 11/2002; TSIKATA v ATTORNEY-GENERAL [2001-2002] 2 GLR 1

[5] Article 140. (1) of the Constitution, 1992: "The High Court shall, subject to the provisions of this Constitution, have jurisdiction in all matters and in particular, in civil and criminal matters and such original, appellate and other jurisdiction as may be conferred on it by this Constitution or any other law. (2) The High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by this Constitution."

[6] Human Rights Reference Handbook, Magdalena Sepúlveda, Theo van Banning, Gudrún D. Gudmundsdóttir Christine Chamoun and Willem J.M. van Genugten, University for Peace, Ciudad Colon, Costa Rica, 2004.

[7] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976

[8] ABU RAMADAN & EVANS NIMAKO VRS. THE ELECTORAL COMMISSION & THE ATTORNEY GENERAL; WRIT. No. J1/14/2016 of 5th May 2016.

[9] Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9: "A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process o f articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[10] including inaction

[11] The Anatomy of Chevron: Step Two Reconsidered, Ronald M. Levin, Chicago-Kent Law Review, Volume 72, Issue 4, Symposium on Administrative Law, October 1997; http://scholarship.kentlaw.iit.edu/cklawreview

[12] Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223 HL. By this Wednesbury's unreasonableness test, a decision is declared unreasonable where no reasonable person or entity could come to it.

[13] "The African Diaspora and Political Engagement: Migrant Voting Behavior", Afrique Contemporaine, Edited by Jean-Philippe Dedieu (CIRHUS/NYU), Thibaut Jaulin (CERI/Sciences Po) and Etienne Smith (Sciences Po)

[14] Daniel T., Administrative Agencies and Claims of Unreasonable Delay: Analysis of Court Treatment, March 21, 2013; Section of Administrative Law & Regulatory Practice, American Bar Ass'n, A Blackletter Statement of Federal Administrative Law, 54 Admin L. Rev. 1, 44 (2002).

[15] 750 F.2d 70 (D.C. Cir. 1984) ("TRAC").

[16] The Electoral Commission's own word

[17] The Law of 'Not Now' by Prof. Cass R. Sunstein & Adrian Vermeule, Discussion Paper No. 775 06/2014, Harvard Law School Cambridge, MA 02138; http://www.law.harvard.edu/programs/olin_center/ ; http://ssrn.com

[18] OEDIPUS THE KING Translation by F. Storr, BA Formerly Scholar of Trinity College, Cambridge From the Loeb Library Edition Originally published by Harvard University Press, Cambridge, MA and William Heinemann Ltd, London First published in 1912

[19] " Ghana Constitution, 1992, article 21 (1)(f) "All persons shall have the right to - (f) information, subject to such qualifications and laws as are necessary in a democratic society…"