IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA AD. 2023

CORAM:

H/L Justice Barbara Ackah-Yensu, JSC

(Sitting as additional Court of Appeal Judge) Presiding

H/L Justice Amma A. Gaisie, J.A.

H/L Justice Richard Adjei-Frimpong, J.A.

Suit No.: H1/114/2022

Date: 16th February, 2023

THE ATTORNEY-GENERAL RESPONDENTS /

THE GENERAL LEGAL COUNCIL APPELLANTS

VRS

PRINCE GANAKU & 4 OTHERS : APPLICANTS / RESPONDENTS

J U D G M E N T

ADJEI-FRIMPONG, J.A.:

We are in this suit to address some questions of constitutional and administrative law importance. The statutory authority to make decisions in the exercise of discretionary powers remains an indispensable component of modern state governance. In this jurisdiction, the constitution and a number of statutes confer broad discretionary powers on various administrative bodies and officials. There is therefore a constant interaction between the citizenry and the repositories of administrative discretion.

Inevitably, the exercise of administrative discretion impinges on human rights and other legally recognized interests. Judicial control by constitutional and statutory means, remains an effective tool to check the exercise of duties and powers of such bodies and officials so as to preserve and protect the rights and interests of those thereby affected. Whether or not a particular body or official has exercised its administrative discretion in manner warranting the court's intervention is regularly a matter in controversy. Such is the controversy that lies at the heart of this suit.

The General Legal Council, the appellant herein, is the body that regulates the legal profession in Ghana. It was set up by statute for the organization of legal education and for upholding standards of professional conduct and discipline.

For purposes of admitting qualified persons to the law school to pursue professional law course, the appellant conducts an entrance examination. It does so through its Independent Examination Committee (IEC), a sub-body also set up by law.

By its practice, the appellant every year prior to the date fixed for the examination, makes publication of notice of the examination in the newspapers. The notice includes the requirements or eligibility criteria and the regulations involved in the examination, as well as the date fixed for the examination. Every candidate is subject to the same

eligibility criteria. The IEC conducts the examination and makes arrangements for the marking of the examination scripts before the publication of results.

The appellant published the notice of the Entrance Examination for the 2019/2020 academic year on Tuesday June 4, 2019. Included in the publication was a requirement of candidates to sign an undertaking to accept without question, the results to be published by the appellant as final.

The examination was conducted on 26th July 2019. Many candidates registered and took part in the examination. Candidates who passed and paid the required fees were admitted to the law school to pursue the course. On our examination of the record, the accuracy of these factual representations is not doubted.

The respondents herein, at the time material to the dispute were holders of LLB certificates from various recognized universities across Ghana and other jurisdictions with passes in the subjects prescribed by law and were thus eligible to apply for enrolment to study the professional law course. They had all applied and taken part in the subject entrance examination. They however suffered the misfortune of failure.

Of the five, the 3rd respondent purportedly applied to the appellant for remarking of his script which we are told was declined. Thereafter, alleging a breach of their fundamental human rights, the respondents invoked the human right enforcement jurisdiction of the High Court under article 33 of the constitution and Order 67 of the High Court (Civil Procedure) Rules, C.I 47.

According to them the undertaking required of candidates to accept the results published as final with no opportunity to seek review or remarking of their scripts was arbitrary, unreasonable and without legal basis. They contended that by its position, the appellant, as an administrative body was in breach of its duty to act fairly and

reasonably in terms of the provision in article 23 of the constitution. They accordingly sought the following reliefs:

i. *A declaration that the undertaking imposed by the respondent on the applicants to accept without question, the decision of the respondent in respect of published results of the examination organized on 26th July, 2019 as final is arbitrary, unlawful, null and void and of no legal effect.*

ii. *A declaration that the failure, refusal or neglect of respondent to publish a procedure for remarking the examination papers of the applicants is arbitrary, unlawful, null and void and of no effect.*

iii. *A declaration that the failure, refusal or neglect of the respondent to provide sufficient clarity that gives dissatisfied candidates the opportunity to seek a review of their examination results is arbitrary, unlawful, null and void and of no effect.*

iv. *An order directed at the respondent to give the applicants the opportunity to have their examination results reviewed or remarked.*

v. *An order directed at the respondent to provide sufficient clarity that gives dissatisfied candidates the opportunity to seek a review of their examination results.*

vi. *An order directed at the respondent to publish the procedure for remarking the examination papers of the applicants within seven days.*

vii. *Costs.*

The appellants resisted the application and the reliefs sought. In essence, it denied breach of any constitutional or statutory rule in the conduct of the entrance examination. In particular, it denied that the undertaking in any way occasioned a breach of the respondents' fundamental human rights. It alluded to various processes

and structures put in place for the conduct of the examination which to it, demonstrated that it acted fairly and reasonably in the discharge of its mandate.

On hearing the application however, the learned trial judge upheld the respondent's claim, granting them the reliefs (i), (ii), (iv) and (vi) but dismissing reliefs (iii) and (v) and (vii).

In the main, the trial judge reasoned that the explanation put forth by the appellant to justify the impugned conduct did not reflect the qualities of fairness, reasonableness and legal compliance within the contemplation of article 23 sourcing guidance mainly from the Supreme Court's decision in the case of AWUNI VRS WEST AFRICAN EXAMINTAION COUNCIL (2003-2004) SCGLR 471. She also determined as unlawful the absence, refusal and or neglect by appellant to allow respondents to apply for review or remarking of their scripts.

The appellant is dissatisfied with the decision of the trial judge and appeals in this court on the following grounds:

1. *That in the absence of proof of the rights claimed by the applicants, the learned trial judge erred in making a decision in favour of the applicants.*

2. *The learned trial judge committed various errors of law.*

   Particulars of errors.

   2.1.The learned trial judge failed to resolve a critical question of law to wit, whether the applicants had the right to seek a review or remarking of examination results.

   2.2. By holding that "the respondent has failed to satisfy me…" the learned trial judge placed the evidential burden on the respondent contrary to statute and binding precedent.

2.3. *The learned trial judge misapplied the principles in Awuni v. West Africa Examination Council (2003-2004) SCGLR 471.*

3. *The respondent has suffered a substantial miscarriage of justice by reason of the various erroneous and indefensible pronouncements in the judgement of the court.*

4. *The judgment is against the weight of evidence.*

We state at once that the 3rd ground of appeal is defective for want of particulars of the so called erroneous and indefensible pronouncements. In its formulation, the ground stated in general terms is also vague. It contains no legal or factual substance worthy of resolution and does not in our view, comply with the provisions of Rule 8 sub-rules 4 and 6 of the Court of Appeal Rules, C.I 19 as amended. See OFUSU-ADDO VRS GRAPHIC COMMUNICATIONS GROUP LTD (2011)1 SCGLR 355.

In any event, perusing the written submission filed by the appellant, we do not find argument of the said ground. It is therefore deemed abandoned. Whichever way it is considered, the 3rd ground of appeal does not stand and is therefore struck down.

A fairly well-settled learning of the omnibus ground of appeal as contained in the 4th ground is that, it throws up the whole matter for re-consideration. It operates as an invitation to us as an appellate court to re-consider the issues of facts and law arising in the case in their entirety, and where appropriate, resolve them afresh. DJIN VRS MUSAH BAAKO (2007/2008) SCGLR 686; BROWN VRS QUASHIGAH (2003-2004)2 SCGLR 930 and ARYEH VRS AKAKPO (2010) SCGLR 89.

Also, the 1st ground of appeal and the error alleged under particulars 2.1 of the 2nd ground of appeal touch on the same allegation of absence of proof of the rights claimed to have been breached by the appellant. Indeed, we see one as merely an elaboration of the other. The two could therefore be resolved together and as they question the very

basis of the decision of the trial judge, we propose to subsume them under the omnibus ground to be determined at a go. In effect, we conjoin the error under paragraph 2.1 and ground 1 and subsume them under the omnibus ground 4. We shall however begin by addressing the two other errors alleged under the 2nd ground of appeal.

First it is contended under paragraph 2.3 of the 2nd ground of appeal that the learned trial judge misapplied the principle in AWUNI VRS WEST AFRICAN EXAMINATION COUNCIL. (AWUNI VRS WAEC).

We pose the question, what principle in the case did the trial judge misapply? From what we learn, AWUNI VRS WAEC is not a case to be pinned down by one ratio or principle. A forerunner case in the enforcement of fundamental human rights under the 1992 constitution at least on the subject of education and examination, four of the five justices wrote an opinion. Unsurprisingly, each spared no effort to decide matters of procedural and substantive constitutional law importance ostensibly to enhance the development of constitutional law in our budding democratic dispensation. Significantly, the decision touched on what procedure was then appropriate to enforce the human rights provisions under the constitution as well as the legal ramifications of the bill of rights under chapter 5. Given the spectrum of the matters decided in the case, we think the appellant ought to have obliged this court the specific principle.

What is even more, having failed to specify the particular principle of the case to have been misapplied, Counsel proceeds to draw on the dissimilarities of the facts in AWUNI VRS WAEC and those of the instant case to say that the difference in the facts was lost on the trial court.

In fairness to the learned trial judge, she did not invoke the decision in AWUNI VRS WAEC to draw on the facts to make a determination. Instead, she only sought guidance

from the court's construction of article 23 and its constitutional implication. This is how she went about it:

> *"This article therefore demands that actions, conducts and decisions of administrative bodies must be in tune with the requirements of fairness and reasonableness. They are further to ensure that their undertakings are dictated by law. These requirements may include the observance of the rules of natural justice, ensuring that their actions are not ultra vires their enabling statute leading to an infringement of the right of another as well as executing mandates in tune with the law. Regarding the respect for the rules of natural justice, the Supreme Court in the cases AWUNI VRS WEST AFRICA EXAMINATION COUNCIL (2003-2004) SCGLR 471 and ABOAGYE VRS GHANA COMMERCIAL BANK LTD (2001-2002) SCGLR 797 has proclaimed it as an administrative right which must not be derogated from by any administrative body or official. In the Awuni case, Sophia Akuffo JSC (as she then was) noted that article 23 of the 1992 constitution established administrative justice as a fundamental human right. The right, according to her, required the observance of due process and the adherence of the principles of natural justice. Her ladyship proclaimed further with emphasis that "where a body or officer has an administrative function to perform, the activity must be conducted with, and reflect qualities of fairness, reasonableness and legal compliance."*

The passage clearly speaks of what the learned judge cited AWUNI VRS WAEC for. The dissimilarities of the facts of the two cases did not matter for her purpose and we think the error alleged against the decision under the paragraph is devoid of merit.

The other error is the alleged wrongful allocation of the evidential burden on the appellant instead of the respondent to prove the breach alleged. Put shortly, the contention is that by stating; "*the respondent has failed to satisfy me…*" the learned judge placed the evidential burden on the respondent contrary to statute and binding

precedent. Section 14 of Evidence Act, NRCD 323; SUMAILA BIELBIEL VRD ADAMU DRAMANI & ATTORNEY-GENERAL (N0.3) (2012)1 SCGLR 370 and page 74 of ESSENTIALS OF GHANA LAW OF EVIDENCE (S.A. BROBBEY) cited.

The error alleged according to the appellant's argument led to trial judge finding thus: *"I further find as unlawful the absence, refusal and or neglect by the respondent to allow applicants to apply for review or remarking of their script".*

To place the impugned statement in its proper context, we reproduce the following excerpts of the judgment to give a sense of what the trial judge was discussing that led to the statement. It is the only way to make a meaning of it and determine its legal validity.

> *"…It must be noted that the respondent does not deny the existence of these allegations. That is, the respondent agrees that it required the applicants to give an undertaking to the effect that its decisions shall be final as regards the results of its entrance examinations. Again, the respondent concedes to the absence of any external allowances to candidates to apply for a review of their marked scripts. These concessions notwithstanding, the respondent justifies its conducts as being in tune with the law and due process. To the respondent, the applicants are given fore notice of its policy and the giving of undertaking and further, it had an internal mechanism that sees to it that scripts are well marked and all errors avoided. Do these justifications of the respondent reflect the qualities of fairness, reasonableness and legal compliance?"* [page 188-189, ROA]
>
> *"In my respectful view, it will serve the interest of the respondent and indeed, better whittle away some of the unnecessary attacks against its works if the respondent put in place mechanisms to review the marked scripts of applicants and publish their actual*

marks. The respondent has failed to satisfy me of the reason(s) for refusing this simple but important tool of transparency and accountability…"

From the above passages, we observe that the trial judge was considering some admissions made by the appellants concerning the undertaking and the corresponding justification for the decision. From what we gather, the trial judge assumed the position that by the admissions made by the appellant on the undertaking, the onus probandi shifted onto the appellant to provide reasons to satisfy her in justification of the undertaking. Apparently, it was these reasons that the trial judge did not find satisfactory.

It is a universal principle under the rules of evidence that the evidential burden, also called the burden of producing evidence is not fixed. It is unlike the legal burden also called the probative burden or the fixed burden of proof. In the words of PHIPSON ON EVIDENCE about the former; *"The onus probandi in this sense rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side--- i.e. it rests before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal… would give judgment if no further evidence were adduced."* Essentially this is what Section 11 of the Evidence Act defines as the obligation of a party to introduce sufficient evidence to avoid a ruling against him on an issue.

On the facts established in the instant case, there is no doubt that the evidential burden or the onus probandi initially rested upon the respondent based on the allegations made against the appellant. However, when on admitting the undertaking and what it stood for, the appellant sought to provide reasons in justification of it, it thereby assumed the *onus probandi* or the evidential burden. It was this burden the trial judge, as we comprehend, did not find satisfactorily discharged. Understandably, what the trial

judge was considering was the justification put forth by the appellant. The onus to satisfy her on the justification was not on the respondents. We believe it was on the appellant. It was in her province to determine whether she was satisfied or not. As to whether her conclusion is supportable on all the matters considered is another question we shall consider in due course. We however hold that her statement did not amount to a wrongful allocation of the evidential burden. The error alleged in ground 2.2 also lacks merit and ground is disallowed.

We shall turn our attention to the omnibus ground which we proposed to take together with ground 1 and the error in paragraph 2.1 of ground 2. On examining the entirety of the record before us including the rival submissions made on behalf of the parties, the overarching issue we set for ourselves to determine, out of those grounds, is whether the decision of the trial judge and the orders she made were supportable by the facts and the law.

Now, what arguments are the parties making before us?

First, the appellant says if the respondents claimed to have a right to remarking or reviewing their examination scripts, then they had to adduce evidence of the existence of that right and if the right was created by law, they had to state that law. This the respondent failed to do. By that default, the respondent did not discharge the legal burden and the trial court erred in granting them any relief.

It is argued that under the law, for there to be an order or a direction of a court to secure or enforce a right, there must be a declaration of the existence of that right and its infringement. AWUNI VRS WAEC cited.

Further, appellant contends that whilst the respondents hinge their claim to the right of remarking or reviewing their examination scripts on the provision in article 23 of the

constitution, they fail to demonstrate how the said provision declare the right or at least how same could be inferred from the provision.

Addressing the provision in article 23, Counsel posits that the provision creates both a duty and a right. The duty is imposed on administrative bodies and officials to act fairly and reasonably and to comply with the requirements of law. The said duty, Counsel explains on authority, involves the duty to observe the rules of natural justice, to comply with requirements of law as well as a duty not to act illegally, irrationally and not to commit procedural impropriety. AWUNI VRS WAEC; REPUBLIC VRS SOCIAL SECURITY AND NATIONAL INSURANCE; EX PARTE ERNEST THOMPSON, Suit No H1/159/2020 cited.

For the appellant, the decision not to allow remarking or reviewing of examination of scripts was not in breach of any rule of natural justice neither was it contrary to the requirement of law. The decision was not also fraught with illegality, irrationality or procedural impropriety.

It is explained that the entrance examination being only a preliminary procedure for admission into the law school, there was good policy rationale for the decision. To allow remarking and reviewing of examination scripts would be stifling and inimical to a smooth admission process. It had the tendency to disrupt the academic calendar and derail the smooth running of the school.

Again, pursuant to the L.I. 2355 the entrance examination was conducted and managed by an Independent Examination Committee (IEC) composed of competent and reputable persons of proven integrity. The examination scripts are also subjected to various layers of quality control and processes before the results are published. This arrangement insulates the conduct and management of the examination from arbitrariness, caprice, bias and/or prejudices.

Additionally, by practice, the appellant gives notice of the policy not to allow remarking or reviewing of scripts to all candidates well in advance. The policy applies to all candidates without exception. No surprise therefore results and there is no likelihood of the creation and breach of legitimate expectation. Again, the appellant's decision did not show dislike for the respondents or preference of other candidates over them. No penal measures or sanctions were also imposed on them.

Counsel further cites the case of STEPHEN KWAKU ASARE VRS ATTORNEY-GENERAL & ANOR (2017-2018)2 SCLRG 570 which decides that whenever a violation of the rights under article 23 was alleged, the proponent had to prove that the exercise of the discretionary power was in violation of either article 296(a) or (b) in order to succeed. He submits that by the decision, the respondents ought to have proved lack of fairness and candour on the part of the appellant or arbitrariness, caprice or bias either by resentment, prejudice or personal dislike in the decision which the respondents failed to do.

Appellant further argues that the right created under article 23 is the right to administrative justice which is the right to be treated fairly and reasonably by administrative bodies and officials. The right to be treated fairly and reasonably entails the right to fair hearing. Remarking or reviewing examination scripts is not within the contemplation of fair hearing in conceptual terms. Fair hearing would normally be required when one is put through a disciplinary process with applicable sanctions. Counsel contends; *"…to admit the principles of natural justice into the conduct of examinations apart from disciplinary functions of the council will surely open the floodgates to a torrid of unbridled abuse"*. AWUNI VRS WAEC cited.

Arguing for his side, Counsel for the respondent thinks that the appellant misapprehends the respondents' case and takes simplistic view of their claim by

positing that the right sought to be enforced was the right to remarking or reviewing examination scripts. Rather, the respondents were enforcing their right to administrative justice under article 23 which was a fundamental human right under Part 5 of the constitution.

Referring to paragraph 17 of the affidavit in support of the respondents' application before the trial court, Counsel submits that the impugned undertaking and the lack of opportunity to request remarking and reviewing of the results were unjustified infringement of the respondents' right to administrative justice which was being enforced. The respondents, Counsel further submits, were entitled to be treated fairly and reasonably in compliance with article 23. AWUNI VRS WAEC cited.

To be treated fairly and reasonably according Counsel, was not restricted to the adherence of fair hearing or *audi alteram partem*. It included, in the words of Sophia Akuffo JSC (as she then was) in AWUNI VRS WAEC; *probity, transparency, opportunity to be heard, legal competence and absence of bias, caprice or ill-will*. These were the qualities the trial judge thought were not satisfied by the appellant's policy.

Furthermore, and citing the case of STEPHEN KWAKU ASARE VRS ATTORNEY-GENERAL (supra) Counsel contended that the undertaking was an imposition on the respondents to which extent same was arbitrary, unfair, unreasonable lacks probity and hence constituted a breach of the right to administrative justice under article 23.

The respondents do not also understand why there is an arrangement under L.I. 2355 allowing for remarking and reviewing of examination scripts of qualifying certificate examination candidates but none for candidate in the entrance examination. At any rate, argue the respondents, the absence of any such arrangement under the law did not preclude the appellant from taking steps to ensure administrative justice as provided for under article 23.

First of all, we do accept as the true position of the law that for a court to make an appropriate order or give proper direction to enforce or secure the enforcement of a right, there must first be a declaration as to the existence of the right and the infringement of it. Kpegah JSC stated the point in AWUNI VRS WAEC as follows:

> *"The question then may be asked: what types of relief can be granted by the High Court in such circumstances? The answer is immediately provided in clause (2) of the said article 33 which empowers the High Court "to issue such directions or orders or writs… for the purposes of enforcing or securing the enforcement" of the rights to which, in the opinion the person is entitled. There should therefore be, first, be a declaration as to the existence or otherwise of a right and its infringement before an appropriate "order" could be made or a "direction" issued to secure or enforce the right."*

There must be some policy justification for the proposition. The process of identifying the particular right and its infringement may reveal the source of the infringement which may have jurisdictional connotation. If, for instance, the source of infringement is an existing law, it will mean that that law is in contravention of the constitution and the appropriate recourse will be the invocation of article 2(1) to have it declared as unconstitutional. The Human right jurisdiction of the High Court will not be appropriate to invoke. In this sense, it became an obligation on the respondents, to demonstrate the right on which their claim was founded for the trial court to make a determination and if an infringement was established, make the order or issue the directive as appropriate.

The following depositions in the respondents' affidavit contain matters about the rights they wanted vindicated:

"8. The applicants state that the undertaking imposed by the respondent on candidates, including the applicants, is arbitrary, unreasonable, and without legal basis.

9. The applicants state further that the respondent has not provided any arrangements in relation to examination script viewing, examination mark reviewing, and appeals concerning examination matters to ensure that they are dealt with transparently.

10. The applicants state further that the respondent has failed to provide sufficient clarity that gives dissatisfied candidates the opportunity to seek review of the examination results.

11. The applicants state that the respondent is enjoined by law to recognize the rights of any candidate to seek a review of examination results and to further appeal the outcome of the process if they are so dissatisfied with the outcome.

12. The 3rd applicant in a letter dated 10 October 2019 demanded a remarking of his script by the respondent. The respondent however failed and/or refused to accede to the request of the 3rd respondent. Attached and marked Exhibit LSC3 is a copy of the latter.

13. The applicants state that the respondent's failure and/or refusal to give candidate the opportunity to challenge published results is an egregious defiance of the duty to act fairly and reasonably, which duty is mandatorily imposed on administrative bodies and officials by the constitution.

14. The applicants repeat paragraph 14 of the affidavit above and state that, under and by virtue of the constitution of the Republic of Ghana (1992), where a body or officer has an administrative function to perform, the activity must be conducted with, and

reflect the qualities of fairness, reasonableness and legal compliance. In effect, all administrative bodies have a constitutional obligation to act fairly and reasonably.

16. *As persons and by virtue of the constitution (1992) and case law, the applicants are entitled to the enjoyment of their fundamental human rights and protection from unjustified infringement of such rights by administrative bodies and any agency of state for that matter.*

17. *Unless this Honourable court intervenes, the respondents shall continue to violate our fundamental and constitutionally guaranteed right to administrative justice with impunity."*

Probing the foregoing depositions, we opine that a view taken that the right the respondents sought to vindicate was the right, merely, to remarking or reviewing of examination results will be stoutly simplistic. Truly, the nut of the respondents' claim in reality terms, was an avenue to seek review or remarking of the scripts as the 3rd respondent was purported to have requested. Nonetheless, that must be understood as the manifestation of the right to administrative justice they sought to vindicate by the action. Thus, from the generality of the matters deposed to above, we do not appreciate the respondents as putting up the right to remarking or reviewing of scripts as a fundamental human right in the nature of a creature of the constitution or a statute for that matter. Such a thinking will amount to theorizing that every conceivable human right grief must find a page in the Part 5 bill of rights. What we understand the respondents as saying is that the right to review or remarking is embedded in the right to administrative justice which by their case, the appellant has violated.

The scenario in REGENTS OF THE UNIVERSITY OF CALIFORNIA VRS BAKKE 438. US. 265 (1978) may help illustrate our point. Allan Bakke, a thirty-five- year-old man had twice applied for admission to the University of California Medical School. He was

rejected both times. The school reserved sixteen places in each entering class of one hundred for "qualified minorities, as part of the university's affirmative action plan in an effort to redress longstanding minority exclusion from the medical profession. Bakke's qualification (college GPA and test scores) exceeded those of any of the minority students admitted in the two years Bakke's applications were rejected. Bakke sued complaining about the university's quota system which he argued was in violation of the Equal Protection Clause of the Fourteenth Amendment. The court's decision was a split one but Bakke ended up being admitted.

The primary complaint of Bakke was against the quota system. The actual right that was alleged to have been breached was the Equal Protection Right under the Fourteenth Amendment. So as in this case, the matter complained of which was the quota system was embedded, so to speak in the Equal Protection Right. We must repeat that the decision has been cited for illustration purposes only.

Many are reported cases out there where a party who has suffered a detriment would complain about the conduct of a public institution or official which plaint, standing alone is not a legislated human right per se but whose culmination is a violation of a defined right under the law. The proper way of looking at such plaint is to place it in the context of the particular human right provision to determine whether there has been a violation or not.

It is in the sense of the above observation that we think the appellant's contention under ground 1 to the effect that the respondents did not prove the right on which their claim was based must be rejected. We find that the respondents claim was anchored in the allegation of breach of their right to administrative justice in terms of article 23 of the constitution.

Along the same line, we find reason to reject the appellant's further contention under the ground 2.1 to the effect that the trial judge did not resolve the critical question of the right of the applicants to seek review or remarking of examination results. We are satisfied the trial judge discharged that task when in the judgment, she noted as follows:

> "*From the affidavit in support of the application, it is beyond doubt that the applicants' case is hinged on allegations of violations of their right to administrative justice enshrined under article 23 of the 1992 constitution. Indeed, Counsel for applicants stated in his written submissions to the Court that "the applicants instituted this action to protect their fundamental human rights under Article 23 of the Constitution. The Court will therefore consider the contours of Article 23 of the constitution vis-à-vis the depositions made by the Applicants and the reliefs sought to determine whether the respondent has violated the said Article and whether the Applicants are entitled to the reliefs sought."*

That said, what is left to decide is whether the trial judge was right on her decision that the appellants violated the respondents' right to administrative justice under article 23 of the constitution. One fundamental point however needs to be clarified in our further discourse.

It is obvious that the application before the trial court was not a judicial review application under Order 55 of the High court (Civil Procedure) Rules, C.I. 47. Indeed, the record before us will bear out, that the issue was taken before the trial judge as to whether judicial review was not the rightful procedure to invoke its jurisdiction. The trial judge determined, correctly in our view, that the matter could proceed under the Order 67 provisions of the procedure Rules.

It is a principle of judicial review that its remedies are generally discretionary. This originates from the English common law. The learned editors of Halsbury's Laws of England describe the remedies under the paragraph on *Discretion* as follows:

> *"**122. Discretion.** The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as prohibition), mandatory orders (formerly known as mandamus), declaratory orders and injunction are all discretionary. The court has a wide discretion whether to grant relief at all, and if so, what form of relief to grant."*

Perhaps, apart from the relief of damages (which can now be claimed in a judicial review application under the English procedure rules) the same list of remedies is provided under Order 55 of the High Court (Civil Procedure) Rules. This leaves us in no doubt that the remedies obtainable under Order 55 are also discretionary. Rule 2(1) of Order 55 provides:

"**Orders obtainable by judicial review**

2. (1) On hearing of an application for judicial review the High Court *may* make any of the following orders as the circumstances may require (a) an order for prohibition, certiorari or mandamus; (b) an order restraining a person from acting in any public office in which that person is not entitled to act; (c) any other injunction; (d), a declaration; (e) payment of damages.

In not any dissimilar terms, Order 67 rule 8 provides:

> ***"Court to issue directions, orders or writs***
>
> *8. The court may issue such directions, orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warranto as it may*

consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms of the constitution to the protection of which the applicant is entitled."

Comparing the provisions in Orders 55 rule 2(1) and 67 rule 8, we do observe that by and large, the same orders and/or directives are obtainable for the two streams of procedure. We notice also that both provisions are couched in permissive terms. Given the commonality in terms and purpose of the two procedures, we take the view that the reliefs obtainable under Order 67 to secure or enforce the human rights provisions in the constitution are also, generally, discretionary.

We made the above analysis to arrive at the decision that the orders made by the learned trial judge were discretionary in nature. As a matter of fact, the reliefs (i) and (ii) which were granted were declaratory reliefs which are inherently discretionary. The other two, (iv) and (vi) were merely pursuant orders of (i) and (ii).

Understood that the reliefs granted were discretionary in nature, it becomes important to remind ourselves as an appellate court, that this appeal being one against the exercise of discretion, we can only interfere with the decision on the grounds that the trial court applied wrong principles, or the conclusions reached were based on unproved matters or that it either gave weight to irrelevant matters or omitted to take relevant matters into account. See IN RE PARAMOUNT STOOL OF BAMIANKOR; EFFIA IV & ANOR VRS NANA TAIBA II & ORS (2010) SCGLR 37; BUABENG VRS FORKUO 22nd Jan 1970, DIGESTED IN (1970) C.C 59

Article 23, the bulwark of the respondents' claim provides follows:

"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."

In ASARE VRS ATTORNRY-GENERAL & ANOR (2017-2018)2 SCGLR 570 at 589, the Supreme Court made the following determination which must be considered instructive:

"The provision in article 23 of the constitution relating to the exercise of discretionary power in respect of administrative justice is regulated by article 296… Thus, when one is considering an allegation of a breach of the right to administrative justice, the evidence required to demonstrate the breach as discerned from article 296, relates issues of candor, fairness, or absence of arbitrariness, caprice, and/or bias. In the circumstances, whenever, a breach is alleged of the right conferred under article 23, the court is required to measure the act or omission on the basis of the facts on which the allegation is based. This will enable the court determine whether or not indeed there has been a breach within the contemplation of article 2(1) of the constitution. Therefore, a consideration of article 23 implies a consideration of the constitutional standard in article 296."

Our immediate worry reading the above decision was, if one were to go by the benchmarks in article 296 (a) and (b) (i.e., duty to be fair and candid and not to be arbitrary, capricious or biased and be in accordance with due process of law) what then happens to the requirements of fairness, reasonableness and duty to comply with the requirement of law stipulated in article 23? What was to deepen our worry was the fact that the learned trial judge rested her decision on the benchmarks in article 23 without adverting her mind to the decision in ASARE VRS ATTORNEY-GENERAL which had been cited to her attention.

At the same time it would sound inconceivable to us that by ascribing the benchmarks in article 296 (a) and (b) to the duty in article 23, the Supreme Court in ASARE VRS

ATTORNEY-GENERAL intended to undo the requirement of fairness, reasonableness and duty to comply with requirement of law in article 23.

Upon a deeper reflection, we were content to assume that the Supreme Court must have intended a harmonious approach to understanding the benchmarks in the two provisions. We are for this view to be vindicated by the well-known presumption against internal inconsistency in legislative construction. At any rate, there is little to choose between the benchmarks in article 23 and those in article 296 (a) and (b). Whereas article 296 (a) and (b) talks of the duty to be fair and candid and not to be arbitrary, capricious or biased and to act in accordance with due process of law about, article 23 talks of fair, reasonable and duty to comply with requirement of law.

Lest we forget, the Supreme Court in AWUNI VRS WAEC per Sophia Akuffo JSC (as she then was) had interpreted fairness and reasonableness in article 23 in broader terms to include "probity, transparency, objectivity, opportunity to be heard, legal competence and absence of bias, caprice or ill-will.

It thus seems clear to us, reading the decisions in AWUNI VRS WAEC and ASARE VRS ATTRONEY-GENERAL, that we are to understand and apply the benchmarks in article 296 (a) and (b) as coterminous with those in article 23. This way, the raison d'etre of the provisions in the two articles which is to regulate and control the exercise of administrative discretion, check its abuse for the public good would be attained.

The foregoing defines the compass within which we proceed to examine whether the impugned decision of the appellant, that is getting the respondents and other candidates to undertake to accept the entrance examination results as final without any right to seek remarking, meets the benchmarks. If it does not, then the respondents' right to administrative justice under article 23 would have been violated. In all, this, one

thing certain which is also common ground is that the decision of the appellant was an act of administrative discretion.

It has been explained that *"the very concept of administrative discretion involves a right to choose between more than one possible cause of action upon which there is room for reasonable people to hold different opinions as to which is to be preferred.* Per Lord Diplock in SECRETARY OF STATE OF EDUCATION AND SCIENCE VRS TAMESIDE METROPOLITAN BOROUGH COUNCIL (1977) AC 1014 at 1064.

In ASSOCIATED PROVINCIAL PICTURE HOUSES LTD VRS WEDNESBURY CORPORATION (1948)1 KB 223 Lord Greene M.R delivers himself of the nature of discretion and how it is exercised as follows:

> *"When an executive discretion is entrusted by parliament to a body such as a local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case…When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, in an absolute one and cannot be questioned in any court of law. What are these principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such discretion must be a real exercise of discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion, it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would be germane to the matter in question, the authority must disregard those irrelevant matters…"*

Also, in PADFIELD VRS MINISTER OF AGRICULTURE, FIRSHERIES AND FOOD (1968) AC 977 at 103, Lord Reid observed:

> *"It is important to bear in mind that when a statute confers the exercise of discretion, the intention of the law must be that the discretion must be exercised to promote the policy and object of the statute. The policy and object of the statute must be determined by construing the statute as a whole and the construction is always a matter of law for the court."*

It appears from the passages above that in examining the exercise of discretion in any particular case, the starting point is to consider the statute or the law conferring the exercise of the discretion. In the instant case, the reference point should be the Legal profession Act (Act 32).

Sections 13 of the Act contains the following provision on legal education, the subject area of this suit:

"13. (1) It shall be the duty of the General Legal Council to make arrangements –

(a) For establishing a system of legal education,

(b) For selecting the subjects in which those seeking to qualify as lawyers are to be examined,

(c) For establishing courses of instructions for students and, generally, for affording opportunities for students to read and to obtain practical experience in the law,

(d) For regulating the admission of students to pursue courses of instruction leading to qualification as lawyers, and

(e) For holding examinations which may include preliminary examination as well as final qualifying examinations.

(2) The Council may carry out the arrangements in such a manner as they think fit and, particular, either through a school of law set up by them or through any other educational institution.

> *(3) The Council shall issue to those who have satisfied the Council that they have attained the necessary standards of proficiency in the law, that they have obtained adequate practical experience in the law and that they are otherwise qualified to practice as lawyers a certificate to that effect (hereinafter referred to as a "qualifying certificate").*"

Section 14 provides for the making of regulations by legislative instrument concerning all matters of legal education including the conduct of examinations. It was pursuant to the said provision that the Legal Profession (Professional and Post-Call Law Course) Regulations, 2018, L.I 2355 by which entrance examinations are conducted was made. In particular, Regulation 1 on *Admissions*, contains the following provisions:

"1. The Council may

(a) Determine the number of students to be admitted to the Professional Law Course each academic year;

(b) Allocate quotas to all universities that the Council has approved to the Bachelor of Laws Programme; and

(c) Conduct an entrance examination for the admission of students to the law school."

Other provisions worthy of mentioning are on Eligibility to apply for Professional Law Course, Application to apply to the Law School, Qualification for Admission to undertake Professional Law Course, Disqualification to undertake Professional Law Course, Appointment of an Independent Examinations Committee (IEC) and Functions of the Independent Examinations Committee under Regulations 2,3,4, 5, 12 and 13 respectively.

We are certain that it was within the compass of the above statutory framework that the appellant's decision not to allow remarking or reviewing of results and for candidates to accept results declared as final was taken. If we had any doubt about the authority of the appellant to make that decision, the provision in article 297(c) would have dispelled it. It is there provided:

> *"297 (c) where a power is given to a person or authority to do or enforce the doing of an act or a thing, all such powers shall be deemed to be also given as are necessary to enable that person or authority to do or enforce the doing of the act or thing."*

The appellant rationalizes its position by saying that any decision to allow for remarking and reviewing of scripts of entrance examination would be stifling and inimical to a smooth admission process. Such a decision, it is said, has the tendency to distort the academic calendar as well as hamper the smooth running of the school.

To further rationalize the decision, the appellant chronicles the process involved in the conduct of examination and publication of results in its affidavit in opposition to the application thus:

"8. That every script in respect of the entrance exam is marked twice.

9. That after the exams, the scripts are dispatched by the IEC to examiners for first round marking.

10. That marked scripts received from the first line examiners are again dispatched by the IEC to second group of examiners for moderation (remarking/reviewing).

11. That moderated scripts and results received are checked for quality assurance for collation.

12. That collated results are reviewed by the IEC for presentation to the Board of Legal Education and the General Legal Council for consideration and approval respectively before publication.

13. That the establishment of the IEC in accordance with law and the measures put in place diffuses any and all allegations of bias, caprice, arbitrariness, unlawfulness, ill-will, lack of probity, objectivity, opportunity and legal competence."

It is significant to note that the process alluded to above were not disputed. Nonetheless, the earned trial judge found the reasons advanced unsatisfactory. The culmination of her appreciation was as follows:

> *"I cannot but find and hold that the requirement of an undertaking by the respondent from applicants as part of their application process to the Ghana School of Law to the effect that they will not question the decision of the respondent is unlawful and indeed same does not accord with the qualities of fairness and reasonableness in terms Article 23 of the 1992 constitution. I further find as unlawful. The absence, refusal and or neglect by respondent to allow applicants apply for review or remaking of their scripts."*

It is understood that by fairness under article 23 and by extension under article 296 is meant procedural fairness. Their Lordships in AWUNI VRS WAEC well recognized this position. KPEGAH JSC pronounced:

> *"The phrase "to act fairly and reasonably" in my opinion necessarily imports a duty to observe the common law maxim of audi alteram partem and other principles of natural justice which is very much part of our jurisprudence and are implicit in the constitutional provisions in article 23."*

For Dr Twum JSC:

> *"My Lords, what does fairness require in this case? To act fairly is to make over to the party affected the evidence available to him. Where the party affected has the right to make representations, this involves three things: (i) he must be informed of the case against him; (ii) so as to tailor his submission thereto; and (iii) to refute some of the*

allegation, (if that is the case), correct his mistakes or explain away otherwise damaging evidence…"

Authorities strongly suggest that procedure fairness is not always feasible and pragmatic in every situation. Indeed, there is a popular view that when it comes to the conduct of examinations there is realistically no room for natural justice principles. Dr Twum in AWUNI VRS WAEC made the point as follows:

"It is sometimes said glibly that any person who decides anything affecting the rights of subjects must observe the rules of natural justice. That is certainly not correct. For example, no such duty arises where numerous persons are competing for scarce resources, eg allocation of government contracts or university places. This may cause some considerable hardship to the unsuccessful contenders, but no court has held that such people have any common law right to go to court on the ground that their applications are summarily rejected."

Not ending at that, his Lordship professed:

"I wish to emphasize that my opinion should be limited in scope to the matter of disciplinary action taken against the affected students. Serious public mischief will result if any attempt is made in the future to introduce the principle of natural justice to the area of marking and moderating examination scripts. I am not oblivious of the rampant nature of examination malpractices in this country. We all bear a heavy responsibility to ensure the canker is completely exterminated. To admit the principle of natural justice into the conduct of examinations apart from the disciplinary functions of the council will surely open the floodgates to a torrent of unbridled abuse."

His Lordship is not alone in this perspective. Even more forthright is what seems a universal recognition that courts generally abstain from intervening in matters of arranging examination and marking of scripts to assess the academic capability of

students. The good policy rationale of this recognition is that the academic institutions have legitimate claim to expertise in such matters and that the court supervision in such matters is inappropriate.

It is reported that way back in 1846 in the case of THOMPSON VRS UNIVERSITY OF LONDON (1864) 33 L.J (Ch) 625 Kindersley V.C declined intervening in a dispute arising out of the regulations governing the marking of the LLD examinations in the University of London. The learned V.C decided:

> *"The holding of examinations and the conferring of degrees being one, if not the main or only object of this university, all the regulations, that is the construction of all the regulations and the carrying into effect of all the regulations… all those regulations are of the domus: they are regulations clearly in my mind coming within the jurisdiction and the exclusive jurisdiction of the Visitor."*

This old mentality has not ceased to be persistent. In THORNE VRS UNIVERSITY OF LONDON (166)2 QB 1237 due recognition was paid by the court to the Visitor's authority by deferring to it in a suit concerning negligence in the marking of an examination paper. Diplock C.J held:

> *"The High Court does not act as a court of appeal for university examiners and speaking for my part I am very glad that it declined jurisdiction."*

In a Canadian case, RE POLTEN AND THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO (1975) 59 DLR (3rd ed) 197 the court said:

> *"[The] standards for a degree and the assessment of student's work are clearly vested in the university. The courts have no power to interfere merely because it is thought that the standards are too high or that the student's work was inaccurately assessed."*

The attitude of the Australian courts appears not any different from the above. EX PARTE MCFAYDEN (1945) SR 200.

Before we are misunderstood, we are quick to concede that these decisions pointing to judicial reticence are cast in jurisdictional terms. We have cited them not by any means to suggest that the trial judge had no jurisdiction to entertain the matter, or she wrongly exercised one. We shall nonetheless posit firmly that at the very least, the principle added a forceful impetus to the reason put forth by the appellant in this case to justify the decision taken. From our standpoint, given that the policy reason behind the cases is mainly founded on competence and expertise of academia on the subject which is lacking in the ordinary courts, we feel persuaded by them in re-evaluating the decision before us. On the facts and guided by the strength of case law on procedural fairness, we hold that the appellant did not breach the requirement of fairness under article 23.

Administrative bodies and officials are required to act reasonably in the exercise of their discretion. However, in determining whether a particular duty was exercised reasonably or not, courts are to be mindful of a basic principle of administrative law. This is that, in exercising judicial control, *"it is not part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question".* Halsbury's Laws of England, Vol.1(1) 4th ed., (Reissue) Para 59. See also D.R FRAZER CO.LTD VRS MINISTER OF NATIONAL REVENUE (1949) AC 24.

The appellant before the trial judge explained the reason behind its decision. It had taken that decision in order not to stifle the academic calendar of the school. It also believed in the integrity of the processes put in place. We take judicial notice of the huge numbers of candidates who apply to write the entrance examination every year. Out of the thousand and over, only a fraction usually pass the entrance examination. Perish the

thought, if all candidates who fail decide to seek remarking or reviewing of their scripts, can the academic calendar run?

To think of it, the reason to seek remarking or reviewing of scripts could be as frivolous as anything. In the instance of the 3rd respondent, the reason for seeking remarking as captured in his letter attached to the affidavit in support of the application was:

> *"I wrote the law school entrance exam on 26th July 2019 as a candidate with index number IEC/EE/2019/1482. Given my perceived performance-one which would at minimum hit the 50% required pass mark-I found my raw score posted on the notice board at your premises quite disappointing. I am kindly requesting a remark of the exam script."*

Must such reasons be entertained to create confusion in the academic calendar and potentially derail the smooth running of the school? We think not.

We are of the considered view that these considerations should have weighed on the trial court in reaching a decision. Had she properly applied her mind to these salient matters, we suppose her conclusion would have been different.

Additionally, we think that trial judge's verdict of the decision of the appellant as unlawful is objectionable. Barring fairness and reasonableness, an administrative discretion is exercised unlawfully where there has been non-compliance with a requirement imposed by law usually the law conferring the exercise of the discretion. We understand the Supreme Court as saying this when in AWUNI VRS WAEC, Dr Date-Bah JSC observed*:*

> *"The next element of the article 23 which we need to examine is the duty to comply with the requirements imposed on administrative bodies and officials by law. I understand this element to be additional to what has been discussed above. In other words, administrative*

bodies and officials in addition to complying with the rules of procedural fairness embodied in audi alteram partem and its derivatives and independent constitutional obligations (if any) distilled by Ghanaian courts from the duty to "act fairly and reasonably" must comply with all other applicable rules of law. Such other relevant applicable rules of law will often be in the constitutive enactment relating to the administrative body concerned"

The verdict of the trial judge presupposes that the constitutive enactment of the appellant, Act 32 and by extension L.I 2355 has a provision allowing remarking or reviewing of scripts which the appellant had breached. There is no such provision in law. The appellant's decision was not to allow such a thing to be introduced for the reasons given. The real issue was whether not giving the opportunity was unfair and unreasonable, capricious, arbitrary etc. We think holding the decision as unlawful is wrongful and perverse.

For the same reasons we have advanced, the appellant's decision cannot be said to be arbitrary or capricious in terms of article 296. Arbitrariness implies the use of discretion in disregard of the law. Its bed-fellow is caprice which implies impulsiveness. See ABU RAMADAN & ANOR VRS ATTORNEY-GENERAL & ANOR (NO.2) (2915-2016)1 SCGLR 1. No allegation of bias was made against the appellant and in any case there is no evidence of any.

For all that has been said, we come to the decision that the trial judge's conclusion that the appellant acted unfairly, unreasonably and unlawfully by its decision on the undertaking and not to allow the respondents to seek remarking or review of their results, was in all the circumstances of the case not supportable in law. We hold that the respondents' right to administrative was not breached by the appellant.

We must recognize the trial judge's concern about the problems of legal education in this country which apparently, influenced her decision. She appears to think that entrance examination is the major cause of the problem of legal education. We are equally concerned. We shall however state that as major stakeholders in legal education, our motivation to contribute a solution must be based on a comprehensive appreciation of the complexity of the problem. There was no evidence before her that entrance examination was the major cause of the problem and certainly there is not guarantee that allowing unbridled opportunity to seek remarking or reviewing is an antidote to the problem. We believe we must allow the rules and such institutions as the IEC the space to work. We must have confidence in the distinguished members of the IEC even in the midst of the challenges.

One last point. The respondents had challenged why students pursuing the professional law school are afforded the right opportunity to seek remarking or reviewing of their results but the same for candidates of the entrance examination.

We believe the potential danger in allowing candidates of entrance examination to seek remarking has been well articulated in this delivery. At any rate it should be noted that the arrangement to allow students pursuing professional law course to seek remarking of results is contained in (L.I 2355) law. If it is thought that, by not according the same treatment to candidates in entrance examination, the law is unfair and discriminatory, the recourse, we suppose is to go to the appropriate forum to challenge the constitutionality of the law that enacted the arrangement. The decision does not rest with this court.

On this note, we allow the appeal and set aside the judgment of the trial court in its entirety.

No order as to cost.

(sgd)

RICHARD ADJEI-FRIMPONG

(JUSTICE OF THE COURT OF APPEAL)

(sgd)

I agree **BARBARA ACKAH-YENSU**

(JUSTICE OF THE SUPREME COURT)

(sgd)

I also agree, **AMMA A. GAISIE**

(JUSTICE OF THE COURT OF APPEAL)

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