Draft - as read on court on May 22, 2012

In the Superior Court of Judicature

In the Supreme Court of Justice

Accra AD 2012

Writ No. J1/6/2011

Professor Stephen Kwaku Asare } Plaintiff

Vrs.

The Attorney General } Defendant

16th May, 2012

Opinion

Sophia A. B. Akuffo, JSC.

I have been privileged to read beforehand the opinion about to be read by my esteemed Brother, Dr, Date-Bah, and I agree generally with the conclusions he has arrived. However, I have serious misgivings concerning the constitutionality of section 16(2) of the Citizenship Act, 2000 (Act 591).

Citizenship (whether or not on a dual or multiple basis) of a country is a precious right which carries with it invaluable privileges. The means by which any of these rights and privileges may be limited are normally governed by clear legal provisions, because such limitations derogate from the incidents of citizenship. Thus, in the case of Ghanaians with dual citizenship, the limitations imposed on their eligibility to hold public office are set by article 8(2) of the

Constitution, as amended by the Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) which provides that:-

> "... no citizen of Ghana shall qualify to be appointed as a holder of any office specified in this clause if he holds the citizenship of any other country in addition to the citizenship of Ghana:
>
> (a) Ambassador or High Commissioner
>
> (b) Secretary to the cabinet
>
> (c) Chief of Defence Staff or any Service Chief
>
> (d) Inspector-General of Police
>
> (e) Commissioner, Customs, Excise and Preventive Service
>
> (f) Director of Immigration Service and
>
> (g) any office specified by an Act of Parliament

Hence, dual citizens of Ghana are prohibited, by the Constitution, from holding these listed positions. Clause (g) however, makes it possible for this list to be expanded by an Act of Parliament, to include other positions. Since the Constitution sets out a certain and specific list, it follows that any addition to the list would amount to an amendment of the Constitution. It is for this reason that, in his Statement of Case, the Plaintiff seeks to argue that the Act of Parliament stipulated in the clause is one that must necessarily comply with the provisions of Chapter Twenty-Five of the Constitution, Article 289 of which provides that:-

> "(1) Subject to this Constitution, Parliament may, by an Act of Parliament, amend any provision of this Constitution.
>
> (2) This Constitution shall not be amended by an Act of Parliament **or altered whether directly or indirectly** unless –

(a) **the sole purpose of the Act is to amend this Constitution**; and

(b) the Act has been passed in accordance with this Chapter."

In my view, these clear, specific and basic requirements for a valid amendment of the Constitution were not complied with in the enactment of Section 16(2) of Act 591. The long title of the Act reads as follows:-

> "An Act to consolidate with amendments the law relating to citizenship of Ghana, to state in respect of .... to bring the law in conformity with the Constitution as amended and to provide for related matters."

The declared purpose of the Act, to my understanding, is therefore that it was being enacted to consolidate and bring into pursuant effect the amended provisions of the Constitution. It was not declared to be, itself, a constitutional amendment act. Thus its sole purpose was not to alter amend the Constitution, and as far as the Ghanaian public is formally aware, there has been only one amendment of article 8(2) of the Constitution, and the terms of that amendment are those set out in Act 527. Yet it is clear that section 16(2) has purported to amend and alter the provisions of Article 8(2). These amendments added to the list of offices that may not be held by persons holding dual citizenship. Additionally, and of even greater concern, they also weakened the process integrity originally envisaged by the constitutional amendment Act, by passing downward to the Minister the power to further add to the list of prohibited offices by legislative instrument. The power thus conferred on the Minister is quite excessive, in my view. Thus, whereas the Constitution stipulates more stringent measures and processes at higher levels for the amendment of its provisions, under the Citizenship Act, an even greater number of persons with dual citizenship may be disqualified by way of a mere

legislative instrument issued by a Minister, thereby by-passing the checks mounted by the Constitution, in Articles 291 and 292.

Now, every provision of the Constitution is presumed to there for a purpose and cannot be disregarded for the sake of convenience. Whilst it may be arguable that the Act of Parliament referred to in article 8(2)(g) of the Constitution (as amended by Act 591) is simply an ordinary Act of Parliament, passed in accordance with Article 106, I am fortified in the position I have taken to the contrary, by the well established principle that in the construction and interpretation of a Constitution, every provision must be given its effect. Therefore, it must be read as whole and not as though each provision exists in isolation, oblivious of the import of any other provisions. Yes, an Act of Parliament to add to the list of offices is referred to in the said clause (g). Yet article 289 also states in categorical terms that an Act of Parliament may not amend or directly or indirectly alter the Constitution unless certain conditions are met. Doubtlessly, in enacting the clause, Parliament was fully aware of Article 289. Hence, if clause (g) was intended to create an exception to the requirements of article 289 it should have been so stated therein expressly that, in respect of the clause, the said requirements are excepted. Clearly this was not done and therefore there would be no justification for reading and such exception into the provisions of clause (g). To hold otherwise would be very dangerous and make a mockery of constitutional provisions such as article 8(2), which particularise specific matters, thereby eventually reducing the Constitution to the status of an ordinary statute, as evidenced by what Parliament has attempted to do in section 16(2) of Act 527.

In my humble opinion, therefore, the fact that an ordinary Act of Parliament undergoes certain levels of scrutiny before enactment is not sufficient justification when there is clear non-compliance with the prescribed procedures and processes stipulated, by the same Constitution that empowered Parliament to alter the article 8(2), for

the enactment of alterations to the Constitution. For the foregoing reasons, I am of the view that the addition of the offices of:-

Chief Justice
Commissioner, Value Added Tax Service
Director General, Prisons Service
Chief Fire Officer
Chief Director of a Ministry and
the rank of a Colonel in the Army or its equivalent in the other security services

in section 16 (2) (a), (h) – (l), to the list of proscribed positions is unconstitutional. So too is section 16 (2) (m) which purports to empower the Minister to prescribe additional offices by legislative instrument. I would therefore declare those provisions null and void.