REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 400 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION

AND CERTIORARI AND

IN THE MATTER OF KENYA SCHOOL OF LAW ACT, 2012

AND

IN THE MATTER OF LEGAL EDUCATION ACT, 2012

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010.

-BETWEEN-

BENJAMIN MORARA ONDARI.....APPLICANT

AND

KENYA SCHOOL OF LAW.....1STRESPONDENT

COUNCIL OF LEGAL EDUCATION.....2ND RESPONDENT

JUDGMENT

Introduction

1. In *Daniel Ingida Aluvaala and another vs Council of Legal Education & Another*[1] I observed that "in any civilized society the maintenance of proper standards of excellence in all professions is essential. The profession of advocacy is no exception. It is not the function of Universities to produce graduates who are ready-made legal practitioners, nor are they able to do so as matters presently stand. Consequently the burden falls squarely on the Council of Legal Education to ensure, in the interests of the public, that the required standards are met and maintained."

2. In the above cited case I also stated that "it is axiomatic that for the proper practice of the advocates' profession there are, essentially, two broad requirements, apart from integrity: they are specialized knowledge and particular skill. The knowledge that is required is knowledge of the substantive and procedural law; the skill involves the ability to apply that knowledge to good effect in practice."[2]

3. A person desiring to practice law in Kenya must in addition to possessing the qualifications stipulated in the Advocates Act, successfully complete the Advocates Training Programme offered at the Kenya School of Law and pass the examinations administered by the Council of Legal Education.[3]

4. Regulation **9 (5)** of The Council of Legal Education (Kenya School of Law Regulations), 2009 provides that " in respect of the Advocates Training Programme a candidate shall be allowed a maximum of five years within which to complete the course of study."

5. Section **23** of the Legal Education Act[4] (hereinafter referred to as the Act) provides for core degree courses which must be provided by a legal provider. These core degree courses are listed in Part **11** of the Second Schedule.

The Applicant's case.

*6. The applicant's substantive Notice of Motion dated **25th** October 2016 seeks the following orders:-*

> *a) An order of **Certiorari** to quash the decision of the Council of Legal Education contained in the letters dated **6th** September 2018 and **18th** September 2018 barring the applicant from registering and directing him to attend the remedial program in accordance with the Legal Education Act, 2012.*
>
> *b) An order of **Prohibition** to prohibit the Council of Legal Education and the Kenya School of Law from barring the applicant from registering and sitting for the Advocates Training Program bar examinations for the academic year 2018 offered by the Council of Legal Education.*
>
> *c) An order of **Mandamus** directed to the Council of Legal Education compelling it to register and allow the applicant to for the Advocates Training Program bar examination for 2018 offered by the Council of Legal Education.*
>
> *d) Costs of this application to provide for.*

Grounds in support of the application.

7. *The applicant states that he obtained a Bachelor of Laws Degree (LLB) from Babasaheb Ambedkar University in India in 2002. He further states he was admitted at the Kenya School of Law for the year 2002/2003 and sat for the examinations in the year 2003, but, he only passed in few units.* He also states that in conformity the then prevailing Kenya School of Law Regulations, he underwent a proficiency test in English language before being admitted to the Advocates Training Programme.

*8. The applicant further states that he applied to the Kenya School of Law and the Council of Legal Education for the Advocates Training Program for 2018. Additionally, he states that he passed the pre-bar examination and was admitted to the School of Law for the Advocates Training Program for 2018. He also states that he was barred from sitting for the Advocates Training Program bar examinations for November 2018 notwithstanding the fact he satisfied all the requirements and paid the exam fees **Ksh. 45,000/=** on **3rd** September 2018.*

*9. Further, he states that the decision by the Council of Legal Education to bar him from sitting for the Advocates Training Programme bar examinations due on November 2018 as communicated in the letters dated **6th** September 2018 and **18th** September 2018 is discriminatory and unfair on grounds that it violates his rights as enshrined in Articles **27** and **47** of the Constitution.*

10. *Also, he states having been* was admitted to the Advocates Training Programme for 2018, he undertook the oral and project examination constituting **40%** of the Advocates Training Examination conducted by the Kenya School of Law for and on behalf of the Council of Legal Education. However, he avers that he received letters dated **6th** September 2018 and **18th** September 2018 notifying him that he is not eligible to sit for the bar examination because his LLB degree is nor recognized and approved by the Council of Legal Education and that he should attend a remedial program in accordance with the Act.

11. The applicant states that having been admitted to the Advocates Training Programme before the enactment of the Legal Education Act, 2012, he cannot now be called upon to comply with the new regulations contained in the new act, and, that the decision which violates his rights Article under Article **27** of the Constitution.

The First Respondent's Replying Affidavit.

12. **Fredrick Muhia,** the first Respondent's Academic Manager swore the Replying Affidavit dated **22nd** October 2018. He averred *inter alia* that the first Respondent is a State Corporation established under section **3** of the Kenya School of Law Act[5], and, it is the successor of the Kenya School of Law under the Council of Legal Education Act, 1993. He also averred that the first Respondent's mandate is training persons for the purposes of the Advocates Act,[6] and, that it mounts the Advocates Training Program under this mandate.

13. **Mr. Muhia** also averred that upon applying on **16th** November 2017, the applicant was given a provisional offer for the Advocates Training Program for the Academic year 2018/19 on **15th** February 2018. He averred that his admission was succeeded on two grounds, namely; he passed the pre-bar examinations, and, he had a Bachelors of Law Degree.[7] He averred that having been registered for the academic year 2018/19 on **23rd** February 2018, he attended the requisite in house training and undertook the oral and project bar examination components which constitute **40 %** of the Bar examinations.

14. He averred that the applicant's case is the pre-bar examinations which fall under the mandate of the second Respondent, hence, it ought to be the sole party in this case.

The second Respondent's grounds of opposition.

15. The second Respondent filed grounds of opposition on **5th** November 2018 stating that the applicant's application discloses no reasonable cause of action against the second Respondent and that the second Respondent's actions and or decision was made within the provisions of section **8 (1) (a) (c) (e)** and **(f)** of the Act.

Issues for determination.

16. Upon analyzing the facts and opposing submissions rendered by the parties, I find that the following issues distil themselves for determination, namely:-

a. Whether the Second Respondent acted ultra vires by making the impugned decision.

b. ***Whether the decision is unreasonable.***

c. ***Whether the decision violates the applicant's Right to legitimate expectation.***

d. Whether the applicant's right not to be discriminated were violated.

17. The impugned decision is contained in two letters written by the Counsel of Legal Education to the applicant. The first letter is dated **6th** September 2018. It reads in part:-

> *"Council notes that you attempted and passed the Pre-bar Examination at the Kenya School of Law. This however did not expunge the requirement to have the LLB degree recognized and approved by Council for purposes of admission to the Advcates Training Programme.*
>
> *As a consequence of the foregoing and the omission to have your foreign qualification recognized and approved, Council finds that you were ineligible for admission to the Advocates Training Programme and therefore ineligible to sit the Bar Examination."*

18. The second letter is dated **18th** September 2018. It reads in part:-

> *"In your application for recognition and approval of foreign qualification received by Council on **27th** October 2016, it reveals that although a substantial number of the core units were taken, the application did not meet the threshold prescribed by part **11** of the Second Schedule to the Legal Education Act, 2012. Specifically, the following units were not covered as envisaged by the Second Schedule.*
>
> *a. Commercial Law (Including Hiree Purchase & Agency).*
>
> *b. Equity and Law of Trusts.*

Councils decision is that you attend the Remedial Programme in thre above mentioned units to regularize your qualifications in accordance with the Legal Education Act, 2012.

19. **Mr. Moriasi**, counsel for the applicant argued that the applicant having been admitted to the Advocates Training Program, the presumption was that he was not required to do the exams. He argued that the law as at the time the applicant was first admitted had no such a requirement, hence the 2012 Act should not operate retrospectively. He also argued that the applicant had done 40 % of the exams.

20. **Miss Kiberenge,** counsel for the first Respondent adopted the contents her client's Replying Affidavit. The crux of her argument as I understood it is that this is essentially a dispute between the applicant and the second Respondent.

21. **Mr. Oduor,** counsel for the second Respondent argued that the impugned letters are properly founded on the law. He argued that the applicant's 2018 admission was not a continuation of the 2001 admission. He also pointed out that the applicant made an attempt to register in 2016 which was declined, hence, he was aware of the requirements. **Mr. Oduor** faulted the first Respondent for admitting the applicant on whose responsibility the admission rests since the Council comes in as the Regulator. He further argued that from **2001** to **2018**, the applicant never completed the course. He argued that when the applicant came back, there was a new law in place governing the process. He also cited Regulation **9 (5)** of the governing Regulations which requires a student to finish the training within **5** years and submitted that in 2018 the applicant came in as a new student, hence, he has to comply with the law as at 2012 and the Regulations.

22. **Mr. Oduor** cited section **8** of the Act and Part **11** of the second schedule to the Act which lists the core subjects and submitted that the council complied with the requirements of the law in making the impugned decision.

23. It is common ground that that the applicant registered for the Advocates Training Programme in 2001/2002. It is undisputed that he failed to pass the examinations, hence, he could not complete the training. It is not contested that Regulation **9 (5)** of the Council of Legal Education (Kenya School of Law) Regulations requires that a student finishes the training within **5** years from the date of registration.

24. I find no serious contest before me that the applicant was not caught up by the five year Regulation. What is contested is whether the requirement that he sits for the two extra units is founded on the law, and if so, whether he is subject to the said legal requirement since he was a student in 2001/2000 long before the 2012 Act came into operation. Differently stated, what was the applicable law in 2018 when the applicant registered. Counsel for the applicant maintains the 2018 registration was not a fresh registration but a continuation of the 2001/2002 registration.

25. The answer to the above questions is twofold; *first,* having failed to complete the training programme within **5** years from the date of registration in 2001/2002, the applicant was caught up by the Regulation **9 (5)**. It follows that in 2018 he registered as a new student. *Second,*

having registered in 2018 as a new student as aforesaid, the law applicable is the law that was in force in 2018 which is the Legal Education Act[8] which was assented to on **21st** September 2012 and commenced on **28th** September 2012.

26. Section **8** of the Act[9]provides for functions of the Council as follows:-

8 (1) The functions of the Council shall be to—

a. regulate legal education and training in Kenya offered by legal education providers;

b. licence legal education providers;

c. supervise legal education providers; and

d. advise the Government on matters relating to legal education and training.

e. recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.

f. administer such professional examinations as may be prescribed under section 13 of the Advocates Act.

(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—

a. accreditation of legal education providers for the purposes of licensing;

b. curricula and mode of instruction;

c. mode and quality of examinations;

d. harmonization of legal education programmes; and

e. monitoring and evaluation of legal education providers and programmes

(3) In carrying out its functions under subsection (2), the Council shall—

a. make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes;

b. establish criteria for the recognition and equation of academic qualifications in legal education;

c. formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels;

d. establish a system of equivalencies of legal educational qualifications and credit transfers;

e. advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;

f. collect, analyse and publish information relating to legal education and training;

g. advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;

h. carry out regular visits and inspections of legal education providers; and

i. perform and exercise any other functions conferred on it by this Act.

27. Also relevant is section **8 (4)** of the Act which provides that *"Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail."*

28. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

29. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji**[10]*:-

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."*

30. An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

31. Statutes do not exist in a vacuum.[11] They are located in the context of our contemporary democracy. The Rule of Law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the Rule of Law and other democratic fundamentals which Parliament has no power to exclude.[12] The courts should therefore strive to interpret powers in accordance with these principles.

32. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

33. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[13]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

34. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[14]

35. In *Council of Civil Service Unions v. Minister for the Civil Service**[15]* Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action in concern, *ultra vires*. These grounds are; *illegality*, *irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely; *proportionality.*[16]What Lord Diplock meant by *“Illegality”* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *“Irrationality”* by succinctly referring it to *“unreasonableness”* in Wednesbury Case.[17] By *“Procedural Impropriety”* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

36. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[18]*where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith.*

37. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature and hence not contravening the will of Parliament. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

38. The principle of Judicial Review is well established in our Constitution. The Constitution clearly mandates the courts to review legislation, conduct, decision or any act that is inconsistent with constitutional provisions. The courts are mandated by constitutional provisions to ensure that the public and statutory bodies operate within the boundaries of the Constitution and the statutes establishing them. At the same time, courts must display a willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; admit the expertise of those agencies in policy-laden or polycentric issues; and accord their interpretations of fact and law due respect and be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.[19]

39. It is essential that courts justify their intervention or non-intervention. It is also important that this be done candidly and consciously rather in a formalistic or coded style.[20] In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this duty that courts are more likely to confront the question of whether to venture into the domain of other branches of government and statutory bodies and the extent of such intervention. But even in these circumstances, courts must observe the limits of their power."

40. In treating the decisions of statutory agencies with the appropriate respect, a court is recognizing the proper role of the such functionaries within the Constitution. In doing so, a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to statutory bodies. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, and the lawfulness of the process. Such a decision requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

41. It is important to mention that the Council is bound by the principle of legality. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be annulled, it must be demonstrated that the decision is *not* grounded on law or the process was flawed, or no reasonable tribunal properly directing its mind to the material presented before it could arrive at the same conclusion. As such, the Councils's actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> "*(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"* ***[21]***

42. Article **47** (1) of the Constitution provides that *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."* Briefly, this means that every citizen has a right to fair and reasonable administrative action that is allowed by the law; and to be given reasons for administrative action that affects them in a negative way. Lawful means that administrators must obey the law and must be authorized by law for the decisions they make. Reasonable means that the decision taken must be justifiable - there must be a good reason for the decision. Fair procedures means that decisions should not be taken that have a negative effect on people without consulting them first. Also, administrators must make decisions impartially. To ensure fairness, the Fair Administrative Action Act[22] sets out procedures that administrators must follow before they make decisions.

43. Section **7 (2)** of the Fair Administrative Action Act[23]provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. For the Court to Review an administrative decision, an applicant must demonstrate any of the above grounds.

44. A reading of the second Respondent's statutory mandate and the impugned decision and the law and jurisprudence governing Judicial Review jurisdiction leaves me with no doubt that the second Respondent acted within its statutory mandate in making and communicating the decision complained of. The applicant has failed to demonstrate that the impugned decision is illegal. In fact there is no argument before me questioning procedural process leading to the decision. The decision was communicated and reasons for the decision are clear. On this ground alone this suit fails.

b. Whether the decision is unreasonable.

45. **Mr. Moriasi** without expounding argued that the decision is unreasonable. He placed heavy reliance in the case of *Kevin K Mwiti & others v Kenya School of Law & others.* ***[24]*** It is necessary to examine the facts of the said case and its *ratio decidendi* so as to establish its relevancy (if any) to this case. *First,* it is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[25]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,* ***[26]****that "Now before discussing the case of Allen vs. Flood* ***[27]*** *and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides...." (Emphasis added)*

46. *Second,* the ratio of any decision must be understood in the background of the facts of the particular case.[28] *Third,* a case is only an authority for what it actually decides, and not what logically follows from it.[29] *Fourth,* a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[30]

47. *Fifth,* each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[31] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[32] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[33] My plea is to keep the path of justice clear of obstructions which could impede it.

48. **Mr. Moriasi's** submission as I comprehend it is anchored on the following excerpt from the ruling dated **9th** November 2017 rendered by the court pursuant to an application seeking a review/interpretation of the court's judgment in the said case. The learned Judge stated:-

"As long as the remains as it (sic) that there is no express provision permitting the retrospective application of the amendment (sic) Act to those who had joined the LLB Degree Course before the same came into effect, those students can only be subject to the law as it then existed."

49. The foundation on Mr. Moriasi's argument as I understand it is hinged on the argument that that since the applicant was registered as a student at the Kenya School of Law in 2001/2002, long before the 2012 came into force, he cannot be subjected to the provisions of the act since the law does not operate retrospectively. That is the basis of his assertion that the impugned decision is unreasonable. It is this argument that **Mr. Moriasi** supports with the above decision.

50. Unfortunately, **Mr. Moriasi's** argument fails on two elementary grounds. *First,* as stated above, the applicant was caught up by Regulation **9 (5)** referred to earlier which was in force at the material time and is still in force. He did not complete the training within **5** years as the regulation required. Consequently, when he came back in 2018, he registered again as a new student to undertake the training afresh. The implication here is simple. The 2012 act was already in force, hence, he was subject to the provisions of the 2012 act.

51. *Second*, the decision relied upon is irrelevant and can be distinguished from the clear facts of this case. The facts of the Mwiti case were summarized by the learned Judge in a ruling rendered in the said case granting conservatory orders on **29th** September 2015 as follows:-

"Recognizing that there were students already enrolled in the University system whose constitutional rights and legitimate expectation to complete their education would be adversely affected by the Act, the 1st and 2nd Respondents published guidelines for admission to the Advocates Training Programme (herein referred as "ATP"). the said guidelines provided inter-alia the following;
…

The effect of the aforesaid guidelines was to provide for a three year transition period beginning 15th January 2013 to cater for students who had already been admitted to the university system prior to the enactment of the Act and to allow them to complete their programmes on the basis of legitimate expectation undergirded by the then existing law. By the said guidelines the Board appreciated the equality and non-discrimination provisions in Article 27(1), (2) and (6) of the Constitution, 2010 and pursuant thereto provided that the students who had already been admitted into the University prior to the said Act would complete their studies under the existing legal regime.

To the applicants, they were already undertaking their programmes and as such at all times protected by the letter and the spirit of the aforesaid guideline which guidelines created a legitimate expectation on the part of the petitioners to be subjected to the then existing law which was guiding admission to the ATP when seeking to join the ATP programme.

It was their case the said guidelines have been applied for the last two admission lots to the ATP programme and were expected to govern the third and last lot of admissions to the ATP Programme for the academic year 2016/2017 and to which academic year the applicants belong. The same transition period, it was contended, is still in force and the applicants expected to be subjected to the aforesaid guidelines.

It was disclosed that sometime in the year 2014, the Parliament of Kenya enacted the ***Statute Law (Miscellaneous) Amendment Act, 2014*** *(hereinafter referred to as "the Amendment Act") which Act amended various Acts including Schedule Two of the Act. The effect of the said amendment was the deleting of the word "or" in the second schedule and substituting therefor the word "and" and creation of the Board of Directors tasked with inter alia the responsibility of management of the School.*

The said amendment changed the eligibility for admission to the ATP programme by making it mandatory for applicants to sit and pass pre bar examinations. To the applicants, the said Amendment Act to the extent that it amended Schedule Two of the Act, the same was done without reasonable public participation especially participation by the Petitioners.

Pursuant thereto and without any prior notice or any reference or consultation with the petitioners, the 1st Respondent by way of an advert published in the local dailies on 2nd September 2015 i.e. The Standard Newspaper on page 23, and on page 43 of The Daily Nation inviting applicants to apply for a 'Pre-bar' examination as a prerequisite for admission to the 1st Respondent's institution to undertake ATP programme which advert listed the eligibility criteria for applicants for the pre bar examinations as follows;….

52. The learned judge in the Mwiti case proceeded to find that *".. although the Amendment Act was passed in 2014, it was not until 2nd September, 2015 that an advert was placed in the media notifying the prospective applicants of the challenged pre-bar exams. Under section 4 of the* ***Fair Administrative Action Act, 2015****, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action."* This was the context within which the case was ultimately determined. In the present case the applicant registered in 2018 after being away for many years, and long after he was caught up by the **5** year Rule. He cannot now be heard to say the law that was in force as at the date he registered for 2018 Training programme is operating retrospectively.This argument lacks substance.

53. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[34] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

54. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others****[35]*** O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.****[36]***

"*The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock* ***[1976] UKHL 6****;* ***[1976] 3 All ER 665*** *at 697****[1976] UKHL 6****; ,* ***[1977] AC 1014*** *at 1064 as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. … Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him*."

55. In *Carephone (Pty) Ltd v Marcus NO****[37]*** per Froneman JA, stated the test as follows:-

"*In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order*.

56. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it****[38]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[39]

57. The above stringent test has been applied in Australia. In *Prasad v Minister for Immigration*,[40] the Federal Court of Australia considered the ground. The Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached (at 167) and to prove such a case required "something overwhelming" (at 168). It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt (page 168.3), and when "looked at objectively… so devoid of any plausible justification that no reasonable body of persons could have reached them" (at 168).

58. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:-

i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;

ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;

iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;

59. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

60. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[41]

61. The test of reasonableness is not applied in a vacuum but in the context of life's realities. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them.

62. In *Republic vs Inspector General of Police & Another ex parte Patrick Macharia Nderitu*[42]it was held that to succeed in an application for Judicial Review, an applicant has to show that the decision or act complained of is tainted with *illegality*, *irrationality* or procedural impropriety.

63. Perhaps I should say something about the test for rationality. True, Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[43] which provides that:-

" *A court or tribunal under subsection (1) may review an administrative action or decision, if-*

i. the administrative action or decision is not rationally connected to-

a) the purpose for which it was taken;

b) the purpose of the empowering provision;

c) the information before the administrator; or

d) the reasons given for it by the administrator."

64. The test for rationality was stated as follows by Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others:-**[44]***

> "*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

65. In *Trinity Broadcasting (Ciskei) v ICA of*,[45] Howie P stated the rationality test as follows:-

> "*In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at*."

66. The Court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.

67. I have carefully examined the impugned decision. There is nothing to show that a reasonable body, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the applicant has not demonstrated that the decision tainted with unreasonableness or irrationality.

68. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

c. ***Whether the decision violates the applicant's Right to legitimate expectation.***

69. **Mr. Moriasi** argued that the decision violates legitimate expectation to join the Kenya School of Law, write the exams and ultimately be admitted as advocates.

70. **Mr. Oduor's** rejoinder was that there cannot be legitimate expectation on the face of clear statutory provisions.

71. Earlier I reproduced the statutory provisions upon which the second Respondent draws its mandate. Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth**[46]* at pages 449 to 450, thus:-

> "*It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> "*An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

72. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. The relevant provisions of the law cited earlier clearly show that the second Respondent's decision is grounded on the relevant statutory provisions, in particular Section **8** reproduced earlier.

d. Whether the applicant's right not to be discriminated were violated.

73. It was **Mr. Moriasi's** argument that the impugned decision is discriminatory. **Mr. Oduor's** rejoinder was simple, that is there is no discrimination.

74. **Mr. Moriasi's** argument on discrimination as I understand is hinged on the decision in the Mwiti case which I have already distinguished. In the circumstances of this case, the argument on the alleged discrimination fails on two grounds. *First*, the law in question applies to all. It was not applied to the applicant alone.

75. *Second*, the guiding principles in a case of this nature are clear. The first step is to establish whether the law differentiates between different persons.[47]The second step entails establishing whether that differentiation amounts to discrimination.[48]The third step involves determining whether the discrimination is unfair. This is where the answer lies. Period.

76. In ***Willis vs The United Kingdom[49]*** the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations.

> *"...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society."* ***[50]***

77. From the above definition, it is safe to state that the Constitution prohibits unfair discrimination. In my view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

78. The test for determining whether a claim based on unfair discrimination should succeed was laid down by South Africa Constitutional Court in *Harksen v Lane NO and Others*[51] in which the Court said:-

> *"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on article 27 the Constitution.*

They are:-

> *(a)Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
>
> *(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:-*
>
> > *(i)Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
> >
> > *(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.……..*
>
> *(c)If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (…..of the ..Constitution).*

79. The clear message emerging from the authorities, both local and from elsewhere, is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.

80. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination.

Disposition.

81. Applying the tests discussed above to the facts of this case, it is my finding that the *ex parte* applicant has not established the requisite tests to persuade the court to grant the Judicial Review orders of *Certiorari* and *Mandamus*.

82. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

83. The *ex parte* applicant also seeks an order of *Prohibition*. The writ of prohibition arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated

above, the illegality of the impugned decision has not been established.

84. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[52] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[53]

85. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or legally discharge its legal mandate, or where the judge considers that an alternative remedy could have been pursued. In this case, the applicant was given the option of writing the examinations in question to comply with the law. It was ill advised for the applicant to move to court in the circumstances of this case. Further, granting the orders sought in the circumstances of this case where the Respondent acted within its powers would amount to impeding the ability of the second Respondent to perform its statutory mandate.

86. Further, truly academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative decisions are subject to Judicial Review. Purely academic decisions are treated as beyond the courts reach though, on facts, in several cases the courts can interfere. The guiding principle in so far as Judicial Review of academic decisions is concerned stands as at to-day undisturbed is that the court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies. The reluctance for interference of the court is evident from the following decisions. In the Indian case of ***Maharashtra State Board -VS- Kurmarsheth & Others***,[54] it was stated as follows:-

> ***"So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations...."(Emphasis added)***

87. In the above case, the court emphasized the need:-

> ***"...to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them."***

88. In *University of Mysore and others v. Gopala Gowda and another**[55]*** the regulations framed by the Academic Council of the University prescribed that in the case of a candidate for the **B. V. Sc.** course failing four times in the first year examination the university can refuse to grant permission to continue the course. When the regulation was under challenge, the High Court of Mysore held that the regulation was beyond the competence of Academic Council or the University and those bodies had no power to prevent the two students from prosecuting their studies and from appearing at the subsequent examination. In the Special Leave Petition moved by the university, the Supreme Court disagreed with the view taken by the High Court and held:-

> *"The Academic Council is invested with the power of controlling and generally regulating teaching courses of studies to be pursued, and maintenance of the standards thereof, and for those purposes the Academic Council is competent to make regulations, amongst others, relating to the courses, schemes of examination and conditions on which students shall be admitted to the examinations, degrees, diplomas, certificates and other academic distinctions. The Academic Council is thereby invested with power to control the entire academic life of the student from the stage of admission to a course or branch of study depending upon possession of the minimum qualifications prescribed".*

89. It was further found that failure by a student to qualify for promotion or degree in four examinations is certainly a reasonable test of such inaptitude or supervening disability. If after securing admission to an institution imparting training for professional course, a student is to be held entitled to continue indefinitely to attend the institution without adequate application and to continue to offer himself for successive examinations, a lowering of academic standards would inevitably result. Power to maintain standards in the course of studies confers authority not merely to prescribe minimum qualification for admission, courses of study, and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree, diploma, certificate or other academic distinction to students who fail to satisfy the examiners' assessment at the final examination.

90. In *Jawaharlal Nehru University vs. B. S. Narwala*[56] it was ruled that the court should not interfere where qualified academic authorities decide to remove a student from the university on the basis of assessment of his academic performance. In this case a student was removed from the rolls for continuous failing in examinations and for consistent unsatisfactory academic performance. The court held that in the absence of any allegation as to bias or *mala fides*, there would be no basis to interfere.

91. Also relevant is the decision in *R vs. Council of Legal Education**[57]*** where the court stated thus:-

> *"The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable.…"*

92. Self-restraint adopted by the judiciary in exercising the power of review in academic matters has left certain academic decisions or regulations governing training and qualifications of professionals untouched. These areas are not disturbed by the courts unless the decisions under challenge are constitutionally so fragile and unsustainable. Academic decisions of the universities and other educational institutions

requiring expertise and experience belong to this category. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the Wednesbury principles of 'illegality', 'irrationality' and 'impropriety', if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper.

93. It is true that courts have upheld the constitutional right of every citizen to select a profession or course of study subject to a fair, reasonable, and academic requirements. But like all rights and freedoms guaranteed by the Constitution, their exercise may be so regulated pursuant to the power of the Regulating body to safeguard general welfare of the public.

94. Thus, persons who desire to engage in the learned professions requiring scientific or technical knowledge may be required to take an examination as a prerequisite to engaging in their chosen careers. This regulation takes particular pertinence in the fields like law and medicine, to protect the public from the potentially deadly effects of incompetence and ignorance among those who would practice in these professional fields.

95. It must be stressed, nevertheless, that the power to regulate the exercise of a profession or pursuit of an occupation cannot be exercised in an arbitrary, despotic, or oppressive manner. A body that regulates the exercise of a particular privilege has the authority to both forbid and grant such privilege in accordance with certain conditions. Such conditions may not, however, require giving up ones constitutional rights.

96. In view of my analysis of the law, facts and authorities enumerated above, I find that the applicant's application dated **25th** October 2018 has no merits and that the reliefs sought are unwarranted. Consequently, I dismiss the said application with no orders as to costs.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this **8th** day of **November** 2018.

John M. Mativo

Judge

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[1] Pet No. 254 of 2017.

[2] Ibid.

[3] Ibid.

[4] Act No. 27 of 2012.

[5] Act No. 26 of 2012.

[6] Cap 16, Laws of Kenya.

[7] Referring to *Alice Wanjiru Njiru vs Kenya School of Law & 16 Others* {2017} eKLR.

[8] Act No 27 of 2012.

[9] Ibid.

[10] {2014} eKLR.

[11] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ''Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law'').

[12] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become ''the ultimate controlling factor in our unwritten constitution''; and see J. Jowell, ''Parliamentarys' Sovereignty under the New Constitutional Hypothesis'' [2006] P.L. 262.

[13] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[14] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29

[15] {1985} AC 374.

[16] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of

proportionality, but did not rule it out for the future

[17] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[18] {2015} eKLR.

[19] See Hoexter 2000 SALJ 501.

[20] Hoexter Administrative Law 138.

[21] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).

[22] Act No.4 of 2015

[23] Act No. 4 of 2015

[24] {2015} eKLR.

[25] MANU/SC/0047/1967.

[26] {1901} AC 495.

[27] {1898} AC 1.

[28] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986.

[29] Ibid.

[30] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59).

[31] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr*. (Citing Lord Denning).

[32] Ibid.

[33] Ibid.

[34] Act No. 4 of 2015.

[35] *{2004} ZACC 15; 2004 (4) SA 490 CC* at 512, para 44.

[36] {1995} 1 All ER 129 (HL) at 157.

[37] *1999 (3) SA 304 (LAC)* at 316, para 36.

[38] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[39] Puhlhofer v Hillingdon London Borough Council [1986] 1 AC 484.

[40] {1985} 6 FCR 155

[41] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[42] {2015}eKLR.

[43] Act No. 4 of 2015.

[44] *2000 (4) SA 674 (CC)* at page 708; paragraph 86.

[45] SA 2004(3) SA 346 (SCA) at 354H- 355A.

[46] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000.

[47] See note 18 below (at para 48).

[48] Ibid Par 54

[49]**No. 36042/97, ECHR 2002 – IV**.

[50] See Andrews vs Law Society of British Columbia [1989] I SCR 143, as per McIntyre J

[51] {1997} ZACC 12; 1998 (1) SA 300(CC); 1997 (11) BCLR 1489(CC) (Harksen) at para 48.

[52] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[53] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

[54] **{1985} CLR 1083.**

[55] A.l.R. 1965 S.C. 1932.

[56] (1980) 4 S.C.C. 480.

[57] {2007} eKLR.