

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Munib Akhtar
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Shahid Waheed

C.M.A. NO. 3932 OF 2023

IN

CONSTITUTION PETITION NO. 14 OF 2023

AND CONSTITUTION PETITION NOS. 14 to 17 OF 2023

(Declaring Notification dated 19.05.2023 (Regarding constitution of an inquiry Commission to probe into the veracity of alleged Audio Leaks) as ultra vires to the Constitution of Pakistan, 1973)

Abid Shahid Zuberi, Advocate Supreme
Court of Pakistan

(in Const. P. 14 & CMA 3663/2023)

Muqtedir Akhtar Shabbir

(in Const. P. 15 of 2023)

Imran Ahmad Khan

(in Const. P. 16 of 2023)

Riaz Hanif Rahi, Advocate Supreme Court
of Pakistan

(in Const. P. 17 of 2023)

...Petitioner(s)

Versus

Federation of Pakistan through Secretary,
Cabinet Division, Islamabad and others

(in Const. P. 14/23 & CMA 3663/23 & Const.P.15 of 2023)

Federation of Pakistan through its
Secretary Cabinet, Pak Secretariat,
Islamabad and others

(in Const. P. 16 of 2023)

Government of Pakistan through ...Respondent(s)
Secretary Cabinet Division, Islamabad
and another

(in Const. P. 17 of 2023)

For the petitioner(s) : Mr. M. Shoaib Shaheen, ASC
Mr. Abid Shahid Zuberi, ASC
Mr. M. Umer Lakhani, ASC

assisted by:

Agha Ali Durrani, Adv.
Ms. Minahil Malik, Adv.
Ms. Amna Khalili, Adv.

(in Const. P. 14/23)

Mr. Shakeel-ur-Rehman, ASC
Mr. Muqtedir Akhtar Shabbir, ASC
(in Const. P. 15/23)

Nemo
(in Const. P. 16/23)

In-person
(in Const. P. 17/23)

For the Federation : Mr. Mansoor Usman Awan, Attorney
General for Pakistan
Ch. Aamir Rehman, Addl. AG
Raja M. Shafat Abbasi, DAG
Assisted by:
Barrister Maryam Ali Abbasi, Adv.
Mr. Saad Javaid Satti, Adv.
Ms. Maryam Rasheed, Adv.
Ms. Mehwish Batool, Adv.
Mr. Rashdeen Nawaz Kasuri, Addl.
AG

For PEMRA : Mr. Amanullah Kanrani, ASC

For PTA : Mr. Afzal Khan, ASC

Date of hearing : 06.06.2023

J U D G M E N T

UMAR ATA BANDIAL, CJ: This judgment shall decide the Federal Government's CMA No.3932 of 2023 ("**recusal application**"), filed in Constitution Petition No.14 of 2023, which seeks the recusal of three learned Members of the Bench, namely, Chief Justice Umar Ata Bandial ("**CJ**"); Justice Ijaz ul Ahsan; and Justice Munib Akhtar. However, as will be explained later in the judgment the prayer in the recusal application was ultimately confined only to the extent of the CJ.

Factual Background

2. The events leading up to the recusal application are that on 14.01.2023 and 18.01.2023 respectively the

Provincial Assemblies of Punjab and Khyber Pakhtunkhwa were dissolved. Article 224(2) of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") mandates:

"224. Time of Election and bye-election.

...

(2) When the National Assembly or a Provincial Assembly is dissolved, a general election to the Assembly shall be held within a period of ninety days after the dissolution, and the results of the election shall be declared not later than fourteen days after the conclusion of the polls."

(emphasis supplied)

Under the said constitutional direction it was imperative for the General Elections to the Punjab Assembly to be held on or before 14.04.2023 and to the Khyber Pakhtunkhwa Assembly on or before 18.04.2023. However, despite the strict deadline no progress was made by the authorities responsible for holding the General Elections to announce the date of the same. As a result, writ petitions were filed in the Lahore High Court and the Peshawar High Court for a direction to these authorities to announce the date of General Elections to the Punjab and Khyber Pakhtunkhwa Assemblies. The Lahore High Court vide its judgment dated 10.02.2023 declared the Election Commission of Pakistan ("**ECP**") as the competent authority to give the date of election. This judgment was immediately challenged by the Governor, Punjab and the ECP through Intra Court Appeals. The writ petition filed in the Peshawar High Court, however, remained pending.

3. Taking stock of the 90 day constitutional deadline expiring in mid-April for holding the General Elections and

the indifference of the concerned authorities to fix the date for such election, a two Member Bench of the Court comprising Justice Ijaz ul Ahsan and Justice Sayyed Mazahar Ali Akbar Naqvi on 16.02.2023 recommended the CJ to take *Suo Motu* notice of the delay in the holding of the General Elections to the Provincial Assembly of Punjab.¹ The CJ was collecting relevant information on the subject from the respective High Courts when two days later on 18.02.2023 the Speakers of the Punjab and the Khyber Pakhtunkhwa Assemblies jointly filed a Constitution Petition in the Court seeking the fixation of date of the General Elections to the two dissolved Provincial Assemblies. At that time the facts of note were that the custodians of both the Provincial Assemblies had approached the Court for relief; that a strict constitutional deadline for holding the General Elections was in the field which required compliance; and that the information from the two High Courts showed that the pending proceedings were not progressing. In the above circumstances, the CJ following the rule laid down in **SMC No. 4 of 2021** (PLD 2022 SC 306) accepted the recommendation made by the two learned Judges of the Court advising *Suo Motu* notice of the delay in announcing the election date. He accordingly invoked *Suo Motu* jurisdiction on 22.02.2023 and constituted a 9 Member Bench to hear the matter on 23.02.2023.

¹ CP No.3988/2022
<https://www.supremecourt.gov.pk/downloads_judgements/c.p._3988_2022.pdf >

4. Meanwhile on 16.02.2023 a Twitter account with the name of *indibell* released three audio recordings of alleged telephonic conversations between the following persons:

- i. Mr. Chaudhary Pervaiz Elahi, ex-Chief Minister, Punjab and Mr. Arshad Jhoja, ASC;
- ii. Mr. Chaudhary Pervaiz Elahi and Mr. Abid Zuberi, ASC, President Supreme Court Bar Association of Pakistan, the petitioner in Constitution Petition No.14 of 2023; and
- iii. Mr. Chaudhary Pervaiz Elahi and Justice Sayyed Mazahar Ali Akbar Naqvi, a sitting Judge of the Supreme Court.

Over a period of two months or so thereafter, more audio recordings of alleged telephonic conversations concerning known personalities or their families were released by *indibell*. Amongst these audio leaks a recording allegedly involving the mother-in-law of the CJ ("**Relative**") was released by *indibell* on 23.04.2023. Without verifying either their authenticity or the identity and credibility of their leaker the Federal Government immediately endorsed the audio recordings to denounce the Judges mentioned therein for compromising the independence of the Judiciary. Accusatory press conferences were held by incumbent Federal Ministers citing the audio recordings as proof that the Superior Judiciary was prejudiced against the Government of the day.

5. Such vilification of Superior Court Judges by elected Government functionaries continued before the media and sometimes even in Parliament. Finally action in the matter was taken by the Federal Government on 19.05.2023.

On this date in exercise of its power under Section 3 of the Pakistan Commissions of Inquiry Act, 2017 the Federal Government formed a three member Inquiry Commission ("**Commission**") vide SRO No.596(I)/2023 ("**impugned notification**") with the mandate, *inter alia*:

"6...

(i) to inquire into the veracity of audio leaks allegedly concerning including the Judiciary; (a) call between ex-Chief Minister Punjab and an advocate regarding a sitting Judge of the Supreme Court of Pakistan, (b) between ex-Chief Minister, Punjab and an advocate regarding fixation of some cases before a particular Bench of the Supreme Court of Pakistan, (c) between ex-Chief Minister Punjab and a sitting Judge of the Supreme Court of Pakistan, (d) between Retired Chief Justice of Pakistan and a senior lawyer, (e) between a lawyer and a journalist on the outcome of a case before a particular Bench of Supreme Court of Pakistan, (f) between former Prime Minister of Pakistan and his party colleague about their links in the Supreme Court of Pakistan, (g) between mother in law of the Chief Justice of Pakistan and wife of a lawyer regarding cases in the Supreme Court of Pakistan and hoping for un-constitutional rule[,] (h) between son of a former Chief Justice of Pakistan and his friend mentioning his father in a political role;

...

(iii) to determine violation, if any, of integrity of the process of administration of justice, independence of Judiciary, right to fair trial and equality of citizens;

...

(v) to determine as to whether any disciplinary proceedings are attracted;

...

(viii) if the stated audios are fake or fabricated, to inquire into and fix responsibility with regards, as to who is making these and recommend action to be taken in this regard;..."

(emphasis supplied)

6. It is clear from clauses 6(i), (iii), (v) and (viii) set out above that the Federal Government desired the

Commission to first inquire into the veracity of the audio recordings. If the same turned out to be genuine and their content disclosed the violation of 'integrity of the process of administration of justice and the independence of the Judiciary' then the Commission was to determine whether disciplinary proceedings are attracted. *Prima facie* the impugned notification does not give the Judges of the Superior Courts named in the audios immunity from such proceedings. On the other hand, if the Commission concluded that the audio recordings are fake or fabricated then under clause 6(viii) action was to be recommended by it against the persons responsible for making the audios.

7. The persons selected by the Federal Government for carrying out these functions of the Commission are serving Superior Court Judges, namely, Justice Qazi Faez Isa, Senior Puisne Judge of the Supreme Court (Chairperson); Justice Naeem Akhtar Afghan, Chief Justice of Balochistan High Court (Member); Justice Aamer Farooq, Chief Justice of Islamabad High Court (Member). It is a matter of record that the Federal Government did not inform, consult with or obtain the consent of the CJ before constituting the Commission. On 22.05.2023 the Commission held its first hearing and passed an order on the same date (the details are not relevant for present purposes).

8. Soon thereafter the titled Constitution Petitions bearing Nos.14 to 17 of 2023 ("**Const P Nos.14 to 17 of 2023**") were filed in Court challenging the *vires* of the

impugned notification. These were duly registered and listed for hearing before the present Bench. On the first date of hearing of the titled petitions i.e., 26.05.2023 the learned counsel for the petitioner in Constitution Petition No.14 of 2023 formulated the common questions of law requiring determination in the petitions. These are:

- i. Whether the impugned notification violates the fundamental constitutional principle of separation of powers by vesting the Executive with the power to investigate alleged judicial misconduct through a Commission comprised of Superior Court Judges and in case of its proof to recommend appropriate disciplinary action;
- ii. Whether the mandate of the Commission encroaches into the exclusive jurisdiction conferred on the Supreme Judicial Council by Article 209 of the Constitution (which lays down the process for and grounds of accountability of Superior Court Judges);
- iii. Whether the impugned notification negates a salient feature of the Constitution, namely, the independence of the Judiciary by interfering with its functioning in bypassing the CJ for unilaterally picking Superior Court Judges as Members of the Commission; and
- iv. Whether in the absence of a law allowing for the surveillance and recording of private communication between citizens, the audios are a breach of Article 14 of the Constitution (right of privacy of home) and the dictum of the Court laid down in **Benazir Bhutto Vs. President of Pakistan** (PLD 1998 SC 388).

During the course of the same hearing the learned Attorney General for Pakistan (“AG”) made an oral request to the Bench that one of us, namely, the CJ may consider recusing

himself from the Bench for the reason that one of the audio recordings selected for probe by the Commission allegedly contains a conversation of his Relative that mentions him. The order dated 26.05.2023 disapproved this oral request of the learned AG for failing to refer to any implicating conversation of the Relative and/or to the particulars of the allegation levelled against the CJ. However, as important constitutional questions of law were raised and explained by the learned counsel for the petitioner in Constitution Petition No.14 of 2023 the said order of 26.05.2023 granted the interim relief sought by him in CMA No.3663 of 2023 in the following terms:

"8. CMA NO.3663 OF 2023 IN CONST.P.14 OF 2023.

Learned counsel for the petitioner also prayed for interim relief since the Commission has already started functioning and has made an order on 22.05.2023 and the next meeting of the Commission is scheduled for 27.05.2023. In the circumstances, till the next date of hearing, the operation of the impugned notification No.SRO.596(I)/2023 dated 19.05.2023 issued by the Federal Government is suspended as is the order dated 22.05.2023 made by the Commission and in consequence thereof proceedings of the Commission are stayed."

(emphasis supplied)

The matter was adjourned to 31.05.2023 when the learned AG pressed the freshly filed recusal application on which notice was issued to the parties for arguments of the learned counsel on 06.06.2023.

Submissions of Counsel

9. At the outset before commencing his submissions on the recusal application the learned AG recorded two preliminary points:

- i. First, that he would not be pressing for the recusal of either Justice Ijaz ul Ahsan or Justice Munib Akhtar; and
- ii. Second, that the sole ground for seeking the recusal of the CJ is his alleged conflict of interest in the matter on account of his Relative.

Our judgment is therefore confined to the prayer made for the recusal of the CJ from continuing to sit on the Bench hearing Const P Nos.14 to 17 of 2023.

10. In support of the recusal application, the learned AG primarily relied on clause 1 of Article IV of the Code of Conduct for Judges of the Supreme Court and High Courts ("**CoC**") which reads:

"A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friend."

He argued that allegedly the Relative of the CJ was conversing in one of the audio recordings which had been selected for probe by the impugned notification. The *vires* of that notification are under challenge in Const P Nos.14 to 17 of 2023. Therefore, to avoid a conflict of interest and to maintain the appearance of impartiality the CJ should recuse himself from the Bench. More so when the rule of necessity did not require his presence on the Bench because even after his recusal there would be a sufficient number of Judges available for a reconstituted 5 Member Bench to hear and

decide the said petitions. He cited Suo Motu Case No.5 of 2012 (PLD 2012 SC 664) to demonstrate that in the past Judges of the Court did not preside over or sit on Benches that were hearing matters involving the interests of their relatives. That in furtherance of the said practice the CJ should disassociate from the Bench. However, he reiterated in categorical terms that it was not the assertion of the Federal Government that the CJ was either biased or that he had any pecuniary or proprietary interest in the decision of Const P Nos.14 to 17 of 2023.

11. In response, the learned counsel for the petitioner in Constitution Petition No.14 of 2023, Mr. Shoaib Shaheen, ASC submitted that the recusal application should be rejected. Otherwise its acceptance would validate a practice of harassing Judges by first maliciously uploading their unverified audios, recorded secretly and unlawfully, anonymously on an unregulated social media platform and then by relying on those audios to seek the recusal of such Judges from hearing cases. He also referred to the decisions rendered in Justice Qazi Faez Isa Vs. President of Pakistan (2019 SCMR 1875); Independent Media Corporation Vs. Federation of Pakistan (PLD 2014 SC 650); Federation of Pakistan Vs. Muhammad Nawaz Sharif (PLD 2009 SC 284); The President Vs. Mr. Justice Shaukat Ali (PLD 1971 SC 585) to show that Judges of the Court have been reluctant to recuse from cases on mere allegations of bias which is a more serious allegation than conflict of interest. In rebuttal, the

learned AG emphasised that in this matter conflict of interest, and not bias, has been alleged therefore the judgments quoted by Mr. Shoaib Shaheen, ASC are inapplicable.

12. After hearing the learned counsel for both sides the Bench reserved its judgment. Our decision on the recusal application and reasons for arriving at the same are given below.

Conflict of Interest and Bias

13. During his arguments, the learned AG relied on Article IV of the CoC (produced above in para 10) to emphasise the principle of conflict of interest mentioned therein. Clearly, the said principle would be attracted if any interest of the CJ or that of his Relative was indicated in the lis. However, the Court's query as to what interest of the CJ or his Relative is involved in Const P Nos.14 to 17 of 2023 was neither answered nor explained by the learned AG. He candidly admitted though that no pecuniary or proprietary interest of either the CJ or his Relative was tied with the fate of the said petitions. When asked to explain the term 'conflict of interest' the learned AG merely clarified that as a ground of recusal it was distinct from 'bias.' The latter being an allegation that the Federal Government had not raised. The diffidence of the learned AG to respond to the Court's questions denotes that the objection of the Federal Government may have been raised nonchalantly, possibly to delay a decision on the merits or to harass the concerned Judge. Nevertheless, to consider the Federal Government's

vague plea with utmost solemnity an effort has been made to understand it. For this purpose the meaning and scope of the term 'conflict of interest' and its difference, if any, from 'bias' have been examined. Relevant passages from two treatises are produced below for reference:

“Corpus Juris Secundum (Volume 48A)

§109: The words “bias” and “prejudice”, as used in connection with the disqualification of a judge, refer to the mental attitude or disposition of the judge toward a party to the litigation and not to any views that he might entertain regarding the subject matter involved. Bias and prejudice mean a hostile feeling or spirit of ill will against one of the litigants, or undue friendship or favoritism toward one. This requires antagonism or animosity toward the affiant or his counsel or favoritism towards the adverse party or his counsel...

§120: Ordinarily, the interest of a judge, in order that he may be disqualified, must be in the subject matter of the litigation, and not merely in a legal question involved...

The interest in the subject matter of the litigation which disqualifies a judge is a direct pecuniary or property interest, or one which involves some individual right or privilege, whereby a liability or pecuniary gain must occur on the outcome of the suit. The interest that disqualifies a judge is a personal interest...

American Jurisprudence, 2nd Edn

§98: It is well settled that a judge is disqualified to sit in an action where he has any pecuniary interest in its result, or owns property that will be affected by its outcome. A disqualifying pecuniary or property interest is an interest in the event or subject matter of the action or in the judgment to be rendered therein such that by the judgment the judge will be directly affected by a pecuniary gain or loss.

According to some of the cases, the interest which will disqualify a judge must be pecuniary in its nature, or must be a pecuniary or property interest in the action or its result. But other courts have held that the interest need not necessarily be a pecuniary one, but that it may be a personal one to the judge...

§167: The words “bias” and “prejudice” refer to the mental attitude or disposition of the judge toward a party to the litigation, and not

to any views that he may entertain regarding the subject matter involved. Bias and prejudice mean a hostile feeling or spirit of ill will against one of the litigants or undue friendship or favoritism toward one..."
(*emphasis supplied*)

14. The afore-quoted excerpts show that conflict of interest and bias are indeed two distinct grounds on which a party may seek the recusal of a Judge from hearing a case. Whilst conflict of interest is related to the Judge's interest in the subject matter of a particular case, bias is concerned with his state of mind and his feelings towards the parties appearing before him. Since the learned AG confined his submissions to the ground of conflict of interest only and not on bias, it is clear that the Federal Government does not anticipate any prejudice from the CJ.

Conflicts of Interest Entailing Disqualification

15. As noted above, a conflict of interest is related to the subject matter of the litigation. This means that the Judge, whose recusal is being sought, must have a direct pecuniary, proprietary or personal interest in the litigation. A classic example of a Judge having a pecuniary interest in a litigation is **Dimes v Grand Junction Canal Proprietors** [10 ER 301 (1852) (HL)]. In that case the (then) Lord Chancellor, Lord Cottenham, owned a substantial shareholding in Grand Junction Canal which was an incorporated body. In a suit filed by Grand Junction Canal the Vice-Chancellor granted the relief sought. The appeal came before the Lord Chancellor who affirmed the decision of the Vice-Chancellor. The matter then came before the House of Lords which reversed the

decree of the Lord Chancellor and Lord Campbell, in what is now regarded as the classic formulation on disqualification on the basis of interest, held:

" ...No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest..."

(emphasis supplied)

16. It is not the case of the Federal Government that the CJ or his Relative have any direct pecuniary and/or proprietary interest in the present matter (refer para 7, pg.5 of the recusal application). Instead it alleges, as noted above in para 10, that because the CJ's Relative is involved in one of the audio recordings selected for probe by the Commission, therefore, he has a direct personal interest in the outcome of these Constitution Petitions. Consequently, he ought to recuse himself from hearing the case. Personal interest has been defined in Halsbury's Laws of England (Volume 61A, 2018) as follows:

"33. ...The most obvious form of direct personal interest is a financial interest... However, financial interests are merely one form of direct personal interest. The rule also applies if the adjudicator's decision will lead to the promotion of a cause in which he is involved together with one of the parties."

(emphasis supplied)

Apart from pecuniary (financial) interest of a Judge, which has already been ruled out because the same was neither alleged nor pressed, the afore-noted comment in Halsbury's

Laws explains that non-pecuniary interests are also included in personal interests. The 'promotion of a cause' has been cited as an example of one such interest. This particular ground was created by the House of Lords in **R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)** ([2000] 1 AC 119) for setting aside its earlier decision wherein Lord Hoffman and two other Judges (by a majority of 3:2) had held that Augusto Pinochet, being the former Head of State of Chile, was not entitled to immunity and could be arrested, extradited and prosecuted for his alleged crimes against humanity. In this earlier decision of the House of Lords Amnesty International ("**AI**") was an intervener and argued in support of the proposition that Pinochet was not entitled to immunity. After the earlier decision was released information came to light that Lord Hoffman was a director of Amnesty International Charity Ltd ("**AICL**"), a registered charity which undertakes charitable works for AI. As a result, Pinochet lodged a petition in the House of Lords with the prayer that either the earlier decision be set aside or the opinion of Lord Hoffman be discarded. Ultimately, the House of Lords granted the former relief. Lord Browne-Wilkinson, speaking for the Bench, observed:

" ...Hitherto only pecuniary and proprietary interests have led to automatic disqualification...

...My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil

litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties."

(emphasis supplied)

17. The principle laid down above by the House of Lords treats the promotion of a cause by a Judge to be in conflict with his constitutional duties. However, the learned AG did not even specify, let alone elaborate, what cause, if any, the CJ may be interested in promoting by sitting on the Bench hearing Const P Nos.14 to 17 of 2023. The failure of the learned AG to identify the specific cause and hence the interest of the CJ or of his Relative that may be affected by the said petitions renders the allegation of the Federal Government against the CJ fanciful. Moreover, the Relative of the CJ is neither a party in these petitions nor is she claimed to be involved in the controversy under adjudication before the Court. In these circumstances, Article IV of the CoC has no application to the present case. Therefore, it appears that an illusory claim of conflict of interest has been alleged against the CJ by the Federal Government to *prima facie* postpone a decision in the instant Constitution Petitions. Such an object appears to be consonant with the Federal Government's strategy, discussed later in the judgment, of

blocking or delaying the Court's decisions on questions of law requiring the interpretation of constitutional principles.

18. There is a possibility that the Court's decision on the questions of law raised in the titled petitions (refer para 8 above) may result in the impugned notification being struck down. That result would relieve the Judges implicated in the said notification from being scandalised in the public without the authenticity of the audios and the identity and credibility of their leaker being established or any allegation of wrongdoing being levelled against them. It becomes apparent then that in the present petitions the Court is acting solely to safeguard the public cause of upholding the cherished values of separation of powers, the independence of the Judiciary and the Fundamental Rights of privacy and dignity of persons. Accordingly, no personal interest of the CJ can inhere in the subject matter of these petitions that pertain only to the determination of constitutional questions of public importance. In fact, to even assume a personal interest of the CJ in the titled petitions a cause promoted by him or a benefit or liability accruing to him would need to be positively identified in the subject matter of the petitions. However, the learned AG has failed to do that. Therefore, the CJ cannot be expected to abandon his constitutional duty as a Judge hearing Const P Nos.14 to 17 of 2023 on the basis of an unknown and imaginary interest. The law is clear that for an

interest to attract the disqualification of a Judge from a case, the same needs to be direct and certain:

“American Jurisprudence, 2nd Edn

S99: To work a disqualification of a judge, the interest must be a direct, certain, and immediate interest and not one which is indirect, contingent, incidental, or remote...

Corpus Juris Secundum (Volume 48A)

S120: ...Although it has been broadly stated that a judge should not sit in any case in which he is directly or indirectly interested, to disqualify a judge, his interest in the subject matter of the litigation, must be direct, real, and certain, and not one which is merely incidental, remote, contingent, or possible, speculative, unreal, or merely theoretical.”

(emphasis supplied)

Necessity

19. On account of his inability to disclose any direct and certain interest of the CJ or of his Relative in Const P Nos.14 to 17 of 2023 the learned AG took the plea that the Federal Government’s request for the CJ’s recusal from the Bench would not offend the rule of necessity. That the CJ’s withdrawal will not prevent the formation of a new 5 Member Bench to hear and decide the titled petitions. Whether the learned AG’s argument has any relevance to the prayer made in the recusal application requires firstly, understanding the meaning of the term ‘necessity’ and secondly, ascertaining the purpose of and the circumstances in which the said principle can be invoked in the context of judicial proceedings. The rule was explained in the case of **Justice Shaukat Ali** (*supra*) in these words:

“ ...“the rule of disqualification must yield to the demands of necessity, and a Judge or an

officer exercising judicial functions may act in a proceeding wherein he is disqualified even by interest... if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would destroy the only tribunal in which relief could be had and thus prevent a termination of the proceeding" (*vide American Jurisprudence, Vol 30, page 770*)..."

(emphasis supplied)

This dictum was subsequently quoted with approval by the Court in the cases of Federation of Pakistan Vs. Muhammad Akram Shaikh (PLD 1989 SC 689) and Parvez Musharraf Vs. Nadeem Ahmed (Advocate) (PLD 2014 SC 585).

20. The above passage shows that even when a Judge suffers from a valid disqualification, the rule of necessity permits him to sit on the Bench if his jurisdiction is exclusive or if no substitute is provided by the law in his place. However, as held above there is no direct and certain interest of the CJ in these Constitution Petitions. Therefore, in the absence of a valid ground for disqualification necessity has no application to the present matter. It may also be observed that the learned AG's submission ignores another crucial aspect of the rule of necessity, namely, that it constitutes a defence for a disqualified Judge to remain a part of the Bench hearing a case rather than being a means for reinforcing a litigant's challenge to the presence of a Judge on the Bench. For these reasons, the learned AG's plea of necessity lacks force and is therefore refused.

Islamic Perspective on Recusal

21. Whilst the law of the land grants a Judge discretion to recuse from a case if his disqualification is sought, the Holy Quran provides the criteria for guiding the exercise of such discretion:

“Surah An-Nisa, Verse 135

O ye who believe! stand out firmly for justice,
as witnesses to Allah, even as against
yourselves, or your parents, or your kin, and
whether it be (against) rich or poor: for Allah
can best protect both. Follow not the lusts (of
your hearts), lest ye swerve, and if ye distort
(justice) or decline to do justice, verily Allah is
well-acquainted with all that ye do.”

(emphasis supplied)

(Translation by Yusuf Ali)

The Holy Quran makes it explicit that believers are expected to uphold the scales of justice even if such a course of action goes against their own interest or that of their parents or relatives. This is because of the higher duty to be impartial and to remain uninfluenced by any interest whilst dispensing justice that is owed by a Muslim to the Almighty. Therefore, there is no rule of Islamic Law requiring a Judge to refrain from administering justice in matters in which his personal interest or that of his relatives is involved. The Judge is nevertheless under the onerous obligation that he must not be swayed by any extraneous considerations when deciding a matter. This duty is also reflected in the Oath of Office taken by a Superior Court Judge: *‘[t]hat I [Judge] will not allow my personal interest to influence my official conduct or my official decisions’* (ref: Third Schedule to the Constitution). It is evident from the above discussion that even if an interest of the CJ had existed in the subject matter of Const P Nos.14 to

17 of 2023 that would still not prohibit him from sitting on the Bench hearing the said Constitution Petitions.²

22. In this respect, Pakistani jurisprudence also leaves it to the discretion of the Judge to decide whether he will be able to perform his legal duty of administering justice in a particular case where either conflict of interest or bias (or both) is alleged against him. Reliance in this regard is placed on **Independent Media Corporation** (*supra*) at para 13; **Federation of Pakistan Vs. Muhammad Nawaz Sharif** (PLD 2009 SC 284) at para 27; **Islamic Republic of Pakistan Vs. Abdul Wali Khan** (PLD 1976 SC 57) at pg.188. In these cases the following allegations were levelled against the Judges of the Court:

- i. In **Independent Media Corporation** (*supra*) the recusal of Justice Jawwad S. Khawaja was sought on account of his sister-in-law's brother being involved in the case before the Court.
- ii. In **Muhammad Nawaz Sharif** (*supra*) the recusal of Judges who had taken oath under the Provisional Constitution Order, 2007 was sought on the basis that the petitioner had expressed strong reservations against such acts.
- iii. In **Abdul Wali Khan** (*supra*) the recusal of two learned Judges was sought on the ground that they were previously associated with the case being prepared for the banning of the National Awami Party which was headed by the petitioner, Abdul Wali Khan.

However, rejecting the contentions of the parties seeking recusal in each of the above cases, the Court observed that it

² The only exception would be if a Judge is unable to dispense justice impartially on account of his/her interest

was for the respective Judge(s) to decide whether to continue to sit on the Bench or not. For reference, the Court's observation in the case of **Independent Media Corporation** (*supra*) is produced below:

"13. ... It is the conscience of the Judge himself which must determine his decision to sit on a Bench or not."

Therefore, apart from failing on both the facts and the law, the Federal Government's objection to the CJ's presence on the Bench disregards the Quranic command to a Judge i.e., to dispense justice impartially; a rule that is also echoed in the Oath of Office administered to Judges under the Constitution. It is accordingly refused for lacking merit.

Conduct of the Federal Government

23. Before parting with this judgment we consider it only fair to reflect on the Federal Government's inimical treatment of the Court and some of its Judges ever since the recommendation for *Suo Motu* notice was made by a two Member Bench of the Court to the CJ on 16.02.2023. This exercise is helpful for understanding the likely purpose of the Federal Government in filing the present recusal application because there is a chain of events in which the Federal Government and/or Federal Ministers have sought to erode the authority of the Court and to blemish the stature of some of its Judges with the object of blocking, delaying or distorting the result of the judgments of the Court on the constitutional right of the people to be governed by an elected government.

24. As already mentioned the crucial point in time is 16.02.2023. On that date, as noted above in para 3, Justice Ijaz ul Ahsan and Justice Sayyed Mazahar Ali Akbar Naqvi recommended the CJ to take *Suo Motu* notice of the delay in holding General Elections to the Punjab Assembly. Curiously, this is also the date on which the first three audio recordings (noted above in para 4) were leaked by *indibell*. Without confirming the veracity of the audios or ascertaining the identity of the person who uploaded them, Federal Ministers on the same day lent support to the news of the leaked audios on national media. Shortly after on 18.02.2023, a Constitution Petition was filed by the Speakers of the Punjab and Khyber Pakhtunkhwa Assemblies in Court. Acknowledging that it was the custodians of the two dissolved Provincial Assemblies who had petitioned the Court, the CJ fixed their Petition and connected matters ("**Speakers Petition**") for hearing before a 9 Member Bench on 23.02.2023.

25. At the very outset of the proceedings one of the learned Judges objected to the presence of Justice Ijaz ul Ahsan and Justice Sayyed Mazahar Ali Akbar Naqvi on the Bench. It was urged that by recommending the CJ to take *Suo Motu* notice of the delay in announcing the date of General Elections to the Punjab Assembly the two learned Judges had '*already expressed their opinion by stating that elections "are required to be held within 90 days" and that there was*

“*eminent danger of violation*” of the Constitution.’³ On the same day, before any arguments on the merits could commence another two learned Judges in their separate notes dated 23.02.2023 dismissed the Speakers Petition.⁴

26. Capitalising on the disorderly proceedings, the ruling coalition parties sought the recusal of Justice Ijaz ul Ahsan and Justice Sayyed Mazahar Ali Akbar Naqvi on the next day i.e., 24.02.2023 from the Bench hearing the Speakers Petition. The basis of the objection was that the two learned Judges had already disclosed their minds on the question in issue. Under the practice of the Court the CJ may commence *Suo Motu* proceedings against the alleged violation(s) of Fundamental Rights on the recommendation of a Bench of the Court. This mode of invoking *Suo Motu* jurisdiction has been recognised and upheld by a larger Bench in **SMC No. 4 of 2021** (*supra*). Consequently, in rejecting the recommendation of the two learned Judges the ruling coalition parties lost sight of this judgment of the Court affirming its settled and declared practice.

27. The apparent purpose of the Federal Government for seeking the recusal of the two learned Judges through an ill-conceived objection was to disrupt or otherwise delay the proceedings in the Speakers Petition. Due to the turbulent hearings of both 23.02.2023 and 24.02.2023 the nine Hon’ble Judges on the Bench met in Chambers on 27.02.2023 to discuss the means for restoring harmony in the proceedings.

³ Separate Note to Order dated 23.02.2023
<https://www.supremecourt.gov.pk/downloads_judgements/s.m.c._1_2023_23022023.pdf >

⁴ Ibid

Ultimately, all nine Judges unanimously resolved vide order dated 27.02.2023 that the CJ should reconstitute the Bench. Pursuant to the said order a 5 Member Bench was constituted to hear the case. The Federal Government did not oppose the reconstituted Bench and therefore the matter proceeded and was decided by a majority of 3:2 through short order dated 01.03.2023. The three Judges in majority declared that the Speakers Petition was maintainable and directed, *inter alia*, that the General Elections to the two Provincial Assemblies must be held within 90 days of their dissolution as mandated by Article 224(2) of the Constitution. The two learned dissenting Judges held the Speakers Petition to be not maintainable and therefore dismissed the same. The said decision displeased the Federal Government which rejected it by proclaiming that the Speakers Petition had actually been dismissed by a majority of 4:3 (after taking into consideration the separate notes earlier authored by the two learned Judges on 23.02.2023 as part of the original 9 Member Bench).⁵ On that pretext the Federal Government refused to accept and implement the short order dated 01.03.2023.

28. The Federal Government repeated its above mantra of dismissal of the Speakers Petition by 4:3 during the hearing of a subsequent election matter. In Constitution Petition No.5 of 2023 the order of the ECP dated 22.03.2023 was challenged for unilaterally extending the date of General

⁵ Press Conference of the Law Minister, Mr. Azam Nazeer Tarar, and the then learned Attorney General held on 01.03.2023
<https://www.youtube.com/watch?v=1YcS2IPZGTQ&ab_channel=SAMAATV>

Elections to the Punjab Assembly from 30.04.2023 to 08.10.2023. The Federal Government hampered the progress of the proceedings in that case under the false guise of dismissal of the Speakers Petition by an alleged majority of 4:3. However, in doing so it ignored the important fact mentioned above that all 9 Members of the Bench vide order dated 27.02.2023 requested the CJ to reconstitute the Bench hearing the Speakers Petition. The CJ accordingly formed a 5 Member Bench. At no stage was a 7 Member Bench constituted to return a 4:3 verdict on 01.03.2023 in the Speakers Petition as contended by the Federal Government. The order of the ECP dated 22.03.2023 challenged in Constitution Petition No.5 of 2023 was set aside by the Court on 04.04.2023 for violating the constitutional command to hold General Elections to a Provincial Assembly within 90 days of its dissolution. Nonetheless, the Federal Government chose not to comply with this order of the Court. Instead it insisted, rather inexplicably, that the short order issued by the 5 Member Bench of the Court on 01.03.2023 had rejected the very maintainability of the Speakers Petition by 4:3. The consequence is that two out of four Provinces continue to be governed by unelected caretaker governments without any end in sight.

29. The resistance of the Federal Government and its coalition parties to our proceedings and judgments has also expanded to hurling threats⁶ and making scathing attacks

⁶ Press Conference of Minister of Information and Broadcasting, Ms. Marriyum Aurangzeb, held on 11.05.2023 <https://www.youtube.com/watch?v=Qr8x0aFuVRM&ab_channel=GNN>

against certain Judges of the Court ever since the audio recordings were leaked.⁷ An extreme example of a personal attack on Judges was witnessed on 15.05.2023 when the Court was hearing the review petition filed by the ECP against the order of the Court dated 04.04.2023 passed in Constitution Petition No.5 of 2023 directing the General Elections to the Punjab Assembly to be held on 14.05.2023. On that day certain political parties forming part of the ruling coalition staged an aggressive demonstration outside the Court threatening the CJ of serious consequences in the event of the Court taking coercive action for securing compliance with its order dated 04.04.2023.⁸ However, the disturbing aspect of the said demonstration was the assistance given by the Federal Government to its coalition parties to gather and protest against the Court in the Red Zone area of Islamabad where such protests are strictly prohibited. The government machinery facilitated the entry of the horde of protestors and remained a silent spectator to their slander, the discernible purpose of which was to pressurise the Court and its Judges into giving a favourable decision or no decision at all. The power show assisted by the Federal Government was a direct attack on the independence of the Judiciary. Although the freedom of speech guaranteed to the people of Pakistan by Article 19 of the Constitution is a Fundamental Right, this right is subject to reasonable

⁷ Press Conference of the Interior Minister, Mr. Rana Sanaulah, held on 23.04.2023 <https://www.youtube.com/watch?v=7zyjomRnkc8&ab_channel=HUMNews>

⁸ <<https://www.dawn.com/news/1753570>> in Dawn Newspaper dated 16.08.2023

restrictions imposed by the law. One such restriction exists in

Article 19 itself:

"19. Freedom of speech, etc. Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law... in relation to contempt of court...

(emphasis supplied)

Despite the afore-noted constraints under Articles 19 and 68 of the Constitution on discussing the conduct of Judges, it is regrettable that amongst others, Cabinet Members also flouted these constitutional limits. Judges were assailed in harsh and intemperate language to justify the defiance of decisions that were perceived to be detrimental to the Federal Government and/or its interests in the matters of the General Elections.

30. In the face of the Federal Government's uncooperative stance the Court exercised restraint for the negation of its judgments notwithstanding its constitutional power to punish any person for disobeying any order of the Court. Such control was exercised on account of the pending review filed by the ECP against the order of the Court dated 04.04.2023 which fixed 14.05.2023 as the date for elections to the Punjab Assembly. Some questions of constitutional importance deserving our attention had been raised by the ECP in its review petition. The Court considered that the prevailing hostile political environment called for the finality of its judgment for which purpose the ECP review had to be decided. For this reason the Court fixed that review petition for hearing on 15.05.2023 and decided to await its outcome

before alleging non-compliance and therefore disobedience of its orders by the Federal Government and the ECP.

31. Be that as it may, we note that the Federal Government has by various machinations and stratagems managed to delay adjudication by the Court and also discredited its judgments:

- i. This happened when our order dated 01.03.2023 was reinvented to have dismissed the Speakers Petition by a majority of 4:3 thereby denying its true legal effect.
- ii. Then without challenging the order dated 04.04.2023 the Federal Government took refuge behind the ECP's review petition filed against that order to justify its inaction.
- iii. Subsequently, Parliament enacted the Supreme Court (Review of Judgments and Orders) Act, 2023 which came into effect on 26.05.2023. The said Act changed the scope and form of review. As a result, the proceedings in the partly heard review petition filed by the ECP were stalled pending adjudication of the *vires* of that law. That Act has since been found and held to be *ultra vires* the Constitution.
- iv. The Federal Government has repeatedly sought recusals of certain Judges from Benches hearing constitutional cases, including of the CJ in the present matter, on unknown and unspecified grounds of conflict of interest and/or bias.
- v. Federal Ministers have also routinely made incendiary statements on public platforms against Judges of the Court sitting on Benches hearing Constitution Petitions pertaining to elections to the Provincial Assemblies to lend strength to the agenda of the Federal Government noted above in sub-point (iv).

The Court has faced all such actions of the Federal Government with tolerance, forbearance and restraint. However, it goes without saying that any refusal to implement a final and therefore binding judgment of the Court can be visited with consequences laid down in the Constitution.

Conclusion

32. In light of the above factual position and the law regarding the recusal of a Judge from a Bench hearing a lis, the instant recusal application filed by the Federal Government is declared to be devoid of merit and legal force. Its object lacks good faith for aiming to harass a Member of the Bench without cause in order to avoid adjudication on the constitutional failings pointed out in the impugned notification by Const P Nos.14 to 17 of 2023. To our minds the recusal application suffers from the common defect of being motivated and hence constitutes an attack on the independence of the Judiciary. In view of the foregoing the recusal application is dismissed.

Sd/-
Chief Justice

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Sd/-
Judge

Announced in open Court
at Islamabad
on 8th September, 2023.

Sd/-
J.

NOT APPROVED FOR REPORTING.