

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Aghu
Mr. Justice Amjad Ali Sahito.

CONST. PETITION NO.D-3507 of 2020

Petitioners

1. Ahmad Omar Sheikh S/o. Saeed Ahmed Sheikh.
2. Fahad Nasim Ahmad S/o. Nasim Ahmed.
3. Syed Salman Saqib S/o. Syed Abdul Rauf.
4. Sheikh Muhammad Adil S/o., Abdul Shakoor through M/s.Mehmood A. Shaikh, Abdul Rauf Shaikh and Nadeem Ahmed Azar, Advocates.

Respondents

Mr. Salman Talibuddin, Advocate General Sindh. a/w Mr. Muhammad Yousuf Rahpoto Assistant Advocate General Sindh.
Mr. Ali Haider Saleem, D.P.G.
Mr. Gul Faraz Khatak, A.A.G.
Mr. Amir Kuvshesi, Special Secretary,
Mr. Baber Qadeer, AS and Aijaz Bhatti, SO, Home Department, Government of Sindh.
04.11.2020 and 24.12.2020.

Date of Hearing

Date of Order

24.12.2020

ORDER

Mohammed Karim Khan Agha J. The concept of liberty has been contextualized in the case of *Siddharam Satlingappa Mhetre (AIR 2011 SC 312)* as follows:

"Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. This is why "liberty" is called the very quintessence of a civilized existence..."

2. The petitioners have challenged three separate preventive detention orders which have been issued by the Government of Sindh for a period of three months each one after the other except that the third preventive detention order was issued prior to the expiry of the second preventive detention order is stated to be in continuation of the second

preventive detention order and a Notification issued by the Government of Sindh placing the petitioners on the IV Schedule of the ATA under various sections of law and in effect contended that such orders and Notification should be struck down as being illegal and issued without lawful authority on account of amongst other things malafides and the fact that the Government of Sindh failed to satisfy itself of the need to issue these orders/Notification on an objective assessment on the material which was placed before it for consideration and that the petitioners were not "enemy aliens" within the purview of Article 10(9) of the Constitution.

3. The brief facts of the case are that petitioners (1) Ahmed Omar Sheikh S/o. Saeed Ahmad Sheikh (2) Fahad Nasim Ahmed S/o. Nasim Ahmad, (3) Syed Salman Saqib S/o. Syed Abdul Rauf and (4) Sheikh Muhammad Adil S/o. Abdul Shakoor were tried by learned Judge, Anti-Terrorism Court Hyderabad Division & Mirpurkhas Division, Hyderabad in Special Case No.26 of 2002 arising out of Crime No.24/2002, U/s. 365-A/368/302/109/201/120-A/34 PPC read with Sections 7-a 8(a)(v)(c), 11/A(a)(b)(c), 6(2)(b)(c)(e)(f), 11/H(3-4), 11/V(I)(a)(b)(2), 11/I(a)(b)7(a)(b)(2), 11/H(2)(a)(b), 11/W(1)(2), 7 of the Anti-Terrorism Act, 1997, Police Station Artillery Maidan, Karachi (South). After their trial vide judgment dated 15.07.2002 the petitioner namely **Ahmed Omer Saeed Sheikh** was convicted and sentenced to death under section 365-A, 302 PPC read with Section 6(a) of the Anti-Terrorism Act, 1997 and Section 120-A PPC. The other petitioners namely **Adil Sheikh, Salman Saqib and Fahad Naseem** were sentenced under section 7 of the Anti-Terrorism Act, 1997 (ATA) to suffer Life Imprisonment. They were also sentenced to pay fine of Rs.500,000/- each. In case of non-payment of fine, the petitioners were ordered to suffer sentence of RI for five (5) years more. The court directed all the four petitioners to pay jointly a sum of Rs.20,00,000/- (Rupees twenty lacs) which shall be given to the widow of Daniel Pearl and also to his orphan son. All the above sentences were ordered to run concurrently. The appellants were extended the benefit of section 382(b) Cr.P.C.

4. The offenses for which the petitioners were convicted and sentenced essentially revolved around the kidnapping for ransom and murder of Mr. Daniel Pearl under the Anti Terrorism Act 1997 (ATA)

whilst he was in Pakistan who was a US national working for the Wall Street Journal.

5. As noted above petitioner Ahmed Omer Saeed Sheikh was sentenced to death whilst the other petitioners received life sentences. The petitioners being aggrieved and dissatisfied by the aforesaid judgment filed an appeal against their conviction before this court whilst the State filed an application for the enhancement of the sentences from life to death to all the petitioners who had not been handed down the death sentence.

6. This Court vide Judgment dated 02.04.2020 allowed the appeals of the petitioners and set aside the impugned judgment as slightly modified in that all the petitioners were acquitted of all charges **except** petitioner Omar Ahmed Sheikh who was **only** convicted under S.362 PPC and as such was sentenced to 7 years RI and a fine of RS 2,000,000 (Twenty lacs) which shall be paid to the widow of Daniel Pearl and also to his orphan son and in the event that such fine is not paid he shall serve a further 2 years RI. He shall have the benefit of S.382 B Cr.PC. The confirmation reference was answered in the negative. The application for enhancement of sentences was also dismissed.

7. Upon announcement of the Judgment referred to above the Government of Sindh immediately issued a preventive detention order under S.3(1) of the West Pakistan Maintenance of Public Order Ordinance 1960 dated 02.04.2020 for a period of 3 months and on its expiry issued a second preventive detention order under S.11 EEE of the Anti Terrorism Act 1997 (ATA) dated 01.07.2020 for a further period of 3 months (a few days prior to this the Government of Sindh had notified the petitioners under S.11 EE ATA under the 4th Schedule of the ATA which was a precondition for a preventive detention order being passed under S.11 EEE ATA) and prior to the expiry of the second preventive detention order issued another (the third) order **in continuation** of the second order under S.11 EEE of the ATA read with Article 10 of the Constitution dated 28.09.2020 for yet another period of 3 months.

8. The Government of Sindh have filed an appeal against acquittal of the petitioners before the Supreme Court assailing the Judgment of this

court dated 02.04.2020 which is yet to be decided but at this point in time has not been suspended by the Supreme Court and as such the petitioners only remain in jail on account of the preventive detention orders referred to above.

9 At this point we would like to make it clear, as rightly pointed out by the learned Advocate General in earlier hearings of this petition, that in deciding the petition in hand we have no concern with the appeals which are pending before the Supreme Court since they both concern separate areas of law. Namely, the legality of an appeal against an acquittal before the supreme court and the legality of preventive detention orders issued by the Government of Sindh before this court. This petition only concerns the legality of the aforesaid preventive detention orders which we shall decide through this order.

10. Learned counsel for the petitioners have contended that immediately upon the petitioners being acquitted by this court on 02.04.2020 the Government of Sindh with malafide intent issued the first Preventive Detention Order (PDO) dated 02.04.2020 under S.3(1) of the West Pakistan Maintenance of Public Order Ordinance 1960 based on information provided by the police which was on an objective assessment of such material was **not** sufficient to justify such an order being issued and that it was only issued in order to keep the petitioners in jail who had already served over 18 years in jail without remission which is clear from the language of the first PDO which relates its issuance to the acquittal of the petitioners by this High Court; that such malafide intent was further illustrated by the Government of Sindh issuing the Second PDO on the expiry of the First PDO by which time the names of the petitioners had malafide recently been placed by the Government of Sindh on the IV Schedule of the ATA by virtue of S.11 EE ATA on the basis of police suspicions (no agency is mentioned in the order) that if released the petitioners will be able to move around / establish or re-establish networks for the purpose of furthering any terrorist activity being affiliated in past with such organization which enabled the Government of Sindh with malafide intentions to continue to detain the petitioners under the Second PDO by virtue of S.11 EEE of the ATA despite the Government of Sindh not having any evidence that any of the petitioners necessitated being detained on an objective assessment and satisfaction of the same

under a second PDO and that there was no evidence that the petitioners had any association with any banned or terrorist organization. Even otherwise only the Federal Government had the power to issue a notification under S.11EE AIA against the petitioners and not the Government of Sindh and that there was no legal authority / power of the Federal Government which enabled it to delegate its powers to a provincial Government so even otherwise the second PDO issued under S.11 EEE was issued without lawful authority and should be struck down; that once again the malafide of the Government of Sindh was shown by it issuing the third PDO **in continuation** of the Second PDO except this time under S.11 EEE **and Article 10 of the Constitution** for a further 3 months with the sole purpose of keeping the petitioners behind bars forever despite being acquitted of the terrorism and other charges against them and as such since all three PDO's had been issued on account of malafides by the Government of Sindh, and as there was also insufficient material placed before the Government of Sindh to legally justify the issuing of the 3 PDO's on an objective assessment of the material placed before it all the three PDO's should be struck down as they had been issued malafidely and without lawful authority as there was insufficient material available for the Government of Sindh to have lawfully issued them; that it was well settled that the petitioners could approach this court in a habeas corpus petition under Article 199 of the Constitution for the release of the petitioners before moving the review board under Article 10(4) which in any event had been denied to them by the Government of Sindh by relying on Article 10(9) which in effect classified them as "enemy aliens"; that none of the petitioners were enemy aliens as they were all Pakistani citizens and Pakistan was not in a declared state of war with any other country and as such their detention under this pretext was both on account of malafides and without lawful authority; that for the above reasons the three PDO's, the petitioners Notification under S.11 EE ATA be held to be issued without lawful authority and the petitioners be declared not to be enemy aliens and be ordered to be released from jail custody immediately. In support of his contentions he has placed reliance on **Muhammad Adeel v. Government of Punjab** (2015 YLR 2422), **Tariq Shah v. Provincial Police Officer Khyber Pakhtunkhwa Peshawar** (2018 P Cr.LJ 947), **Khawaja Mureed Hussain v. Government of the Punjab, Home Department, Lahore** [(2013 P.Cr.LJ 312) Lahore], **Federation of Pakistan**

v. Mrs. Amatul Jalil Khawaja and others (PLD 2003 SC 442), Muhammad Irshad v Government of Punjab and others [(2020 P.Cr. L J 206) Lahore, Bahawalpur Bench], Dr. Niaz Ahmed v D.C.O. and others (PLD 2014 Lahore 516), Javed Iqbal v Government of the Punjab and another (2014 MLD 1308), Syed Ghazanfar Kazmi v Government of Khyber Pakhtunkhwa and others (PLD 2017 Peshawar 105), Maulvi Farid Ahamd v Government of West Pakistan (PLD 1965 (W.P.) Lahore 135) Khawaja Salman Rafique V NAB (PLD 2020 456) and an unreported DB Judgment of this court in CP No.D 3275 of 2020 dated 21.12.2020 in the case of **Mst Aziza Naeem V Government of Sindh**.

11. Learned Advocate General Sindh has submitted before this court that this bench of this court has already made up its mind in respect of this petition after deciding the case of **Mst Aziza Naeem V Government of Sindh** in CP No.D 3275 of 2020 dated 21.12.2020 which is according to him on the same footing and that we should transfer this petition to another Bench of this court. In our short order dated 24.06.2020 (which is reproduced at the end of this order) we rejected such contentions in the following terms;

*" We called upon the learned Advocate General of Sindh to argue this matter on behalf of the Government of Sindh, however, he contended that this bench should not hear this case because this bench had already made up its mind in this petition as it had already passed an order in C.P. No.D-3275 of 2020 **Mst. Aziza Naeem vs. Government of Sindh** dated 21.12.2020 which was similar to this petition and as such this matter should be placed before another bench of this Court for hearing excluding the members of this bench. We find no merit in this submission of learned Advocate General, Sindh which submission is declined/rejected. This is because the members of this bench might have already passed an order in a similar case but in any event if this matter was placed before another DB of this court such DB would be bound to follow the order of this DB so no useful purpose would be served in transferring the petition to another DB of this Court. In our view the proper approach would have been for learned Advocate General to have challenged our earlier order before the Hon'ble Supreme Court. Even otherwise we are of the view that this petition is different in nature and the facts and circumstances relating to this case in terms of the material relied upon to detain the petitioners is quite different from the material relied upon for issuing the PDO's in **Aziza Naeem's case** (supra) and as to why the petitioners were placed under preventive detention. It is settled by now that each case is to be decided on its own particular, facts and circumstances. It was also confirmed by the Advocate General himself that the preventive detention order which is currently in operation against the petitioners is going to expire on 27.12.2020 and as such if we adjourn this case on his request it will cause extreme prejudice to the petitioners as in our view based on the previous conduct of the Government of Sindh when 27th December 2020*

is passed which will be in a few days' time and the preventive detention order currently in effect expires the Government of Sindh will most likely again detain the petitioners under another preventive detention order to prevent their release from jail which will lead to this petition becoming infructuous and the petitioners being returned to square one where they will have to file fresh petitions. We also note that the material provided by the intelligence agencies which lead to the petitioners' names being subject to the PDO's has already been placed before us in chambers and reviewed by us which material was obviously different to that relied on in **Mst. Aziza Naeem's case** (supra). Learned Advocate General had also provided his authorities which he intended to rely on in this petition in respect of decisions being made on a subjective as opposed to objective basis and the petitioners being enemy aliens to the petitioners well before the date of this hearing as such the petitioners already knew the heart of his case against them. Learned Advocate General Sindh had requested for an adjournment so that he could move an application to place this case before any other bench of this court. We are of the view that he had sufficient time to make such an application after the passing of the order in **Mst. Aziza Naeem's case** (supra) which was passed about 03 days ago on 21.12.2020 but the same was not moved. In our view not to hear this petition today would cause irreparable harm and extreme prejudice to the petitioners who had already been behind bars for over 18 years without remission prior to their acquittal and have since their acquittal have remained behind bars for almost a further 09 months based on PDO's issued by the Government of Sindh".

12. When we rejected his submission for the reasons set out above through our short order which is reproduced at the bottom of this order we again asked the learned Advocate Sindh to make his submissions in respect of this petition however despite being given the opportunity of being heard he declined to make any submissions.

13. Learned DPG and learned AAG adopted the exact same submissions and relied on the exact same authorities as the Advocate General Sindh had made in the case of **Mst Aziza Naeem V Government of Sindh** in CP No.D 3275 of 2020 dated 21.12.2020 where they were also in attendance and had made their own submissions.

14. In order to give some context to the submissions adopted by the learned DPG and AAG we set out below the submissions and authorities relied upon by learned Advocate General Sindh in the case of **Mst Aziza Naeem V Government of Sindh** in CP No.D 3275 of 2020 dated 21.12.2020.

"8. Learned Advocate General Sindh has contended that the correct test for determining whether the material placed before the Home Secretary justifies issuing a preventive detention order ought to be on a subjective basis although he has conceded that in Pakistan the

current test is an objective one based on the Supreme Court case of **Pakistan V Mr. Amatul Jalil Khawaja**. He has urged this court that on account of the changing times especially in terms of the war on terror which according to him arose in Pakistan when the Army Public School (APS) was attacked in 2011 by militants that the appropriate test ought to be the subjective one which should be made on an assessment of the material made by an expert in assessing intelligence material which in this case was the Home Secretary rather than judges; that a hybrid test primarily based on expertise and subjectivity be introduced to analyze the intelligence and determine whether a preventive detention order was justified especially as intelligence could never be precise and that was why it was better that it be determined by the competent authority instead of the courts especially as such issues were very sensitive and concerned national security and in this respect he placed reliance on a number of Judgments from India, Malaysia, Singapore, Nigeria and Zimbabwe in support of his contention. He also relied on certain Pakistani Judgments from Lahore and Quetta concerning the upholding of preventive detention orders. These judgments although being only of persuasive value nevertheless have been considered by us and we have observed that by and large they are distinguishable from the present case as they concerned detention under the MPO, concerned a first preventive detention order and even a second but not a third which has been issued and challenged in this case, they do not all relate to terrorism which the second and third preventive detention orders are related to in this case and a number of the persons against whom preventive detention orders were made were already under going a trial although they may have been granted post arrest bail whereas the petitioner has been acquitted on appeal; even otherwise he contended that there was sufficient material to justify the preventive detention orders issued by the Government of Sindh based on the material which had been placed before the Home Secretary who had issued the preventive detention orders; he further contended that the petitioner fell within Article 10(9) of the Constitution and as such was an "enemy alien" and as such Article 10 of the Constitution did not apply to the petitioner as he owed no allegiance to Pakistan and was a part of the war on terror against Pakistan and therefore he had no right to a review board or to be released until determined by the competent authority. In support of his contentions he has placed reliance on **Moulvi Farid Ahmad v Government of Pakistan** (PLD 1965(W.P.) Lahore 135, **State of Maharashtra v Bhaurao Punjabrao Gawande** (AIR 2008 Supreme Court 1705), **Liversidge v Anderson and Another** (All England Law Reports Annotated-338), **Miraj Muhammad Khan v Government of West Pakistan and Superintendent of Jail, Karachi** (PLD 1966 (W.P) Karachi 282), **Syeda Shamim Akhtar v Government of Pakistan and 3 Others** (1996 P Cr.L.J 326), **Aamna Bibi V Government of Balochistan** (2003 YLR 1460), **Saadullah v Secretary, Home Department and Another** (PLD 1986 Quetta 270), **Federation of Pakistan v Mrs. Amatul Jalil Khawaja** (PLD 2003 SC 442), **Syed Muhammad Ali v Government of Balochistan** (1999 P Cr.L.J 1490), **Malik Mushtaq Anwar v District Magistrate, Lahore** (1979 P Cr.L.J 658), **Part Cargo v Steamship "Zamora"** (Privy Council Appeal No.109 of 1915), **R v Secretary of State for the**

Home Department, ex parte Hosenball (All England Law Reports-452), Secretary of State for the Home Department v Rehman (2001 UKHL-47), Karpal Singh v Minister for Home Affairs and Others (1989 LRC (Const) Malaysia -648), Teo Soh Lung v Minister for Home Affairs and Others (1990) LRC (const) Singapore-490), Chan Hiang Leng Colin and Others v Minister for Information and the Arts (1997) 1 LRC -107 Singapore), Wang and Others v Chief of Staff, Supreme Headquarters, Lagos and Others (1986) LRC (Const) Nigeria -320), H. Shah v State of W.B. (AIR 1974 SC 2154), Mohd. Subrati v State of W.B. (AIR 1973 SC 207), Reference No.01 of 1965 decided on 8th February 1965 (PLD 1966 (W.P.) Karachi 160), Bull v. Minister of Home Affairs ((1987) LRC (Const) Zimbabwe 547), excerpt from The Judiciary and Emergency Powers- Australia, Second Edition, Cambridge University Press and various Terrorism laws applicable in the UK which concern pre charge detention and scholarly articles on this issue. Learned Additional Attorney General produced a notification issued by the Ministry of Interior where by the Federal Government had delegated its powers through S.33 of the ATA to Home Secretaries to issue orders under S.11 EE and as such in this respect he contended that the preventive detention orders issued by the Government of Sindh under the ATA had been legally issued. Addl. Prosecutor General Sindh under instructions of the Prosecutor General Sindh adopted the arguments of learned Advocate General Sindh."

15. We have heard the parties at length, considered the record and the relevant law including that cited at the bar.

16. At the outset we would like to note that Pakistan is governed by the Constitution of 1973 as amended from time to time which is a blend of secular law and Islamic law as is made clear by both the preamble of the Constitution and the Objectives resolution at Article 2 (A) which forms a part of the Constitution. When the Constitution is read in a holistic manner it is apparent that the form of Government in Pakistan is one of Parliamentary democracy based on the trichotomy of powers between the executive, legislature and the judiciary where checks and balances on each organs powers are ensured by the other organs of the State. The Constitution through numerous of its Articles ensures the independence of the judiciary and the rule of law and the due process rights under the law of its citizens as would be expected in any civilized society and Islamic welfare state.

17. In our view one of the key attributes of our Constitution is that it seeks to protect and safeguard the rights of the individual from misuse or abuse of executive power and does so by enshrining a number of

fundamental rights which are found in Chapter one of the Constitution. It also in our view aims to strike a fair balance in respect of legal and legitimate preventive detention of citizens in appropriate cases in the interest of the State based on sound reasons and prevent such detention being misused for ulterior purposes by the executive.

18. We set out below a number of the Articles of the Constitution in material part which we consider are relevant in terms of this petition with the most important ones in our view based on the particular facts and circumstances of this case being Articles 9 and 10.

Article 4 of the constitution (although not a fundamental right as per Chapter One of the Constitution) reads as under:-

4. Right of individuals to be dealt with in accordance with law, etc.-(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan.

(2) In particular-

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do.

Chapter One of the Constitution creates certain fundamental rights.

Those Articles of the constitution which create fundamental rights and set out the consequences of their breach which we consider applicable to the petition in hand are set out as under in material part.

8. Laws inconsistent with or in derogation of Fundamental Rights to be void.-(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

(3) The provisions of this Article shall not apply to-

(a) Any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or

1[(b) any of the-

(i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii) other laws specified in, Part I of the First Schedule;]

and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter.

(4) Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in 2[Part II of the First Schedule] into conformity with the rights conferred by this Chapter:

Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months.

Explanation.-If in respect of any law [Majlis-e-Shoora (Parliament)] is the appropriate Legislature, such resolution shall be a resolution of the National Assembly.

(5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.

9.--- Security of person. No person shall be deprived of life or liberty save in accordance with law.

10. Safeguards as to arrest and detention.-(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the nearest Magistrate, and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding 1[three months] unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of 1[three months], unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.

Explanation I.-In this Article, "the appropriate Review Board" means,

(i) in the case of a person detained under a Federal Law, a Board appointed by the Chief Justice of Pakistan and consisting of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court: and

(ii) in the case of a person detained under a Provincial Law, a Board appointed by the Chief Justice of the High Court concerned and consisting of a Chairman and two other persons, each of whom is or has been a Judge of a High Court.

Explanation II.-The opinion of a Review Board shall be expressed in terms of the views of the majority of its members.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, 2[within fifteen days] from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:

provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.

(6) The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government

concerned, to the effect that it is not in the public interest to furnish any documents, is produced.

(7) Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:

Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy 3[or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity].

(8) The appropriate Review Board shall determine the place of detention of the person detained and fix a reasonable subsistence allowance for his family.

(9) Nothing in this Article shall apply to any person who for the time being is an enemy alien.

10A. Right to fair trial.—For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.]

14. Inviolability of dignity of man, etc.—(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

(2) No person shall be subjected to torture for the purpose of extracting evidence.

15. Freedom of movement, etc.—Every citizen shall have the right to remain in, and, subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof.

25. Equality of citizens.— (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex 1[****].

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

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19. In our discussion about the legality of the preventive detention orders we need to keep these Articles of the Constitution in mind which are applicable to all citizens of Pakistan. **With respect to fundamental rights guaranteed by the Constitution and some of these Articles of the Constitution in the case of Khawaja Salman Rafique V NAB (PLD 2020 456)** which concerned two post arrest bail petitions in a NAB case where the petitioners were **still facing trial** and had **not** been acquitted of the charge (as is the situation in the instant case before us where the PDO's have been issued) the **supreme court recently emphasized and highlighted the importance of fundamental rights in the Constitution** in order to safeguard the rights of the citizens of this country in respect of an abuse or misuse of executive authority including amongst others the right to enjoy the protection of law and to be treated in accordance with law (Article 4 of the Constitution), the right to life and liberty (Article 9 of the Constitution), the inviolability of the dignity of man (Article 14 of the Constitution) and equality before the law (Article 25 of the Constitution) as set out below;

37. *This country has been achieved through the enormous sacrifices and relentless struggle of our forefathers, with a will, a clear vision, and a conviction for an independent democratic state, "wherein the principle of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed" and "wherein the State shall exercise its powers and authority through the chosen representative of the people", as a sacred trust, "wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association", "wherein, independence of judiciary shall be fully secured". "So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity". The above vision, conviction and commitment find expression in the shape of the preamble to the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution"), the Constitution, that we achieved through unremitting struggle of the people of this country, after years of the disillusionment and failures, has provided to us a complete scheme and an immaculate and robust mechanism for realizing the above dream and to translate the vision and aspirations of our founding fathers and the toiling millions of this country.*

38. *Through its Article 4 the Constitution declared that to enjoy the protection of law, and to be treated in accordance with law is the inalienable right of every citizen, and that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. And in terms of Article 5 declared obedience to the Constitution and law to be inviolable obligation of every citizen. Article 9 of the Constitution guarantees that no person shall be deprived of life or liberty save in accordance with law. The dignity of man has been protected as an inviolable right. Equality of all citizens before the law, and*

their entitlement to equal protection of law has been guaranteed through article 25.

39. *The Courts in Pakistan have jealously protected the fundamental rights conferred by the constitution.* In the case of *Pakistan Broadcasters Association* PLD 2016 SC 692, the Court reiterated the oft repeated constitutional principle as follows:-

"Undoubtedly no one can be deprived of his fundamental rights. Such rights being incapable of being divested or abridged. The legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions and that too as may be mandated by law and not otherwise. The authority wielding statutory powers conferred on it must act reasonably (emphasis supplied) and within the scope of the powers so conferred."

40. In the case of *District Bar Association*, reported as PLD 2015 SC 401, a bench consisting of the Full Court pronounced that Prominent characteristics, which defined the Constitution and were its Salient Features included Democracy, Federalism, Parliamentary Form of Government blended with the Islamic Provisions, Independence of Judiciary, Fundamental rights, Equality, Justice and Fair Play, Protection and preservation of the rights of minorities, both as equal citizens of Pakistan and as minorities etc.

In *Watan Party Case*, reported as PLD 2011 SC 997 this Court cited with approval, its earlier pronouncement in the case of *Eli Lilly Pakistan 2009 SCMR 127* which reads:-

"It is the duty and obligation of the State on account of the various provisions of the Constitution to provide the atmosphere based on honesty by providing equal protection of law. Every citizen must be treated equally, dignity of human being life should be maintained, and liberty of life and honour must be guaranteed as envisaged in the Articles 9, 14 and 25 of the "Constitution."

41. The significance of protecting liberty has also been highlighted by this Court in the case of *Federation of Pakistan and others vs. Shaukat Ali Mian* PLD 1999 SC 1026 in the following words:-

"The perusal of the above quoted Article indicates that every citizen and every other person for the time being in Pakistan is guaranteed as his inalienable right to enjoy the protection of law and to be treated in accordance with law wherever he may be and in particular no action detrimental to the life, liberty, body, reputation or property of any person can be taken except in accordance with law."

42. The liberty and dignity of man have always remained sacrosanct and have been placed atop the fundamental/human rights pedestal. Islam has conferred upon human beings the highest level of dignity amongst all of Allah's creation and secured and protected for them complete liberty within the prescribed limits.

43. It was way back in the year 1212 that the *Magna Carta* impregably secured the liberty, freedom, property and customs, for

the people, and protected them from being banished or ruined, in the following words:-

"No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice."

Whereas, Article (9) (1) of the International Covenant on Civil and Political Rights declared:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

Similarly, Article 9 of the Universal Declaration of Human Rights provides:-

"No one shall be subjected to arbitrary arrest, detention or exile".

44. The renowned English Philosopher John Locke in his central philosophy believes in a government that provides, what he claims to be basic and natural given rights for its citizens, **being the right to life, liberty, and property.**

45. Ronald Dworkin has coined the term 'rights as trumps' which posits that rights should, generally, trump other interests. While this is not to say that an individual's fundamental rights may never be curtailed, it means that rights are not merely aspirations that may be trumped at the altar of expediency. Rather, that rights represent the contract between a State and its citizens and that rights may not be curtailed arbitrarily.

46. XXIV Amendment to the Constitution of the United States, places a restraint on enforcing any law which may abridge the privileges or immunities of the citizens of that country, **or deprive them of life, liberty, or property, without due process of law, or deny to them equality or protection of laws in the following words:-**

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person, of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

In the words of an Indian Supreme Court Judge:-

"Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society."

Chambers' Twentieth Century Dictionary defines "liberty" as "Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges

are enjoyed, freedom of speech and action beyond ordinary civility....

Dicey in his treatise on Constitutional Law observed that, "Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification..."

69. It is the duty and obligation of the State to ensure that the Constitution reigns supreme and the rule of law is all pervading so as to create an environment conducive to the expression of diverse ideas. The State is obliged to ensure that every citizen is treated equally and that his life, dignity, honour and property is fully secured.

70. This Court in the case of *Ismaeel Vs. The State* (2010 SCMR 27) observed as follows:

"Our Constitution is based on the concept of welfare State wherein the principle of democracy, freedom, equality tolerance and social justice as enunciated by Islam, should fully be observed. The mandate of the Constitution envisages that every person has to obey the Constitution as it demands loyalty and obedience. Constitution is a social binding contract between the State and the people. Every organ of the State should act within its parameters as defined by the Constitution without meddling into the matters of the other organs. Media who acts as a fourth and equally important pillar of the State, needs to highlight the character of the Founder of Pakistan so that people can adopt his teachings to get rid of evils like greed and lust and toil for the welfare of the State and people of Pakistan".

71. In exercising its power and authority, NAB should not lose sight of the well-entrenched legal principle that no power conferred upon executive or public authority is unfettered. Every executive act has to be founded in law and has to be exercised as prescribed thereby, particularly, where the exercise of such power, tends to intrude into the constitutionally guaranteed rights. This is even more pertinent when such action violates the liberty of a person, or is likely to hurt his honour, and dignity. The bureau should remain mindful of the fact that the power to arrest, as conferred by Section 18 (e) read with Section 24 of the NAO, is always subject to review by the constitutional courts on the ground of fairness, proportionality, reasonableness, and necessity. It hardly needs any emphasis that all powers in a democratic state governed under a Constitution, are to be exercised justly, fairly and for the public good only. No authority or state institution, howsoever mighty can unlawfully curtail the rights guaranteed by the Constitution.

72. Arrest of any person is a grave matter. Capricious exercise of the power to arrest has deleterious consequences, thus highlighting the need to exercise it with care, caution and sensitivity. Arrest of a person has to be

justified not only by referring to prima facie evidence and adequate actionable material sufficiently connecting the person with the offence/crime complained of, but also by showing that in the given circumstances, there were no other less intrusive or restrictive means available. **The power of arrest should not be deployed as a tool of oppression and harassment.**

73. This Court, after exhaustively examining the provisions of Cr.P.C. in the case titled "*Muhammad Bashir v. Station House Officer, Okara*" [PLD 2007 SC 539] held that arrest of an accused by a police officer would not be justified on the sole ground that an FIR was registered and because the latter was nominated therein. **There must be sufficient incriminating material to justify deprivation of liberty. The august Supreme Court has explicitly declared arbitrary exercise of power to arrest as 'abuse of authority'.** The above view was recently reaffirmed by a larger Bench of the august Supreme Court in the case titled "*Mst. Sughran v. The State*" [PLD 2018 SC 595] by observing:

"Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest and for such justification he is to be guided by the relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934. According to the relevant provisions of the said Code and the Rules a suspect is not to be arrested straightaway or as a matter of course and, unless the situation on the ground so warrants, the arrest is to be deferred till such time that sufficient material or evidence becomes available on the record of investigation prima facie satisfying the investigating officer regarding correctness of the allegations levelled against such suspect or regarding his involvement in the crime in issue."

74. In a judgment of the House of Lords titled "*Liversidge v. Anderson*" reported as [1941] 3 All E.R 338, Lord Atkin, in the context of an action for false imprisonment, has highlighted the importance of liberty as follows. -

"The plaintiff's right to particulars, however, is based upon a much broader ground, and on a principle which again is one of the pillars of liberty, in that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot, in such proceedings as the present, be questioned."

75. While dealing with the cases pertaining to the liberty of a person, we should not lose sight of a fundamental principle of criminal jurisprudence that a person is presumed to be innocent until proven guilty. This principle stems from a general rule that burden of proof in a criminal case is on the prosecution to establish the guilt of an accused beyond reasonable doubt. The justification for the above principle is that the outcome a wrongful conviction is far worse than that of a wrongful acquittal. We should also remain mindful of the fact that the public interest in ensuring that no innocent person is incarcerated, subject to humiliation and convicted,

greatly overwhelms the public interest in securing conviction of the guilty. Thus, the concept of the presumption of innocence is imperative, not only to protect an accused on trial, but to secure and maintain public confidence in the fairness, impartiality, integrity and security of the criminal justice system".

20. Thus, in our view, like the power of arrest, the power to detain someone without charge and deprive them of their liberty cannot be used in a whimsical or arbitrary manner but must be based on some solid, cogent, reliable material and must be anchored on a bonafide exercise of such power.

21. The First Preventive Detention Order (First PDO) under S.3 (1) of the West Pakistan Maintenance of Public Order 1960 (MPO) dated 02/04/2020 was issued by the Government of Sindh for a period of 3 months.

22. For ease of reference both S.3 (1) MPO and the First PDO are set out below;

' S.3(1) MPO Power to arrest and detain suspected persons.-

(1) Government, if satisfied that with a view to preventing any person from acting in any manner prejudicial to public safety or the maintenance of public order it is necessary so to do, may, by an order in writing, direct the arrest and detention in such custody as may be prescribed under subsection (7), of such person for such period as may, subject to the other provisions of this section, be specified in the order, and Government, if satisfied that for the aforesaid reasons it is necessary so to do, may extent from time to time the period of such detention for a period not extending six months at a time.(bold added)

23. The First PDO

**GOVERNMENT OF SINDH
HOME DEPARTMENT
ORDER**

NO.SO(JUDL.II)/HD/6-2/2020 Whereas, according to letter received from Deputy Inspector General of Police CIA Sindh Karachi vide No.DIGP/CIA/RDR/4532/Karachi dated 02.04.2020, wherein he has reported that appeal vide constitutional petition No.68/2012 of Ahmed Omer Shaikh s/o Saeed Ahmed along with co-accused Ahmed Umir shaikh s/o Saeed Ahmed Shaikh, Fahad Nasim Ahmed s/o Nasim Ahmed, Syed Salman Saqib s/o Syed Abdul Rauf,

and **Sheikh Muhammad Adil s/o Abdul Shakoor** in Daniel Pearl Case has been accepted and decided by Hon'ble High Court. The DGP CIA Karachi has informed that it is apprehended that the release of said accused will create serious law & order situation, therefore, Deputy Inspector General of Police CIA Karachi has recommended that they may be detained for a period of 03 months;

2. **AND WHEREAS**, the Government of Sindh on the basis of request and considering the merits of the case is satisfied that there is serious apprehension of public safety, in case the persons are released, that they may act against the interest of the country and public and that the presence of **Ahmed Umir Shaikh s/o Saeed Ahmed Shaikh, Fahad Nasim Ahmed s/o Nasim Ahmed, Syed Salman Saqib s/o Syed Abdul Rauf, and Sheikh Muhammad Adil s/o Abdul Shakoor** at any public place is likely to pose grave threat to the public safety and cause breach of peace and tranquility;

3. **AND NOW THEREFORE**, in exercise of the powers under section 3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960, the government of Sindh has sufficient reason to believe that **Ahmed Omer Shaikh s/o Saeed Ahmed, Fahad Nasim Ahmed s/o Nasim Ahmed, Syed Salman Saqib s/o. Syed Abdul Rauf and Sheikh Muhammad Adil s/o Abdul Shakoor** be arrested and detained for a period of 03 months from the date of arrest. Their custody shall be placed under the Senior Superintendent of Central Prison Karachi.

4. The grounds of their detention order are narrated in Para-1 above.

5. They shall be at liberty to make a representation to the Provincial Government against this order.

Sd/-

ADDITIONAL CHIEF SECRETARY
HOME DEPARTMENT
Karachi dated 02.04.2020"

24. That immediately after the expiry of the First PDO the Second PDO under S.11 EEE of the Anti Terrorism Act 1997 (ATA) dated 01.07.2020 was issued by the Government of Sindh for a further period of 3 months a few days after all the petitioners had been placed on the IV Schedule of the ATA by the Government of Sindh by virtue of S.11 EE ATA by Notification dated 29.06.2020 (the Notification)

25. For ease of reference S.11EE, S.11EEE ATA 1997, the Notification and the Second PDO are set out below;

S.11EE. Proscription of Person. 1[(1) The Federal Government may, by order **published in the official Gazette**, list a person as a proscribed person in the fourth Schedule on an ex-parte basis, if **there are reasonable grounds to believe that such person is —**

- (a) concerned in terrorism;
- (b) an activist, office bearer or an associate of an organization kept under observation under section 11D or proscribed under section 11B; and
- (c) in any way concerned or **suspected** to be concerned with such organization or affiliated with any group or organization suspected to be involved in terrorism or sectarianism or acting on behalf of, or at the direction of, any person or organization proscribed under this Act.

Explanation.- The opinion concerning reasonable grounds to believe may be formed on the basis of information received from any credible source, whether domestic or foreign including governmental and regulatory authorities, law enforcement agencies, financial intelligence units, banks and non-banking companies and international institutions.] 1[(1A) **The grounds shall be communicated to the proscribed person within three days of the passing of the order of proscription.**] (2) Where a person's name is listed in the Fourth Schedule, the Federal Government as the case may be, without prejudice to any other action which may lie against such person under this Act or any other law for the time being in force, may take following actions and exercise following powers, namely:-

- (a) require such person to execute a bond with one or more sureties to the satisfaction of the District Police Officer in the territorial limits of which the said person ordinarily resides, or carries on business, for this good behaviour and not involve in any act of terrorism or in any manner advance the objectives of the organization referred to sub-section (1) for such period not exceeding three years and in such amount as may be specified:

Provided that where he fails to execute the bond or cannot produce a surety or sureties to the satisfaction of the District Police Officer order him to be detained and produced within twenty-four hours before a court which shall order him to be detained in prison until he executes the bond or until a satisfactory surety or sureties if required, are available or, failing that the term of the order under clause (a) expires:

Provided further that where he is a minor, the bond executed by a surety or sureties only may be accepted;

- (b) require any such person to seek prior permission from the officer incharge of the Police Station of the concerned area before moving from his permanent place of residence for any period of time and to keep him informed about the place he would be visiting and the persons, he would be meeting during the stay;

- (c) require:-

- (i) that his movements to be restricted to any place or area specified in the order;

- (ii) him to report himself at such times and places and in such mode as may be specified in the order;
- (iii) him to comply with both the direction; and
- (iv) that he shall not reside within areas specified in the order;

(d) direct that he shall not visit or go within surroundings specified in the order including any of the under mentioned places, without the written permission of the officer incharge of the Police Station with in whose jurisdiction such place is situated, namely:-

- (i) schools, colleges and other institutions where persons under twenty-one years of age or women are given education or other training or are housed permanently or temporarily;
- (ii) theatres, cinemas, fairs, amusement parks, hotels, clubs, restaurants, tea shops and other place of public entertainment or resort;
- (iii) airports, railway stations, bus stands, telephone exchanges, television stations, radio stations and other such places;
- (iv) public or private parks and gardens and public or private playing fields; and
- (v) the scene of any public meeting or procession of any assemblage of the public whether in an enclosed place or otherwise in connection with any public event festival or other celebrations;

(e) check and probe the assets of such persons or their immediate family members i.e. parents, wives and children through police or any other Government agency, which shall exercise the power as are available to it under the relevant law for the purposes of the investigation, to ascertain whether assets and sources of income are legitimate and are being spent on lawful objectives:

Provided that no order under clause (d) or (e) above shall be made operative for a period of more than three years; and

(f) monitor and keep surveillance over the activities of such person through police or any other Government agency or any person or authority designated for the purpose.

(3) [Where any person is aggrieved by the order of the Federal Government made under sub-section (1), he may, within thirty days of such order, file a review application, in writing, before the Federal Government stating the grounds on which it is made and the Government shall, after hearing the applicant, decide the matter on reasonable grounds within ninety days.]

(3A) a person whose review application has been refused under sub-section (3) may file an appeal to the High Court within thirty days of the refusal of the review application.]

(4) Any person who violates a direction or order of the Federal 1 or any terms of bond referred to in sub-section (2), shall be punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]**

11EEE. (1) Powers to arrest and detain suspected persons.- (1) Government if satisfied that with a view to prevent any person whose name is included in the list referred to section 11EE, it is necessary so to do, may, by order in writing, direct to arrest and detain, in such custody as may be satisfied, such person for such period as may be specified in the order, and Government if satisfied that for the aforesaid reasons it is necessary so to do, may, extend from time to time the period of such detention for a total period not exceeding twelve months.

(2) the provisions of Article 10 of the Constitution of the Islamic Republic of Pakistan shall mutatis mutandis apply to the arrest and detention of a person ordered under sub-section (1).]

26. The Notification dated 29.06.2020 issued by the Government of Sindh placing the petitioners on the IV Schedule of the ATA by virtue of S.11 EE ATA.

“GOVERNMENT OF SINDH
HOME DEPARTMENT

NOTIFICATION

NO.SO(JUDL-II)HD/6-2/2020: Whereas, the Inspector General of Police Sindh Karachi vide letter No.AIGP / Legal /III/LC/ CPO / 100-103/2020 dated 26.06.2020 has recommended in view of report of Additional Inspector General of Police Counter Terrorism Department (CTD) Sindh Karachi vide letter NO.ADDL:IGP/CTD/NAP-TAP/4th Schdl-1 5464-671 dated 26.06.2020 to place/enlist the following four (04) persons on the list of Fourth Schedule of Anti-Terrorism Act, 1997:-

Sr. #	Full Name
01	Ahmed Omer Saeed Shiakh @ Chaoudry Bashir s/o Saeed Ahmed Shiakh
02	Fahad Naseem s/o Naseem Ahmed
03	Syed Salman Saqib @ Ali Junaaid s/o Syed Abdul Rauf
04	Shaikh Muhammad Adeel s/o Abdul Shakoor

AND WHEREAS, Section 11-EE of the said Act read with National Crisis Management Cell, Ministry of Interior Notification S.R.O. (1)/2014 dated 19.10.2014 empowers the Government of Sindh/Home Secretary of Province to notify the name(s) of such person(s) to be entered in the Fourth Schedule of the Act abid;

NOW THEREFORE, in exercise of the powers conferred under Section 11 EE of the Anti-Terrorism Act, 1997 the names of above mentioned persons are hereby entered in the Fourth Schedule of the ATA, 1997 for a period of three years with immediate effect, unless otherwise rescinded or withdrawn by the Government of Sindh.

Without prejudice to any other action which may lie under any law for the time being in force they shall:-

- (a) Execute a bond with one or more sureties to the satisfaction of the District Police Officer in the territorial limits of which the said person ordinarily resides, or carries on business, for his good behavior and not to involve in any act of terrorism or in any manner advance the objectives of the organization referred to in sub-section (1) of Section 11-EE for such period not exceeding three years and in amount of Rs.500,000/-
 Provided that where he fails to execute the bond or cannot produce a surety or sureties to the satisfaction of the District Police Officer order him to be detained and produced within twenty four hour before a Court which shall order him to be detained in prison until he execute the bond or until a satisfactory surety or sureties if required, are available or failing that the term of order under clause (a) expire;
- (b) inform the officer incharge of the Police Station of the concerned area before moving out of his place of residence;
- (c) Be required:-
- (i) That his movements to be restricted to the neighborhood and surroundings of residence registered with Police Station;
 - (ii) To get written permission from SSP concerned for any movement out of restricted area;
 - (iii) To comply with both the directions;
- (d) Report to the Police Station concerned once in a week.

Their activities shall be monitored and kept under surveillance by the concerned Senior Superintendent of Police and any other government agency or any person or authority as may be designated any time for this purpose by the Government of Sindh.

The listed person(s) may appeal to the Government of Sindh in terms of Section 11-EE of ATA Act within 30 days of issuance of this notification.

Sd/-
 ADDITIONAL CHIEF SECRETARY
 HOME DEPARTMENT

27. The second PDO

"No.SO(Jud-II)HD/6-2/2020
 GOVERNMENT OF SINDH
 HOME DEPARTMENT

Karachi Dated 1st July 2020

ORDER

No.SO(Jud-II)HD/6-2/2020 whereas the Inspector General of Police vide letter No.AIGP/Legal-III/LC/CPO/100-3/2020 dated 26th June, 2020 forwarded the recommendation as received from the office of the Additional Inspector General of Police (CTD), Sindh letter No.Addl:IGP/CTD/NAP/TAP/4th Schedule-I/5464-71 dated 26th June, 2020 for inclusion of following persons affiliated with terrorist organization and involved in terrorist acts in the 4th Schedule under section 11EE of the Anti-Terrorism Act, 1997.

- 1) Ahmed Omar Saeed Shaikh @ Ch. Basheer s/o Saeed Ahmed Shaikh
- 2) Fahad Naseem s/o Naseem Ahmed.
- 3) Syed Salman Saqib @ Al Junaid s/o Syed Abdul Rauf.
- 4) Shaikh Muhammad Adeel s/o Abdul Shakoor

Whereas being satisfied the Government of Sindh included the names of these four individuals in the 4th Schedule under the Anti-Terrorism Act, 1997 vide order No.SO(Jud-II)HD/6-2/2020 dated 29.06.2020.

Now the DIGP South has reported vide letter No.DIGP/SZ/ZIB/20 249/2020 dated 29th June 2020 that while being on 4th Schedule these four persons will be able to move around / establish or re-establish networks for the purpose of furthering any terrorist activity being affiliated in past with such organization.

NOW THEREFORE the Government of Sindh being satisfied that there exists apprehension that any or all of these four persons named above may indulge in networking / terrorism if released and therefore are required to be detained for the purpose of maintaining peace and tranquility by way of detaining them and hence under section 11EEE of Anti-Terrorism Act, 1997 hereby direct that these four persons namely 1) Ahmed Omar Saeed Shaikh @ Ch. Basheer s/o Saeed Ahmed Shaikh 2) Fahad Naseem s/o Naseem Ahmed 3) Syed Salman Saqib @ Al Junaid s/o Syed Abdul Rauf and 4) Shaikh Muhammad Adeel s/o Abdul Shakoor be arrested and detained for a period of 03 months. Their custody shall be placed under the Senior Superintendent of Central Prison, Karachi or Sukkur whichever is nearest / applicable.

The order shall be served upon the person named above who shall have the right to consult and be defended by legal petitioner(s) of their choice.

Sd/-

ADDITIONAL CHIEF SECRETARY
HOME DEPARTMENT."

28. That during the pendency of the Second PDO and in continuation of the Second PDO the Third PDO under S.11 EEE of the Anti Terrorism Act 1997 (ATA) read with Article 10 of the Constitution dated 28.09.2020 was issued by the Government of Sindh for yet another period of 3 months.

29. The Third PDO is set out below for ease of reference:

GOVERNMENT OF SINDH
HOME DEPARTMENT

ORDER

NO.SO(JUDL.II)/HD/6-2/2020 Whereas, Deputy Inspector General of Police Sindh Karachi vide No.DIGP/SZ/ZIB/20655/2020, has recommended for the preventive detention of the following persons affiliated with terrorist organization and involved in terrorist acts and whereas secret reports received from concerned agencies also support the contention of police in respect of those individuals:-

1. Ahmed Omar Saeed Shaikh @ Ch. Bashir s/o Saeed Ahmed Shaikh.
2. Fahad Naseem s/o Naseem Ahmed
3. Syed Salman Saqib @ ali Junaaid s/o Syed Abdul Rauf
4. Shaikh Muhammad Adeel s/o Abdul Shakoor

2. AND WHEREAS, the Government of Sindh after carefully considering the reports and inputs from relevant law enforcement agencies is **satisfied** that the grounds exist for extending preventive detention of the above said persons;

3. AND NOW THEREFORE, the Government of Sindh after being **satisfied**, and in continuation of this department order of even No. dated 01.07.2020, hereby directs that the persons named above be detained for a further period of three months on expiry of current detention under section 11EEE of ATA 1997 read with article 10 of the Constitution of Islamic Republic of Pakistan. Their custody shall be placed under the Senior Superintendent of Central Prison Karachi or Sukkur whichever is applicable to the above detained individuals.

Sd/-

ADDITIONAL CHIEF SECRETARY
HOME DEPARTMENT
Karachi dated 28.09.2020"

30. This Third PDO is due to expire on 27.12.2020 as confirmed by the learned Advocate General Sindh.

31. At the outset we find that the Home secretary had the lawful authority to issue a Notification under S.11EE of the ATA which power had been delegated to him under S.33 ATA by the Federal Government. As S.11 EEE ATA refers to "Government" which as per the definition section of the ATA can be either Federal or Provincial Government the Home Secretary also had the authority to issue an order under S.11 EEE ATA.

32. We note that both the first PDO and the second PDO have now expired and are no longer in the field and as such we shall not determine their legality. Their significance so far as this petition is concerned is to provide us background information being a part of the so called, "**facts and circumstances of the case**" and as such reveals to us that the First PDO was issued **immediately** after the petitioners were acquitted by this court and were lawfully entitled to be released and as such deprived them of their liberty for 3 months, that it was based on information provided by the police and that **immediately prior to its expiry** the petitioners were notified by the Government of Sindh as being on the 4th Schedule of the ATA by virtue of S.11 EE ATA and on its expiry the Second PDO under S.11 EEE was immediately issued and came into effect which ensured that the petitioners remained in jail for yet another 3 months and that it was issued under the ATA and not the MPO on recommendations made by the police.

33. We will therefore rule only on the legality of the Third and final PDO whilst considering the background to the first and second PDO's to assist us in determining both the legality of the Third PDO and the bonafides of the Government of Sindh in issuing the three successive PDO's.

34. To assist us in reaching this decision we shall briefly consider the background of petitioner Omar Sheikh and the other three petitioners. All four of them were convicted for their involvement in the murder and kidnapping for ransom of Daniel Pearl under the ATA who was a US citizen whilst he was in Pakistan working for the Wall Street Journal. At the time of the trial of the petitioners no evidence came on record that the petitioners worked for Al-Qaeda or any other banned terrorist organization. The abduction and murder took place in 2002 over 18 years ago which was at the start of the so called "war on terror" when such groups as the PTT or many other terrorist organizations had **not** yet come into existence. For the last 18 years they have been in jail either as UTP's or convicts. During this time no material has come on record that any of the petitioners were associating themselves with any banned organization or proscribed person (in fact petitioner Omar Ahmed Shaikh was confined alone in a death cell) through prison visits, intercepts, video recordings so in effect since the start of the war on terror the petitioners have been out of

the picture. In fact if the petitioners were regarded as so dangerous terrorists why were their names not put on the 4th Schedule to the ATA prior to the abduction and murder of Daniel Pearl in 2002 which they were not and there was not even an FIR outstanding against any of them in 2002 or at the time of their arrest back in 2002 **or immediately on their acquittal** if this was justified and why were their names only placed on the 4th Schedule of the ATA by virtue of S.11 (EE) just shortly before the first PDO was about to expire and a new PDO under S.11 EEE was about to be passed. At this time there was not even an FIR in existence against any of the petitioners. In our view the answer is obvious. Namely, this could justify their detention under S.11 EEE ATA despite their being no material before the Government of Sindh to show that on an objective assessment of the same that the competent authority could be satisfied that that any of the petitioners belonged to a banned organization or would involve themselves in terrorist acts on their release. Even the reasons for placing the names of the petitioners on the IV Schedule of the ATA were spurious and without justification. In the comments filed by AIGP Legal II dated 02.11.2020 the reasons were stated as under;

"That during the course of Provincial Committee meeting cases were discussed thoroughly and **keeping in view the degree / severity of crime, number of cases registered, the potential of future damages(s)**, the following four [04] persons (the petitioners) **involved in the case FIR No.24/2002 u/s 365-A/368/302/109/201-A/34 PPC r/w 7-A, 8(a)(v)(c), 11/ A(a)(b)(c), 6(2)(b)(c)(e)(f), 11-H(3-4), 11/V(I)(a)(b)(2), 11/L (a)(b), 7 (a)(b)(2), 11/H (2)(a)(b), 11/W(I)(II), 7 of the Anti-Terrorism Act, 1997, PS Artillery Maidian** were proposed to be placed on the 4th Schedule of the ATA."

35. Based on this recommendation all the petitioners (without independently assessing **each** of their cases on merit) were all placed on the IV Schedule of the ATA by the Government of Sindh. **Significantly**, the petitioners had been acquitted of all such offenses mentioned in the recommendation and no FIR was outstanding against any of them and there was no material to show that any of the petitioners were a part of a banned/proscribed organization.

36. Even DIGP South Zone in his letter dated 29.06.2020 whose recommendation was also taken into account only recommended that the petitioner's names be placed on the 4th Schedule of the ATA for **monitoring**. There was no suggestion that the further detention of any

of the petitioners was required let alone justified. Even the Notification dated 29.06.2020 which placed the names of all the petitioners on the 4th Schedule of the ATA under S.11 EE was for monitoring. This recommendation of monitoring is also completely illogical if the petitioners were in jail and the Government of Sindh had no intention of releasing them. The reasons therefore for placing the petitioners on the IV Schedule of the ATA by virtue of S.11 EE was therefore self contradictory especially as **only 2 days later** after their notification under the IV Schedule of the ATA under S.11 EE whilst they were still in jail the petitioners were detained under S.11 EEE. This conduct speaks volumes about the malafide intentions of the Government of Sindh and that S.11 EE was illegally and malafide utilized by the executive authorities so that it could be used to enable and unjustifiably/illegally detain the petitioners for even longer under S.11 EEE ATA and thereby deriving them of their liberty.

37. Based on the above discussion the Notification dated 29.06.2020 issued by the Government of Sindh placing the names of all the petitioners on the IV Schedule of the ATA under S.11 EE is struck down as having been issued without lawful authority and also on the basis of malafides as it was clearly issued with the sole purpose of continuing the unjustified detention of the petitioners under S.11 EEE which otherwise would not have been applicable. **This being the case it follows that the Third PDO issued under S.11EEE was also issued without lawful authority and is hereby struck down.** This is because a notification under S.11 EE is a *precondition* of a person being subject to a PDO under S.11 EEE of the ATA and once it has been found by us (as we have so found) that the names of the petitioners had been placed on the IV Schedule of the ATA by virtue of S.11 EE without lawful authority they could not *legally* have been detained under S.11 EEE ATA. Never the less by way of completeness we shall also consider whether the satisfaction of the Home secretary in issuing such PDO's should be based on a subjective or objective assessment of the material before him

38. With regard to whether the satisfaction of the Home Secretary should be subjective or objective despite the authorities cited by the learned advocate general in particular from the UK we are not persuaded

by such a contention as a number of such authorities relate to a time of a declared International Armed conflict which is not the case in Pakistan today as we shall come to later in this order. It may be that a number of other jurisdictions such as India, Malaysia, Singapore, Nigeria and Zimbabwe have left the decision to assess the material with the competent authority or executive rather than judges in order to satisfy it self as to the need to pass a preventive detention order and perhaps in those other foreign jurisdictions the deciding authority has greater expertise. In any event as will be mentioned later in this order it is for each country to pass its own laws to meet the various challenges facing its own environment at any particular time. It is true that most judges do not have particular expertise in assessing and evaluating intelligence material but Judges have been doing so in this country since partition. It may be that some better expertise is required but that is for Parliament to determine and pass appropriate laws **keeping in view that Article 10 (4) of the Constitution has provided for a review board comprising of a judge to review preventive detention orders in the 1956, 1962 and 1973 Constitutions** and this situation was not changed even after the cross party Rabbani Committee considered each Article of the 1973 Constitution and made substantial changes to many Articles of the Constitution in 2010 through the 18th Constitutional amendment which was **after** the so called "war on terror" had commenced in 2011 as per the learned Advocate General. Even otherwise in terms of expertise it is not always necessarily the case that a judge may be less well experienced in analyzing intelligence material than the competent authority and have less expertise in order to evaluate the material placed before the court. For example, in the case in hand the material was considered by two Judges of this court with considerable experience in criminal law as both lawyers and Judges including in ATA cases whilst the Home Secretary who issued the last preventive detention order in this case had by his own admission only been home Secretary for less than one year with the rest of his career having been spent as an Ombudsman, Secretary health, Commissioner, Secretary Services and General Administration, assigned to Canada where he was involved with the CAA and Consul General, DCO and in Finance who as such in **this particular case** does not appear to have any particular expertise to analyze intelligence reports over that of the Judges. If such an argument were to be accepted it might also lead to further complications.

For example, the FBR officials and Tribunals adjudicating upon taxation disputes and the lawyers appearing before them usually have far more experience and expertise in pleading and determining taxation issues than high court judges who may be assigned an appeal against their order. Could then a very experienced tax lawyer argue that a High Court Judge or even Supreme Court Judge could not hear the appeal as he/she had lesser expertise than the Taxation Tribunal which had decided the matter and attempt to debar the High Court from hearing the matter. In our view such a anomalous contention would be without substance as the law has given the High Court the power to hear the appeal and likewise the current law allows the High Court to rule on the legality of PDO's passed by the executive by way of judicial review which it has been doing for the last 70 years as shown by the numerous Pakistani case laws relied upon by each side. Even Review Boards under Article 10 of the Constitution consist of High court Judges whose role along with others is to evaluate the intelligence material which has also been the case in the 1956 and 1962 Constitutions. **Most significantly**, if we were to accept this contention of subjective analysis of the intelligence material and the courts playing no role in this respect this would in effect oust the Courts jurisdiction of judicial review which would mean that there would be no check and balance on the executive which may pass such PDO's orders malafidely and/ or in a whimsical and arbitrary manner without application of mind and the detained person would have no judicial recourse for redressal of his grievance which proposition we do not find acceptable keeping in view Article 199 of the Constitution and one of the main purposes of the Constitution being to protect is citizens against misuse and or abuse of executive authority. Pakistan is not a police State as per its constitution but as mentioned earlier one based on the trichotomy of powers where checks and balances operate on each organ of State. Furthermore, although the learned Advocate General placed great weight on the UK case of **Liversidge v Anderson and Another** (All England Law Reports Annotated-338), 1941 in support of the subjective test which was decided during World War Two we have found that the Supreme Court of Pakistan considered this case in terms of preventive detention in the case of **Ghulam Jilani v Government of West Pakistan** (PLD 1967 SC 373) as approved and referred to in the case **Mir Abdul Baqi Baluch V Government of Pakistan and others** (PLD 1968 SC 313) and rejected the

same along with its finding of subjective considerations by the competent authority prevailing and not being subject to interference by the courts in the following terms at P.315 as under which still remains the law in Pakistan today as we shall come to later;

"The trend of decisions both in this country as well as in England has been to regard the decision in Liversidge's case as limited to the interpretation of Regulation 18(B) of the English Defence (General) Regulations, 1939 as a special war measure.

The majority decision in Ghulam Jilani's case altered the law laid down in Liversidge's case only to the extent that it is no longer regarded as sufficient for the executive authority, merely to produce its order, saying that it is satisfied. **It must also place before a Court the material upon which it so claims to have been satisfied so that the Court can, in discharge of its duty under Article 98 (2)(b)(i) be in turn satisfied that the detenu is not being held without lawful authority or in an unlawful manner. The wording of clause (b)(i) of Article 98 (2) shows that not only the jurisdiction but also the manner of the exercise of that jurisdiction is subject to judicial review. If this function is to be discharged in judicial manner, then it is necessary that the Court should have before it the materials upon which the authorities have purported to act. If any such material is of a nature for which privilege can be claimed, then that too would be a matter for the Court to decide as to whether the document concerned is really so privileged. In exercising this power the High Court does not sit as an appellate authority nor does it substitute its own opinion for the opinion of the authority concerned.**

After the decision in Ghulam Jilani's case the High Court should have examined the grounds of detention to test their reasonableness. On this ground alone, this appeal was liable to be allowed and the case sent back to the High Court for re-hearing, after examining the materials produced before it.

Though it is true that there is a difference between "being satisfied" and "suspecting upon reasonable grounds" the difference, is this that the former connotes a state of mind boarding on conviction induced by the existence of facts which have removed the doubts, if any, from the mind and taken it out of the stage of suspicion. If so, then it is not reasonable to presume that the law by making such significant differentiation intended to cast a duty of a more onerous nature upon the person charged with the duty of being satisfied and to

"satisfy" the Court that he had acted in such manner".(bold added)

39. Although we recognize that times may be changing especially in terms of terrorist threats we are not convinced for reasons mentioned later in this order and pursuant to the latest order of the Supreme Court on preventive detention that at least in Pakistan the requirement of satisfaction should be based on subjective assessment of material as opposed to an objective satisfaction which is the current law in Pakistan as laid down by the Supreme Court which the High Courts must follow as per the command of the Constitution as was held in the case of **Federation of Pakistan V Mrs.Amatul Jalil Khawaja** (PLD 2003 SC 442) which dealt with PDO's in great detail and reviewed all the then existing laws on PDO's and laid down the principles for the courts to follow in such cases in 2003 (after the so called "war on terror" had started) and held at P.454 concerning the **required level of satisfaction** in respect of material which justified a PDO being issued against a person and at P.467 **in terms of the test to be applied** as under;

"We have carefully examined the respective contentions as agitated on behalf of the parties in the light of relevant provisions of Constitution of Islamic Republic of Pakistan, the Security of Pakistan Act, 1952, the Qanun e-Shahadat Order, 1984 and judicial precedents. It would be relevant to mention here at this juncture **that our, security laws and anti-terrorism enactment are silent to the effect that Al-Qaeda is a terrorist organization** having its network at global level and is a serious threat to national/international piece, security and tranquility. We have also perused the order impugned with care and caution. **The pivotal question which needs determination would be as to whether sufficient incriminating material justifying the detention of respondents under section 3(1)(b) of the Security of Pakistan Act, 1952 was available which could not be appreciated in its true perspective by the learned Single Judge who erred in substituting his own opinion to that of Federal Government by misconstruing the provisions of section 3 of the Security of Pakistan Act, 1952 and misinterpreting the word "satisfaction" as used therein which resulted in serious miscarriage of justice?** Before the said question could be answered in this particular context we have thrashed out almost the entire law available on the subject, detail whereof is as follows:--

6. The judicial consensus seems to be as under:--

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(i) "An order of preventive detention has to satisfy the requirements laid down by their Lordships of the Supreme Court that is to say (i) the Court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention (ii) that satisfaction should be established with regard to each of the grounds of detention and if one of the grounds is shown to be bad nonexistent or irrelevant the whole order of detention would be rendered invalid (iii) that initial burden lies on the detaining authority to show the legality of the preventive detention and (iv) that the detaining authority must place the whole material, upon which the order of detention is based before the Court notwithstanding its claim of privilege with respect to any document the validity of which claim shall be within the competence of the Court to decide. In addition to these requirements, the Court has further to be satisfied, in cases of preventive detention, that the order of detention was made by the authority prescribed in the law relating to preventive detention; that each of the requirements of the law relating to preventive detention should be strictly complied with; that 'satisfaction' in fact existed with regard to the necessity of preventive detention of the detenu; *that the grounds of detention had been furnished within the period prescribed by law, and if no such period is prescribed, then 'as soon as may be'; that the grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenu to make representation against his detention to the authority prescribed by law; that the grounds of detention that is they are not irrelevant to the aim and object of this law and that the detention should not be for extraneous considerations or for purposes which may be attacked on the ground of malice.*" (Liaquat Ali v. Government of India through Secretary, Home, PLD 1973 Karachi 78). (Emphasis provided)

(ii) "The right of a person to a petition for habeas corpus is a high prerogative right and is a Constitutional remedy for all matters of illegal confinement. This is one of the most fundamental rights known to the Constitution. There being limitation placed on the exercise of this right, it cannot be imported on the actual or assumed restriction which may be imposed by any subordinate Legislature. If the arrest of a person cannot be justified in law, there is no reason why that person should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty which is his basic right. In all cases where a person is detained and he alleges that his detention is unconstitutional and in violation of the safeguards provided in the Constitution, or that it does not fall within the statutory requirements of the law under which the detention is ordered, he can invoke the jurisdiction of the High Court, under Article 199 and ask to be released forthwith. (PLD 1965 Lah. 135). He need not wait for the opinion of the Advisory Board before praying for a habeas corpus. (AIR 1952 Cal. 26). However, jurisdiction of High Court while examining the material before the detaining authority is not unlimited. When an order passed by an executive authority detaining a particular person is

challenged by invoking extraordinary jurisdiction of High Court it is always by means of judicial review and cannot be treated as appeal or revision. The Court cannot substitute its discretion for that of administrative agent. **The only function of the Court in such cases is to see whether or not order of detention is reasonable and objective.**" (PLD 1979 Lah. 741. (Emphasis provided).

(iii) "The Court can see whether the satisfaction about the existence of the requisite condition is a satisfaction really and truly existing in the mind of the detaining authority or one merely professed by the detaining authority. (AIR 1953 SC 451) A duty has been cast upon the High Court whenever a person detained in custody in the Province is brought before that Court to **"satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner."** This Constitutional duty cannot be discharged merely by saying that there is an order which says that he is being so detained. If the mere production of an order of detaining authority, declaring that he was satisfied, was to be held to be sufficient also to "satisfy" the Court then what would be the function that the Court was expected to perform in the discharge of this duty. **Therefore it cannot be said that it would be unreasonable for the Court, in the proper exercise of its Constitutional duty to insist upon a disclosure of the materials upon which the authority had acted so that it should satisfy itself that the authority had not acted in an "unlawful manner".** (Abdul Baqi Baloch v. Government of Pakistan PLD 1968 SC 313). (Emphasis provided).

(iv) "High Court cannot claim in the exercise of writ jurisdiction to usurp the functions of the authority in which power has been vested nor to substitute their own decision for the decision of that authority. Nor can the Court insist on being satisfied that there were materials upon which it itself would have taken the same action. It is in this sense that it has been said that the Court is not concerned with either the adequacy or the sufficiency of the grounds upon which action is taken. The Court in order to be satisfied as required by the Constitution must know that there were in fact grounds relatable to the purposes of the statute upon which the action of the authority concerned could at all have been founded **after an honest application of the mind of the authority concerned** to all the relevant considerations. The question however, that still remains to be considered is as to whether the reasonableness of the action can be examined when the statute itself does not require the authority to act upon reasonable grounds but leaves him to act upon his own subjective satisfaction. **In view of the provisions of Article 199 of the Constitution that degree of reasonableness has at least to be established which has been indicated in the case of Abdul Baqi Baluch PLD 1968 SC 313** Otherwise if an authority could protect himself by merely saying that he believed himself to be acting in pursuance of a statute then what would be the material upon which the Court could say that it was satisfied that the detention or impugned action had not been taken in an unlawful manner. **The presumption is that every imprisonment without trial and conviction is prima facie**

unlawful." (Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri PLD 196,9 SC 14). (Emphasis provided).

(In the case of **Abdul Baqi Baluch PLD 1968 SC 313** it was indicated that it is for the High Court to consider as to whether there were grounds upon which any reasonable person could have been satisfied as to the necessity of detention)

Test to be applied.

"There could be no other opinion that it is for the High Court to examine while exercising its Constitutional Jurisdiction the material on which the satisfaction of the detaining authority is based and had to determine whether it was sufficient for the satisfaction of the detaining authority. Let we mention here at this juncture that when a privilege is claimed even the High Court would be competent to examine the document / material regarding which privilege is sought in order to determine as to whether such privilege is being claimed in advisedly, lightly or as a matter of routine. In this regard we are fortified by the dictum laid down in PLD 19689 SC 14; Abdul Baqi Baluch v. Government of Pakistan (PLD 1968 SC 313); National Bank v. Faridsons Limited 20 DLR SC 249. **The High Court can examine the reasonableness of the grounds of detention so as to satisfy itself that the detenu has not been held in custody without lawful authority or in an unlawful manner. It is not the satisfaction of only detaining authority but judicial conscious is also required to be satisfied and thus in our opinion the satisfaction of detaining authority should have been based on actual and real facts and not on mere suspicion, doubt or conjectural presumptions.**"(bold added)

40. With regard to the malafides on the part of the Government of Sindh and the legality of the third PDO we are guided by the findings in the case of **Mrs. Amatul Jalil Khawaja** (Supra) which held at P.499;

"The words "without lawful authority" and "in lawful manner" appearing in Article 199(b) (i) of the Constitution cannot be considered as tauto logous or superfluous and in fact deserve due consideration.

"The words 'in lawful manner' used in Article 199(b)(i) of the Constitution have been used deliberately to give meaning and content to the solemn declaration **under the Constitution itself that it is the inalienable right of every citizen to be treated in accordance with law and only in accordance with law.** Therefore, in determining as to how and in what circumstances a detention would be detention in an unlawful manner one would inevitably have first to see whether the action is in accordance with law. If not, then it is action in an unlawful manner. Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior

Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American 'due process' clause in a new garb. **It is in this sense that an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant consideration is also not action in accordance with law. Action taken upon no ground at all or without proper application of the mind of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner."** (bold added)

41. The malafides on the part of the Government of Sindh in issuing three PDO's one after the other is apparent from the timings of the PDO's especially the first PDO which was issued **immediately on the same day** as the petitioners were acquitted and communicated to Central Jail Karachi which in effect meant that the petitioners were acquitted in the morning, within a few hours the police found material to justify the detention of all the petitioners under the MPO, such material was sent to the Home department which traveled on the same day up the bureaucratic chain which finally reached the Adl. Chief Secretary/Home Secretary on the same day who after calling various high powered meetings and after applying his mind in considering such material issued the first PDO on the same day which reached central prison Karachi on the same day **as he was objectively satisfied** based on the material before him that the First PDO was legally justified, that the language of the first PDO gives the impression that it has been issued because the petitioners have been acquitted from the High court and therefore need to be kept behind bars and not for any genuine reason, likewise all the PDO's were essentially issued one after the other in a mechanical manner without application of mind in order to keep the petitioners in jail, the fact that from the material we have seen in respect of all PDO's they did not legally justify the Government of Sindh by any stretch of the imagination issuing such PDO's **on the basis of objective satisfaction** in respect of **each petitioner**, the switch from the first PDO under S.3 MPO which was based on material gathered by the police (which could **not** have been gathered in one day) and **not** by any agency which was later put before us, the quick change of tact to placing **all** the petitioners on the 4th Schedule of the ATA based on S.11 EE when there was no material which we have seen which

could have **objectively satisfied** the competent authority of the justification/necessity of the same and in our view was only used as a **pretext** to invoke S.11 EEE ATA (as a person cannot be detained under S.11 EEE ATA without that person as a necessary **pre condition** being placed on the IV Schedule of the ATA under S.11 EE ATA) which once again the material we have seen could **not have objectively satisfied**/justified the issuing of the second PDO and finally the third PDO where towards the end of the second PDO the idea was born of treating the petitioners as "enemy aliens" under S.10 (9) of the Constitution which would mean that they were not entitled to a review Board to consider the legality of their detention under Article 10 (4) of the Constitution and presumably could be kept in detention indefinitely. **Significantly** in not one of the PDO's was it stated that the petitioners were being detained as "enemy aliens" under Article 10(9) of the Constitution which was clearly an **after thought** by the Government of Sindh in order to thwart the petitioners' ability to challenge their PDO's otherwise such wording would have appeared in the first PDO or at least the second PDO. It is quite apparent that from the material which we have seen the **Government of Sindh acted malafidely in issuing the three PDO's one after the other with the sole intention of keeping the petitioners in jail after their acquittal and thus deliberately and illegally deprived them of their right to liberty without any legal justification.** The third PDO is therefore struck down on it being issued malafidely by the Government of Sindh in order to keep the petitioners behind bars without legal justification

42. Even otherwise the third PDO is struck down as being issued without lawful authority on the ground that the Government of Sindh patently failed to apply its mind in satisfying itself that the material placed before it on an objective assessment justified the issuance of the third PDO when the material which we have seen did not come near such a standard as to deprive a person of his liberty for 9 months and as such the third PDO is also struck down as being issued without lawful authority as it was issued on the basis of vague and insufficient material based on assumptions and presumptions through which it was not possible for the Government of Sindh to be satisfied on an **objective** assessment of such material to lead it to issuing the third PDO which

material itself could not have been relied upon to deprive the petitioners of their liberty.

43. Thus, the third PDO is struck down on account of malafides **and** on the basis that the material considered by the Government of Sindh was **insufficient and too vague and ambiguous and based on assumptions and presumptions which could not satisfy on an objective basis the Government of Sindh that it was legally justified in detaining the petitioners under the Third PDO.** The Notification under S11.EE ATA in respect of the petitioners, as mentioned earlier in this order is also struck down as the Government of Sindh had no material before it which on an objective assessment could satisfy it that the petitioners belonged to a banned organization and would be involved in terrorism. If the grounds used in the three PDO's and the Notification were accepted on such flimsy evidence it would also in effect mean that hardly any person who was acquitted of an offense by a high court in a terrorism case would not be subject of sanction under S.11 EE at the least and most probably be detained under S.11 FEE on spurious grounds which would unjustly deprive him of his liberty.

44. The next issue is whether the Government of Sindh's reliance on Article 10 (9) of the Constitution can justify the three PDO's issued by the Government of Sindh keeping in view that Article 10 (9) was **not** mentioned in either the first, or second or third PDO as a grounds for detaining the petitioners and only emerged as a reason/justification along with S.11EEE ATA when the third PDO **in continuation** of the second PDO was issued and came into effect.

45. It seems to us that the Government of Sindh's case in this respect primarily rests on the interpretation of Article 10(9) of the Constitution which once again is set out for ease of reference;

10. Safeguards as to arrest and detention.-(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2).....

(3) etc.....

(9) Nothing in this Article shall apply to any person who for the time being is an enemy alien.

46. In effect the argument of the Government of Sindh is that in this case the petitioners are all "enemy aliens" and as such the whole of Article 10 will not be applicable to them and that Article 10 concerning Safeguards as to arrest and detention including preventive detention will be ousted and as such the petitioners will have no right to challenge the detention order against them or even a right of review and in effect can be kept in detention indefinitely **after their acquittal from terrorism related charges.**

47. The question is therefore what is meant by the term "enemy alien" as contemplated by Article 10 (9) of the Constitution and whether the petitioners fall within the ambit of Article 10(9).

48. Within the trichotomy of powers it is the role of the legislature to make laws and the role of the judiciary to interpret those laws if such interpretation is necessary. It is well settled by now that if a statute has expressly provided for something without any ambiguity then there is no question of the courts interpreting the same as the legislative intent is clear and the Act/Ordinance must be given effect to unless it is deemed to be contrary to the constitution. **The judiciary's role of interpretation of the statute only arises when the statute is to a certain extent either unclear or ambiguous or is prima facie in violation of the constitution and in such cases it is for the judiciary to interpret that piece of legislation by trying to ascertain the intent of Parliament in passing that legislation.** The Courts have absolutely no authority or power to substitute their views for those intended by the legislature simply because they may disapprove of a particular law and the way in which that law is being applied.

49. In this respect reference is made to the case of **Justice Khurshid Anwar Bhinder V Federation of Pakistan** (PLD SC 2010 P.483.Relevant P.492-493) whereby it was held as under:

"A fundamental principle of Constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it. The pole star in the construction of a Constitution is the intention of its

makers and adopters. When the language of the statute is not only plain but admits of but one meaning the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation. Such language besides declares, without more, the intention of the law givers and is decisive on it. The rule of construction is "to intend the Legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Therefore if the meaning of the language used in a statute is unambiguous and is in accord with justice and convenience, the courts cannot busy themselves with supposed intentions, however admirable the same may be because, in that event they would be traveling beyond their province and legislating for themselves. But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean then the court must interpret that language in accordance with the indication of the intention of the Legislature so plainly given. **The first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the court to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.** (bold added)

50. In our view based on a plain reading of Article 10 (9) and the arguments of the parties it is **not** precisely clear what is meant by the words, "enemy alien" and thus we must look to the intent of the framers of the Constitution in including Article 10 (9) in the Constitution and try to interpret who **might** have been intended to fall within the term "enemy alien".

51. None of the parties have been able to assist us on the original intent of including Article 10 (9) in the Constitution and what the framers of the Constitution precisely wanted to convey through the words, "enemy alien" keeping in view that this would have potentially denied a class of persons their fundamental right regarding arrest and detention whether preventive or otherwise and liberty. Thus, there must have been compelling reasons for including Article 10(9) in the Constitution as potentially this could lead to unlimited detention without trial.

52. Significantly, when the so called cross party Rabbani Committee went through each Article of the Constitution and made substantial amendments to the same through the 18th Constitutional Amendment in

2010 Article 10(9) remained untouched and thus we can safely assume that it would be applicable to some exceptional situations especially as no part of the Constitution can be rendered redundant although it is difficult to see how Article 10(4) and Article 10(9) of the Constitution could be harmoniously interpreted.

53. No relevant Pakistani authority, Supreme Court or otherwise, concerning the interpretation of Article 10 (9) has been placed before us.

54. We have observed that in both World War One and World War Two certain persons were described as "enemy aliens".

55. We have found a number of definitions of "enemy aliens". For example,

56. Black's Law Dictionary (6th Ed.) defines "enemy alien" as under;

"Enemy alien. An alien residing or travelling in a country which is at war with the Country of which he is a national. Enemy aliens may be interned or restricted"

57. As defined in Collins English on line Dictionary

enemy alien in British English

(ˈɛnəmi ˈeɪliən)

NOUN

"a citizen of one country living in another country with which it is at war, and viewed as suspect as a result"

58. **As defined in On Line Dictionary .com**

noun

"an alien residing in a country at war with the one of which he or she is a citizen".

59. **As defined in the free Dictionary on line.**

Definition in online infoplease

en'emy al'ien

Pronunciation: [key]

"an alien residing in a country at war with the one of which he or she is a citizen".

Random House Unabridged Dictionary, Copyright © 1997, by Random House, Inc., on Infoplease

60. **Definition in what does that mean on line website**

Definition of: enemy alien

"An alien living or interned in a country which is at war with his own country".

Read more: <http://www.whatdoesthatmean.com/dictionary/E/enemy-alien.html#ixzz6f2p1ZnUM>

61. **The definition of "alien" is also important.**

62. **Under the Pakistan Citizens Act 1951 in the definition section at Section 2 an alien is defined as**

"alien" means a person who is **not** a citizen of Pakistan or a commonwealth citizen"

63. **Definition of Alien in Encyclopedia Britannica; (on line)**

"**Alien**, in national and international law, a foreign-born resident who is not a citizen by virtue of parentage or naturalization and who is still a citizen or subject of another country".

64. It would appear to us from the various definitions of "enemy aliens" that these were a class of persons (a) who were **not** nationals in the State in which they were residing **and** (b) their State of Origin was in a declared war with the State where they were residing. This would include persons who may have been nationals of the State **but had their origins** in the State with which the State they were currently residing in was at war.

65. In such situations during World War Two such enemy aliens even if they had not committed a crime were often placed in internment or detention centres during the course of the war due to the fear of the State in which they were residing that they **might support their State of origin** who the State they were residing in was at war with through acts of espionage, sabotage etc..

66. The classic example would be the internment of Japanese Americans or Japanese Americans of Japanese origin living in America after the Japanese attack on Pearl Harbor and where after the USA went to

5

war with Japan. Most of these Japanese/ American enemy aliens were sent to internment centres.

67. This is amply set out in a paper on **Enemy Aliens Treatment of the Japanese-American Internment during World War II in State U.S. History Standards** Oddvar Holmefjord Heen 2014 (on line source)

"Overview of the Internment of Japanese Americans. The internment of Japanese Americans refers to the involuntary incarceration of approximately 120,000 individuals of Japanese ancestry under President Roosevelt's Executive Order 9066, from 1942 to 1945. The internees were both alien-born Issei (first generation born in Japan,) and citizen Nisei (second generation, U.S.-born naturalized citizens of the United States). Both groups, if they resided on the West Coast, were interned without due process. Elsewhere on the mainland and in the Hawaiian Islands few were interned. The treatment of Japanese Americans was unlike that of any other wartime "enemy" population group. Although non-citizen German and Italian aliens were also interned, the total numbers of these people were small in comparison to that of the Issei. Furthermore, no U.S. citizens other than the Nisei were interned. Despite the recent attack at Pearl Harbor, only 1% of Hawaiian Japanese Americans were interned, as apposed to the en masse internment on the West Coast. Internment camps were set up in locations throughout the interior, most sharing the characteristics of barren land with extreme temperatures. Internees were housed in poor conditions and overseen by guards with machineguns and surrounded by watchtowers and barbed wire. Despite being banned from military service at the start of the war, a manpower shortage lead to ease on restrictions and a reasonably large share of the internees saw service in and for the U.S. military at some point during the war. In 1943 and 1944, the U.S. Supreme Court upheld different provisions of the internment by finding them constitutional, verdicts that were vacated by federal courts in the 1980s. **Officially, the internment was the government's reaction to the threat of espionage and sabotage from Japanese Americans following the Japanese attack on Pearl Harbor.** The general consensus today, however, is that the internment was the result of wartime hysteria, particularly in the press, racial prejudice stretching back half a century and a failure of leadership from all three branches of the U.S. government". (bold added)

68. Like wise the treatment of German citizens living in Britain when Germany and Britain were at war in World War Two is amply set out below in "My war service" by Michael Maynard (online source)

"My War Service Part 1
By Michael Maynard

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Archive List - Books - My War Service by Michael Maynard 30
Workshop Control Unit REME British Army of the Rhine

Contributed by:

Michael Maynard

People in story:

Michael Maynard

Location of story:

England, Belgium, Holland, Germany

Background to story:

Army

Article ID:

A 5350303

Contributed on:

27 August 2005

The War Service of Michael Maynard 1940 to 1947.

Friendly "Enemy" Alien

"While the 'phoney' was continued the government had to consider the legal position of the German passport holders, who were, technically, enemy aliens. They knew, of course, that the bulk were refugees from Nazi Germany, who posed no threat to the country. **A small number were not refugees and could be a potential threat.**

As a result, tribunals were set up in various parts of the country, consisting mainly of local magistrates, who were to classify each 'enemy' alien into three categories after examination :

A - meaning immediate internment, B- exemption from internment but subject to restrictions, C- total exemption with the status of 'Victim of Nazi Oppression',

The system seemed to have worked reasonably well with inevitable misjudgments through prejudice and ignorance of what had really been happening in Germany since 1933. To them it was 'Germans are Germans' or 'there are no good Germans', a carry-over from the W.W.I

As a result, my friend Hans was classified as a 'B'. His answers seem to have been too hesitant through nervousness. I became a 'C' by the same tribunal. This meant that I was free to travel outside London and could keep my bicycle.

Internment

The invasion of Norway, Denmark and then the Low Countries brought in its train waves of rumours about the clever infiltration by disguised German forces, e.g. soldiers disguised as nuns, treachery and treason by German sympathisers and similar stories - some unfortunately true. The term Quisling become symptomatic with this era. (He was a Norwegian Minister who had become a Nazi sympathizer.)

It put pressure on the government to watch out for any 'fifth column' in our midst and to do something about it. The catastrophic fall of France and the expected fear of an invasion increased this pressure, leading to the slogan 'Intern the Lot'. (for details see 'Continental Britons' by Anthony Grenville). Under this pressure, the government ordered the internment of those

classified as 'B'. Thus, my friend Hans Strauss was collected from our lodging one day in early May 1940 while I was at work.

After the fall of France the Home Office instructed Police Forces to arrest all German Nationals between 16 - 70 for internment unless they were certain that they did not pose a threat. A very questionable criterion for individual senior officers whose workload was already very heavy. In most cases this meant 'Better safe than sorry'.

In my case this resulted in a policemen appearing one morning in June at my place of work to tell me that I was to be interned. They took me in a police car to my lodgings to collect essential items and then to Tottenham police station nearby; for the first and only time I was locked into a police cell in the U.K. Everything was done on a friendly basis. Later the same day a small coach arrived with some other internees from the area and took us to Lingfield racecourse in Surrey. This had been taken over by the army as a temporary internment camp.

There, we were given a large sack and straw to stuff it with - palliases for sleeping on and a blanket.

Later, I learned that this preparation of bedding was very much the army method of dealing with new arrivals at barracks. The food was army style, basic but adequate, dealt out from mobile food trailers..... "

69. Significantly, some guidance can be taken from the 1956 Constitution of Pakistan which contained a similar Article on "enemy alien" being Article 7 (3) as set out below;

1956 Constitution

Article 7 (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person - (a) who for the time being is an enemy alien; or (b) who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorize the detention of a person for a period exceeding three months unless the appropriate Advisory Board has reported before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such detention.

Explanation: In this clause "the appropriate Advisory Board" means, in the case of a person detained under a Central Act or an Act of Parliament, a Board consisting of persons appointed by the Chief Justice of Pakistan, or, in the case of a person detained under a Provincial Act or an Act of a Provincial Legislature, a Board consisting of persons appointed by the Chief Justice of the High Court for the Province.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order:

Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.

70. Likewise the 1962 Constitution at Article 8 (2) also seemed to provide no relief for enemy aliens

"8. Safeguards in Relation to Arrest and Detention.

1. A law authorizing the arrest or detention of persons should ensure that a person arrested or detained under the law;
 - (a) Is informed of the grounds of his arrest or detention at the time he is arrested or detained or as soon thereafter as is practicable;
 - (b) Is taken before the nearest Magistrate within a period of twenty-four hours after he is arrested or detained, excluding the time necessary to convey him to the Magistrate;
 - (c) Is released from custody at the expiration of that period unless further detention is authorized by a Magistrate; and
 - (d) Is at liberty to consult, and to be represented and defended by a legal practitioner of his choice.
2. This Principle does not apply to a law authorizing the arrest or detention of enemy aliens or providing for preventive detention, but law providing for preventive detention;
 - (a) Should be made only in the interest of the security of Pakistan or of public safety;
 - (b) Should ensure that (except where the President or the Governor of a Province, in the interest of the security of Pakistan, directs otherwise) a person detained under the law is informed of the grounds of his detention at the time he is detained or as soon thereafter as is practicable;

(c) and Should ensure that a person is not detained under the law for a period longer than three months without the authority of a Board consisting of ;

- (i) Where the law is a Central Law - a Judge of the Supreme Court, who shall be nominated by the Chief Justice of that Court, and another senior officer in the service of Pakistan, who shall be nominated by the President; or
- (ii) Where the law is a Provincial Law - a Judge of the High Court of the Province concerned, who shall be nominated by the Chief Justice of that Court, and another senior officer in the service of Pakistan, who shall be nominated by the Government of that Province"

71. The same wording of "enemy alien" was also incorporated in Article 10(9) of the 1973 Constitution which is the Article dealing with arrest and detention and as mentioned earlier **remained untouched in 2010** whilst the cross party Parliamentary Rabbani Committee went through each Article of the Constitution to consider potential amendments and indeed made numerous significant amendments to the Constitution yet Article 10(9) remains a part of our Constitution today even after further Constitutional amendments following the 18th Constitutional amendment.

72. Thus, in our view since "enemy alien" had become defined as set out by us earlier in this order during World War Two between 1939 and 1945 and such definition had been used in Britain of which India was formerly a Colony prior to partition in 1947 which gives a **strong indication** that the original framers of the constitution **intended that the expression "enemy alien" as found in the 1956 Constitution was based on the definition of enemy alien as used and applied by the British during World War Two, which was once again reflected in the 1962 Presidential Constitutional and the 1973 Parliamentary Constitution which Governs Pakistan today.**

73. As per our definition of enemy alien the first limb to be fulfilled would be that the petitioner **must be a non national**. At this stage the Government of Sindh's argument fails as the petitioners are all Pakistani nationals. It may be that one of the petitioners Omer Ahmed Shaikh holds dual nationality however whilst he is in Pakistan his Pakistani nationality will prevail over his other nationality. We are **not** persuaded that a person

who had lost allegiance to a State was a non National **unless** the State itself had stripped him of that nationality which is not the case in so far as it relates to the petitioners. The petitioners at best appear to us to be terrorist/militants who at this point in time have not been proven to belong to any banned organization in Pakistan.

74. **Even otherwise** the second limb of the test would need to be satisfied. Namely, there would also need to be a declared state of war between Pakistan and another country. In the current situation neither is Pakistan involved in any declared international armed conflict nor any declared internal armed conflict which might lead to the combatants having the benefit of at least some parts of the Geneva Conventions regarding the laws and customs of war. **Pakistan in our view today is fighting groups which can be described as insurgents, terrorists and/ or militants mainly of an internal nature which the State's security forces are ably dealing with.**

75. In our view, the phrase "War on Terror" was coined after Osama Bin Laden and Al Qaeda attacked the World Trade Centre (WTC) in the USA on September 11 2001 by flying commercial jet airliners into such buildings which lead to the collapse of the WTC and the loss of around 3,000 precious lives. This resulted in a US lead coalition through exercising its right of self defense under International law retaliating against the Taliban regime in Afghanistan who refused to hand over Osama Bin Laden and other Al Qaeda members who the USA held responsible for the attack on the WTC and who were taking refuge within their territory and whom the State of Afghanistan refused to surrender. This so called "War on Terror" has been continuing for the last 19 years and thus if the petitioners were to fall within this so called "War on Terror" they may never be released from jail despite having been acquitted of the offenses including terrorism for which they were originally charged some 19 years ago.

76. It then begs the question whether the conflicts in Iraq, Syria, Yemen, Libya, Somalia or sporadic terrorists attacks in France, the UK, Turkey, Nigeria etc all fall within the ambit of the "War on Terror" as in this day and age usually some kind of unconventional militancy/terrorism is taking place in some part of the World which

involves some kind of terrorist element which if deemed to be a part of the so called "War on Terror" may lead to a so called never ending war with so called enemy aliens being left in black holes without any kind of legal relief without trial indefinitely which we consider would **not have been the intention** of the framers of our Constitutions in 1956, 1962 and 1973 through the insertion of Article 10 (9). This is more so since our current form of Parliamentary democracy under the 1973 Constitution attaches great weight to the freedom of the individual, due process of law, enforcement of fundamental rights and the rule of law which are the hall marks of any civilized society. We are also not convinced that such a harsh interpretation of Article 10 (9) which gave no legal relief to an aggrieved party would sit well in a Constitution which is secular in nature but blended with Islamic principles.

77. Now a days the manner of warfare may have changed but back in 1956 when our first Constitution was framed the only reference to "enemy alien" which the framers of our Constitution would have had reference to, as mentioned above, was how "enemy aliens" were defined and treated by the British during World War Two and thus in our view when the term, "enemy alien" was included in the **1956 Constitution it was the intention of the framers of that Constitution** that the term "enemy alien" was to mean the same as it was interpreted and applied by the British during World War Two and such meaning of "enemy alien" has continued into the 1962 and 1973 Constitutions **and today** where the term remains unchanged in Article 10(9). Even when the far reaching 18th Constitutional amendment, as mentioned earlier, was promulgated in 2010 and the so called "War on Terror" had been raging for **almost 9 years** Parliament felt no need to change the wording of Article 10 (9) of the Constitution which it could have done had it so intended keeping in view the change in the nature of war fare since 1945 which the world was now dealing with in 2010 in the so called "War on Terror" and thus the original intention of the framers of the Constitution in 1956 as to the meaning of Article 10 (9) remains in tact today as interpreted by us earlier in this order.

78. Thus, we are of the considered view that the petitioners are **not** "enemy aliens" as contemplated under Article 10 (9) of the Constitution and as such Article 10(9) is **not** applicable to any of the petitioners.

79. In our view a person **might** be considered as an "enemy alien" as per our interpretation of its meaning if he was a non Pakistani citizen living in Pakistan when Pakistan was in a declared war with another State and that person was from that other State which Pakistan was at war with and could be considered as a spy or a saboteur who was assisting the enemy State in its conflict against Pakistan. For example, such a situation may have arisen if during the 1965 and 1971 wars with India if an Indian national was residing in Pakistan and assisting the Indian forces against the State of Pakistan who India was at war with but even then in our view the proper legal approach would most likely be to intern that person especially if he was a civilian against whom there was no cogent evidence of collaborating with the enemy or try him as a spy as the case may be.

80. We are fortified by our findings by **The Actions (in aid of Civil Power) Regulation 2011 (the Regulations) and Rules** made there under.

81. The Regulations were issued during the height of the so called "war on terror" and even when the territorial integrity of Pakistan was under threat by terrorists/militants. Its Preamble reads as under;

"to provide for Action in aid of civil power in the Federally Administered Tribal Area.

WHEREAS there exists grave and unprecedented threat to the territorial integrity of Pakistan by miscreants and foreign funded elements, who intend to assert unlawful control over the territories of Pakistan and to curb this threat and menace Armed forces have been requisitioned to carry out actions in aid of Civil Power.

AND WHEREAS continuous stationing of Armed Forces in territories, that have been secured from miscreants in the provincially Administrative Tribal Areas, is necessary and it is, therefore, imperative that a proper authorization be given to the Armed Forces to take certain measures for incapacitating the miscreants by interning them during continuation of the actions in aid of civil power and it is also necessary to ensure that Armed Forces carryout the said operation in accordance with law;

AND WHEREAS the miscreants are no longer loyal and obedient to the state and Constitution of the Islamic Republic of Pakistan;

AND WHEREAS to address this situation, the federal Government have directed Armed Forces to act in aid of Civil power to counter this threat to the solidarity and integrity of Islamic Republic of Pakistan while being subject to the law provided hereinafter;

NOW, THEREFORE, in exercise of powers conferred by clause (4) of Article 247 of the Constitution of Islamic Republic of Pakistan, the President is pleased to make the following regulations, namely:-

1. *Short title, application and commencement:- (1) This Regulation may be called the actions (in Aid of Civil Power) Regulation, 2011.*
2. *It shall be applicable to the Federally Administrative Tribal Areas of Pakistan*
3. *It shall come into force at once and shall be deemed to have taken effect from the 1st February 2008.*

82. Significantly the Regulations and the rules made there under do not use the words "enemy aliens" but use the words "**miscreants**" for those who fall under the ambit of the Regulations and the Rules made hereunder.

83. At section 2(l) of the Regulations "Miscreants" are defined as under;

"miscreants" means any person who or may not be a citizen of Pakistan and who is intending to commit or has committed any offence under this Regulation and includes a terrorist, a foreigner, a non state actor or a group of such persons by what so ever names called;

84. The non use of the words "enemy alien" and "miscreants" instead in our view was because the legislature in its wisdom **intended to include Pakistani nationals in this piece of legislation as well as non Nationals which would not be in consonance with the definition of "enemy alien" who had to be non Pakistani nationals.** Perhaps the rationale behind this definition was that the miscreants who were carrying out a large scale insurgency and terrorist activities mainly limited to FATA as per the Regulations included Pakistani nationals who had to be brought within the net of the Regulations

85. **Again significantly,** this piece of legislation also provided for internment centre's for those miscreants who were captured **with a right of review of their detention** or who else might be sent up for trial and proceeded with in accordance with the law and thus even today there are no legal black holes in Pakistan whereby even suspected terrorists or militants are provided due process of law as guaranteed under Article 10(A) of the Constitution.

86. We are further fortified by our findings in respect of the definition of "enemy alien" as set out in Article 10(9) of the Constitution by the now lapsed **Protection of Pakistan Act 2014** (Act X of 2014) the Preamble of which reads as under;

"An Act to provide for the protection against waging of war or insurrection against Pakistan and the prevention of Acts threatening the security of Pakistan and for speedy trial of offenses falling in the schedule and the matters connected therewith or incidental thereto" (bold added)

87. At section 2 in the definition section it defined at (d) "enemy alien" as under;

- (d) "enemy alien" means a militant:-
 - (a) whose identity is unascertainable as a Pakistani, in the locality where he has been arrested or in the locality where he claims to be residing, whether by documentary or oral evidence; or
 - (b) who has been deprived of his citizenship, under the Pakistan Citizenship Act, 1951 (II of 1951), acquired by naturalization;

88. Thus the precondition for a person to be considered an "enemy alien" under this Act was that he was *not* a Pakistani national. Perhaps the rationale for excluding Pakistani nationals was the increasing attacks on Pakistan by non Pakistani nationals crossing over Pakistan's borders and carrying out attacks in Pakistan and then either retreating back to the sanctuary of their own country or staying in Pakistan to carry out further terrorist activities.

89. At section 2 (f) Militant was defined as under;

- "militant" means any person who;
 - (a) wages war or insurrection against Pakistan, or
 - (b) raises arms against Pakistan, its citizens, the armed forces or civil armed forces; or
 - (c) takes up, advocates or encourages or aids or abets the raising of arms or waging of war or a violent struggle against Pakistan; or
 - (d) threatens or acts or attempts to act in a manner prejudicial to the security, integrity or defence of Pakistan; or
 - (e) commits or threatens to commit any schedule offence; and includes:
 - (i) a person who commits any act outside the territory of Pakistan for which he has used the soil of Pakistan for preparing to commit such act

- that constitutes scheduled offence under this Act and the laws of the State where such offence has been committed, including an act of aiding or abetting such offence; or
- (ii) any person against whom there are reasonable grounds that he acts under the directions or in concert or conspiracy with or in furtherance of the designs of an enemy alien;

90. This Act which was considered by Parliament long after the so called "War on Terror" had started and would have been discussed and debated from all angles yet it uses the definition of "enemy alien" as found by us which would **exclude all** the petitioners from the definition under Article 10 (9) as they were all Pakistani nationals. Parliament in its wisdom would have been well aware of the changed nature of war fare since World War One and Two where the enemy was usually easily identifiable through the use of different uniforms and emblems to today where often the fighters are unidentifiable as belonging to any particular or cohesive group and wear no distinguishing uniforms or emblems but **deliberately and intentionally adopted the traditionally used and British definition of "alien enemy" as being non Pakistani nationals.**

91. To us this is the clearest indication of how Parliament intended the words "enemy alien" to be interpreted as used in Article 10(9) of the Constitution. This Act, as with the World War Two cases, also established detention/interment centres for those who fell into the category of enemy alien and did not create legal black holes.

92. In our view Pakistan is passing through challenging times but we are not at war but rather we are having to deal with the scourge of terrorism and militancy like many other countries and we have passed appropriate laws to deal with such miscreants.

93. In this so called "War on Terror" it is always a careful and fine balance between ensuring the security of the State and at the same time ensuring civil liberties and rights of the citizens which are guaranteed and protected by the Constitution and it is the role/obligation of the Judiciary to jealously safe guard its citizens from executive abuse or over reach of power in such times.

94. Each State has responded to this so called "War on Terror" in its own way depending upon its own particular circumstances, needs and environment. Some States through extremely harsh preventive detention laws which have lead to persons being detained for years on end at prisons like Guantanamo Bay without trial and the US Patriot Act 2001, some through less harsh laws, for example we have resorted to the use of internment centre's where the worst instances of terrorism and militancy has taken place which still ensure the due process rights of the internee to a large extent and in recent times Parliament in its wisdom has **abandoned** under the Constitution by not renewing the same the concept of trial by military courts even for the most hardened jet black terrorist or militant to whom even minimum due processes standards were observed, whilst in the UK currently under the Protection of Freedoms Act 2012 the maximum pre charge detention period allowed for **suspected terrorists** is 12 days after which the suspected terrorist must be released or charged. Ultimately, **however** it is for each country through its own legislature based on its own circumstances, needs and its own prevailing environment to promulgate such laws as it considers appropriate. As for the struggle between striking the correct balance between security and civil liberties the proponents of each respective side will continue to fight for the supremacy of its own ideal over the other.

95. This struggle to find the right balance was well set out in a paper by David Cole (Heinonline – 54 Stan.L.Rev.953 2001-2002) wherein at the start of the so called "War on Terror" he wrote in part as under concerning the US situation;

"INTRODUCTION

"On January 24, 2002, the United States military transported John Walker Lindh, a young American raised in Marin County, California, and captured with the Taliban on the battlefields of Afghanistan, to Alexandria, Virginia, where he was to be tried in a civilian criminal court for conspiring to kill Americans. White House spokesman Ari Fleischer announced that "the great strength of America is he will now have his day in court". At the same time, the military was holding 158 foreign-born Taliban and Al Qaeda prisoners at a military base in Guantanamo Bay, Cuba, in 8-foot-by-8-foot chain-link cages. A widely circulated press photo depicted the prisoners bound and shackled, with bags covering their heads and eyes, kneeling on the ground before U.S. soldiers. President George W. Bush announced that he had categorically determined that the Guantanamo detainees were not entitled to the protections accorded prisoners of war under the Geneva

Conventions, and Secretary of Defense Donald Rumsfeld dismissed concerns about their treatment with the assertion that it was better than the treatment the Taliban and Al Qaeda accorded their prisoners. Two months earlier, the President had issued a military order providing that Al Qaeda members and other noncitizens could be tried by military tribunals, in which the military would act as prosecutor, judge, jury, and executioner, without any appeal to a civilian court.

The difference between the treatment afforded John Walker Lindh and his fellow Taliban and Al Qaeda prisoners held on Guantanamo rested on the fact that Lindh was, as the press nicknamed him, "the American Taliban." When the Attorney General announced the charges against Lindh, a reporter asked why Lindh was being tried in an ordinary criminal court rather than before a military tribunal. The Attorney General explained that because Lindh was a United States citizen, he was not subject to the military tribunals created by President Bush's order. As a purely legal matter, the president could have made U.S. citizens subject to military commissions; citizens have been tried in military tribunals before, and the Supreme Court expressly upheld such treatment as recently as World War II. But the president chose to limit his order to noncitizens.

That choice is emblematic of how we have responded to the terrorist attacks of September 11, 2001. While there has been much talk about the need to sacrifice liberty for a greater sense of security, in practice we have selectively sacrificed *noncitizens'* liberties while retaining basic protections for citizens. It is often said that civil liberties are the first casualty of war. It would be more accurate to say that noncitizens' liberties are the first to go. The current war on terrorism is no exception.

In the wake of September 11, we plainly need to rethink the balance between liberty and security. The attacks, which killed more than 3,000 people and did immeasurable damage to the human spirit, succeeded beyond our worst nightmares and their perpetrators' wildest dreams in wreaking destruction and spreading fear throughout the nation. We all feel a profound and deeply unfamiliar sense of vulnerability in their wake and have a correspondingly urgent need for security and reassurance. The anthrax scare that followed underscored the gravity of the threats we face, vividly demonstrating that scientific and technological advances have made instruments of mass destruction far too widely accessible. And as Attorney General John Ashcroft's statement quoted as an epigraph to this article illustrates, many argue that the demands of waging war—here, a war without an articulable endpoint—require that civil liberties not stand in the way of victory.

There is undoubtedly a balance to be struck between liberty and security, but there are also several reasons to be cautious about too readily sacrificing liberty in the name of security. First, as a historical matter, we have often overreacted in times of crisis. In World War I, we imprisoned people for years at a time merely for speaking out against the war effort. In World War II, we interned more than 110,000 persons solely because of their Japanese ancestry. And during the Cold War, thousands of innocent persons lost their jobs, were subjected to congressional investigations, or were incarcerated for their mere association with

the Communist Party. In hindsight, these responses are generally viewed as shameful excesses; but in their day, they were considered reasonable and necessary.

Second, there is reason to think that as a general matter in times of crisis, we will overestimate our security needs and discount the value of liberty. Liberty is almost by definition abstract; it is measured by the absence of control or restraint. Fear, by contrast, is immediate and palpable; it takes physical form as stress, anxiety, depression, a pit in the stomach, a bad taste in the mouth. It is easy to take liberty for granted, and to presume that government powers to intrude on liberty are not likely to be directed at one's own liberty. Fear affects us all, especially after an attack like that of September 11.

Third, liberty and security are not necessarily mutually exclusive values in a zero-sum game. Liberty often plays a critical role in maintaining security. One of the justifications for guaranteeing political freedoms is that a free people are less likely to be driven to extreme violence. A political process that treats people with equal dignity and allows dissidents to voice their views and organize to change the rules through political means is likely to be more stable in the long run. Recent experience in England and Israel has shown that cracking down on civil liberties does not necessarily reduce violence, and may simply inspire more violence. As Justice Brandeis wrote, the Framers knew "that fear breeds repression; that repression breeds hate; [and] that hate menaces stable government."

Understanding both the importance of liberty and the temptation to restrict it that government authorities and democratic majorities would face in times of crisis, the Framers sought to protect our basic liberties from the momentary passions of the majority by inscribing them in the Constitution. But with few exceptions, constitutional rights are not absolute; a balance must be struck. As Justice Goldberg famously put it, "[the Constitution] is not a suicide pact."

Thus, while the tension between liberty and security should not be overstated, it cannot be denied. We love liberty and security, but recognize that sometimes we must limit one to enjoy the other. When a democratic society strikes that balance in ways that impose the costs and benefits uniformly on all, one might be relatively confident that the political process will ultimately achieve a proper balance. But all too often we seek to avoid the difficult tradeoffs by striking an illegitimate balance, sacrificing the liberties of a minority group in order to further the majority's security interests. In the wake of September 11, citizens and their elected representatives have repeatedly chosen to sacrifice the liberties of noncitizens in furtherance of the citizenry's purported security. Because noncitizens have no vote, and thus no direct voice in the democratic process, they are a particularly vulnerable minority. And in the heat of the nationalistic and nationalist fervor engendered by war, noncitizens' interests are even less likely to weigh in the balance".(bold added)

96. Thus, even by US standards, now a days, it seems that a US citizen would not be considered as an "enemy alien" to be interned as opposed to being tried in an ordinary court of law.

97. Regarding this balance between civil liberties and preventive detention in the UK it was noted in online source Law Library of Congress on "Pre Charge detention for terrorist suspects ;United Kingdom" that;

...

"Reasons for the Extension of Pre-Charge Detention

The extension of pre-charge detention, as noted above, is not a new issue and has presented itself with some regularity over the past several years to controversy each time legislation has been introduced. **The struggle the government faces of how to balance protecting its citizens from the risk of a terrorist attack without determining the basic human rights of individuals and their right to liberty, while acting within the limits of the law can be demonstrated by the fact that pre-charge detention has reportedly been "debated more than any other legal procedural issue in recent years."** and

"Concluding Remarks

The Joint Committee on Human Rights has noted that "whilst anti-terrorist legislation is not new, each incremental installment, generated by concerns about public safety, must be considered not only on its merits but also in relation to the totality of such legislation. "The large volume of anti-terrorism legislation in the UK appears to have caused much controversy about the pre-charge detention provisions in the context of its cumulative effect. **Additionally, much controversy exists regarding the potential injustice that an individual could face by being detained for up to forty two days without being charged with a crime to only later be determined to not pose a threat. The government's concerns regarding the challenges that it faces and the consequences of not having powers to enable police to effectively tackle the terrorist threat are unenviable and not open to an easy solution. The final resolution of the controversy surrounding the issue of pre-charge detention is dependent upon the social and political climate to determine whether the chosen measures are proportionate to the challenge faced.**

The reception that the provisions in the bill relating to pre-charge detention have met in the House of Lords indicates that the provisions would likely not be enacted". As noted below the extension of pre charge detention to 42 days was rejected by the British Parliament.

...

98. As noted above in recent times in the UK the pre charge detention for terrorist suspects has been whittled down from 28 days to 12 days and an attempt to have the preventive detention period increased from 28

days to 42 days (prior to it being reduced from 12 days) was defeated by Parliament despite the recent terrorist attack at a musical concert in Manchester which killed and injured many youngsters and other such terrorist incidents in London.

99. In conclusion we find that the petitioners being Pakistani nationals living in Pakistan whilst Pakistan is not in a declared state of war do **not** fall within the definition of "enemy alien" as used in Article 10 (9) of the Constitution and whose detention under Article 10 (9) was without lawful authority and in violation of the Constitution.

100. We have already in this order struck down the Third PDO and the Notification issued against the petitioners under S.11 EE of ATA for the reasons mentioned earlier in this order.

101. Suffice it to say that such malafide conduct on the part of the Government of Sindh is highly deprecated. The petitioners were convicted by the trial court for very serious offenses including terrorism and were accordingly each handed down heavy sentences including that of death in one case however after serving over 18 years in jail without remission the petitioners were all acquitted of all charges except one who was given a lesser sentence. The State appealed the acquittal of the petitioners as was its legal right which is still pending before the Supreme Court for determination.

102. This is how our criminal justice system works and enables the public to have faith in the same. Issuing continuous and successive PDO's on unjustified grounds just to keep a person in jail despite his acquittal by the courts only serves to undermine and lessen confidence in the eyes of the public in their rights as guaranteed under the Constitution and the criminal justice system and leads to the **perception** that it is not based on the principles of equality, fair play and that the rule of law which this Country so cherishes is being compromised by the executive authorities.

103. Thus, not only did the Government of Sindh violate the Constitutional rights of the petitioners to seek a review board for their preventive detention under Article 10 of the Constitution based on the particular facts and circumstances of this case the Government of Sindh also violated Articles 4,9, 10, 10(A), 14 , 15 and 25 of the Constitution by

issuing PDO's which lacked legal justification based on the material which was placed before the competent authority (as the petitioners have been found by us not to be enemy aliens) as such the third PDO which is the only PDO which remains in the field is for the avoidance of doubt for the reasons mentioned earlier in this order hereby struck down as being unlawful and of no legal effect.

104. In particular, especially during challenging times the courts must ensure the Constitutional guarantees/protections provided to the citizens of this country through the Constitution and protect them from any misuse or abuse by the executive authorities especially when the liberty of the individual is at stake which is one of the most important fundamental rights guaranteed by the Constitution. Without the jealous protection of liberty and other fundamental rights by the courts we are no where both as a State and citizen of that State and the road to chaos and tyranny will not be far away. In this respect it is apt to cite the case of **Khawaja Salaman Raqifue** (Supra) which held as follows as para's 91 and 92 as under;

"91. Discretion has been granted to the constitutional courts in order to widen the scope of their power and competence, albeit within the prescribed parameters. The constitutional courts are the guardian of the constitution, and thus required to ensure that the executive refrain from violating the constitutional mandate, and to stop such violation when it occurs. The Court has to review the executive actions and the conduct of the public authorities on the touchstone of fairness, reasonableness and proportionality. They should not hesitate in performing their constitutional duty objectively, particularly, when it comes to the matter of rights that have been guaranteed by the constitution, we should remain mindful of the sensitivity of such issues, as unless the constitutionally guaranteed rights protections and privileges are respected and safeguarded the situation shall inevitably degenerate into chaos and anarchy. People wielding power should not lose sight of the fact that the constitutionally guaranteed rights have been obtained and secured by the people of this country through a social contract in the shape of the constitution.

92 Before parting, it is worth recalling Antonio Gramsci's exhortation to civil society to be intellectually pessimistic but with a will that is optimistic. Legal protections, however sacrosanct, are inadequate to preserve liberties in a society that values outcomes over due process and is happy to sacrifice procedural safeguards at the altar of expediency. Until we value the ideals of democracy and liberty, we shall forever remain shackled not only deprived of the rights afforded to us by the Constitution but also unable to gain our rightful place in the comity of nations. As Thucydides wisely

proclaimed "the strong will continue to do what they can and the weak shall continue to suffer what they must." Our salvation, thus, lies not in suppressing ideas we disagree with but in demanding freedom of thought, conscience, and expression for those whom we most vociferously disagree with. Until we create a culture of transparency, liberty, civility, and democratic values, our desire for peace and order shall continue to elude us".

Conclusion.

105. The petition is allowed. The First two PDO's have expired and as such are no longer in the field having ceased to have effect on their expiry. The only PDO which is currently operating is the third PDO referred to in this Order which the petitioners are subject to which is struck down as being issued in violation of Articles 4,9,10,10(A), 14 , 15 and 25 of the Constitution as being illegal and issued without lawful authority.

106. The Notification dated 29.06.2020 placing the petitioners in the IV Schedule of the ATA by virtue of S.11 EE ATA referred to earlier in this order issued in respect of all the petitioners is struck down for the reasons mentioned earlier in this order as being issued without lawful authority and on account of malafides.

107. All the petitioners are found **not** to be "enemy aliens" so as to fall within the ambit of Article 10(9) of the Constitution and their detention under this sub Article of the Constitution is found to be illegal and without lawful authority.

108. It is **directed** that all the petitioners be released forthwith from jail **unless** wanted in any other custody case/crime or any stay order passed by the Supreme Court is currently in operation preventing their release.

109. It is also **directed** that none of the petitioners be detained under any further preventive detention order by either the Federal Government or any Provincial Government or any law enforcement agency or any other body without the permission of this court.

110. A copy of this order shall be sent by the office by fax immediately to Secretary Ministry of Interior Government of Pakistan, Secretary Home Department and Chief Secretary Government of Sindh, IGP Sindh and Superintendants Central Prisons Karachi **and** Sukkur and IGP Prisons Sindh for compliance.

111. These are the reasons for our short order dated 24.12.2020 which is set out below for ease of reference;

"We have heard learned counsel for all the petitioners namely Ahmad Omar Sheikh, Fahad Nasim Ahmad, Syed Salman Saqib and Sheikh Muhammad Adil.

We called upon the learned Advocate General of Sindh to argue this matter on behalf of the Government of Sindh, however, he contended that this bench should not hear this case because this bench had already made up its mind in this petition as it had already passed an order in C.P. No.D-3275 of 2020 **Mst. Aziza Naeem vs. Government of Sindh** dated 21.12.2020 which was similar to this petition and as such this matter should be placed before another bench of this Court for hearing excluding the members of this bench. We find no merit in this submission of learned Advocate General, Sindh which submissions is declined/rejected. This is because the members of this bench might have already passed an order in a similar case but in any event if this matter was placed before another DB of this court such DB would be bound to follow the order of this DB so no useful purpose would be served in transferring the petition to another DB of this Court. In our view the proper approach would have been for learned Advocate General to have challenged our earlier order before the Hon'ble Supreme Court. Even otherwise we are of the view that this petition is different in nature and the facts and circumstances relating to this case in terms of the material relied upon to detain the petitioners is quite different from the material relied upon for issuing the PDO's in **Aziza Naeem's case** (supra) and as to why the petitioners were placed under preventive detention. It is settled by now that each case is to be decided on its own particular, facts and circumstances. It was also confirmed by the Advocate General himself that the preventive detention order which is currently in operation against the petitioners is going to expire on 27.12.2020 and as such if we adjourn this case on his request it will cause extreme prejudice to the petitioners as in our view based on the **previous conduct** of the Government of Sindh when 27th December 2020 is passed which will be in a few days' time and the preventive detention order currently in effect expires the Government of Sindh will most likely again detain the petitioners under another preventive detention order to prevent their release from jail which will lead to this petition becoming infructuous and the petitioners being returned to square one where they will have to file fresh petitions. We also note that the material provided by the intelligence agencies which lead to the petitioners' names being subject to the PDO's has already been placed before us in chambers and reviewed by us which material was obviously different to that relied on in **Mst. Aziza Naeem's case** (supra). Learned Advocate General had also provided his authorities which he intended to rely on in this petition in respect of decisions being made on a subjective as opposed to objective basis and the petitioners being enemy aliens to the petitioners well before the date of this hearing as such the petitioners already knew the heart of his case against them. Learned Advocate General Sindh had

requested for an adjournment so that he could move an application to place this case before any other bench of this court. We are of the view that he had sufficient time to make such an application after the passing of the order in **Mst. Aziza Naeem's case** (supra) which was passed about **03 days ago** on 21.12.2020 but the same was not moved. In our view not to hear this petition today would cause irreparable harm and extreme prejudice to the petitioners who had already been behind bars for over 18 years without remission prior to their acquittal and have since their acquittal have remained behind bars for almost a further 09 months based on PDO's issued by the Government of Sindh.

We have heard the arguments of learned DPG and DAG who have adopted exactly the same arguments and relied on exactly the same authorities as learned Advocate General Sindh in **Mst. Aziza Naeem's case** (supra).

For reasons to be recorded later on we:

- (i) Find that once the first and second preventive detention orders dated 02.04.2020 and 01.07.2020 have expired they are no longer in the field.
- (ii) Find that the notification dated 29.06.2020 placing all the petitioners on the IV Schedule of ATA pursuant to S. 11 EE as being issued without lawful authority and therefore of no legal effect and hence is struck down.
- (iii) Find the third preventive detention order dated 28.09.2020 under article 2A, 4, 9, 10, 10(A), 14, 15 and 25 of the Constitution of Pakistan as being issued without lawful authority and in violation of the said Articles of the Constitution and is hereby struck down.
- (iv) Find that none of the petitioners are 'enemy aliens' as contemplated under Article 10(9) of the constitution and as such their detention under this sub Article of the constitution is found to be illegal and without lawful authority.
- (v) Direct that all the petitioners namely Ahmad Omar Sheikh son of Saeed Ahmed Sheikh, Fahad Nasim Ahmad son of Nasim Ahmed, Syed Salman Saqib son of Syed Abdul Rauf and Sheikh Muhammad Adil son of Abdul Shakoor shall be released from jail forthwith on the receipt of this order unless they are wanted in any other custody case or any order against their release has been passed by the Hon'ble Supreme Court of Pakistan.
- (vi) Direct that none of the petitioners be placed under any preventive detention order by the Federal Government, Provincial Government, any Law Enforcement Agency or any other body without the prior permission of this court.

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- (vii) Direct that all the petitioners shall be placed on the ECL until such time as their appeals have been decided by the Hon'ble Supreme Court. Learned counsel for the petitioners undertakes that they will produce all the petitioners before the Hon'ble Supreme Court on each and every date when their appeal is being heard.
- (viii) A copy of this order shall be sent by fax to Chief Secretary and Home Secretary Government of Sindh, Secretary Ministry of Interior, Government of Pakistan, IGP Sindh, Superintendent Central Jails Karachi and Sukkur and IGP prisons Sindh for compliance."

112. The petition stands disposed of in the above terms.

Arif