

[Supreme Judicial Council]

Present: Mian Saqib Nisar, Chairman, SJC, Asif Saeed Khan Khosa, Ejaz Afzal Khan, Muhammad

Noor Meskanzai and Syed Mansoor Ali Shah, Members

ALI ANWAR GOPANG---Applicant

Versus

JUSTICE SHAUKAT AZIZ SIDDIQUI, JUDGE, ISLAMABAD HIGH COURT---Respondent

Supreme Judicial Council No.242 of 2015, decided on 18th May, 2017.

(Reference under Article 209 of the Constitution).

(a) Supreme Judicial Council Procedure of Inquiry, 2005---

---Para. 13---Constitution of Pakistan, Arts. 4, 10A, 14, 25 & 209---Paragraph 13 of the Supreme Judicial Council Procedure of Inquiry, 2005, Vires of---Proceedings against a Judge of the High Court before the Supreme Judicial Council---Scope---Application seeking proceedings in open court---Plea of applicant/Judge of the High Court that holding in-camera proceedings in secret in terms of para. 13 of Supreme Judicial Council Procedure of Inquiry, 2005 was violative of the Fundamental Rights guaranteed to him under Arts. 4, 10A, 14 & 25 of the Constitution, therefore, para.13 should be declared to be ultra vires the Constitution---Validity---Supreme Judicial Council ("Council") was not a court---Proceedings before the Council did not determine the civil rights or criminal liabilities of a Judge against whom the proceedings were being conducted, therefore, the request for an open trial of the proceedings on the touchstone of Arts. 4, 10-A, 14 & 25 of the Constitution was not well founded---Furthermore, show cause notice was issued to the applicant along with the information and material against him; he had filed his reply thereto; the statement of allegations had been served upon him and the Attorney General had been required to conduct the reference---For the purposes of establishing the allegations contained in the complaint the affidavits of the witnesses who intended to depose in support of the complainant were to be filed through the Attorney General---Applicant was entitled to receive an advance copy of the affidavits, and the right to cross-examine the witnesses---All the documentary material brought on the record during the course of inquiry was also going to be delivered to the applicant, who would have the right to controvert such material---Applicant was also be entitled to produce oral and documentary material in support of his defence---Where the assistance of the Supreme Judicial Council was required, the same would be duly provided to the applicant---All said steps conformed to the utmost rules of fairness in proceedings, natural justice, transparency and due process of law---Paragraph 13 of the Supreme Judicial Council Procedure of Inquiry, 2005 was not ultra vires the Constitution, nor the proceedings conducted in the present manner would deny the applicant the right to defend himself in a robust and meaningful manner---Application was accordingly dismissed.

Zulfikar Ali Bhutto v. The State PLD 1979 SC 53; Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others PLD 1996 SC 632; The President v. Justice Shaukat Ali PLD 1971 SC 585; Chief Justice of Pakistan Iftikhar Muhammad Chaudhary v. President of Pakistan through Secretary and others PLD 2010 SC 61 and George Meerabus v. The Attorney General of Belize [(2005) 2 AC 513 ref.

(b) Supreme Judicial Council Procedure of Inquiry, 2005---

---Para. 13---Constitution of Pakistan, Art. 209---Proceedings against a Judge of the High Court before the Supreme Judicial Council---In-camera proceedings---Proceedings before the Supreme Judicial Council not conducted in open court was in the larger interests of the judiciary, as the issues brought before the Supreme Judicial Council and the allegations levelled may ultimately turn out to be false, frivolous and vexatious.

The President v. Justice Shaukat Ali PLD 1971 SC 585 and Chief Justice of Pakistan Iftikhar Muhammad Chaudhary v. President of Pakistan through Secretary and others PLD 2010 SC 61 ref.

Hamid Khan, Senior Advocate Supreme Court (assisted by Honourable Murad Siddiqui and Ajmal Ghaffar Toor for Respondents.

Ashtar Ausaf Ali, Attorney General for Pakistan Moulvi Anwar-ul-Haq, Advocate Supreme Court (Assisted by Barrister Asad Rahim Khan and Salaar Khan Advocates (on Court's Notice).

Date of hearing: 18th May, 2017.

ORDER

MIAN SAQIB NISAR, CHAIRMAN.-

C.M.A.No.13/2017:

The applicant is a Judge of the Islamabad High Court. Proceedings in terms of Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution) are pending against him before the Supreme Judicial Council (SJC). He has moved an application that the proceedings be held in open Court. In this context he has challenged Paragraph 13 of the Supreme Judicial Council Procedure of Inquiry 2005 (the Procedure), which provides that proceedings be conducted in-camera. According to the applicant, despite the aforesaid paragraph, holding proceedings in secret is violative of the fundamental rights guaranteed to him by the Constitution. It is stated in the application and was argued by his counsel Mr. Hamid Khan, learned Sr. ASC, that any adverse recommendation made by the SJC against the applicant will form the basis of his removal from the constitutional office of a Judge, stigmatize the applicant (and his family) for the rest of his life, deprive him of his pensionary benefits and no right of appeal or review is available to him in case of an adverse report which will be final and conclusive for all intents and purposes. It was argued that Paragraph 13 notwithstanding, proceedings conducted in-camera against the applicant would be violative of the provisions of Articles 4, 10-A, 14 and 25 of the Constitution. Given the serious consequences of any adverse finding, the rule of proportionality weighs heavily in favour of open public proceedings. To conduct an open trial is not only a fundamental right of the applicant but a cardinal rule of administration of justice; thus as a matter of right and course the applicant is entitled to an open trial and holding of in-camera proceedings should be an exception. It was submitted that the applicant's case does not fall within any of the exceptions recognized by law for conducting in-camera proceedings, such as in matters pertaining to the rights of lunatics, minors, females or on account of public safety or the security of the country. It was also argued that justice must not only be done but must be seen to be done and this is only possible through an open trial. An open trial in the matter would provide comfort and confidence to the applicant that he had been judged by his peers in open proceedings so that in case there was no adverse finding against the applicant by the SJC, there would remain no doubt in the mind of the public that no case of misconduct was made out against the applicant and he would be able to conduct himself with full confidence. Conversely if there is no report and the proceedings are simply dropped, there would remain an element of doubt in the mind of the public. In support of his contentions, he relied upon on the judgments reported as *Zulfikar Ali Bhutto v. The State* (PLD 1979 SC 63) and *Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others* (PLD 1996 SC 632). Learned counsel for the applicant at the very outset of his submissions, in the presence of his client, stated on his client's behalf and instructions that "I have full confidence in the Council if the proceedings are held in camera or in the open".

2. Heard. In *Zulfikar Ali Bhutto's* case (supra), paragraph No.365 at page 179 provides as follows:-

"365. It will thus be seen that it is an essential and salutary principle of administration of justice that it must not only be done but should also appear to be done. This necessarily carries with it the

right to an open trial in the full gaze of the public, including the Press. This in turn leads to a healthy, fair and objective administration of justice calculated to promote public confidence in the Court and is conducive to dispel all misgivings about it. There can be no two opinions about it. But this rule, on all accounts, is not a rigid and inflexible one, and must not be pressed to its breaking point in defeating the very ends of justice. It admits of exceptions and cases may arise whereby following this rule for an open trial justice may itself be defeated. A Court of law exists for the administration of justice. The primary function and the ultimate goal before a Court is to do justice between the parties. However, as seen, above, there is no dearth of cases in which the very requirement of the administration of justice in itself demands that a trial may be held in private or in camera and an open public trial is likely to result in the stultification of justice. In this category are included cases within the parental jurisdiction of the Court for the safeguard of the interests of the ward or lunatics. But it is, nonetheless, not possible to prepare an exhaustive list of all such cases. In fact each case must be judged on its own facts in this respect. Indeed even the Legislature has also, in its wisdom, expressly provided for the holding of trials in camera under some of the statutes in force in this country."

Mrs. Shahida Zahir Abbasi's case (*supra*) at page 676 also refers to similar reasons for preferring an open trial "unless there are some very compelling reasons justifying the camera trial of the accused officer". As the case concerned a Court Martial, the eventual decision as to whether the trial ought to be conducted in-camera or open Court was left to the Court Martial itself. The rule which can be culled from the aforesaid judgments is that in cases pertaining to the determination of the civil rights or criminal liabilities of a person, ordinarily a case should be tried in open court, subject to the exceptions provided in these judgments or any other exception which may warrant in-camera proceedings in the specific facts and circumstances of the case or if specifically provided by law. Thus, irrespective of the consequences pointed out by Mr. Hamid Khan, the question is whether the proceedings before the SJC under Article 209 of the Constitution, are in the nature of determination of civil rights and/or criminal liabilities and whether this forum is a court. In this regard, the nature and the scope of the proceedings before the SJC has been succinctly expressed in *The President v. Mr. Justice Shaukat Ali* (PLD 1971 SC 585 at page 602) in the following words:-

"Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceeding but it is, in our opinion, mainly an administrative proceeding conducted by a domestic forum to examine the professional fitness of a Judge. The subject-matter of these proceedings is neither civil rights and duties nor criminal liabilities. It is simply the conduct of a judge which is to be properly reviewed in the interest of the purity and honour of the judiciary. The forum consists of Judges of superior Courts who also belong to the same profession. To be tried by one's peers is a protection because they understand one's difficulties, problems and the situation in which one was. Doctors, architects, accountants and lawyers aim at having and have their domestic tribunals, that is to say, the tribunals which judge their conduct are manned by their own peers".

Mr. Justice Sheikh Shaukat Ali's case (*supra*) also provides an answer to the remarks made by Mr. Hamid Khan that the Procedure has no force of law because it has neither been framed under the Constitution nor any other law. In this context the judgment, at page 602, *ibid* provides:-

"Learned counsel, in putting forward this extreme contention has unfortunately overlooked the fact that no procedure has been provided even for an inquiry into the conduct or capacity of a Judge, and thus the Supreme Judicial Council has been made the sole judge of its own procedure. It can follow any procedure which is just and equitable."

In the judgment reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61) while examining the status and the nature of the proceedings before the SJC it was concluded that:--

"96. The conclusion is thus inevitable that the Supreme Judicial Council is a forum created by the Constitution but the Constitution itself has refused to grant it the status of a court.

97. Although, having discovered the verdict of the Constitution itself about the status of the S.J.C., it may no longer be necessary to say anything more on the subject but it may be of some help to mention the further insight provided to us by the Constitution vis-a-vis the said issue. The proceedings which take place before the S.J.C. have been described, by Article 209 of the Constitution, as an inquiry and not a trial. It is too well known by now that an inquiry is only a fact-finding and not a right-determining exercise and further that the courts ordinarily hold trials and finally pronounce upon the rights of the parties if the proceedings were of a civil nature or declare the guilt or innocence of the accused persons if the proceedings were of a criminal or a quasi-criminal nature. The courts of law deliver judgments and pass orders which are final, enforceable and executable and do not submit reports. But according to clause (6) of the abovementioned Article 209, what is produced by the S.J.C. as a result of the proceedings taken by it is only a report which is to be submitted/sent to the President. Although the opinion of the SJC about the fitness of a Judge receives *quietus* but it has no power to make a final pronouncement which could *PROPRIO VIGORE* be binding on and create rights and obligations between the parties and consequently could not order removal of a Judge from office who is found unfit by it to hold the said office. In fact, as declared by this Court in the case of KHAN ASFAND YAR WALI (PLD 2001 SC 607) and in the case of MALIK ASAD (PLD 1998 SC 161), the findings of the S.J.C. and its report to the President were only "recommendatory in nature". It may be added that if the intention of the framers of the Constitution was to have the inquiry in question conducted by a court then it would be absurd to expect the Constitution to first create a Council and then to expect us to stretch all limits and confer the status of a court on the said Council for the said purpose when the same object could have been achieved by assigning the said task to an already existing court like it had been done through Article 169 of the 1956 Constitution which had cast this obligation on the Supreme Court itself with respect to the High Court Judges.

98. Having thus examined the relevant legal and constitutional provisions and also having surveyed the case law, I am of the opinion that the true status of the Supreme Judicial Council is the one suggested by Syed Sharif-ud-Din Pirzada, the learned Sr. ASC appearing for the President of Pakistan while placing reliance on MR. JUSTICE SHAUKAT ALI'S CASE (PLD 1971 SC 585 at 602) wherein the said status had been determined as under:-

"Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceedings, but it is, in our opinion, mainly an ADMINISTRATIVE PROCEEDINGS conducted by a DOMESTIC FORUM to examine the professional fitness of a Judge. The subject-matter of these proceedings is neither civil rights and duties nor criminal liabilities. It is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary. The forum consists of judges of superior courts who also belong to the same profession. To be tried by one's peers is a protection because they understand one's difficulties, problems and the situation in which one was. DOCTORS, ARCHITECTS, ACCOUNTANTS AND LAWYERS

aim at having and have THEIR DOMESTIC TRIBUNALS, that is to say, the tribunals which judge their conduct are manned by their own peers." (Emphasis and underlining has been supplied)

99. Since nothing could be offered by Sahibzada Ahmed Raza Qasuri, ASC or even by Malik Muhammad Qayyum, ASC to come to any conclusion different from the one reached through MR. JUSTICE SHAUKAT ALI'S CASE, therefore, I agree with Syed Sharifud-Din Pirzada, Sr. ASC appearing for the President of Pakistan, with Mr. Makhdoom Ali Khan, the learned Attorney General for Pakistan and Mr. Aitizaz Ahsan, Sr. ASC for the petitioner and hold that while the Supreme Judicial Council may have some attributes and trappings of a court of law but it was neither intended by the Constitution to be a court nor, could any such status be conferred on it in view of the relevant constitutional provisions. It is, at best, a fact-finding domestic forum set up by the Constitution to look into the affairs of the Judges of the Superior Judiciary. I may, however, add that the said Council is entitled to the highest of respect because at least three of its members are the most senior Judges of the country. And before parting with this aspect of the matter, it may also be added that only because some holder of some public office or some forum stood blessed with the power to award punishment for contempt, was never by itself, sufficient to constitute such a person or a forum, as a court. Of the umpteen number of examples available in our corpus juris, I shall quote just one. The Federal Ombudsman (the Wafaqi Mohtisib) created under the Establishment of the Office of Wafaqi Mohtisib (Ombudsman) Order No.1 of 1983, has power to punish its contemnors vide Article 16 of the said Order but nobody has ever said that the Ombudsman was a court only because it could impose punishment for its contempt."

The ratio of the afore-quoted judgment(s) settles the issue about the scope and the nature of the proceedings conducted under Article 209 of the Constitution and the status of the SJC. Further, we came across a judgment of the Privy Council {George Meerabus v. The Attorney General of Belize [(2005) 2 AC 513]}, the brief facts of which are that a Judge of the Supreme Court of Belize was removed from office by the Governor-General on the advice of the Belize Advisory Council (BAC). He claimed that his rights under Sections 3(a), 6(1) and 6(8) of the Belize Constitution had been infringed and asked the Court to make a declaration to that effect and award damages. He raised two main pleas: firstly, regarding the bias of the BAC and secondly, that under the Constitution he was entitled to a public hearing of the matter which was denied to him by the BAC during the course of the inquiry conducted against him. Both these pleas were rejected by the Privy Council and the reason cited in the context of the latter plea is relevant for our purposes, that "The BAC is not part of the Judiciary. It is an independent body, uniquely constituted as part of the executive. The functions that are conferred on it are not judicial functions of the kind contemplated by section 6(8)". It was further held that though the Judge was entitled to a fair hearing but "Fairness does not always require such proceedings to be held in public...The question whether the proceedings are fair must be determined by looking at the proceedings as a whole."

3. In the light of the above we are of the view that the SJC is not a court; the proceedings before the SJC do not determine the civil rights or criminal liabilities of a Judge against whom the proceedings are being conducted. Therefore, the request for an open trial of the proceedings on the touchstone of Articles 4, 10-A, 14 and 25 of the Constitution is not well founded. We are also not persuaded to hold that after the inclusion of Article 10-A into the Constitution, the legal position has changed and that the SJC has attained the status of a court and that the proceedings before the SJC should be conducted like a civil or criminal trial. The contention that on account of in-camera proceedings any prejudice would be likely to be caused to the applicant is absolutely unfounded because firstly, full confidence in the SJC has been expressed by

the learned counsel for the applicant, as stated above. Besides, at the very beginning of the proceedings it was made clear to the applicant and to Mr. Makhdoom Ali Khan, learned Sr. ASC representing him earlier, that the proceedings would be conducted in a fair and transparent manner and that the rules of natural justice would be duly observed. In this regard a show cause notice was issued to the applicant along with the information and material against him was also provided to him; he has filed his reply thereto; the statement of allegations has been served upon him and the learned Attorney General for Pakistan has been required to conduct the reference. For the purposes of establishing the allegations contained in the complaint the affidavits of the witnesses who intend to depose in support of the complainant will be filed through the learned Attorney General for Pakistan. The applicant will be entitled to receive an advance copy of the affidavits. He shall have the right to cross-examine the witnesses. All the documentary material brought on the record during the course of inquiry shall also be delivered to the applicant, who will have the right to controvert such material. He will also be entitled to produce oral and documentary material in support of his defence. If the assistance of the SJC is required, the same shall be duly provided to the applicant. All these steps conform to the utmost rules of fairness in proceedings, natural justice, transparency and due process of law. The only reason assigned in the application and propounded before us in support of the notion of an open trial was that only if the proceedings are made public will transparency and fairness be achieved: this, in our considered view is not well-founded. It is on account of the sanctity of the institution and the dignity of the applicant and other Judges whose matters are inquired into by the SJC that in-camera proceedings are expedient. It is in the larger interests of the judiciary that the proceedings are not conducted in open Court, as the issues brought before the SJC and the allegations levelled may ultimately be proved to be false, frivolous, vexatious. Thus, the holding of in-camera proceedings is absolutely in line with the principles laid down in the opinions of this Court in Mr. Justice Shaukat Ali (*supra*) and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (*supra*). Further, we do not find that Paragraph 13 *supra* is ultra vires the Constitution or that the proceedings conducted in the present manner would deny the applicant the right to defend himself in a robust and meaningful manner. Therefore we do not find any merit in this application which is accordingly dismissed.

MWA/A-20/S Application dismissed.