

ORDER SHEET

LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No.72452/B/2023

Hamza Khalid

Vs

The State and another

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with the signature of the Judge and that of parties or counsel where necessary
-------------------------------	------------------------------	---

07.12.2023 Ch. Khursheed Anwar Bhinder, Advocate, assisted by Mr. Imran Qadir Bhinder, Advocate, for the petitioner.
 Mr. Zain Qazi, Assistant Attorney General, with Shafique Ahmad Bhatti/Inspector FIA.
 Barrister Muhammad Momin Malik, *amicus curiae*.

Tariq Saleem Sheikh, J. – Through this application, the petitioner seeks post-arrest in case FIR No.354/2023 dated 7.9.2023 registered at Police Station FIA, Gujranwala, for an offence under section 18 of the Emigration Ordinance, 1979 read with section 6 of Passport Act, 1974 and sections 34/109 PPC.

2. According to the crime report, the prosecution's case is that the Federal Investigating Agency (FIA) received source information that a group of people were involved in human trafficking. They had established an illegal set-up and prepared counterfeit travel documents for various European countries. Acting on this tip-off, the Deputy Director of FIA constituted a raiding party led by Inspector Shafique Ahmad Bhatti (hereinafter referred to as the "Complainant"), which raided a house in Lane No.4, Sialkot Road, Gujranwala, on 7.9.2023, around 3:30 a.m. The Complainant apprehended the petitioner and another individual with fake foreign passports, foreign driving licences, computers, printers, scanners and other machines, counterfeit stamps, visa stickers, monograms, and other articles. The petitioner applied for post-arrest bail before the Special Court Central-I, Gujranwala, but that was declined.

3. Ch. Khursheed Anwar Bhinder, Advocate, contends that the Petitioner is innocent and has been falsely implicated in this case. According to him, he was not arrested at the scene, and the Complainant made him a scapegoat after releasing the actual culprits. Mr. Bhinder

further contends that the FIA's actions were unlawful, emphasizing that they did not obtain any warrant for search and seizure from any court. Additionally, he points out that they did not involve any inhabitants from the locality during the raid. Finally, Mr. Bhinder argues that the offence under section 18 of the Emigration Ordinance is not attracted to the facts of the case. In contrast, the offence under section 6 of the Passport Act, 1974, carries a maximum punishment of three years imprisonment or a fine and thus does not fall within the prohibitory clause of section 497 Cr.P.C.

4. Mr. Zain Qazi, Assistant Attorney General, has contorted the above contentions. He argues that the petitioner was caught red-handed while actively involved in the preparation of counterfeit documents. He maintains that the accusation of false implication is unfounded. He submits that the FIA conducted the raid lawfully, and no objection can be raised against it.

5. This Court appointed Barrister Muhammad Momin Malik as *amicus curiae* in this case to assist in determining whether the FIA is obligated to obtain search and arrest warrants from the court or a competent authority before searching a dwelling house. If so, whether the proceedings or seizures resulting from such searches would be vitiated in the absence of search warrants. Mr. Malik has argued that the Federal Investigation Agency Act, 1974 (the "FIA Act") empowers the FIA to search and arrest persons and seize property throughout Pakistan. According to him, any irregularities or illegalities in the search or arrest process do not invalidate the proceedings unless they have caused serious prejudice to the accused.

6. I have heard the learned counsel and examined the record.

7. Parliament has established FIA through the Federal Investigation Agency Act of 1974 for inquiry and investigation of certain offences committed in connection with matters concerning the Federal Government.¹ Section 3 of the Act, read with the Schedule thereto, lists those offences and adds that it would include an attempt

¹ Preamble of the Federal Investigation Agency Act, 1974.

or conspiracy to commit any such offence and the abetment thereof. Section 4(2) stipulates that administration of the FIA shall vest in the Director General, who shall have the same powers as the Inspector General of Police under the Police Act, 1861. Section 5 of the FIA Act describes the powers of the members of the FIA.

8. Section 5(1) stipulates that, unless otherwise ordered by the Federal Government, members of the FIA shall possess, throughout Pakistan, powers related to search, arrest of persons, and seizure of property for an inquiry or investigation under the FIA Act. These powers, duties, privileges, and liabilities are akin to those of provincial police officers in relation to the investigation of offences under the Code of Criminal Procedure 1898 or any other law for the time being in force. Section 5(2) states that subject to rules, a member of the FIA not below the rank of a Sub-Inspector may exercise powers equivalent to those of an officer-in-charge of a police station in the area where they are currently stationed for the purpose of any inquiry or investigation under the Act. Section 5(3) empowers FIA members, not below the rank of a Sub-Inspector and authorized by the Director-General, to arrest without a warrant any person suspected of committing offences referred to in section 3(1) of the Act. Section 5(5) states that if, in the opinion of a member of the FIA conducting an investigation, any property relevant to the investigation is likely to be removed, transferred, or disposed of before obtaining an order for its seizure from the appropriate authority, that member can, through a written order, direct the owner or current possessor not to take such actions without his prior permission, and such order shall be subject to any order made by the court having jurisdiction in the matter. Section 5(6) mandates that contravention of an order issued under section 5(5) is punishable by rigorous imprisonment for up to one year, a fine, or both.

9. The Sindh High Court considered section 5(5) of the FIA Act in Najib Rahim v. Federation of Pakistan and others (PLD 2017 Sindh 53) and observed that it has four elements: (i) the property has some nexus with the investigation/alleged offence; (ii) there is a likelihood that the property will be removed, transferred,

or otherwise disposed of before an order for its seizure is obtained from the appropriate authority; (iii) issuing a written order directing the owner or any person in possession at the time not to remove, transfer, or otherwise dispose of the property; and (iv) the order shall be subject to any order made by the court having jurisdiction in the matter.

10. The legislature has used two terms in section 5 of the FIA Act, i.e. “inquiry” and “investigation”, without providing specific definitions. While these terms are commonly considered interchangeable, they carry distinct meanings in the legal context.² In *Adamjee Insurance Company Ltd. v. Assistant Director, Economic Enquiry Wing* (1989 PCr.LJ 1921), a Divisional Bench of the Sindh High Court stated that the above-mentioned two terms “connote two different meanings. In our view, inquiry can be termed as the first step towards investigation.”

11. It is crucial to note that the powers granted by section 5(5) of the FIA Act are applicable exclusively during an investigation and do not extend to the inquiry stage. Furthermore, the FIA is empowered to invoke section 5(5) in urgent situations where the officer is genuinely of the *opinion* that the property which is the subject matter of the investigation is likely to be removed, transferred, or otherwise disposed of before an order for its seizure is obtained from the appropriate authority. According to *Merriam-Webster’s Dictionary of Law*,³ “opinion” connotes “a belief stronger than impression and less strong positive knowledge.” In *Ray v. City of Philadelphia*, 25 A.2d 145, 344 Pa. 439 (1942), it was held that “an ‘opinion’ creates no fact but is what someone thinks about something and the thought may be accurate or inaccurate and yet represent the honest conviction of person expressing it.” In *Northeastern Gas Transmission Co. v. Benedict*, 89 A.2d 379, 139 Conn. 36, the court held that “an ‘opinion’ is a belief less strong

² The Code of Criminal Procedure, 1898, defines the two terms as follows in section 4(1):

- (k) “Inquiry”.— “Inquiry” includes every inquiry other than a trial conducted under this Code by a Magistrate or Court.
- (l) “Investigation”.— “Investigation” includes all the proceedings under this Code for the collection of evidence conducted by a police- officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

³ 17th Printing Harrisonburg VA (2014), p.337

than positive knowledge and the forming of the opinion, therefore, ordinarily involves the exercise of discretion in determining the weight to be given to various conflicting considerations.” In **Dolgobinda Paricha v. Nimai Charan Misra** (AIR 1959 SC 914), the Indian Supreme Court stated that the word “opinion in section 50 of the Indian Evidence Act means something more than mere retailing of gossip or hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question.” In **Star Rolling Mills v. C.I.T.** (1974 PTD 200), the Sindh High Court held that “an opinion on the basis whereof a statutory authority is entitled or empowered to take any action or initiate any legal proceedings, may be accurate or erroneous, but it must be an honest opinion or conviction, based on tangible material capable of sustaining such opinion, and not a *mala fide* opinion or a colourable exercise of statutory power.”⁴

12. The phrase “in the opinion of” is generally considered to convey a less stringent implication than the term “satisfied”. In **Barium Chemicals Ltd. and another v. Company Law Board and others** (AIR 1967 SC 295), it was noted:

“The words ‘in the opinion of the Central Government’ in section 237 (b) [of the Companies Act 1956] indicate that the opinion must be formed by the Central Government and it is of course implicit that the opinion must be an honest opinion. The next requirement is that ‘there are circumstances suggesting etc.’ These words indicate that before the Central Government forms its opinion, it must have before it circumstances suggesting certain inferences.”

13. In view of the above, an officer claiming authority under section 5(5) of the FIA Act does not have unfettered powers. He must act in good faith and refrain from arbitrary actions. There must be circumstances justifying the necessity for swift intervention. Furthermore, the property sought to be seized should have a nexus with the investigation of the alleged offence. In **Khawaja Muhammad Sharif v. Federation of Pakistan and others** (PLD 1988 Lahore 725), a Larger Bench of this Court underscored that an order is without lawful authority when an action is taken, or power is exercised,

⁴ Cited with approval by a Larger Bench of the Lahore High Court in ***Khawaja Muhammad Sharif v. Federation of Pakistan and others*** (PLD 1988 Lahore 725).

without any basis or beyond the power conferred, or for extraneous considerations, or when impermissible factors are taken into account.

14. To assert jurisdiction under section 5(5) of the FIA Act, the officer concerned must document the facts and reasons in the case diary (to the extent possible), laying the foundation for his decision/opinion.

15. The FIA is obligated to follow the procedure set out in Chapter VII of the Code of Criminal Procedure to search the premises unless it is exercising powers under a special law which prescribes some other procedure. Notably, under section 96 Cr.P.C., a court may issue a search warrant for any inquiry, trial or other proceedings.

16. Violations of Chapter VII of the Code and section 5(5) of the FIA Act are frequent and sometimes encroach upon the guarantees under Articles 4, 9, and 24(1) of the Constitution of 1973. Since the proceedings under section 5(5) of the FIA are subject to confirmation by the court of competent jurisdiction, any person aggrieved by such proceedings may seek redress before that court. If the officer concerned of the FIA is found to have committed any misconduct, legal action can be initiated against them under the relevant laws, and they may also face disciplinary action within the department. However, a lingering question remains: Where the property is seized as a result of an illegal raid or the powers are not exercised in accordance with section 5(5) of the FIA Act, what would be the effect of such illegality or irregularity on the fate of the case?

17. In Kuruma v. R. [1955 AC 197 : (1955) 1 All ER 236 : (1955) 2 WLR 223 (PC)], the Privy Council held that the crucial criterion for determining the admissibility of evidence is whether it is relevant to the matters in issue. If the evidence is relevant, it is admissible, and the court does not delve into how it was procured. This principle holds for both civil and criminal cases. However, in criminal cases, the judge retains the discretion to exclude evidence if strict admissibility rules would prejudice the accused.

18. India follows the rule established by the Privy Council in *Kuruma v. R.* (*supra*). Evidence obtained illegally or improperly is not

per se inadmissible. If the violation committed by the investigating authority is of a serious nature and causes serious prejudice to the accused, such evidence may be excluded. In *Radhakishan v. State of U.P.* [1963 Supp (1) SCR 408: AIR 1963 SC 822: (1963) 1 Cri LJ 809], Justice Mudholkar, speaking for a three-member Bench, stated:

“So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of Sections 103 and 165 of the Code of Criminal Procedure are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences, no further consequence ensues.”

19. In *Pooran Mal v. Director of Inspection* [(1974) 1 SCC 345 : 1974 SCC (Tax) 114], the Constitution Bench of the Indian Supreme Court held that India's law of evidence is modelled on the principles of evidence which prevailed in English law. Courts in both India and England have consistently rejected the exclusion of relevant evidence solely because it is acquired through illegal search or seizure. The test of admissibility of evidence lies in relevancy. Unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of an illegal search or seizure is not liable to be excluded.

20. In *Dr. Partap Singh v. Director of Enforcement* [(1985) 3 SCC 72 : 1985 SCC (Cri) 312 : 1985 SCC (Tax) 352], the Supreme Court emphasized that the legality in the method, manner, or initiation of a search does not necessarily mean that anything seized during the search has to be returned. Items or documents seized during a search may serve as evidence. The Supreme Court further stated:

“Illegality of search does not vitiate the evidence collected during such illegal search. The only requirement is that the court or the authority before which such material or evidence seized during the search shown to be illegal, is placed has to be cautious and circumspect in dealing with such evidence or material. This is too well-established to necessitate its substantiation by a precedent.”

21. The courts in India consider the powers of searches and seizure as incidental to the investigative process. Hence, the notion that every search operation should necessarily result in the discovery of incriminating material is unfounded. There may be instances where a

search fails to produce evidence, or there might be a plausible explanation for certain documents. In *I.T.O. v. Seth Brothers* [(1969) 2 SCC 324], the Indian Supreme Court clarified that the presence of non-useful or irrelevant documents among those seized during a search does not invalidate the search, nor does it imply that the initial exercise of power was malicious. In *Pooran Mal's* case, the Supreme Court held that the subsequent determination that books of account and other documents collected during a search were irrelevant does not render the search and seizure illegal.

22. In Pakistan, the case of *Bisvil Spinners (Pvt.) Ltd. v. Pakistan through the Secretary, Ministry of Finance, Islamabad, and others* (PLD 1992 SC 96) is considered seminal.⁵ The company was accused of clearing excisable woollen yarn without paying the prescribed duty. Legal action ensued, during which the Deputy Collector Customs found it guilty of violating excise laws and rules, determining that it was liable for a duty exceeding two lakhs of rupees. One of the contentions before the Supreme Court of Pakistan was that the documents on the basis of which the company was held guilty had not been obtained lawfully. Consequently, they were deemed inadmissible as evidence and could not be used against it. The Supreme Court of Pakistan held:

“We do not accept as valid the argument that the evidence, in the form of documents recovered (or obtained) from the petitioner, could not be examined or relied upon because allegedly certain formalities were not observed in taking them into possession. If otherwise relevant and reliable, there was nothing wrong in using it against the petitioner.”

23. In *Justice Qazi Faez Isa and others v. President of Pakistan and others* (PLD 2022 SC 119), the Supreme Court ruled that the Qanun-e-Shahadat, 1984, governs the admissibility of evidence. According to Article 18 of this law, the criterion is whether the evidence is relevant to the facts in issue. Therefore, unless there is an express or necessarily implied prohibition in the Constitution or other laws, evidence obtained through illegal search or seizure is not liable to be

⁵ This case was cited with approval in *Muhammad Ijaz Ahmad Chaudhry v. Mumtaz Ahmad Tarar and others* (2016 SCMR 1), and *Justice Qazi Faez Isa and others v. President of Pakistan and others* (PLD 2022 SC 119).

excluded. Ordinarily, the same principle applies in both civil and criminal proceedings. The Supreme Court also delved into legal precedents from various jurisdictions, including Pakistan, India, the United Kingdom, Canada, Australia, and the Privy Council, and stated:

“A perusal of these cases and laws demonstrates that in both criminal and civil matters either there is no bar to the admission of evidence collected by any means [except for the absolute prohibitions enshrined in the Constitution such as the protection against self-incrimination (Article 13(b)), the inviolability of dignity of man (Article 14(1)) and the prohibition of torture for the purpose of extracting evidence (Article 14(2))] as long as it is relevant and genuine (Pakistan, UK, Privy Council and India) or a balancing exercise needs to be carried out by the Courts to determine the admissibility of the disputed evidence (Canada and Australia). However, in neither of these countries is there an absolute bar to the admission of illegally collected evidence.”

The Supreme Court further stated:

“In contrast, the United States follows what is known as the exclusionary rule which outrightly prohibits the admission of evidence collected via an illegal search and seizure. The rationale behind this strict approach is the Fourth Amendment to the Constitution ... The United States by virtue of the Constitutional command in the Fourth Amendment is one of the strongest proponents of the exclusionary rule. Yet it has not transposed the approach of excluding illegal evidence to civil proceedings; and in criminal matters, has qualified the severity of the rule due to its adverse effect on discovering the truth. There is no reason why in our jurisdiction where there is no such Constitutional or statutory obligation to exclude illegally collected evidence, the said rule should be adopted mechanically.”

24. In *Fida Jan v. The State* (2001 SCMR 36), a three-member Bench of the Supreme Court of Pakistan held that the provisions of section 20 of the Control of Narcotic Substances Act, 1997, are of a directory nature. If a raid is conducted without obtaining a search warrant, the trial would not be vitiated on this ground alone. In a parallel context, in *State through A.-G, Sindh, Karachi v. Hemjoo* (2003 SCMR 881), another three-member Bench of the Supreme Court dealing with the CNSA held that in exceptional cases where obtaining a search warrant before conducting a raid is impractical, an authorized officer can proceed with the raid without a warrant. However, the Court underscored that this power should not be exercised in every case under normal circumstances. A similar view was expressed in *Arshad Mahmood v. The State* (PLD 2008 SC 376) and *Syed Zulfiqar Shah v. The State* (2022 SCMR 1450).

25. Nevertheless, our judicial system insists that tax authorities strictly follow the legal procedure for conducting searches. The courts have consistently held that carrying out raids on taxpayers' premises by tax authorities without obtaining permission from a magistrate and without providing reasons for the claim of an emergency is illegal. The case reported as **Collector of Sales Tax and Central Excise (Enforcement) and another v. Mega Tech (Pvt) Limited** (2005 SCMR 1166) is illustrative. In the said case, following an anonymous complaint regarding sales tax evasion, an authorized officer from the Sales Tax Department visited the company's premises along with his subordinates. The company allegedly refused their request for records. The Deputy Collector of Sales Tax then invoked section 40-A of the Sales Tax Act 1990, seizing numerous documents from the company's office, including box files, bank statements, and annual statement files. The next day, various items such as documents, computers, diskettes, and CDs were also impounded from the company's godown. The company challenged the legality of the actions, alleging *mala fide* intentions and a blatant violation of the law because the Sales Tax Department had proceeded without prior notice or obtaining a search warrant from a magistrate. The High Court declared the actions illegal and directed the restoration of seized records. It held that the impugned action occurred after a lapse of two days, which was sufficient time to obtain a search warrant from the magistrate if the Department believed the complaint was genuine. The High Court doubted the *bona fides* of the Department in bypassing section 40 of the Act and straightaway assuming extraordinary powers under section 40A. The Supreme Court dismissed the Department's appeal, holding:

“At any rate, it is not apparent from the statement prepared by the authorized officer that it was his genuine belief that there was reasonable danger of removal of records, which may be relevant to any proceedings under the Act. In the absence of any strong belief to such effect, it is difficult to agree with the submission that section 40-A confers unlimited and unbridled powers on the authorized officer to conduct a search or to impound any kind of documents without any reasonable cause and without obtaining any search warrant from the magistrate.”

26. A reference may also be made to ***Federation of Pakistan and others v. Master Enterprises (Pvt) Ltd.*** (2003 PTD 1034) in which the Supreme Court refused to grant leave against an order of the Sindh High Court striking down the Sales Tax Department's action in circumstances similar to those mentioned in the preceding paragraph.⁶

27. In several instances, the courts have directed Customs authorities to return records seized through an unlawful raid. A pertinent example in this context is ***S. M. Yousuf and others v. Collector of Customs and others*** (PLD 1968 Karachi 599).

28. I conclude that criminal cases falling within the ambit of the FIA Act are notably different from those under the purview of tax authorities. As such, they must be dealt with distinctively. In these matters, the principles established by the Supreme Court in *Justice Qazi Faez Isa's* case apply.

29. In the present case, the petitioner does not dispute the FIA's jurisdiction over offences under the Passport Act 1974 and the Emigration Ordinance 1979. He contends that the Complainant, Inspector Shafique Ahmad Bhatti, and his squad raided the house without a search and seizure warrant. It is, however, noted that the FIA conducted that raid on 7.9.2023 at around 3:30 a.m. based on source information. No court was available at that time to which the Complainant could apply for a search warrant. Considering the urgency involved, any procedural irregularities or illegalities in the process should be condoned, especially when the petitioner has not alleged any malice on the Complainant's part or any member of his team. Nonetheless, the petitioner may demonstrate during the trial if the actions caused him any prejudice.

30. The petitioner's next objection is that the Complainant violated section 103 Cr.P.C. while conducting the raid. According to him, he did not associate any inhabitant from the locality with the proceedings. There is a plethora of case law that police witnesses are as

⁶ Also see: *Ihsan Yousaf Textile Mills (Pvt) Ltd. v. Federation of Pakistan and others* (2003 PTD 2037), *Megna Textiles Mills v. Collector of Customs* (2004 PTD 1339), *Food Consults (Pvt) Ltd. and others v. Collector (Central Excise & Sales Tax), Lahore, and others* (2004 PTD 1731).

good as any other witness from the general public unless they have any animosity towards the accused and have a motive to implicate him falsely.⁷ With this observation, I move on. The petitioner may show cause at the trial why the above-mentioned proceedings cannot be relied upon.

31. According to the prosecution, an FIA team apprehended the petitioner on the spot with fake foreign passports, foreign driving licences, computers, printers, scanners and other machines, counterfeit stamps, visa stickers, monograms and other articles (detailed in the FIR). *Prima facie*, the ingredients of the offences under section 18 of the Emigration Ordinance 1979, and section 6 of the Passport Act 1974 are satisfied. Section 18, *ibid*, falls in the prohibitory clause of section 497 Cr.P.C.

32. The Assistant Attorney General has submitted documents which reflect that the petitioner was previously convicted in case FIR No.163/2022 dated 11.08.2022 under section 18 of the Emigration Ordinance and sentenced to 10 months rigorous imprisonment with a fine of Rs.20,000/- As such, he has repeated the offence.

33. The petitioner has failed to make a case for bail. Hence, this application is **dismissed**.

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge

⁷ *Muhammad Azam v. The State* (PLD 1996 SC 67), *Muhammad Hanif v. The State* (2003 SCMR 1237), *Riaz Ahmad alias Raju v. The State* (2004 SCMR 988), *Naseer Ahmad v. The State* (2004 SCMR 1361), *Zafar v. The State* (2008 SCMR 1254).