

Crl. Misc. No.19997/B/2023

Syed Asim Ghaffar etc.

24.3.2023 Barrister Salman Safdar and Mr Intazar Hussain Panjhuta,
Advocates, with the Petitioner.
M/s Muhammad Mustafa Chaudhry, Rai Asif Mehmood
and Humayun Aslam, Deputy Prosecutors General.

4. In response, Barrister Salman Safdar has argued that the incumbent Government is politically victimizing the Petitioner. It has opened floodgates of vexatious cases. About 100 FIRs have been registered against him so far across the country. The motive is to sabotage his election campaign. Despite this, the counsel submits that the Petitioner has appeared before the courts in various cases,

demonstrating his *bona fides*. He contends that extraordinary circumstances in the present case warrant the grant of protective bail/extension of the time limit for which this Court has ample powers.

Determination

5. It might be useful to start with a few words about the right to access to justice. Historically, It has been interpreted in different ways. The narrowest definition of “access to justice” comes from liberal states of the 18th and 19th centuries and refers to an individual’s legal right to prosecute or defend. In the 1960s, the definitions of access to justice focused on “practising law for poor people”. The objective was to provide legal representation to low-income people who could not afford it. It sought to reduce the legal system’s expense, time, and complexity, which is still the foundation for legal aid and poverty law clinics today.¹

6. Since the 1980s, the concept of equality has prompted a change in perspective on access to justice, leading to a more expansive outlook. This approach goes beyond equal access for the disadvantaged and marginalized litigants and seeks to achieve equality of outcomes by removing barriers to accessing the legal system. Remedies include reforming and streamlining various aspects of the legal system and other social institutions to develop a more holistic service model. This approach combines different approaches, such as using simplified court procedures, alternative dispute resolution, and other preventative measures to solve legal problems before they reach the litigation stage.²

7. The modern concept of “access to justice” calls for societal change beyond the legal realm. It urges the justice system to collaborate holistically with communities and governments to solve legal problems. It emphasizes the need to shift away from court-centric and lawyer-centric practices towards a more client-centric strategy that focuses on resolving the daily challenges of the community members.³

¹ Alberta Civil Liberties Research Centre (ACLRC), What is Access to Justice? <https://www.aclrc.com/what-is-access-to-justice>

² *ibid.*

³ *ibid.*

8. According to Byrnes *et al.*, access to justice, also sometimes referred to as the right to “access justice”, is “a cross-cutting right that must be understood and interpreted in line with other principles, such as equal recognition before the law, which enables and enhances other rights.”⁴ The United States Institute of Peace states that access to justice is more than improving an individual’s access to the courts or ensuring legal representation. Access to justice is defined as the ability of the people to seek and secure a remedy for grievances in accordance with human rights principles through formal or informal institutions of justice. There is no access to justice when people (especially marginalized groups) fear the legal system, perceive it as an alien, and do not use it; when the justice system is financially out of reach; when individuals lack access to lawyers; when they are unaware of their rights; or when the justice system is weak. Access to justice includes legal protection, awareness, legal aid and advice, adjudication, enforcement, and civil society oversight. It fosters long-term peace by offering a more appealing alternative to violence in resolving personal and political disputes.⁵

9. International human rights law recognizes access to justice as basic human right.⁶ Its importance is reaffirmed by: (i) the Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993;

⁴ A. Byrnes, I. Doron, N. Georgantzi, W. Mitchell and B. Sleaf, Access to Justice: A discussion paper for the 11th session of the United Nations General Assembly Open-ended Working Group of Ageing (January 2020). <https://social.un.org/ageing-working-group/documents/eleventh/Discussion%20paper%20on%20access%20to%20justice%20January%202020.pdf>

⁵ Necessary Condition: Access to Justice, <https://www.usip.org/guiding-principlesstabilization-and-reconstruction-the-web-version/rule-of-law/access-justice>

⁶ ***International instruments***

- Universal Declaration of Human Rights (UDHR) (Articles 6, 7, 8 & 10);
- International Covenant on Civil and Political Rights (ICCPR) (Articles 2(3) & 14(1);
- Declaration on the Rights of Indigenous Peoples Article 40); the Convention on the Rights of Persons with Disability (CRPD) (Article 13), the United Nations Convention on the Rights of the Child (UNCRC) (Articles 37 & 40).

Regional instruments

- Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa (the African Protocol) at Article 4;
- Inter-American Convention on Protecting the Human Rights of Older Persons (the Inter-American Convention) at Article 31; and
- Various European human rights standards, including the European Union (Charter of Fundamental Rights, Article 47 (right to an effective remedy) Charter of Fundamental Rights, Article 51 (field of application) Charter of Fundamental Rights, Article 52 (3) (scope of interpretation of rights and principles) Treaty on European Union (TEU), Article 4 (3) TEU, Article 19) and the Council of Europe (ECHR, Article 6 (right to a fair trial) ECHR, Article 13 (right to an effective remedy) ECHR, Article 35 (admissibility criteria) ECHR, Article 46 (binding force and execution of judgments). (Source: See Note 4)

(ii) the Committee on the Elimination of Discrimination against Women General Recommendation No. 33 on women's access to justice; and (iii) the Committee on the Rights of Persons with Disability General Comment No.1 (2014) Article 12: Equal Recognition before the Law. Access to justice is also an important part of the United Nations development agenda. The Sustainable Development Goals (SDGs) at Goal 16 prescribe 12 targets, each with its own indicators. Target 16.3 envisages promoting the rule of law at the national and international levels and ensuring equal access to justice for all. The indicators of Target 16.3 include (a) the proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms (16.3.1); and (b) un-sentenced detainees as a proportion of the overall prison population (16.3.2).⁷

10. Access to justice is inextricably linked to the rule of law. Without access to justice, people cannot have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable. The OHCHR has described the relationship between access to justice and the rule of law as follows:

“Access to justice is a core element of the rule of law. It is a fundamental right and prerequisite for protecting and promoting all other human rights. Access to justice encompasses the right to a fair trial, including equal access to and equality before the courts, and seeking and obtaining just and timely remedies for rights violations. Guaranteeing access to justice is indispensable to democratic governance, the rule of law, and to combat social and economic marginalization.”

11. Lord Reed JSC (with whom the rest of the Supreme Court agreed) considered the importance of the rule of law and the role of access to justice in maintaining the rule of law in ***R (UNISON) v Lord Chancellor*** [2017] UKSC 51; [2017] 3 WLR 409 at [68]. He stated:

“At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its

⁷ See note 4.

functions in accordance with the law. In order for the courts to perform that role, people must, in principle, have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade ...”

12. In *R (1) FB (Afghanistan) and (2) Medical Justice v Secretary of State for the Home Department* [2020] EWCA Civ 1338, Lord Justice Hickinbottom said that the right to access to justice is an inevitable result of the rule of law. As such, it is a fundamental principle in any democratic society that supports and protects larger procedural fairness rights.

13. The U.S. Constitution guarantees the right to legal redress. The 14th Amendment states that no state shall make or enforce any law limiting the privileges or immunities of citizens of the United States. It also prohibits the states from depriving any person of life, liberty, or property without due process of law; or denying the equal protection of the laws to any person within their respective jurisdictions. In *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, Chief Justice Marshal stated that “the very essence of civil liberty consists in the right of every individual to claim the protection of laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.”

14. In England, it is argued, the right of access to justice is rooted in common law, but Magna Carta (1215) formally committed to it. Blackstone wrote in his *Commentaries*, 4th ed (1876), 111: “A ... right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man’s life, liberty and property, courts of justice must at all times be open to the subject and the law be duly administered therein.” In *R v. Secretary of State for the Home Department ex parte Leech*, [1994] QB 198, Steyn LJ held that “it is a principle of our law that every citizen has a right of unimpeded access to a court.” In *R v. Lord Chancellor ex parte Wiltham* [1998] QB 575, Laws J. held that the common law protects the citizen’s right to access the courts as if it were a constitutional right.

Hence, it cannot be restricted without an Act of Parliament. In *Attorney General v Times Newspapers Ltd.* [1974] AC 273, Lord Diplock made the following important statement on p. 309:

“My Lords, in any civilized society, it is a function of government to maintain the courts of law to which its citizens can have access for impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole ... The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in the evidence adduced before it in accordance with the procedure adopted in the courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law.”

15. Pakistan’s Constitution of 1973 does not specifically mention the term “access to justice.” However, it has always been considered one of the basic constitutional values and a part of various enumerated fundamental rights. In *Miss Benazir Bhutto v. Federation of Pakistan and another* (PLD 1988 SC 416), Muhammad Haleem, CJ. observed that access to justice for everyone is not only an internationally recognized human right but has also gained constitutional importance because it provides a broad-based remedy for human rights breaches. It also promotes socio-economic justice, which is critical in advancing the national hopes and aspirations of the people permeating the Constitution and the basic values incorporated therein.⁸

16. In *Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and others* (PLD 1993 SC 341), the Supreme Court of Pakistan approvingly cited the following excerpt from *Sharaf Faridi and others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another* (PLD 1989 Karachi 404), a case decided by 7-Member Bench of the Sindh High Court:

“The right of ‘access to justice to all’ is a well-recognized inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of ‘due process of law’. The right to access to

⁸ These observations were approvingly cited in *Sh. Riaz-ul-Haq and another v. Federation of Pakistan through the Ministry of Law and others* (PLD 2013 SC 501).

justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal. This conclusion finds support from the observation of Willoughby in the Constitution of the United States, Second Edition, Vol. II at page 1709, where the term ‘due process of law’ has been summarized as follows: (1) He shall have due notice of the proceedings which affect his rights. (2) He shall be given a reasonable opportunity to defend. (3) That the tribunal or court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and (4) That it is a court of competent jurisdiction.”

17. According to *Azizullah Memon*, the right of access to justice is enshrined in Article 9 of the Constitution. In *Aftab Shahban Mirani v. President of Pakistan and others* (1998 SCMR 1863), the Supreme Court held that it is included in Article 4 (Right of individuals to be dealt with in accordance with the law), and forms a part of the right to a fair trial. In our opinion, it can also be read into Article 14 (right to dignity).

18. The insertion of Article 10A by the Constitution (Eighteenth Amendment) Act, 2010, has made the right of access to justice a more robust right. We draw on *Golden v. United Kingdom*, (1975) 1 EHRR 524, for this holding in which the European Court of Human Rights interpreted Article 6(1) of the European Convention on Human Rights,⁹ whose first part is very similar to Article 10A of our Constitution. It ruled that “the right of access constitutes an element which is inherent in the right stated by Article 6 para 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para 1 (art. 6-1) read in its general context and having regard to the object and purpose of the Convention, a lawmaking treaty ... and to the general principles of law.” The U.K. Supreme Court approvingly cited the aforesaid case in *Benkharbouche v Secretary of State for Foreign & Commonwealth Affairs*, [2017] UKSC 62, adding that the

⁹ Article 6 para 1 of the European Convention on Human Rights is as follows:

6. Right to a fair trial.— (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

“right to a court” corresponds to a right which the common law has recognized for more than two centuries.

19. Life and personal liberty are an individual’s most cherished possessions. Life is not worth living without honour and dignity. Since arrest and detention greatly impact one’s life, comprehensive principles have evolved to protect the people from the excesses of State authority. This has also given rise to the concept of bail. According to American Jurisprudence, Second Edition (2009), Volume 8A, pages 298 - 300, bail aims to allow an accused to answer a charge without restricting his liberty and violating his right to be presumed innocent until proven guilty. Its goal is to dissuade the accused from fleeing and ensure his presence at trial while simultaneously allowing him to prepare his defence. Another view is that the purpose of a pretrial bail is to prevent punishment before conviction.

20. There is no provision in the Code of Criminal Procedure, 1898 (Cr.P.C.), for protective/transitory bail. Still, the High Courts in our country have invoked section 561-A Cr.P.C. and Article 199 of the Constitution to accommodate the accused and allow them to approach the court concerned for a remedy. The High Court does not touch the merits of the case while considering such requests. Thus, protective bail serves a specific purpose and is granted for a fixed time. It is not the same as anticipatory or pre-arrest bail granted under section 498 Cr.P.C. When the accused appears before the court concerned, it deals with him independently, and protective bail does not automatically entitle him to pre-arrest bail. In *Naseer Ahmed and another v. The State* (2009 PCr.LJ 1430), a learned Single Judge of this Court held that protective bail merely restrains the police from arresting the accused for a certain period. So, technically it is not bail.

21. The concept of protective/transitory bail must be considered within the context of the constitutional rights to liberty, dignity, access to justice, a fair trial, and the right to be treated in accordance with the law. The accused person is deprived of these rights if protective bail is denied. The courts are the guardians of the people’s

fundamental rights, and Article 199 of the Constitution empowers the High Courts to issue appropriate directions for their enforcement.¹⁰

22. The history of protective bail shows that the High Courts were initially hesitant in entertaining applications for it, but as time progressed, they became liberal. Lately, they have also given the accused relief in respect of an offence committed in a province other than the one over which they have jurisdiction.¹¹ In ***Malik Azmat Ullah v. Federation of Pakistan and others*** (2023 PCr.LJ 290), this Court held that if a person from outside Pakistan wishes to surrender before the country's court(s) to face any criminal proceedings pending against him, the High Court has the authority to protect him from arrest on arrival and afford him transitory bail.¹²

23. We have not come across any reported judgment or order addressing the issue of whether a second application for protective bail is competent or whether the High Court can extend the time granted in the first. Hence, we take the present case as one of first impression.

24. As adumbrated, the concept of protective/transitory bail is rooted in fundamental rights. Therefore, the High Court cannot short-shrift an accused's second request. It must judicially assess and determine if he has legitimate grounds to justify it. The High Court should ensure that the accused does not obstruct the investigation by playing hide and seek with the criminal justice system.

25. Let's now see what the Petitioner has to say in the present case. He submits that on 17.3.2023, he applied to this Court for protective bail in FIR No.242/2023, *supra*, and four other cases (through Crl. Misc. Nos. 18448/B/2023, 18449/B/2023, 18453/B/2023 & 18454/B/2023) which was allowed until 12:30 p.m. of the 24th. The following day, on 18.3.2023, he travelled to the Judicial Complex,

¹⁰ *Malik Azmat Ullah v. Federation of Pakistan and others* (2023 PCr.LJ 290).

¹¹ *Ch. Allah Ditta v. The State* (1989 PCr.LJ 2152); *Malik Mukhtar Ahmad Awan v. The State* (1990 PCr.LJ 617); *Sabir Hussain and others v. The State* (1999 MLD 2208); and *Sharjeel Inam v. Federation of Pakistan and others* (2017 YLR 2423).

¹² The Court considered the following cases for its holding: *Javed Iqbal Mirza v. National Accountability Bureau* (2007 PCr.LJ 1230); C.P. No. 1662/L of 2018 titled "*Muhammad Rafique Virk v. Secretary Interior, Government of Pakistan, Islamabad etc.*" decided by the Supreme Court of Pakistan vide Order dated 9.1.2020 (unreported); *Hasan Sohail v. The State* (2006 YLR 3116); *Muhammad Jamal v. Federation of Pakistan and others* (2012 YLR 167); and *Mrs. Asma Alamgir v. Federation of Pakistan and others* (2017 YLR 1626).

Islamabad, to attend a hearing before Mr Zafar Iqbal, Additional Sessions Judge, Islamabad (West), in the case titled “*District Election Commission v. Imran Ahmad Khan Niazi.*” His attorney, Mr Intazar Hussain Pajutha, Advocate, also filed pre-arrest applications before Raja Jawad Abbas, Judge, Anti-Terrorism Court, Islamabad, in FIR No.242/2023 and the other four cases. Since both these courts were located in the same Judicial Complex, the Petitioner was to appear first before Mr Zafar Iqbal and then in the ATC Court. Incidentally, a huge crowd gathered in the Judicial Complex and created a law and order situation, preventing the Petitioner from getting out of his car and reaching the courtroom until late evening. Mr Zafar Iqbal directed his staff to get his signatures while he was in the vehicle to confirm his attendance, after which he had to turn back. The national media covered all these events live. The 19th of March was a Sunday. On 20.3.2023, the Petitioner’s counsel was required to appear before a learned Bench of this Court in W.P. No.16120/2023 wherein the Petitioner challenged the Government’s order to withdraw his security personnel. According to him, that petition was extremely important because there had been an assassination attempt on him a few weeks back. On 21.3.2023, the Petitioner filed Crl. Misc. Nos.18916/2023 and 18919/2023 in this Court and appeared before two different Division Benches to get protective bail in two more cases registered against him in Islamabad Capital Territory in the meanwhile. On 22.3.2023, he could not travel because the Government refused to provide him with security despite a threat alert. The 23rd of March was a national holiday. On 24.3.2023 (today), the Petitioner filed the present petition. He has explained that due to security risks, he wishes to directly approach the Islamabad High Court for pre-arrest bail in light of the judgment reported as *Sh. Zahoore Ahmad v. The State (PLD 1974 Lahore 256)*. He could have gone today, but because it is a Friday, the Divisional Bench of the Islamabad High Court, which has jurisdiction over the matter, is not available.

26. The learned Law Officers have not denied that there are currently about 100 FIRs against the Petitioner, a number which is growing by the day. This Court had granted him protective bail for

seven days vide order dated 17.3.2023 in FIR No.242/2023 (and four other cases). We have noticed that two of these days were closed holidays, and the Petitioner has adequately explained his activities for the remaining days. More importantly, Mr Intazar Hussain Panjutha, Advocate, and the Petitioner have filed affidavits *inter alia* stating that they have submitted an application for pre-arrest bail in the Anti-Terrorism Court, Islamabad, in the above-mentioned case which has not been taken up.

27. In view of the above, overruling the objection relating to maintainability, we accepted this petition vide short order dated 24.3.2023 and extended the Petitioner’s protective bail till 27.3.2023.

(Anwaar Hussain)
Judge

(Tariq Saleem Sheikh)
Judge

Approved for reporting

Judge

Judge

Naeem