

ISLAMABAD HIGH COURT, ISLAMABD

NO. _____ IHC/Jude. Deptt.

(REVISED FORM OF BLUE SLIP

Case No. WP 4451 - 2013

Titled

Muhammad Tariq Malik
Vs
Pakistan

- (a) Judgment approved for reporting Yes / No
- (b) Judgment any comment upon the Conduct of the Judicial Officer for Quality of the impugned judgment is Desired to be made. Yes / No

(In case the answer is the affirmative Separate confidential note may be Sent to the Registrar drawing his Attention to the particular aspect).


Initial of the Judge.

NOTE

1. If the slip is used, the Reader must attach on top of first page of the judgment.
2. Reader may ask the Judge writing the judgment whether the judgment is to be approved for Reporting of any comment is to be made about the Judicial Officer/ quality of judgment.
3. This slip is only to be used when some action is to be taken.

FORM NO: HCJD/C

JUDGMENT SHEET

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT**

Writ Petition No.4451/2013

Muhammad Tariq Malik.

Vs.

Pakistan through Secretary Establishment Division and
two others.

Date of hearing 13.12.2013

Mr. Babar Sattar, Advocate alongwith Ms. Sarah Rehman,
Advocate for the petitioner.

Mr. Muhammad Akram Sheikh, Advocate alongwith Ch.
Hassan Murtaza Mann, Advocate for respondent No.1.

Mr. Muhammad Shoaib Shaheen, Advocate for respondent
No.2.

Amjad Saeed Awan, S.O, Establishment Division.

Muhammad Imtiaz, Additional Secretary, Ministry of
Interior.

Tariq Aleem Gill, Section Officer, Ministry of Interior.

Noor-Ul-Haq N. Qureshi, J. Compendious

facts of this constitutional petition are that in pursuant to
the provisions of Section 3 of the National Database and
Registration Authority Ordinance, 2000 (hereinafter
referred to as NADRA Ordinance), vide Notification dated
17.07.2012, the petitioner was appointed as the Chairman
of National Database and Registration Authority
("NADRA"). Previously, the petitioner had been working
in NADRA initially against the post of General Manager
Networks and then for the most part, as Deputy

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Chairman, NADRA. He was also appointed as Member of NADRA under Section 3(3) of NADRA Ordinance. As such, the petitioner possessed intimate practical knowledge and hands-on technical and operational experience of NADRA's projects and functioning before becoming Chairman NADRA.

2. The petitioner has through out been a thorough professional, holding Master degrees in Computer Science from Quaid-e-Azam University, Islamabad and in International Management from Schiller International University, Heidelberg, Germany. He also got trainings at JFK School of Government, Harvard University, Massachusetts and Stanford University, California, USA. The petitioner has been working in the areas of strategic project management of Technology, IT governance, systems, analysis, design, software development and business process re-engineering for over 20 years in Pakistan and abroad. With direct relevance of these fields with NADRA's functioning and profile as one of the largest information and communication technology organizations in the country operating projects both nationally and internationally, NADRA stands to benefit, and has in fact tremendously benefited, from the petitioner's knowledge and experience in the aforesaid fields. The petitioner has been directly managing important national and international projects of NADRA in an effective and efficient manner. His contribution has been acknowledged both

locally and internationally. It is further maintained that under the petitioner's leadership, NADRA has acquired an established international profile as one of the top few organizations globally in the fields of information and communication Technology (ICT) and Homeland Security Solutions. NADRA has developed passport issuance system of Kenya, Identity Management System of Nigeria, Driving License System of Bangladesh, Civil Registration System of Sudan, Refugee Registration System of UNHCR and Poverty Score Card for World Bank. While successfully undertaking international projects in African countries like Nigeria Sudan etc, the petitioner has been keenly competing abroad for more projects for NADRA to earn valuable foreign exchange for the country. It is further alleged that NADRA is a self-reliant organization with no financial support received form the Federal government. It is one of the most profitable organizations in Pakistan.

3. The petitioner won international business for NADRA despite an internationally unhelpful image of Pakistan. That the petitioner being head of NADRA which is an organization vested with the lawful custody of the entire citizenry's personal data always held the security and protection of this data close to his heart. As Deputy Chairman NADRA and Chairman NADRA, the petitioner took various personal initiatives to enhance data protection in NADRA's system and database, which are mentioned in para No.12 (a to j) of the petition. It is also asserted that

former government of ex-President Pervez Musharraf allowed a USA made system known as PISCES installed at Pakistani International Airports after 9/11 attacks under USA's pressure. The system was sending Pakistani passengers' detailed information to the USA. The petitioner took initiative and indigenously designed, developed and successfully deployed an Integrated Board Management System (IBMS) according to Pakistani immigration laws and booted the US system out.

4. The petitioner is a son of the soil and patriotism and love of motherland runs in his blood through his very upbringing. His father, Professor Fateh Muhammad Malik is a staunch nationalist. The petitioner was also awarded the prestigious Civil Award of Sitara-e-Imtiaz by the Federal Government. The petitioner has an unblemished career having served honestly and dedicatedly wherever he has been. He has also achieved eminence and a reputation of integrity. The petitioner also effectively led and managed the Electoral Rolls project which was outsourced to NADRA by the Election Commission of Pakistan. That ever since the Election Tribunals all over the country have started referring to NADRA the counterfoils of ballot papers and Electoral Rolls in different constituencies of National and Provincial Assemblies for verification of the thumb impressions affixed thereon. There have been several attempts to put  pressure on the petitioner by means of threats by

anonymous callers on phone as well as in writing, which have also been reported to the Ministry of Interior and even got published in the news media very recently. In view of this backdrop, the petitioner has had legitimate expectancy of finishing his 3 years term of office as Chairman NADRA prescribed in Section-3 of NADRA Ordinance, but all of sudden on 02.12.2013, the petitioner was informed late in the evening about the sudden premature termination of his 3 years terms of office by respondent No.1 together with direction to respondent No.2 to look after the charge of the petitioner's office till the appointment of a regular incumbent. Feeling aggrieved the petitioner has preferred the instant Constitutional Petition and seeks the setting aside of the two notifications issued by respondent No.1. The prayer made is repeated as under:-

**"It is, therefore, humbly prayed that
the respondent No.1's two impugned
Notifications both bearing
No.1/79/2004-E-6 dated 02.12.2013
may kindly be declared to have been
issued without lawful authority and
of no legal effect and be set aside."**

5. Per contra, respondents No.1 and 2 opposed the petition tooth and nail by filing separate written

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comments.

6. In support of petition, learned counsel for the petitioner contended that this case is so simple of the illegal removal of officer, whose tenure is secured by the statute, but the Government is trying to convert it into big and sensitive issue. The appointment and removal of Chairman NADRA is governed strictly by the provisions of NADRA Ordinance. It is to be seen that how the petitioner was appointed. In this regard he has drawn the attention towards the document i.e Minute Sheet (HR Directorate), wherein it is mentioned that "**After interviewing the candidate, the board unanimously agreed on the selection of Mr. Muhammad Tariq Malik as "General Manager Networks" at Rs.385,000/- pm in T-10 Scale in Networks Dte. HQ, NADRA Islamabad**". He also referred document having subject of "**Selection of General Manager Networks in Networks Dte, HQ NADRA**", which shows that salary of the petitioner as General Manager was fixed as Rs.3,85,000/- per month. He referred the letter of appointment of the petitioner on contract basis as General Manager dated 27.05.2008 and also read its clause 14, wherein it is provided that "**the appointment during the period of contract shall be liable to be terminated on thirty days notice on either side or payment of pay in lieu thereof, without assigning any reason.**". It is contended that then the petitioner was brought to board as Additional Ex-officio member in NADRA under Section 3 (3) of the National

Database and Registration Authority Ordinance, 2000 and in this regard no additional salary was given to the petitioner. It is added that then the petitioner was appointed as Deputy Chairman NADRA under Section-35 of NADRA Ordinance, 2000 and Regulation 8(3) of the NADRA Employees Service Regulation 2002 by the competent authority vide office order dated 18.08.2008 and his terms and conditions are contained in letter dated 26.09.2008, which shows that his pay scale was T-11 (equivalent to BPS-21), but vide letter dated 31.10.2008 this appointment was objected to by the Ministry of Interior. This letter was replied by the NADRA through letter dated 07.11.2008 informing the Ministry of Interior that the post of Deputy Chairman was created under Section 35 of the NADRA Ordinance 2000 & Chapter 2, Section 4 of NADRA Employees (Service) Regulation 2002.

7. It was further apprised in the said letter that the emoluments of the position of Deputy Chairman have been arrived at keeping in view the hierarchical level of the position, pay structure of the organization and the market salary being offered by the other public/private sector organizations to professionals with the same level of education, experience and exposure at such positions. The petitioner was elevated as Deputy Chairman of the Authority in view of the Authority's desire to expand the portfolio of duties assigned to GM Networks and the expertise and competence of the petitioner. Creation of

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the position of Deputy Chairman was a legitimate exercise of the powers of the Authority. He then read out section 35 of the NADRA Ordinance, which provides that:-

"35. Registration Officers, officers, employees, etc.- To carry out the purposes of this Ordinance, the Authority may, from time to time, appoint Registration Officers, members of its staff, experts consultants, advisers and other officers and employees on such terms and conditions as it may deem fit."

He also read out Regulation 4 of the National Database and Registration Authority Employees (Service) Regulations, 2002, which provides that:-

"4. Sanction, creation, re-designation and abolition of posts, etc.- The authority may sanction, create, re-designate or abolish any post, discipline or cadre within the Authority as it may deem fit. Accordingly, the Authority shall determine the strength of its posts including, without limitation, administrative posts and technical posts and that of a discipline and cadre of the authority.

8. Learned counsel urged that the terms and conditions
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his emoluments as required by Section 33 of the Ordinance, which says that:-

"33. Remuneration.-The Chairman and members shall be paid such emoluments as may be determined by the Federal Government and shall not be varied to their disadvantage during their term of office."

Therefore, the terms and conditions could not go beyond the limited scope of Section 33 ibid. Learned counsel for the petitioner went on to argue that there are two issues, i.e, what was the process of appointment and that what were the credentials. The credentials have been explained under Section 3 (7) of the NADRA Ordinance, which provides that "**The Chairman shall be an eminent professional of known integrity and competence with substantial experience in the field of computer science, engineering, statistics, demography, law, business, management, finance, accounting, economics, civil or military administration, or the field of registration**".

9. The appointment of the petitioner as Chairman of the Authority was in accordance with the provisions of NADRA Ordinance and the NADRA Ordinance does not lay down any procedural requirement for the appointment of chair. Despite absence of a notified mode of appointment

D/R under second proviso to section 3 (3) of the NADRA

Ordinance, the petitioner was appointed after considering all relevant facts, aspects and adopting a reasonable mode which met the requirements of statute. Chairman NADRA had been granted MP1 scale and the terms attached thereto, the petitioner was already getting salary in excess of the MP1 scale in accordance with yearly enhancements added under the Service Regulations, offering him MP1 scale salary would have amounted to reducing the salary that he was receiving as Deputy Chairman. The competent authority only approved emoluments under Section 33 of the Ordinance. The termination clause was not only in contravention of Section 3 sub-sections 5 and 12 of the Ordinance and of no legal effect but was also not approved by the competent authority i.e Prime Minister. Mr. Babar Sattar stressed that NADRA is not an attached department of the Ministry of Interior, rather it is fully independent statutory body, both administratively and financially with no interference from the Federal Government. In the Ordinance itself no powers have been bestowed to the Federal Government. However, the Federal Government can make rules and they can appoint Chairman and members. According to learned counsel the disqualification of the Chairman was provided in sub section 4 of Section 3 of the NADRA Ordinance, which says that "**No person shall be appointed as the Chairman or a member if he has been declared insolvent, or convicted for an offence involving moral turpitude, or declared to be**

disqualified from employment in, or dismissed from Government Service."

10. Learned counsel for the petitioner laid much emphasis that the petitioner could only be terminated after fulfilling the conditions laid down in Section 3 (2) of the Ordinance. At this juncture it would be convenient to re-produce the said sub section, which runs as under:-

"(12) The Federal Government may remove the Chairman or any member from office if-

- a. upon an inquiry, he is found incapable of performing the functions of his office by reason of mental or physical incapacity or has been found guilty of misconduct; or**
- b. after his appointment he is disqualified from being so appointed as provided in sub-section (4)."**

11. Learned counsel for the petitioner was of the view that agreement cannot override the law or its operation. No one can amend the law or alter the law or change its effects by mutual agreement. In this regard he has placed reliance upon the following cases:-

1. **Abdul Rashid V. Saleh Muhammad** (1980 SCMR 506).

2. **Mst. Ghulam Sakina v. Khaliq Bari** (1984 CLC 71).

3. **United Bank Ltd. Karachi vs. Messrs Gravure Packaging (Pvt.) Ltd** (2001 YLR 1549).
4. **Abdul Razzak v. Karachi Development Authority** (1991 CLC 1551).
5. **Muhammad Atif Hanif v. Government of the Punjab** (2013 CLC 1612).
6. **Sukhdev Singh, Oil & Natural Gas v Ghagat Ram** (AIR 1975 SC 1331).

12. Learned counsel further highlighted that under the Ordinance acting charge for the post of Chairman could not be awarded. He submits that any agreement executed, out of law, is void ab initio having no value in the eye of law. According to learned counsel the petitioner had Master Degree in International Management, Schiller International University, Heidelberg, Germany, 1993, Major in International Business Management, Master Degree in Computer Science, Quaid-e-Azam University, Islamabad, Pakistan, 1991 Major in Systems Analysis & Design and Bachelor Degree in Mathematics. In addition to it the petitioner was blessed with Sitara-e-Imtiaz. The petitioner was appointed as Chairman of NADRA vide Notification dated 17.07.2012 for a period of 3 years in accordance with Section 3, Clause 5 of the NADRA Ordinance, 2000 and at the same time his appointment as Deputy Chairman was terminated. He then invited the attention of the court towards summary dated 11.07.2012 flouted for his appointment as Chairman NADRA. Learned counsel read out para No.2 of the summary, which runs as under:-

"Mr. Muhammad Tariq Malik has been working as Deputy Chairman for the last four years. He is thorough professional, trained at JFK School of Government, Harvard University, Massachusetts and Stanford University California, USA. He is one of the few professionals in Pakistan who are trained in implementing Smart Cards Technology. His personal contribution as Deputy Chairman was internationally acknowledged and he won "ID People Award 2011" by ID Word EMEA (Europe, Middle East, Africa) in Abu Dhabi last year. He also won the most prestigious 'ID World Achievement Award 2009' by ID World Congress based in Milan, Italy."

13. It is also contended with full vehemence that Establishment Division raised some objections upon the summary and in this context he referred para 8, which provides that:-

"Moreover, in terms of policy guidelines for contract appointment in autonomous/semi-autonomous bodies/Corporations, issued by Establishment Division vide O.M No.6/2/2000-R-3, dated 06.5.2000,

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selection made through a regularly constituted selection Committee/Board (Annex-II). However, Serial No.133 of Esta Code contains guidelines for appointment on contract basis which inter alia provide that the condition of open advertisement may be relaxed with prior approval of the Prime Minister, in case of intake of qualified persons from the market/private sector in exceptional situations where it is not practicable to observe the said condition (Annex-III). However, the instant case has not been processed as prescribed procedure."

14. That after due approval from the Prime Minister of Pakistan the petitioner was appointed as Chairman NADRA. As per letter dated 27.7.2012, the terms and conditions of service were to be settled separately, which had been recommended by NADRA Board in its meeting held on 25th July, 2012 to provide protection to the pay of officer that he was already drawing as Deputy Chairman, NADRA. Learned counsel for the petitioner contended that in the terms and conditions, the condition of termination of contract i.e on one month's notice on either side or payment of one month's pay in lieu thereof was added.

15. Learned counsel for the petitioner then referred office memorandum dated 24.08.2012, issued by

Finance Division, Regulations Wing, which inter alia says that "**Finance Division proposes that the Chairman may be granted emoluments of MP-1. Since he had been drawing special pay, adhoc reliefs and other perks, it would be difficult to vary that to his disadvantage. Establishment Division may consider those provided these were granted with the approval of the Prime Minister. It is pointed out that ultimately the terms and conditions were approved by the prime minister vide letter dated 21.09.2012".**

Learned counsel for the petitioner referred the case of "**Khawaja Muhammad Asif v. Federation of Pakistan**" (2013 SCMR 1205), as in the said esteemed judgment, the Hon'ble Supreme Court of Pakistan has prescribed the procedure for scrutinizing and removing heads of statutory bodies in case of wrongful appointments. To shore up his view, he has read out para No.26 of the judgment, which provides that:-

"Be that as it may, in order to ensure the enforcement of the fundamental right enshrined in Article 9 of the Constitution and considering it to be a question of public importance, a Commission headed by any comprising two other competent and independent members having impeccable integrity, may be the Federal ombudsman or Chairman NAB or a Member of Civil Society

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having exceptional ability and integrity, is required to be constituted by the Federal Government through open merit based process having fixed tenure of four years to ensure appointments in statutory bodies, autonomous bodies, semi-autonomous bodies, regulatory authorities to ensure appointment of all the government controller corporations, autonomous and semi-autonomous bodies, etc. The Commission should be mandated to ensure that all public appointments are made solely on merits. The Commission should discharge mainly the following functions:-

- i. Regulate public appointments processes within his remit;
- ii. Implement a Code of Practice that sets out the principles and core processes for fair and transparent merit-based selections;
- iii. Chair the selection panels for appointing heads of public/statutory bodies and chairs and members of their boards, where necessary;
- iv. Appoint Public Appointments Assessors to chair the selection

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- panels for appointing heads of public/statutory bodies and chairs and members of their boards, where appropriate;**
- v. **Report publicly on a public/statutory body's compliance with the Code of Practice, including examples of poor and good performance, and best practice;**
- vi. **Investigate complaints about unfair appointment process;**
- vii. **Monitor compliance with the Code of Practice;**
- viii. **Ensure regular audit of appointments processes within his remit."**
- ix. **Issue an annual report giving detailed information about appointments processes, complaints handled, and highlights of the main issues which have arisen during the previous year. The annual report for the previous calendar year should be laid before the Parliament by 31st March;**
- x. **Take any other measures deemed necessary for ensuring that processes for public sector**

appointments that fall in his remit are conducted honestly, justly, fairly and in accordance with law., and that corrupt practices are fully guarded against.”

16. Learned counsel for the petitioner explains that in compliance with the said judgment the Establishment Division vide Notification dated 22.07.2013 constituted a Commission to be known as the Federal Commission for Selection of Heads of Public Sector Organizations (FCI-IPSO) empowering the Commission inter-alia to investigate complaints about unfair appointment process, therefore, the government instead of terminating the petitioner should have filed complaint before the Commission. In terminating the employment of the petitioner, respondent No.1 has usurped the jurisdiction vested exclusively in the Selection Commission constituted under the directions of the august Supreme Court of Pakistan.

17. It is further stressed that now the Hon'ble superior courts of the country have declared that a termination simpliciter clause within the contract of a public official is illegal and ultra vires of the Constitution. Even if the initial appointment is irregular, show cause process to reach such determination is mandatory. In support of his contentions, he has places reliance on the following dictums:-

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1. **Agha Salim Khurshid v. Federation of Pakistan** (1998 PLC (C.S) 1345).
2. **Muhammad Aslam v Vice Chairman** (2010 PLC (C.S) 266).
3. **Habib Bank Limited v. Ghulam Mustafa Khairati** (2008 SCMR 1516).
4. **Faisal Sultan v. E.D.O** (2011 PLC (C.S) 419).
5. **Muhammad Ashraf Tiwana v Pakistan** (2013 SCMR 1159).

18. From the case of Muhammad Ashraf Tiwana op-cite, the learned counsel for the petitioner has read out para No.56 of the judgment, which says that:-

"To sum up the discussion in this part, when we read the Act in the light of principles elaborated repeatedly in our precedents, it becomes clear that the SECP cannot simply be terminating the services of its employees at its whims and pleasure, without having recourse to valid reasons. It can only terminate an employment when it has reasons to do so which are fair and just and advance the purposes of the Act. Both law and public policy require this. This is why, in our short order, we declared Clause 3(1) of Chapter 11 of the SECP Service Rules (HR Handbook), which allows for termination simpliciter (without cause) of employees of SECP, as ultra vires the Constitution and inter alia, the Act. We had also directed

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that the above clause be replaced appropriately by provisions ensuring due process and adherence, inter alia to Articles 9, 10A, 14, 18 and 25 of the Constitution and which are consistent with the provisions of the Act ensuring independent and objective decision making without fear or favour, as required of an independent regulator.”

19. As regards dual nationality of the petitioner, learned counsel vigorously asserted that in this regard petition was filed before the Hon'ble Supreme Court of Pakistan, in which Ministry of Interior submitted report and consequently the petition was filed. In the reply submitted by the Ministry of Interior, it was incorporated as under:-

“Mr. Muhammad Tariq Malik has been working in areas of strategic project management of Technology, IT Government, systems, analysis, design, software development and business process re-engineering for over 19 years in Pakistan and abroad. With direct relevance of these fields with NADRA's functioning and profile as one of the largest information and communication technology organizations in the country operating doing project both

**nationally and internationally,
NADRA stands to benefit, and has in
fact tremendously benefited, from
Mr. Muhammad Tariq Malik's
knowledge and experience in the
aforesaid fields."**

According to learned counsel this was the official position of the government regarding the petitioner which cannot be changed in any way.

20. Learned counsel for the petitioner dynamically argued that courts have also taken notice of and struck down sinister efforts to undertake governmental/regulatory captures and such capture was previously being undertaken by the appointment of unqualified individuals to head statutory bodies which were consequently struck down as an abuse of the government's authority and discretion to distribute state largesse. The petitioner being qualified and credible professional with a track record of performance and excellence has been removed to undertake prohibited government capture of statutorily independent bodies. It is added that principle of statutory autonomy and the need to protect it and prevent governmental capture has been emphasized by superior courts in Pakistan. He has relied upon the case of

"Muhammad Yasin v. Federation of Pakistan & others
(PLD 2012 SC 132)." In this context he has stressed upon para No.23 of the said judgment, which says that:-

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"The provisions that the Legislature has made for ensuring regulatory autonomy are a reflection of accumulated economic wisdom based on empirical study. Here we can cite just one pertinent example from contemporary literature on regulatory economics pointing to the rationale and text of the Ordinance. In her article "Effectiveness of Regulatory Structure in the Power Sector of Pakistan", Afia Malik, a research economist at the Pakistan Institute of Development Economics, Islamabad, identifies "regulatory autonomy" as the foremost indicator of good regulatory governance. "Regulatory autonomy" refers to be regulator's ability to resist the pressure of 'regulatory capture' and pressures from economic and political interest groups. Amongst the key dangers to watch out for, according to the author, are "[u]ndue interference and influence of the government" which the author says hamper independent functioning, which in turn affects the consumers as well as produce." Also, A.R Kamal, one of the Pakistan's renowned development economist has similarly highlighted the importance of effective checks, cautioning against the danger of compromising the autonomy of regulatory institutions. He warns

"[s]ince there is a cycle where the regulatory agencies over time degenerate into protecting the organizations which they are supposed to regulate, checks and balances must be put in place so that persons in responsible positions in these bodies are not corrupted." He further emphasizes that "regulatory authorities...must be given autonomy so that their decisions gain credibility; and checks and balances should be so formulated that they cannot indulge in corrupt practices." The legislature has taken stock of these concerns and made a number of provisions noted above for such "checks and balances".

21. It is next argued that the petitioner is a fair and upright gentleman and there was pressure of previous government. In this context he has referred letter dated 28.11.2012 issued by the NADRA to the Ministry of Interior, informing that due to judgment of the Sindh High Court, all type processing of new/revalidation of Arms Licenses have been stopped, so directives/approvals should not be issued till the final decision of the case.

22. It is further contended that after the General Elections, 2013, certain complaints were filed. NADRA has technical capacity to undertake verification of thumb impression and the matters were referred to the NADRA

for verification of thumb impression, therefore, the government was trying to over-power the NADRA.

23. It is also contended that under the Chairmanship of the petitioner, NADRA managed to obtain certain projects from foreign countries, but the petitioner was not allowed to visit abroad and he was not permissible to talk with media.

24. It is further asserted that respondent No.2 hails from Lahore and is himself facing internal inquiry within NADRA and by no means fulfils the criteria of even becoming a member of NADRA Authority. The acting or look after charge of Chairman NADRA's position is totally alien to the NADRA Ordinance and thus the same is unlawful on that count alone.

25. Another contention raised by the learned counsel for the petitioner was that the superior courts of the country have chided the executive over the deplorable practice of appointing individuals to head important statutory and regulatory organizations on acting charge, temporary or till further order. It is also settled law that unless the law provides for the appointment of Acting Chairman/Head such appointment is devoid of legality. To reinforce his contentions, he has relied upon "**Hamid Mir v. Federation of Pakistan** (PLD 2013 Supreme Court 244)", "**Bank of Punjab v. Harris Steel** (PLD 2010 Supreme Court 1109)" and "**Barrister Sardar**

D/A **Muhammad Ali v Federation of Pakistan** (PLD 2013

Lahore 343). He further stresses that para No.52 of the judgment of the Bank of Punjab supra has much import, which runs as under:-

"It is a principle too well established by now that no one could be heard or allowed to reap the benefits of his own omissions, misfeasance or non-feasance. And more importantly, the provisions envisaging appointments of acting incumbents are a mere stopgap arrangement meant to cater for emergencies and such-like provisions can never be allowed to be used to circumvent the law relating to the making of a regular appointment to such an office or to be used as a substitute for a regular appointment or to be abused to put an un-qualified person to hold a post which the law does not permit him to hold. Reference may be made to Al-Jehad Trust Case (PLD 1996 SC 324)."

26. According to learned counsel as per Schedule-III provided under Rule 4 (4), the Rules of Business, 1973 the list of attached departments has been given, wherein the NADRA has not been incorporated therein, therefore, NADRA in no way can be considered as attached  department of Ministry of Interior.

27. Learned counsel for the petitioner has also placed reliance on the case of "**Amanullah Khan v. Federal Government of Pakistan (PLD 1990 SC 1092)**", wherein it has been inter alia ruled out as follows:-

"Wherever wide worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it give that impression in the first instance but where the authorities fail to rationalise it and regulate it by Rules, or Policy statements or precedents, the Courts have to intervene more often, than is necessary, part from the exercise of

such power appearing arbitrary and capricious at times."

Another case relied upon by the learned counsel for the petitioner was "**Faisal Sultan v. EDO** (2011 PLC (C.S) 419)", wherein it was held that:-

"The lapses and mistakes committed by the respondents in carrying out the recruitment process cannot affect the appointments of the petitioners or deprive them of the benefit accrued to them. Mistakes committed by the respondent department can result in departmental inquiry against the respondents (as discussed later) but cannot affect the concluded contracts entered into with the petitioners, except where they are not in accordance with law or violate the terms of the Agreement. This rule applies in cases where petitioners are fully qualified to hold the said posts and not otherwise. There is no room for arbitrary and unreasoned orders in the public employment sector. The comments of the respondents state that the Merit List was wrongly tabulated but fails to point out with necessary specificity the laps(s) committed in each case. The comments and the "errors" referred to are not

satisfactory. Reliance is placed upon re: Fuad Asdullah Khan v. Federation of Pakistan through Secretary Establishment and others 2009 SCMR 412, re: Hameed Akhtar Niazi v. The Secretary Establishment Division, Government of Pakistan and others 1996 SCMR 1185, re: Secretary to Government of N.-W.F.P. Zakat/Social Welfare Department, Peshawar and another v. Sadullah Khan 1996 SCMR 413, re: Muhammad Zahid Iqbal and others v. DEO, Mardan and others 2006 SCMR 285 and re: Abdul Salim v. Government of N.-W.F.P. through Secretary, Department of Education Secondary, N.-W.F.P., Peshawar and others 2007 PLC (C.S) 179."

28. As per learned counsel there are two types of termination i.e. termination for convenience and termination for cause. Respondent No.1 claims that the employment of the petitioner was terminated for convenience i.e. termination simpliciter upon giving salary in lieu of one month notice, but from the comments it is manifest that the termination of the petitioner was actually for cause. That the petitioner has been terminated in complete violation of articles 2-A, 4, 8, 9, 10-A, 17, 18, 25 and 220 of the Constitution of the Islamic Republic of Pakistan as well as principles of natural justice and due

process. The impugned action is also illegal, unconstitutional, malafide and void ab initio.

29. The learned counsel for the petitioner in order to supplement his contentions has further placed reliance upon the following citations:-

1. **Gadoon Textile Mills v. Wapda** (1997 SCMR 641)
2. **Chairman Regional Transport Authority, Rawlapindi v. Pakistan Mutual Insurance Company Ltd, Rawlapindi** (PLD 1991 SC 14)
3. **Ramana Dayaram Shetty v. The International Airport Authority of India** (AIR 1979 SC 1628).
4. **Syed Mahmood Akthar Naqvi v. Federation of Pakistan** (PLD 2013 Supreme Court 195).
5. **Shabana Akthar v. District Coordination Officer** (2012 PLC (C.S) 366).
6. **Naubahar Ali v. Vice Chancellor and others** (2010 PLC (C.S) 783).
7. **Muhammad Ilyas Khan Lodhi v. Additional District Judge** (2011 YLR 2705).
8. **Sharafat Kaleem v. Additional District Judge, Bahawalnagar** (2013 CLC 185).
9. **Collector, Sahiwal and 2 others v. Muhammad Akhtar** (1971 SCMR 681)
10. **Aftab Shahban Mirani V. President of Pakistan** (1998 SCMR 1863).
11. **Pakistan International Airlines Corporation (PIAC) v. Nasir Jamal Malik** (2001 SCMR 934).
12. **Mrs. Anisa Rehman v. PIAC** (1994 SCMR 2232).

13. **M/s Faridsons v. Government of Pakistan** (PLD 1961 SC 537).
14. **Chief Commissioner, Karachi v. Mrs. Dina Sohrab Katrak** (PLD 1959 SC 45).
15. **Raja Mujahid Muzaffar and others v. Federation of Pakistan and others** (2012 SCMR 1651).
16. **Suo moto case No.12 of 2009 (MPCHS case)** (PLD 2011 SC 619).
17. **V Punnan Tomas v. State of Kerala** (1969 AIR Ker 81).
18. **Messrs Airport Support Services v. The Airport Manager** (1998 SCMR 2268).
19. **Pakistan Muslim League v. Federation** (PLD 2007 SC 642).
20. **Muhammad Amjad Malik v. Pakistan State Oil co. Ltd** (2005 PLC (C.S) 318 [Supreme Court of Pakistan]).
21. **Rai Zaid Ahmad Kharal v. Water and power Development Authority** (2008 PLC (C.S) 1005).
22. **Muhammad Amjad v. WAPDA** (1998 PSC 337).
23. **Aleem Jaffer v. WAPDA** (1998 SCMR 1445)
24. **The Secretary, Government of the Punjab v. Riaz ul Haq** (1997 SCMR 1552).
25. **Mrs. Abida Parveen Channar v. High Court of Sindh** (2009 SCMR 605).
26. **Engineer Samiullah Mughal v. Chairman, Pakistan Engineering Council** (2009 PLC (C.S) 280).
27. **Dr. Mazhar Naeem v. Pakistan International Airlines Corporation, Karachi** (2001 PLC (C.S) 824).
28. **Nadeem Ahmed v. PIAC** (1998 PLC 19).

29. **K.C Joshi v. Union of India and others** (1985 AIR 1046).
30. **Elord v. Burns** (427 U.S 347, 1976).
31. **Branti v. Finke** (445 U.S. 507(1989)).
32. **Rutan Vs. Republican Party of Illinois** [497 U.S. 62(1990)].

30. Mr. Muhammad Akram Sheikh, Advocate representing respondent No.1 on his turn raises question that could an employee entering into a contractual appointment with his free will without any undue influence or compulsion in a statutory organization challenge his termination by saying that he is entitled to statutory protection. It is added that the petition is not maintainable as the superior courts of the country in many land mark judgments held that contractual rights, commitments, undertakings and obligations have to be enforced through courts of ordinary jurisdiction and should not be interfered with by the High Court while exercising its extraordinary jurisdiction under Article 199 of the Constitution. In this regard reliance has been placed on the case of "**Pakcom Ltd v. Federation of Pakistan** (PLD 2011 SC 44), in which it has been held as follows:-

"47. It seems proper here at this juncture to mention that the contractual rights, commitments, undertakings and obligations have to be enforced through courts of ordinary jurisdiction which should not be interfered with by the High

Court while exercising Constitutional jurisdiction especially in those matters arising out of a contractual obligations. (Millat Tractors E.T v. Govt. of Pak (PLD 1992 Lahore 68), Ahmed Hassan v. Pakistan Machine Tools Factory (1990 CLC 2007) Sufi Muhammad Ramzan v Secretary, Local Government and Rural Development Department Corporation Ltd v. Pak. WAPDA (PLD 1986 Quetta 181). In such like eventualities the normal remedy to law being a suit for enforcement of contractual rights and obligations would be availed instead of invocation of Article 199 of the Constitution merely for the purpose of enforcing contractual obligations."

Reliance was further placed on the case of "Major ® Nisar Ali V. Pakistan Atomic Energy Commission (204 PLC (C.S) 758, wherein it was held that:-

"The contractual appointment and regular appointment are neither synonymous nor interchangeable terms. The contractual appointment is subject to the terms and conditions as enumerated in the contract executed between the employer and the employee while regular appointment is subject to

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Service Laws and rules made thereunder and the question of its applicability depends upon the terms and conditions of the appointment. In fact the employees who were appointed on contract basis are entirely a distinct class and they don't belong to any integrated service. A line of distinction is to be drawn between service under the rules and contract service."

He contends with intonation that the contractual appointment in a government service can be made under serial No.133 of the ESTA Code. If a person is appointed for a period of more than 2 years, the appointment is to be made through Federal Public Service Commission. Learned counsel discloses that the petitioner holds 4 passports, which is an offence under the law of land. In addition to it the petitioner has dual nationality. He also points out that the petitioner made 117 foreign visits without permission of the competent authority and he has also committed pilferage of millions of rupees; that evidence has been collected regarding corruption of the petitioner and he will be prosecuted in accordance with law. It is also contended that the petitioner was a political figure. In this regard, Mr. Sheikh referred a document, viz Election Monitoring Cells-PPP, appended with comments of respondent No.1 to show that the petitioner was IT advisor of Pakistan Peoples Party in the General Elections 2008.

31. Learned counsel for respondent No.1 stressed that the petitioner was inducted in the NADRA and he very rapidly got the position of Chairman. In this regard he referred Annexure D of his reply, which is Minute sheet HR Directorate dated 23.5.2008 to contend that the summary of the petitioner for his appointment as General Manager Networks was received from Chairman Secretariat of Pakistan Peoples Party. That for the appointment on this post no advertisement was given and there was no competition and no selection process and he was the only candidate for the said post. He referred document of Board Proceeding HR Directorate whereby heavy amount of Rs.3,85,000/- was fixed as his per month salary; that it was political payout, on extraneous considerations, without due process of law, without advertisement and without competitive process of law, hence contrary to law laid down by the apex court of this country.

32. It is further maintained that the petitioner is not entitled to the protection of law as he managed his appointment as Chairman NADRA through an unlawful and deceiving manner. In this context he has placed reliance upon "**Muhammad Yasin v Federation of Pakistan** (PLD 2012 SC 132), wherein it was held that:-

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"The Ordinance does not state that the Federal Government may in its absolute and unfettered discretion appoint a Chairman. Quite to the contrary, the

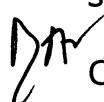
legislature has specified measurable objective criteria which must be adhered to in making this appointment. It is equally clear that if the criteria prescribed by law are not met, any appointment made would be violative of the law and would, therefore, necessarily be subject to judicial review."

33. Learned counsel pointed out that on 23.5.2008, the petitioner was appointed as General Manager and on the same day he assumed the charge of the said post. Subsequently, after short span of time on 13.6.2008, the petitioner was appointed as Additional Member NADRA. Despite the objection raised by the Ministry of Interior, Prime Minister approved the summary, thus the fundamental rights of others were violated. Another protestation of the learned counsel for respondent No.1 was that there was no seat of Deputy Chairman in the NADRA but for the person of present petitioner the said post was created and without any advertisement and calling applications from the general public the petitioner was appointed as Deputy Chairman NADRA on 18.08.2013. At this juncture, learned counsel for respondent No.1 referred an unreported case titled Major General ® Malik Muhammad Farooq Vs. Government of Pakistan etc. W.P No.1515/2013 decided by another learned Bench of this court and in this regard he read out

D/R para No.4 of the judgment which runs as under:-

"This Court asked the learned counsel that if for the sake of arguments , it may be presumed that for Retired Army Officers prescribed criteria and conditions can be waived of then what is the criteria on the basis of which any Army Officer can be picked amongst the Army Officers? To which learned counsel replied that authorities can pick any one for this purpose. I afraid, this contention of the learned counsel is totally besides the organic law i.e Constitution of the Islamic Republic of Pakistan, and dictums laid down by the Hon'ble Supreme Court of Pakistan. Even otherwise policy circulated though establishment division office memorandum No.6/22000R.3 dated 06.05.2000 is offensive to the constitutional mandate, principles of natural justice and motivated to avoid appointments on merit and to oblige blue eyed persons, such policies are not less than political bribe."

It is further contended that Mr. Ali Arshad Hakeem was Chairman NADRA, he was appointed as Chairman, FBR, but he was subsequently ousted from service by the order of the Hon'ble Supreme Court of Pakistan, therefore a summary was sent for appointment of the petitioner as

 Chairman NADRA and ultimately he was appointed on the

said post on 17.07.2012 and that too without adopting any process required by law. There were no exceptional circumstances, but even then the petitioner was appointed as Chairman. Learned counsel read out Notification dated 17.7.2012, which inter alia provides that "**on appointment as Chairman, NADRA, the contract appointment of Mr. Muhammad Tariq Malik as Deputy Chairman, NADRA stands terminated.**"

Learned counsel states that if the appointment of the petitioner as Deputy Chairman NADRA was in accordance with law then why the same was terminated as per Notification dated 17.07.2013. It is further contended that in the Notification dated 17.7.2012 it is specifically incorporated that he was appointed on contract basis and if the petitioner had any objection he should have refused the offer of appointment as Chairman and now after availing perks and privileges for 4 years he cannot be allowed to say that he was not contract employee. Learned counsel profoundly criticized that at the time of filing of writ petition copy of terms and conditions for appointment of Chairman NADRA were annexed with the petition, but malafidely only one page was annexed whereas 2nd page was not placed and the same was placed on record at the time of filing of re-joinder and it was done so to obtain ad-interim injunction. It is further asserted that at the time of termination of the petitioner cheque for the payment of one month salary in lieu of notice period was

handed over to the petitioner in compliance with terms and conditions of the contract.

34. It is strenuously urged that principle of master and servant is applicable in the case of the petitioner, so in such like state of affairs, this court has no jurisdiction to entertain the petition. The appointment of respondent No.2 as Chairman NADRA is only stopgap arrangement and matter is being referred to the Commission (constituted for the said purpose) for appointment of Chairman NADRA strictly in accordance with rules and in a transparent manner.

35. Learned counsel for respondent No.1 also placed reliance upon the case of "**Muhammad Ashraf Tiwana v. Pakistan (2013 SCMR 1159)**", in which it was ruled out as under:-

"We have carefully gone through the record placed before us. Apart from the circumstances, noted above, which show that no attempt whatsoever was made to attract the pool of potential talent having the requisite statutory qualifications, we have been unable to find any exercise or effort whatsoever for determining if need respondent No.4 was a person known for his integrity or if he had the requisite expertise, experience or eminence. It may well be that he may have three



qualifications; equally, it may be that he does not possess these attributes. What is missing is due diligence or a fair and demonstrably transparent selection process. In the notings on official files, as observed above, a wholly haphazard and unstructured culture of contacts, recommendations or sifarish appears to have pervaded the corridors of Government in the matter of appointment of Commissioners.”

In respect of contractual appointment learned counsel for respondent No.1 has relied upon the case of **“Human Rights cases No.57701-P, 57719-G, 5774-P, 58152-P, 59036-S, 59060-P, 54187-P and 58118-K of 2010 and SMC No.24 of 2010** (PLD 2011 SC 205), wherein it was ruled out that:-

“It may not be out of context to note that in terms of the definition of section 2(1)(6)(ii) of the Civil Servants Act, 1973, a person who is employed on contract does not even fall within the definition of a civil servant, so his authority to command and maintain discipline can well be imagined from the fact that if a person himself is not a Civil Servant, he is considered only bound by the terms and conditions of his contract and not by the statutory law, because if any condition laid down in the contract is violative to

statutory law, he would only be subject to action under the said contract."

He was of the view that the Government has full power to terminate the heads of the Government organizations appointed without following due process of law and in this regard he referred "**Kh. Muhammad Asif Vs. Federation of Pakistan (2013 SCMR 1205)**", in which it was inter alia opined as under:-

"All the orders of removal or transfers as well as posting on deputation of civil servants and Chief Executive Officers of statutory bodies, autonomous/semi-autonomous bodies, corporations, regulatory, etc., by the Caretaker Cabinet/Prime Minister are hereby declared void, illegal and of no legal effect w.e.f. date of issuance of Notifications respectively, however:

i. the Federal Government would be empowered to continue the removal or transfers, etc, of Chief Executive Officers/heads of the departments, statutory bodies, autonomous/semi-autonomous bodies, corporations, regulatory authorities, etc. in the public interest, subject to following requisite provision of law.

As far as contract employees are concerned, whose contracts have been cancelled or those to whom fresh contracts of service have been given by the caretaker

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Cabinet/Government, shall stand cancelled as holders of contract employment of both these categories deserve no interference in view of the judgment of this court in the case of State Life Insurance Employees Federation of Pakistan v. Federal Government of Pakistan (1994 SCMR 1341) because no relief can be granted to them in these proceedings as no question of public importance with reference to enforcement of their any of the fundamental rights arises."

In addition to above, learned counsel for respondent No.1 has also placed reliance upon the following rulings:-

1. **Abdul Jabbar Memon and others** (Human Rights cases) (1996 SCMR 1349).
2. **Maj. Gen Retd. Malik Muhammad Farooq v. Government of Pakistan** (2013 PLC (C.S) 962).
3. **M. Ashraf Azeem v. Federal Government of Pakistan** (2013 PLC (C.S) 1147).
4. **Engineer Imam Ali Soomro v. Govt of sindh** (1998 PLC (C.S) 311).
5. **Secretary to the Government of the Punjab v. Ghulam Nabi** (PLD 2001 SC 415).
6. **Mst. Kaniz Fatima through legal heirs v. Muhammad Salim** (2001 SCMR 1493).
7. **Malik Muhammad Majeed v. "Government of Pakistan** (PLD 2002 Lahore 290).
8. **Messrs Shakil Waqas & co. v. General Manager/Marketing, Pakistan Railways** (PLD 2001 Karachi 185).

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9. Islamic Republic of Pakistan v. Muhammad Zaman Khan (1997 SCMR 1508).

10. Multiline Associates v. Ardeshir Cowasjee (PLD 1995 SC 423).

Mr. Muhammad Shoaib Shaheen, Advocate learned counsel for respondent No.2 on his turn submitted that admittedly the petitioner was active member of political party. He was inducted in NADRA as compensation and finally he was appointed as Chairman within shortest span of time and that too during the period of probation. He was appointed in the NADRA without due process.

36. Learned counsel forcefully asserted that the petition is not maintainable as the petitioner seeks to enforce contractual obligations pertaining to terms and conditions of his service through constitutional jurisdiction, which is not permissible under the law. The petitioner has not come to the court with clean hands, therefore, he is not entitled to any equitable relief from this court. The very inception and unprecedented growth of the petitioner in NADRA is one of the worst examples of nepotism, personal whims, fancies and maladministration on the part of the previous Government led by Pakistan Peoples Party. According to learned counsel, it is settled law that paramount consideration in exercise of Constitutional jurisdiction is to foster justice, therefore, before a person is permitted to invoke the discretionary power of the court, it must be shown that the order sought to be set aside had

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occasioned some injustice to him. In this regard he has referred case of "**Mst. Kaniz Fatima V. Muhammad Salim** (2001 SCMR 1493).

37. It is added that his client i.e respondent No.2 has been appointed as Acting Chairman to look after the affairs till the appointment of new Chairman in accordance with rules and law. During his service respondent No.2 remained posted as Director General,NADRA of Balochistan, Sindh and Lahore Regions. Moreover, he has been an effective Chief Operating Officer during crucial time of August, 2009 to April, 2011 when important projects such as disbursement of amount to the IDPs of Swat, payment of cash through WATAN Card and Pakistan Card and expanding the registration of citizens of Pakistan were undertaken. Moreover no inquiry was ever initiated against him and in this regard the petitioner has made the false allegation with malafide intention. That though competent authority, may relax the condition for issuance of advertisement yet it is nowhere mention that process of selection can also be relaxed.

38. It is further contended that word "contract" has specifically been included in appointment Notification of the petitioner. Under the law in case of contractual appointment no writ can be issued. He has relied upon the case of "**Lt-Col (Retd.) Aamir Rauf v. Federation of Pakistan and 3 others** (2011 PLC (C.S)654" and averred that the only remedy available to the petitioner was to file

suit for damages. That the petitioner accepted the terms and conditions and after acceptance of the same he could file suit for damages. Reliance was placed on "**Capt. (Retd.) Muhammad Naseem Hijazi v. Province of Punjab and 2 others** (2000 PLC (C.S) 1310). According to Learned counsel new ground cannot be raised in re-joinder.

39. It is further maintained that if some illegal order has been passed, which is void ab initio in that case principle of locus poenitentiae would not be applicable. The appointment Notification of the petitioner was illegal, therefore, on the basis thereof he cannot claim the benefit of locus poenitentiae.

40. He further stated that factual controversy is involved in this case, which cannot be resolved in constitutional jurisdiction of this Court. To add vigor to his contention he has placed reliance upon the cases of "**Fida Hussain and another v. Mst. Saiqa and others** (2011 S C M R 1990)" and "**Aamir Jamal and others v. Malik Zahoor ul Haq and others** (2011 S C M R 1023). That if the Chairman is terminated the process of checking of thumb impression shall continue .

41. He also referred case of "**Khawaja Muhammad Asif v. Federation of Pakistan**" (2013 SCMR 1205), and read para-30, which inter alia provides that:-

"30. Thus, at the touchstone of the parameters laid down in the paras supra about the powers of the Caretaker

Cabinet/Government , it is declared and held as under:-

iii(a)...

iii(b)...

iii(c)...

iii(d)...

iii(e) The appointments in autonomous/semi-autonomous bodies, corporations, regulatory authorities, etc. made before the appointment of Caretaker Government shall also be subjected to review by the Elected Government by adopting the prescribed procedure to ensure that right persons are appointed on the right job, in view of the observations made in above paras (paras No.25 and 26)."

42. It is finally asserted that the Federal Government has taken its decision in accordance with law and no illegality was committed in this regard.

43. By availing the right of rebuttal, learned counsel for the petitioner downright denied the allegation and contended that neither the petitioner made 117 foreign visits nor he had four passports. He also denied the allegation of corruption of the petitioner. If the petitioner was corrupt then why the cheque of huge amount was given to the petitioner at the time of his termination. It is next contended that the appointment of the petitioner is not under challenge; whereas termination of the petitioner as well as appointment of respondent No.2 is under

challenge. According to learned counsel the petitioner is not getting Rs.21-lacs as his salary. He clarifies that Deputy Chairman and Acting Chairman are two different things. That the petitioner was statutory appointee. He contended that the respondent No.2 was at serial No.6, but despite this he was appointed as Acting Chairman. That in the cases referred to by the other side, there was abuse of process, therefore, principles held in those cases cannot be applicable in this case.

44. I have heard the learned counsel for the parties at great length and surveyed the material available on file with their assistance and also perused the citations quoted by them.

45. From the controversies raised by the parties either through their pleadings, or by oral arguments in view of some citations and provisions of law leads towards several legal aspects.

46. The petitioner's side mainly emphasized that in view of case law developed throughout the history of law, the petitioner cannot be terminated by this way. His term of service since protected by section 3(5) of NADRA Ordinance 2000, therefore through office memorandums or simple instructions cited in the Estacode having no overwhelming effect nor it could be considered as binding force even terms accepted by the petitioner at the time of his induction in service.

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47. The some up of the stance taken by the respondents mainly emphasized the induction of the petitioner without following procedure is illegal. There are serious allegations against the petitioner with regard to moral turpitutes, integrity and political affiliation. Therefore he has no right to seek equitable relief, when he himself has not approached the court with clean hands.

48. The case law referred in support of the arguments have also been scanned with due care.

49. The respondents since raised controversy with regard to transparency in employment of petitioner, the court was constrained to call the original record of summary by which termination of the service taken place.

50. During hearing of lengthy arguments some quarries also raised to which surprisingly something totally beyond the imagination, illogical as well came to light.

51. Surprisingly the counsel for respondent No. 2 disclosed that his client took over charge on 02nd December 2013 at 09-30 a.m, when the Additional Secretary appeared later on to produce the original file of summary disclosed the time of floating the summary at 11-30 a.m.

52. On scanning the summary two things very strange noted: -

**(a) The summary was floated on 02-12-2013,
all the notifications issued on the very same
day rather entire process was completed**

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including submission of the summary and finalization of its process up to issuance of salary cheques etc.

Summary was floated on 02-12-2013 entirely the process was completed on administrative side. Question raises in the mind as to how and under whose orders the salary cheques were issued on the very same day, it is still a mystery shrouded.

(b) The list of Director Generals appended with the summary showing respondent No. 2 placed at Sr. No. 6. It is not known as to why the person at Sr. No. 6 was chosen to look after the office of Chairman NADRA, when particularly he was performing duties as Director General at Karachi.

53. Surprisingly the said Director General as per oral version of his own counsel took over the charge at 09-30 a.m. Therefore coupled with the illogical speed of the summary as noted was completed entirely with all its process during single day indicates the governance of the government in this case as a special measures.

54. During arguments neither respondent No. 1 nor 2 nor the officials appeared from the offices of the respondents ever explained as to what was the urgency by

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which the said process was completed so hurriedly. The respondents by their arguments or written reply no where slightly indicated the very reason of removal contended in Para-II of the summary which is reproduced herein below:-

"the performance of Mr. Muhammad Tariq Malik as Chairman NADRA till date is not satisfactory. NADRA is embroiled in unnecessary controversies. Such matters are still pending adjudication in various courts. This has tarnish the image of NADRA beside inefficient handling of affairs has not allowed NADRA to attain its true potential".

55. Lengthy history of the country shows that actions of the Government of like nature have been challenged, the Government tried to create justifications in support of the orders passed, by defending their stance from record. But in the instant case none of the respondents have argued the very important aspect with regard to reason of removal of the petitioner embodied in the summary.

56. On the contrary they mainly stressed upon the character of the petitioner thereby trying to prove his shaken integrity, involvement in embezzlement for which Government intend to take action. Instead of following the law, or honour the legal propositions enunciated by different authoritative judgments of the superior courts, a threatening attitude has been introduced. Such way

positively indicates that the Government frightened the petitioner for future actions in case of contrary decision to their wishes he will be put to hot waters. Such conduct by it self showing their ill attitude and bad governance and their future ill-design plans seemingly having intention to flout the orders by adopting coercion.

57. So for the concern of legal aspects of this case I have carefully examined the record, documents filed by either parties to which it appears that the induction of petitioner vide notification dated 17th- July-2012 was for a period of three years in accordance with section (3) clause(5) of NADRA Ordinance 2000. For just and convenience the text of notification is reproduce hereunder: -

**"Mr. Muhammad Tariq Malik is appointed
as Chairman National Database & Registration
Authority(NADRA) on contact basis under
ministry of interior, for a period of three years,
in accordance of section(3) clause(5) of NADRA
Ordinance 2000 with immediate effect and until
further orders.**

**On appointment as Chairman NADRA the
contract appointment of Mr. Muhammad Tariq
Malik as Deputy Chairman NADRA stands
terminated.**

**His terms and conditions of appointment
will be settled separately."**

58. It is necessary to point out here before parting with other aspects of the case I would like to discuss the controversy with regard to single page submitted by the petitioner in support of its contention showing only one leaf of the terms and conditions indicating concealment of facts. Surprisingly the said leaf in the same condition is lying at Page No. 272 of the original file of summary. Therefore such documentary position cannot be adversely considered against the petitioner. Later on the petitioner through rejoinder submitted all the documents.

59. Dispute with regard to the terms and conditions of the service of petitioner when entire summary is perused it appear that the issues raised by Establishment Division to follow the O.M and instructions for contract appointment, the Finance Division as well as the Board of Directors of NADRA. The Ministry of Interior through its secretary submitted a note with regard to the terms and conditions of service, seeking approval as recommended by NADRA Authority (Board). Also the pay adhoc relieves and other perks which he was drawing prior to appointment as Chairman as stated were difficult to vary to his disadvantage. The then Prime Minister approved the proposal at Para-3 Read with Para 9 of the summary.

 **Para 3 & para 9 are reproduced hereunder:-**

Para 3- 'In view of forgoing Ministry of Interior recommends that the terms and conditions of the Mr. Muhammad Tariq Malik as Chairman NADRA has recommended by NADRA Authority Board may be approved as a special case, keeping in view the justification given above"

Para 9- Prime Minster may allow Mr. Muhammad Tariq Malik to draw his pay and other emoluments from NADRA in accordance with authority rules.

60. Therefore it will be just and appropriate to see the terms and conditions settled by the NADRA Board available at Page No. 262 of the summary file as minutes of the board. The terms and conditions of the Chairman as incorporated therein are also given below: -

"PSO to Chairman briefed the Board that before appointment as a Chairman NADRA Mr. Muhammad Tariq Malik was drawing salary from NADRA as Deputy Chairman and on appointment as Chairman his contract appointment as Deputy Chairman has been terminated. His terms and conditions of appointment as Chairman are to be settled separately by the Establishment Division (Govt. of Pakistan). He further informed that the existing salary being drawn as Deputy Chairman NADRA is higher than the salary of MP-1 scale. In order to protect the

existing salary and other term & conditions recommendation of the Authority is required to make proposal to the Federal Government for approval.

Mr. Muhammad Ayub Ghallu commented that upon appointment as Chairman, there should not be any monetary loss and Mr. Muhammad Tariq Malik may continue as Chairman with existing pay and allowances. Mr. Kaiser Bengali supported his version.

After discussion it was resolved that;

"Proposal be made to the Federal Government for approval of terms and conditions of Mr. Tariq Malik as Chairman NADRA with existing salary being drawn from NADRA"

61. From perusal of minutes of meeting it appears that it was decided for making a proposal to the Federal Government for approval of terms and conditions of service of the petitioner.

62. As per Learned Counsel for respondent No. 1, the terms and conditions are essentially to be followed as per O.M (office memorandum) and S.I.133 of the Estacode. The OM has already been referred above, while referring relevant S.I of Estacode, it appear in its Para-II for separate guidelines for a contract appointment in autonomous bodies, semi autonomous bodies, corporations, Public Sector Companies etc.

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63. Now the only question raises in the mind whether a tenure post as mandated by section 3(5) of NADRA Ordinance 2000 can be attached with the contract by imposing terms and conditions followed by OM and S.I as referred above.

64. The very notification of appointment does not disclose the contractual appointment of the petitioner. On the contrary in clear words his appointment was made in accordance with section 3(5) of NADRA Ordinance 2000. Even if the conditions referring Estacode have been later on imposed, cannot change the nature of appointment under the ordinance which by itself is a tenure post with over whelming support of the legislation.

**The relevant section 3(5) is reproduced
herein below; -**

**"The chairman and the member
shall, unless he resigns or is removed
from office earlier herein after provided,
hold office for a term of three years and
shall be eligible for reappointment for {a
similar term or terms} as the Federal
Government may determine"**

**Provided that a Chairman or member
shall retire on attaining the age of 65
years.**

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65. The term of the post of the Chairman and Member has been protected by virtue of above enactment, hence cannot be knocked down by the method adopted for his termination. **The procedure of removal has also been provided by sub-section 12 or section 3 which is also reproduced herein below: -**

"The Federal Government may remove the Chairman or any member from office if: -

- (a) Upon an inquiry, he is found incapable of performing the functions of his office by reason of mental or physical incapacity or has been found guilty of misconduct; or**
- (b) After his appointment he is disqualified from being so appointed as provided in sub-section (4).**

Sub-section (4) is also reproduced as ready reference: -

"NO person shall be appointed as the Chairman or a member if he has been declared insolvent, or convicted for an offence involving moral turpitude, or declared to be disqualified from employment in, or dismiss from Government service."

66. There is no other way provided by the law to terminate the member or Chairman of NADRA from his office except adopting the above course.

67. Another very important feature while relying upon the Learned Counsels for either side emphasize the principles sketched for illegal appointment of the heads of different departments could be removed through a commission. Admittedly such commission constituted but instead of referring case of the petitioner to the commission, the petitioner has been removed from his office by leveling allegations referred above. Such allegations if existing, that even require for adopting a procedure laid down under the law instead of passing an order beyond the sketched boundaries of law. Even his induction in service as per stance of the respondents was illegal, his removal should not have been taken place by such an illegal procedure adopted. The affairs have been managed as observed above, the whole action of the respondents smacked mala-fidies.

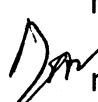
68. The above proposition with regard to the constitution of commission has been directed with elaborate sifting by the Honourable Supreme Court in Khuwaja Asif's case, keeping a heavy responsibility over the Federal Government to avoid the injustice. Though the Learned Counsel for respondent No.1 with a weak reason of making complaint has attempted to release the burden

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of the Government under the guidelines of Khuwaja Asif's case reported in **2013 SCMR 1205** but same being directives of the Honourable Supreme Court are binding. In the instant case the Government avoided to refer the case to the commission and decided the same by leveling allegations of embroiled NADRA in unnecessarily controversies as the matters are pending adjudication in various courts. In view of the government if a tarnished image of NADRA beside inefficient handling of affairs is in field, that should have been even achieved by adopting the legal course provided by the Ordinance as discussed above. In other case as argued by both the counsels of respondent No. 1 &2 it could have been referred to the commission constituted by the Government.

69. It is well settled principle of law as enunciated by the Honourable Superior courts that agreement by itself cannot over ride the law or its operation. No one can alter or amend the law or its effects by mutual agreement. In this regard I am fortified with the cases referred in para No.11 supra.

70. Since by notification it was a termination simpliciter but later on facts divulged through summary when summoned, the reason which has not even been argued before this Court. Therefore by virtue of notification it being the termination simpliciter has been exhibited repugnant by the Honourable Superior Courts in the referred cases in Para No. 17. With regard to acting charge



of Chairman the superior courts have enunciated principles being devoid of legality as referred in Para No. 25.

71. Otherwise it is a well settled principle of law that one cannot be ousted even if he is a contract employee unless the legal procedure is adopted. The respondents have grossly ignored the wisdom of law, principles sketched as well as the legal propositions in this regard time to time enunciated by the superior courts.

72. Contrary to the reason of termination set forth in the summary the stance taken with regard to moral turpitude, integrity and political affiliation as discussed above. The Learned Counsels for the respondents tried to create a justification that employment of the petitioner was totally illegal. Therefore even if these allegations are considered to be true, the basic requirement of law of providing an opportunity of hearing is lacking in this case. Therefore under the guidance of Honourable Supreme Court in case of Pakistan International Airlines Corporation through its Chairman & others... Versus... Nasir Jamal Malik & others... reported in **2001 SCMR 934**. It was held that where adverse action being contemplated would have at least right to defend such action. Like view of the Honourable Supreme Court is also available in reported case of Muhammad Shoaib & two others.... Versus... Govt. of NWFP Through the Collector D.I Khan and others... Reported as **2005 SCMR 85**. In the said case the appointment was disputed as without advertisement and

test. The removed civil servants challenged such action on the basis of Principles of Audi Alterum Partem. As their termination without show-cause notice was observed to be illegal. Logically such ambiguity is to be cleared on providing an opportunity of hearing and defense that the appointments were if at all illegal, same have been committed by the department it-self and civil servants could not be penalized for such action. Therefore they being condemned unheard were granted such relief Like view also drawn by the Honourable Supreme Court in case of Secretary to Govt. of NWFP Zakat.....Versus....Sadaullah Khan reported as 1996 SCMR 413. Another case reported in 2004 SCMR 303 (Collector of Custom & Central Excise Peshawar & 2 others....Versus...Abdul Waheed & 7 others).

73. From the record and arguments it is explicitly clear that the Government is not on any of the firm stance taken in the summary for termination as well as through their written reply and arguments advanced. Hence it appears to be a case of victimization for which material placed on record. The Government has just awoken from a lengthy dream after the cases referred by the election authorities for some verifications. Apparently the petitioner refused to follow directives, with the super sonic speed the entire action was done within a day that it too appears to be fabricated afterwards.

74. Under the circumstances, I am of the confirm
 view that the proceedings initiated for removal of

petitioner as Chairman NADRA through notification dt: 02-12-2013 is a colourful exercise and entirely tainted with mala-fidies. Therefore same are required to be struck down. The instant petition is therefore accepted as a result the notification dated 02-12-2013 by which the services of petitioner were terminated and notification dt: 02-12-2013 by virtue whereof respondent No.2 has been assigned to look after the work of the office of Chairman NADRA are hereby set-aside.

Parties to bear their own cost.

Noor-ul-Haq M. Qureshi
Judge

Announced in open Court on 13 - 01 - 2014.

Wafay Sabir

Approved for report

Judge

Blow seal added.

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