Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 2236 of 2019

Mushtaq Ahmed Sukhera

Vs

President of Pakistan through Secretary to the President, etc.

DATE OF HEARING: 20-08-2019.

PETITIONER BY: Mr. Babar Sattar and Ms Zainab Janjua Advocates.

RESPONDENTS BY: Mr Anwar Mansoor Khan, Attorney General for Pakistan.
Mr Sajid Ilyas Bhatti, Addl. Attorney General.
Mr Tariq Mahmood Jahangiri, Addl. Attorney General.
Syed Muhammad Tayyab, Deputy Attorney General.
Mr Farrukh Shahzad Dall, Assistant Attorney General.
Mr Saqlain Haider, Assistant Attorney General.

ATHAR MINALLAH, CJ.- Through this petition, Mushtaq Ahmed Sukhera [hereinafter referred to as the "**Petitioner**"] has invoked the jurisdiction of this Court under

Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 [hereinafter referred to as the "**Constitution**"] assailing the Notification, dated 12-06-2019, whereby he has been informed that the President of Pakistan [hereinafter referred to as the "**President**"] has withdrawn, ab initio, the Notification, dated 31-08-2017, regarding his appointment as the Federal Tax Ombudsman [hereinafter referred to as the "**Tax Ombudsman**"].

2. The facts, in brief, are that the Petitioner retired from the Police Service of Pakistan on 19-01-2017 upon attaining the age of superannuation. Pursuant to the advice of the Prime Minister of Pakistan, he was appointed as the Tax Ombudsman by the President vide Notification, dated 31-08-2017. After the change of Government following the general elections, the newly elected Prime Minister of Pakistan approved the summary which was submitted by the Ministry of Law and Justice wherein it was proposed that the advice tendered to the President by his predecessor vide the PM's Office U.O. No. 986/Secy (PM)/2017, dated 30-08-2017, was void ab initio and thus liable to be withdrawn. Consequently, the advice which had led to the appointment of the Petitioner to the office of the Tax Ombudsman was withdrawn followed by the issuance of the impugned notification by the President.

3. Mr. Babar Sattar, ASC, the learned counsel for the Petitioner has argued that; the Constitution is the supreme law and its provisions control all subordinate legislation; the provisions of a statute are ultra vires if they are in conflict with the provisions of the Constitution; Article 48 (1) applies to all actions of the President, whether under the Constitution or any subordinate laws; nothing can be read into the articles of the Constitution and nothing can be declared redundant; Article 48(2) has been misinterpreted by the respondents; Article 48(2) of the Constitution is an exception to the rule stated in Article 48(1); Reliance has been placed on the case titled "Al-Jehad Trust through Raees-ul-Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court and another v. Federation of Pakistan and others " [PLD 1997 SC 84]; the apex Court has not held in any judgment that Article 48(1) of the Constitution does not apply to subordinate legislation and, therefore, the principles and law enunciated by the august Supreme Court in the cases titled "University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali" [1992 SCMR 1093], "Federation of Pakistan through Secretary, Establishment Division, Govt. of Pakistan, Islamabad v. Muhammad Tariq Pirzada and others" [1992 SCMR 2189], "Dr Zahid Javed v. Dr Tahir Riaz Chaudhry and others " [PLD 2016 SC 637] are distinguishable because the facts and circumstances in these judgments were in a different context altogether; the power

to rescind is available under section 21 of the General Clauses Act 1897 but not when such authority has been acted upon; once power is exercised and has been acted upon then it creates vested rights which cannot be undone in the exercise of executive discretion; reliance has been placed on the case titled "Pakistan, through Secretary, Ministry of Finance v. Himayatullah Farukhi" [PLD 1969 SC 407]; the only exception to the doctrine of locus poenitentiae is where no vested rights are created and the order passed is illegal and void; in matters relating to service, it is settled law that the employee or appointee cannot be penalized or removed from service for the failure or disregard by the appointing authority of the appointment procedure; section 21 of the General Clauses Act 1897 read with section 16 ibid is not available to the executive authority for annulment of an appointment made by the competent authority; the President cannot be deemed as persona designata merely because the function that he is required to perform is vested in him under a statute as opposed to under the Constitution; under the Federal Ombudsmen Institutional Reforms Act, 2013 [hereinafter referred to as the "**Act of 2013**"] the President is not persona designata; in the absence of gross misconduct the Petitioner could not be removed before the completion of the fixed term which has been guaranteed by the statute.

4. Mr Anwar Mansoor, learned Attorney General for Pakistan has contended that; the Notification, dated 31-08-2017, whereby the Petitioner was appointed as the Tax Ombudsman under section 3(1) of the Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000 [hereinafter referred to as the "**Ordinance of 2000**"] was void ab initio; the President had appointed the Petitioner upon the advice of the Prime Minister which was in violation of the legislative intent of vesting the power of appointment in the President; the power of appointing a person as Tax Ombudsman under section 3(1) of the Ordinance of 2000 is exclusive to the President and it is not a function of the President under the Constitution; neither the Ordinance of 2000 nor the Act of 2013 specifies that the President will appoint the Tax Ombudsman upon the advice of the Prime Minister; when the President exercises power under section 3 (1) of the Ordinance of 2000 then the latter acts as persona designata rather than as the President; while acting as persona designata under section 3(1) of the Ordinance of 2000, Article 48 of the Constitution does not come into play and thus the President is not required to act upon the advice of the Prime Minister or the Cabinet; reliance has been placed on the cases of "University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali" [1992 SCMR 1093], "Federation of Pakistan through Secretary, Establishment Division, Govt. of Pakistan,

Islamabad v. Muhammad Tariq Pirzada and others" [1992 SCMR 2189], "Dr Zahid Javed v. Dr Tahir Riaz Chaudhary and others " [PLD 2016 SC 637]; the President himself was the appointing authority and, therefore, the appointment of the Petitioner, having been made upon the advice of the Prime Minister, was void ab-initio and illegal; it is settled law that where power is conferred on a person then the latter cannot transfer such power to another; transferring of such power to another person would be ultra vires and amounts to usurpation of power and thus nullity in law; when a statute has prescribed a procedure for doing a certain thing then that thing must be done only in that manner; reliance has been placed on "Muhammad Yasin v. Federation of Pakistan and others" [PLD 2012 SC 132] and "Muhammad Ashraf Tiwana and others v. Pakistan and others"[2013 SCMR 1159]; the removal of a Tax Ombudsman on the ground that the initial appointment was void ab initio is outside the scope of the jurisdiction vested in the Supreme Judicial Council.

5. The learned counsel for the Petitioner and the learned Attorney General for Pakistan have been heard and the record perused with their able assistance.

6. The admitted facts are that the Ordinance of 2000 was promulgated and notified on 11-08-2000 and since then,

from time to time, several persons were appointed as Tax Ombudsmen under section 3(1) ibid by the President on the advice of the Prime Minister. In accordance with this long standing tradition and the interpretation of section 3(1) of the Ordinance of 2000, the Petitioner was also appointed on the advice of the Prime Minister vide Notification, dated 31-08-2017. This advice, vide PM's Office U.O. No. 986/Secy (PM)/2017, dated 30-08-2017, by the predecessor of the holder of the office of the Prime Minister was withdrawn consequent to the acceptance of the summary, dated 17-05-2019, submitted by the Ministry of Law and Justice and thus the impugned notification was issued. A plain reading of the summary, dated 17-05-2019, submitted to the Prime Minister by the Secretary, Ministry of Law and Justice shows that section 3(1) of the Ordinance of 2000 has been interpreted by placing reliance on the judgments rendered by the august Supreme Court in the cases titled "University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali" [1992 SCMR 1093], "Federation of Pakistan through Secretary, Establishment Division, Govt. of Pakistan, Islamabad v. Muhammad Tariq Pirzada and others" [1992 SCMR 2189], "Dr Zahid Javed v. Dr Tahir Riaz Chaudhary and others" [PLD 2016 SC 637]. It is not the case of the respondents that the Petitioner has become incapable of properly performing the duties of his office nor is he alleged to have been guilty of misconduct. In

response to a query, the learned Attorney General has unequivocally stated that the Federal Government is satisfied that no ground exists to initiate proceedings for removal of the Petitioner and that the impugned notification has been issued solely because the appointment made on the advice of the Prime Minister was illegal and void ab initio. The main question which has emerged from the arguments advanced at the Bar essentially relates to the interpretation of section 3(1) and, particularly, whether in the light of the principles and law enunciated by the apex Court in the aforementioned judgments, the power to appoint a person as Tax Ombudsman under the Ordinance of 2000 exclusively vests in and falls within the realm of the discretion of the President or whether the latter is mandated to exercise this function on the advice of the Prime Minister. In order to answer the questions which have been raised in the case in hand, it would be beneficial to briefly survey the provisions of the Ordinance of 2000, the Act of 2013 and thereafter examine the precedent law which has been relied upon by both sides.

7. The Ordinance of 2000 was promulgated and notified in the official gazette on 11-08-2000. The object and purpose for enacting the said statute has been described in its preamble as to provide for the appointment of the Federal Tax Ombudsman to diagnose, investigate, redress and rectify

any injustice done to a person through maladministration by functionaries administering tax laws. Section 2 defines various expressions. The office of the Tax Ombudsman has been established under section 3 of Chapter-II. Sub section (1) of section 3 provides that there shall be a Tax Ombudsman "who shall be appointed by the President". Sub section (2) provides that before entering upon the office, the Tax Ombudsman shall take oath before the President in the form set out in the schedule. Sub section (1) of section 4 explicitly provides that the Tax Ombudsman shall hold office for a period of four years and that he or she shall not be eligible for any extension of tenure or reappointment as Tax Ombudsman. Sub section (2) of section 4 provides that the Tax Ombudsman may resign his office by writing under his hand addressed to the President. The terms and conditions of service and remuneration of the Tax Ombudsman are determined by the President as provided under section 6. Sub section (2) of section 6 empowers the President to remove a Tax Ombudsman on the grounds of misconduct or if the latter becomes incapable of performing the duties of his office for reasons of physical or mental incapacity. Nonetheless, the proviso has placed restrictions on the power regarding the removal of the Tax Ombudsman. The jurisdiction, functions and powers of the Tax Ombudsman have been described in section 9 and Chapter IV while the

procedure for the redressal of grievances is stated in Chapter-III. Section 16 explicitly empowers the Tax Ombudsman to punish any person for contempt and provides that the latter would have the same powers as are vested in the august Supreme Court.

8. The Act of 2013 was published in the official gazette on 20-03-2013 and the object and purpose of its enactment has been described as making institutional reforms for standardizing and harmonizing the laws relating to the institution of Federal Ombudsmen and the matters ancillary or akin thereto. Clause (b) of section 2 defines the expression “Ombudsman” for the purposes of the statute as meaning an Ombudsman appointed under the 'relevant legislation'. The expression 'relevant legislation' has been defined under clause (c) of section 2 and it, inter-alia, includes the Ordinance of 2000. Section 3 provides that the Ombudsman shall hold office for a period of four years and shall not be eligible for any extension of tenure or re-appointment as Ombudsman under any circumstances. Section 5 provides that an Ombudsman may be removed from office by the Supreme Judicial Council on the grounds of being incapable of properly performing the duties of his office by reason of physical or mental incapacity or found to have been guilty of misconduct. Section 6 provides that the Ombudsman may

resign his office under his hand addressed to the President. Section 12 reaffirms the powers of the Ombudsman to punish for contempt. Section 14 provides a remedy to an aggrieved party by a decision, order, finding or recommendation of an Ombudsman to the President. Section 24 gives an overriding effect to the provisions of the Act of 2013 notwithstanding anything contained in any other law for the time being enforced and it further explicitly provides that in case there is a conflict between the provisions of the Act of 2013 and the relevant legislation then the provisions of the former to the extent of inconsistency shall prevail.

9. A combined reading of the provisions of the Ordinance of 2000 and the Act of 2013 clearly manifests that the legislature, in its wisdom, has unambiguously intended to ensure the independence of the office of the Tax Ombudsmen by guaranteeing a fixed term of four years and restricting the scope of removal of a person appointed under section 3(1) of the Ordinance of 2000 and that too through the Supreme Judicial Council established under Article 209 of the Constitution. A person who has once been appointed and, pursuant thereto, has taken oath of the office of the Tax Ombudsman, then he or she, as the case may be, can only be removed before the expiry of the guaranteed fixed term of four years on two grounds; firstly, if the holder of the office

becomes incapable of properly performing the duties of his office due to physical or mental incapacity and, secondly, if found guilty of misconduct. The removal can only be made through the Supreme Judicial Council. The third mode in which the office of the Tax Ombudsman may fall vacant is when the person appointed under section 3(1) voluntarily tenders resignation by writing under his or her hand addressed to the President. The legislature, by enacting the Act of 2013, has reaffirmed the independence of the office of the Tax Ombudsman by doing away with the limited power which was vested in the President under the Ordinance of 2000 regarding the removal of a Tax Ombudsman. Sub section (1) of section 3 of the Ordinance of 2000 provides that the Tax Ombudsman shall be appointed by the President. Since the Ordinance of 2000 was promulgated, several persons, from time to time, were appointed to the office of the Tax Ombudsman by the President upon the advice of the Prime Minister and so was the Petitioner. After almost two decades from the date of promulgation of the Ordinance of 2000 and appointing several persons, from time to time, against the post of Tax Ombudsman on the advice the Prime Minister, the Ministry of Law and Justice appears to have formed a different opinion regarding the interpretation of section 3(1) ibid by questioning the legality of the appointment of the Petitioner as is evident from the

summary, dated 17-05-2019. A plain reading of the aforementioned summary shows that reliance has been placed on judgments of the august Supreme Court in the cases titled "University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali" [1992 SCMR 1093], "Federation of Pakistan through Secretary, Establishment Division, Govt. of Pakistan, Islamabad v. Muhammad Tariq Pirzada and others" [1992 SCMR 2189], "Dr Zahid Javed v. Dr Tahir Riaz Chaudhry and others " [PLD 2016 SC 637]. It is the stance of the respondents that since the judgment of the august Supreme Court in the case of "Dr Zahid Javed" supra was rendered on 03-03-2016, therefore the law enunciated therein was attracted while appointing the Petitioner because his appointment was made and notified on 31-08-2017. The learned Attorney General has also heavily relied on the above precedent law during the course of his arguments and, therefore, in order to answer the questions raised by him it would be essential to examine the said precedent law of the apex Court.

10. In the case titled "University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali" [1992 SCMR 1093] the august Supreme Court has interpreted sub section (8) of section 11 of the University of the Punjab Act 1973 and has held that the position of the Governor as Chief Executive of

the Province and while acting as Chancellor of the University is distinct. In this regard the apex Court has quoted with approval the judgment from the Indian jurisdiction titled "Dr. S. C. Barat and another v. Hari Vinnyak Pataskar and others" [AIR 1962 MADHYA PRADESH 73]. The controversy in the said case related to the powers of the Chancellor of Jabalpur University. In this case the High Court had held that the State legislature was not prevented from conferring by law any functions on the Governor either as Governor or in a different capacity. It has been further elaborated that when a statute confers power on the Governor not qua the Governor but in a different capacity by virtue of the latter's office then the powers and duties so conferred are not powers and duties of the office of the Governor but that of the different capacity. While interpreting section 9 of the Jabalpur University Act 1956 it was held that the provision does not make the Governor of the State the Chancellor of the University by virtue of his office as Governor. It was thus interpreted that the plain meaning of the provision is that the person who is for the time being the Governor of the State shall be the Chancellor. The High Court, therefore, held that the powers and duties which the Chancellor exercises or performs under the Jabalpur University Act 1956 are not powers or duties conferred on the Governor qua Governor or of a capacity which he occupies by virtue of the said office. These are

powers and duties of a public capacity held by the personage who also happens to be the Governor. The High Court explained and held that the Chancellor's powers under the Jabalpur University Act 1956 were not the powers and duties of the office of the Governor.

11. The statute which was being interpreted by the apex Court in the case titled "University of the Punjab, Lahore and 2 others v. Ch. Sardar Ali" [1992 SCMR 1093] was similar to the one that was interpreted by the learned High Court of Madhya Pradesh in the aforementioned case. The powers and functions conferred on the Chancellor under the University of the Punjab Act 1973 were not conferred on the Governor qua Governor but in a different capacity by virtue of his office.

12. In the case titled "Federation of Pakistan through Secretary, Establishment Division, Government of Pakistan, Islamabad v. Muhammad Tariq Pirzada and others" [1999 SCMR 2189] the august Supreme Court had dealt with a petition seeking review of an earlier judgment wherein Article 32 of the Establishment of the office of Wafaqi Mohtasib (Ombudsman) Order, 1983 [hereinafter referred to as the "**Order of 1983**"] had been interpreted and it was held that the President was vested with full and complete powers to arrive at his own conclusion independently and that such

power was not fettered by the advice of the Prime Minister. The august Supreme Court, therefore, held as follows:

> *"The adjudicatory/quasi judicial powers vesting in the President under Article 32 of the Order are to be exercised by him in his individual judgment by recording reasons in writing and not on the advice of the Prime Minister/Cabinet. The recommendations/findings recorded by the Mohtasib are binding on the Agencies concerned subject to the orders by the President on representation under Article 32 of the Order and in the light of the observations made in the judgment under review as clarified in this order."*

13. The august Supreme Court, in the case titled "Rana Aamer Raza Ashfaq and another v. Dr Minhaj Ahmad Khan and others" [2012 SCMR 6], interpreted the provisions of Baha-ud-Din Zakariya University Act 1975 and held that the Chancellor, in performance of functions and exercise of powers and duties, was bound by the advice of the Prime Minister. However, the said judgment was later declared as not to be a good law by a larger Bench of the august Supreme Court consisting of five Hon'ble Judges in the case

titled "Dr Zahid Javed v. Dr Tahir Riaz Chaudhry and others" [PLD 2016 S.C. 637].

14. In the aforementioned case titled "Dr Zahid Javed v. Dr Tahir Riaz Chaudhry and others" supra the august Supreme Court, while interpreting the powers conferred on the Governor in performing functions and exercising powers and duties of the Chancellor under the University of the Punjab Act 1973, has made a distinction between the expressions function, power and quasi judicial powers. The august Supreme Court has held that the Governor, who exercises powers as persona designata i.e as Chancellor of the University and in the nature of quasi judicial powers, then in such an eventuality the latter has to act independently and not upon the advice of Prime Minister. It has been observed that such powers, functions and duties can neither be delegated to any other person or authority nor exercised on the recommendations of any other authority or person. The august Supreme Court affirmed the principles and law propounded in the earlier judgments of the University of the Punjab versus Ch. Safdar Ali, supra and Federation of Pakistan versus Mohammad Tariq Pirzada, supra.

15. It is noted that a plain reading of Article 48 of the Constitution manifests the intent of the makers and it has to

be interpreted and understood in the context of the acknowledged salient features which forms the foundation of the edifice of our Constitution. The august Supreme Court has consistently held that some characteristics, such as democracy, federalism, parliamentary form of government, independence of judiciary, fundamental rights, equality, justice and fair play are the salient features of the Constitution and that there are implied restrictions upon the Majlis-e-Shoora (Parliament) to amend or abrogate these fundamental characteristics. Article 48 of the Constitution, therefore, has been interpreted in the context of the most important salient feature of the Constitution i.e. the parliamentary form of government. A larger Bench of the august Supreme Court in the case titled "Al-Jehad Trust through Raees-ul-Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court and another v. Federation of Pakistan and others" [PLD 1997 S.C. 84] has held that Article 48 of the Constitution contains the basic characteristic of parliamentary form of government by mandating that the President has to act upon the advice of the Cabinet or the Prime Minster. It has been further held that Article 48(1) will automatically be attracted whenever the President is exercising his functions, except in the case of the exception described under Article 48(2) which provides that the President shall act in his discretion in respect of any matter

which he is empowered by the Constitution to do so. It has been further observed that making an appointment is an executive function. The principles of parliamentary democracy have been highlighted by the august Supreme Court in the case titled "Mian Muhammad Nawaz Sharif v. President of Pakistan" [PLD 1993 S.C. 473] and the relevant portion is reproduced as follows:

> **"***Our Constitution, in fact, is designed to create a parliamentary democracy. The President in this set-up is bound to act, in the exercise of his functions, in accordance with the advice of the Cabinet or the Prime Minister [Article 48(l)] and the Cabinet in its turn is collectively responsible to the National Assembly [Article 91(4)] though the Prime Minister holds office at the pleasure of the President. However, the President cannot remove him from his office as long as he commands the confidence of the majority of the members of the National Assembly [Article 91(5)]. In view of these provisions, the system of Government envisaged by the Constitution of 1973 is of the parliamentary type wherein the Prime Minister as Head of the Cabinet is responsible to the Parliament, which consists of the representatives of the nation.*
>
> *It is manifest, therefore, that in the scheme of our Constitution, the Prime Minister in administering the affairs of the Government is neither*

answerable to the President nor in any way subordinate to him. In formulation of the policies of his Government and in the running of its affairs, the Prime Minister is answerable only to the National Assembly and not to the President. Indeed, it is the President who is bound by the advice of the Prime Minister or the Cabinet in all matters concerning formulation of policies and administration of the affairs of the Government and not the other way about, as appears to have been mistakenly understood. Undoubtedly, the President may require the Cabinet or the Prime Minister, as the case may be, to reconsider any advice tendered to him but the President is bound to act on the advice tendered, even if it be the same, after consideration. Undoubtedly, both are expected to work in harmony and in close collaboration for the efficient running of the affairs of the State but as their roles in the Constitution are defined, which do not overlap, both can exercise their respective functions unhindered and without bringing the machinery of the Government to a standstill. Despite personal likes or dislikes, the two can co-exist Constitutionally. Their personal likes or dislikes are irrelevant so far as the discharge of their Constitutional obligations are concerned. Despite personal rancour, ill-will and incompatibility of temperament, no deadlock,

no stalemate, no breakdown can arise if both act in accordance with the terms of the Oath taken by them, while accepting their high office. They have sworn: not to allow their personal interest to influence their official conduct or their official decisions."

16. In the light of the above discussion, it is obvious that the scheme of the Constitution is based on the foundation of parliamentary form of Government and democracy and thus it is the constitutional obligation of the President to act on the advice of the Prime Minister except when the Constitution has explicitly empowered the former to act in his discretion. Moreover, while interpreting a statutory provision the scheme of the Constitution is an important factor that has to be taken into consideration. The Majlis-e-Shoora (Parliament) is empowered to confer powers, duties and functions on the President, either as President or in a different capacity. Likewise, the duties, powers and functions conferred through a statute can either be administrative e.g making an appointment or adjudicatory or quasi judicial in nature such as deciding representation under Article 32 of the Order of 1983 or review, revision or appeal. When the power, duty or function has been conferred under a statute on the President as President and it is not in the nature of adjudicatory or quasi judicial power then it is mandatory to act on the advice

of the Prime Minister. On the other hand, when the power or function conferred under the statute on the President is not qua the President but in a different capacity such as Chancellor of a University, as was the case in the aforementioned judgments, then such power or function is to be exercised independently and not on the advice of the Prime Minister. In such an eventuality the President is vested with powers not as qua President but rather as persona designata. In the case in hand, section 3(1) of the Ordinance of 2000 provides that 'there shall be a Federal Tax Ombudsman who shall be appointed by the President'. This function has been conferred on the President qua the President and not in a different capacity. It is an administrative function and does not involve exercising adjudicatory or quasi judicial power. The President thus does not act as persona designate, rather the power and function has been conferred on the President as President and not in a different capacity. On the touchstone of the principles and law enunciated by the august Supreme Court in the cases titled University of the Punjab versus Ch. Safdar Ali, supra, Federation of Pakistan versus Mohammad Tariq Pirzada, supra and Dr Zahid Javed versus Dr. Tahir Riaz Chaudhry, supra the President, in exercising power under section 3(1) of the Ordinance of 2000, has a constitutional duty to act on the advice of the Prime Minister. However, though the power

conferred under section 32 of the Ordinance of 2000 or section 14 of the Act of 2013 is conferred on the President qua the President but it has to be exercised independently and not on the advice of the Prime Minister because its nature is adjudicatory or quasi judicial. The summary, dated 17-05-2019, submitted to the Prime Minister and proposing to withdraw the summary dated 30-08-2017, whereby advice was tendered to the President regarding the appointment of the Petitioner as Tax Ombudsman was based on gross misinterpretation of section 3(1) of the Ordinance of 2000 and the law enunciated by the august Supreme Court in the judgments which have been discussed above. This Court has been informed that only recently the Ombudsman under the Insurance Ordinance, 2000 was appointed by the President on the advice of the Prime Minster pursuant to a summary initiated by the Ministry of Law and Justice. The learned Attorney General, despite his able assistance, could not give a plausible explanation for the submission by the Ministry of Law and Justice of an altogether contradictory opinion in the case of the Petitioner's appointment. The opinion stated in the summary, dated 17-05-2019, by the Ministry of Law and Justice and the consequent impugned notification, dated 12-06-2019, are declared as illegal, issued in violation of the Ordinance of 2000 read with the Act of 2013 and without lawful authority and jurisdiction.

17. For what has been discussed above, this petition is ***allowed*** and consequently the impugned notification, dated 12-06-2019, is hereby set aside. The impugned notification was illegal and definitely issued in violation of the scheme of the Constitution, the Ordinance of 2000 read with the Act of 2013.

18. Before parting, this Court cannot ignore the lack of care exercised by the Ministry of Law and Justice in initiating the summary dated 17-05-2019. The learned Attorney General could not give a plausible explanation regarding a different stance taken by the Ministry of Law and Justice in the case of the recently appointed Ombudsman under the Insurance Ordinance of 2000. The Ministry of Law and Justice was expected to have taken extraordinary care while initiating the summary because what had been proposed had serious consequences for an essential salient feature of the Constitution i.e parliamentary form of government and democracy, besides the independence of a statutory adjudicatory public office. Moreover, the Ministry of Law and Justice was proposing a course of action based on interpretation of section 3(1) of the Ordinance of 2000 which was a drastic departure from the interpretation that had led to appointments made from time to time for almost two decades. The Ministry, as well as the learned Attorney General, could not give a satisfactory answer regarding the

fate of the orders passed and convictions handed down for contempt by successive Tax Ombudsmen since the promulgation of the Ordinance of 2000 almost two decades ago if the appointments were to be treated as void ab initio. Taking extraordinary care and exercising extreme caution was inevitable because the impugned notification issued in view of the summary dated 17-05-2019 has definitely undermined and jeopardised the legislative intent of ensuring the independence of the office of the Tax Ombudsman and the Ombudsmen appointed under the other relevant laws. It was of utmost importance to lean in favour of caution because according to the unequivocal statement made by the learned Attorney General of Pakistan on behalf of the Federal Government, the latter has no reservation whatsoever regarding the conduct or capability of the Petitioner in performing the duties of his office. In response to the Court's query the learned Attorney General had unambiguously stated that the Federal Government has no reservation or objection regarding the Petitioner being an accused and charged for the offence of murder in a pending trial. It would be appropriate not to make any observation in this regard lest it may prejudice any proceedings that may be initiated later. The summary, dated 17-05-2019, was based on a misleading interpretation which had led to the issuance of the impugned notification. In the facts and circumstances of the case in

hand, particularly in view of protecting the integrity and independence of the office of the Tax Ombudsman, the Prime Minister and the President, before acting upon the opinion of the Ministry of Law and Justice, could have considered other options including invoking the advisory jurisdiction of the august Supreme Court conferred under Article 186 of the Constitution. It was definitely a matter of public importance because the departure from two decades of consistent interpretation of section 3(1) read with Article 48 of the Constitution had consequences for the independence of the office of the Tax Ombudsman as well as one of the essential salient features of the Constitution. This Court expects that in future in such matters of public importance the Ministry of Law and Justice and other authorities would exercise extreme care and caution in order to avoid undermining the integrity and independence of adjudicatory public offices because it is better to err on the side of caution rather than committing an illegality amounting to violation of the scheme of the Constitution.

CHIEF JUSTICE

Announced in open Court on **19-09-2019.**

CHIEF JUSTICE

Approved for reporting.

Tanveer Ahmed.