

**ORDER SHEET**  
**ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT**

**Writ Petition No.3970 of 2018**

***Ali Rizwan Raja.***  
***Vs***  
***Federation of Pakistan and others.***

<b>S. No. of order/ proceedings</b>	<b>Date of order/ Proceedings</b>	<b>Order with signature of Judge and that of parties or counsel where necessary.</b>
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15.11.2018.	M/s Inam Ul Rahim & Malik Waheed Akhtar, Advocates for the petitioner. Mr. Arshad Mehmood Kiani, learned DAG. Brigadier Falak Naz Director (Legal), M/o Defence. Mr. Omer, SP Saddar. Mr. Gulzar, Inspector P.S Ramna. Mr. Jamshed, Inspector P.S Ramna.
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**AAMER FAROOQ J.** The instant petition is in the nature of habeas corpus filed by one Ali Rizwan Raja seeking production of his father Brigadier (retired) Raja Rizwan Ali Haider, who allegedly is missing since 10.10.2018. In this behalf, it has been alleged in the petition, that the petitioner's father Brigadier (retired) Raja Rizwan Ali Haider, along with his driver Waseem Akbar went to meet a friend at G-10, Islamabad at 07:00 P.m and when he was near G-10/2, Islamabad at about 08:00 P.m as he stopped and got out from the car to buy some eatables, he disappeared and never returned. It was also alleged that the mobile phone of the petitioner is switched off since then. It was also alleged that with the aid of

police the matter was investigated, however, it transpired that Brigadier (retired) Raja Rizwan Ali Haider was forcibly pushed into a car white colour Fielder with tainted glasses. This Court on 22.10.2018 issued notices to the respondent and had also summoned respondent No.5 to render report. In response to the notices issued, respondents have entered appearance and report/comments have been filed on behalf of respondent No.1, wherein, it has been stated that Brigadier (retired) Raja Rizwan Ali Haider is in military custody.

2. Learned counsel for the petitioner, inter alia, contended that Brigadier (retired) Raja Rizwan Ali Haider is in unlawful custody of military inasmuch as he is a retired Army Officer and is not subject to the Pakistan Army Act, 1952. It was further contended that under Section 59 of the Pakistan Army Act, 1952 certain procedure needs to be followed on detention of any person, which has not been done in the instant case apparently.

3. Learned Deputy Attorney General as well as Director law respondent No.1, inter alia, contended that Brigadier (retired) Raja Rizwan Ali Haider is under investigation for offences committed under Pakistan Army Act, 1952; that inquiry/investigation for conducting Court Martial are under way; that even persons who

are not otherwise susceptible to Pakistan Army Act, 1952 can be detained and investigated under Section 2(d)(ii) of 1952 Act. It was further contended that under Sections 73, 74 & 75 detailed procedure is provided for detaining a person against whom investigation is pending for holding a Court Martial, hence the custody of Brigadier (retired) Raja Rizwan Ali Haider is not unlawful.

4. Arguments advance by learned counsels for the parties have been heard and documents placed on record examined with their able assistance. The petitioner, in the instant petition has made the following prayer:-

***i. The respondents be directed to produce the father of the petitioner Brigadier (retired) Raja Rizwan Ali Haider, safe and sound before this Hon'ble Court, who on production, be dealt with in accordance with law and the Constitution.***

***ii. The respondents be directed to disclose the charge (if any), pending against the detinue before this Hon'ble Court.***

***iii. The abductors of Brigadier (retired) Raja Rizwan Ali Haider be proceeded against criminally on account of his illegal arrest and detention.***

***Any other relief which this Hon'ble Court deems fit and proper may also be awarded.***

5. As mentioned above, the instant petition is in the nature of habeas corpus i.e. for production of petitioner's father Brigadier

(retired) Raja Rizwan Ali Haider. It was alleged in the petition that the whereabouts of the referred person are not known, therefore, respondents be directed to produce him. Since now as per the statement by the learned Deputy Attorney General as well as Director law respondent No.1, Brigadier (retired) Raja Rizwan Ali Haider is in military custody hence whereabouts of the referred person are known.

6. It has been contended by learned counsel for the petitioner that Brigadier (retired) Raja Rizwan Ali Haider is not subject to Pakistan Army Act, 1952, however, such is not the case inasmuch as under Section 2(1) of the Act the following persons are subject to Pakistan Army Act, 1952 which include under Section 2(1)(d) persons not otherwise subject to this Act, who are accused of--

(i) -----

(ii) having committed, in relation to any work of defence, arsenal, naval, military or air force establishment or station, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan, an offence under the Official Secrets Act, 1923.

7. Furthermore, the report filed by respondent No.1 as well as during the course of arguments it was stated by the learned

Deputy Attorney General that the allegations leveled against the petitioner are inter alia, under Official Secrets Act, 1923.

8. Learned counsel for the petitioner also stated that under section 59 of Pakistan Army Act 1952, the custody of the petitioner is unlawful. In response to the said argument learned Deputy Attorney General contended that Sections 2(1)(d) is to be read with Section 59, 73, 74 and 75 of Pakistan Army Act, 1952. For the sake of brevity the said provisions of law are reproduced below:-

**59. Civil offences.**        **(1) Subject to the provisions of subsection (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be 4[dealt with under this Act], and, on conviction, to be punished as follows, that is to say,---**

**(a) if the offence is one which would be punishable under any law in force in Pakistan with death or with imprisonment for life, he shall be liable to suffer any punishment assigned for the offence by the aforesaid law or such less punishment as is in this Act mentioned; and**

**(b) in any other case, he shall be liable to suffer any punishment assigned for the offence by the law in force in Pakistan, or rigorous imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned [:]**

**2[Provided that, where the offence of which any such person is found guilty is an offence liable to hadd under any Islamic law, the sentence awarded to him shall be that provided for the offence in that law.]**

**(2) A person subject to this Act who commits an offence of murder against a person not subject to this Act 5[xxx]6[ or the Pakistan Air Force Act, 1953 (VI of 1953)], or to the 7 [Pakistan Navy Ordinance, 1961 (XXXV of 1961)], or of culpable homicide not amounting to murder against such a person or**

of **8**[Zina or Zina-bil-Jabr] in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be **9**[dealt with under this Act] unless he commits any of the said offences,---

(a) while on active service, or

(b) at any place outside Pakistan, or

(c) at a frontier post specified by the Central Government by notification in this behalf.

(3) The powers of a Court martial **2**[or an officer exercising authority under section 23] to charge and punish any person under this section shall not be affected by reason of the fact that the civil offence with which such person is charged is also an offence against this Act.

**3**[(4) Notwithstanding anything contained in this Act or in any other law for the time being in force a person who becomes subject to this Act by reason of his being accused of an offence mentioned in clause (d) of sub-section (1) of section 2 shall be liable to be tried or otherwise dealt with under this Act for such offence as if the offence were an offence against this Act and were committed at a time when such person was subject to this Act; and the provisions of this section shall have effect accordingly].

**73. Custody of offenders.**\_\_\_\_(1) Any person subject to this Act who is charged with any offence may be taken into military custody.

(2) Any such person may be ordered into military custody by any superior officer, or except in the case of a person subject to this Act as an officer, by any member of the military, naval or air force police.

(3) An officer may order into military custody any officer, though he may be of a higher rank, who is engaged in a quarrel, affray or disorder.

**74. Duty of commanding officer in regard to person in custody.** Every commanding officer shall take care that a person under his command when charged with an offence is not detained in custody for more than forty-eight hours after the committal of such person into custody is reported to him, without the charge being investigated, unless investigation within that period seems to him to be impracticable having due regard to the public service. Every case of a person detained in custody beyond a period of forty-eight hours and the reason therefor shall be reported by the commanding officer to the officer, to whom application is to be made to convene a general or District Court martial for the trial of the person charged,---  
Provided that in reckoning the period of forty-eight hours all public holidays shall be excluded.

**75. Interval between committal and Court martial. In every case where any such person as is mentioned in section 73 and as is not on active service remains in custody for a longer period than eight days, without a Court martial for his trial being ordered to assemble, a special report giving reasons for the delay shall be made by his commanding officer in the manner prescribed and a similar report shall be forwarded at intervals of eight days until a Court martial is assembled or such person is released from custody.**

9. The above provisions of Pakistan Army Act, 1952 were dilated upon by the Hon'ble Lahore High Court, in case reported as "Allah Rakha Vs. District Magistrate Sialkot" (PLD 1968 Lahore 1061). The Hon'ble Lahore High Court observed as follows:-

**"The combined effect of sections 73,74 and 75 seems to be that a person subject to the Act and accused of an offence triable under the Act can be taken into custody by the military authorities and detained in such custody until he is tried by a military Court or otherwise released. When these provisions are read in conjunction with the provisions to which reference has already been made, namely, the enlarged sections 2 and 59 of the Act, it becomes clear that a civilian accused of an offence punishable under section 3 of the Official Secrets Act in relation to the military affairs of Pakistan can be arrested and detained by the military authorities as he becomes a person subject to the provisions of the Pakistan Army Act in view of the amendments introduced in section 2 and 59 of the Act".**

10. Similarly, in case reported as "Farzana Tasneem Vs. Federation of Pakistan" (PLD 2005 Lahore 391) the Hon'ble Lahore High Court observed as follows:-

**"It is an admitted position that the detenus have been arrested under the Army Act as stated by the learned D.A.-G and we find that there is no**

***reason disbelieve his statement and it is sufficient to infer that the detenus have not been arrested except in due course of law and the matter relating to the members of the Army Force are immune from scrutiny of this Court in view of Sub Article (3) of Article 199 of the Constitution except where the judgment is mala fide, without jurisdiction or coram non judice. Reliance can be placed to the cases of Ex. Lt.-Col. Anwar Aziz v. Federation of Pakistan through Secretary Ministry of Defence, Rawalpindi and 2 others (PLD 2001 SC 549). In case of Mst. Naheed Maqsood v. Federation of Pakistan and 4 others (1997 CLC 13), it has been observed that where Clauses (3) & (5) of Article 199 of the Constitution are attracted, the ouster of jurisdiction if any, is absolute and it is not conditional upon the existence of some circumstances. The same principle had been laid down by the Hon'ble Supreme Court in case of Muhammad Mushtaq v. Federation of Pakistan (1994 SCMR 2286) which envisages that the relief regarding fundamental rights is included in Sub-Article (1); which is clearly barred under Article 199 of the Constitution with regard to Sub Article (3) thereof. The matter has lastly been dealt with by the Hon'ble Supreme Court in case of Mst. Shahida Zahir Abbasi and 4 others (supra) as earlier referred by us in the preceding paragraph. Further strength can be sought from a recent judgment passed in Writ Petition No.66 of 2004 by a Division Bench of this Court".***

11. Likewise, in case reported as "Asif Mehmood vs. Federation of Pakistan" (PLD 2005 Lahore 721) the Hon'ble Lahore High Court observed as follows:-

***"I am, therefore, of the view that non-production of the accused officers within 24 hours of their arrest before a Magistrate in accordance with the provisions of Article 10(2) of the Constitution for obtaining their remand was of non-consequence. Similarly, the absence of a written order of arrest as according to the contention of respondents, the accused officers were arrested under an oral order of C.O.A. S. which is permissible under the Act though not preferable.***



***It is admitted position that the detenu has been arrested under the Army Act and there is no reasons to disbelieve this statement as it is sufficient to infer that the detenu has not been arrested except in due C course of law and the matter relating to the members of the army force are immune from scrutiny of this Court in view of Sub-Article (3) of Article 199 of the Constitution except where the judgment is mala fide.***

***Though the detenu in this case has not been an Army personnel but he has also been arrested under the Army Act, therefore, this case is also covered with the bar as contained under Article 199(3) of the Constitution of Islamic Republic of Pakistan, 1973”.***

12. In view of the above provisions of Pakistan Army Act, 1952 and the interpretation awarded to the same, it is clear that a person who is not an Army Officer can be detained and or proceeded under the Pakistan Army Act, 1952 in the circumstances mentioned in Section 2 (d) of the Act *ibid*. Moreover, such a person can be detained for investigation and proceeded with accordingly. There is nothing on record to show that otherwise the arrest/detention of Brigadier (retired) Raja Rizwan Ali Haider is unlawful in any manner. In PLD 1968 Lahore 1061 *supra* the Hon’ble Lahore High Court clinched the subject by observing that a person can be proceeded against under Pakistan Army Act, 1952 if he falls under Section 2(1)(d) of the same; when such is the case Sections 73 to 75 are attracted and detention can be

extended time and again for reasons in writing where the Court Martial proceedings do not commence within eight days of detention.

13. In view of the foregoing, since the whereabouts of Brigadier (retired) Raja Rizwan Ali Haider are known and he is under the custody of military under the Pakistan Army Act, 1952, hence his production order cannot be made. The relief to the said extent cannot be granted, hence is disallowed. Moreover, in light of report by respondents the detinue is under investigation for offences under Section 2(1)(d) of Pakistan Army Act, 1952. The petition to the extent of second part of relief has borne fruit and is accordingly disposed off. Likewise in view of above discussion third part of relief prayed is disallowed. However, needless to observe that Brigadier (retired) Raja Rizwan Ali Haider may avail remedies available to him under the law.

**(AAMER FAROOQ)**  
**JUDGE**

\*Shakeel Afzal\*