

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1350 of 2017

Dr. Joseph Wilson

Versus

Federation of Pakistan through Secretary Ministry of Interior and
others

Date of Hearing: 09.05.2017

Petitioner by: Mr. Farooq Amjad Meer, learned ASC,

Respondents by: Chaudhry Abdul Khaliq Thind, learned
Deputy Attorney-General,
Mr. Imran Shafique, Special Prosecutor
N.A.B. with Ahmad Saeed Wazir, Deputy
Director/I.O. N.A.B.

Mr. Muhammad Azeem Akhtar, Assistant
(ECL) Ministry of Interior.

MIANGUL HASSAN AURANGZEB J:- Through the instant petition under Article 199 of the Constitution, the petitioner, Dr. Joseph Wilson, seeks the quashment of memorandum dated 03.03.2017, issued by Ministry of Interior, Government of Pakistan (respondent No.1), whereby his name was placed on the Exit Control List ("E.C.L.") on the recommendation of the National Accountability Bureau (respondent No.2).

2. The record shows that the petitioner is a citizen of Pakistan by birth, and also a naturalized citizen of Canada. The petitioner is a lawyer by training, and has received an L.L.M. degree from the University of Georgia (U.S.A.) in 1995; a further L.L.M. degree from McGill University, Montreal (Canada) in 1996; and a degree of Doctorate of Law from McGill University, Canada, in 2002.

3. The petitioner served as a Member of the Competition Commission of Pakistan ("C.C.P.") for three consecutive terms of three years each until November, 2016. On 26.07.2013, the Federal Government notified the petitioner as the Acting Chairman, C.C.P., under Section 16 of the Competition Commission, Act, 2010 ("the 2010 Act"). The petitioner served as the Acting Chairman, C.C.P. from 22.08.2013 to 22.12.2014.

4. The petitioner was issued call-up notices dated 26.01.2016, and 28.04.2016, by respondent No.2 requiring him to record his

plea regarding appointments made in C.C.P., during the period when the petitioner served as Acting Chairman of C.C.P., and when a ban on appointments had been imposed by the Federal Government. The petitioner was also required to record his plea regarding the hiring of the building for the Regional Office of the C.C.P. at Karachi; the procurement of furniture of the said office; and sanctioning of foreign visits for employees of C.C.P. without fulfilling the requisite formalities. The petitioner submitted written replies to the first call up notice on 11.02.2016, and to the second call up notice on 03.05.2016. During the petitioner's visit to respondent No.2's office on 25.07.2016, he surrendered his passports on the directions of the Inquiry Officer.

5. On 26.10.2016, the petitioner filed writ petition No.3867/2016, before this Court, seeking quashment of the proceedings initiated against him by respondent No.2. The petitioner had also sought the return of his passports. On 10.11.2016, respondent No.2 returned the petitioner's passports. After the petitioner came to know that an investigation has been authorized against him, and that he had been accused of causing a loss of Rs.10 million to the national exchequer, he filed an application (C.M.No.4867/2016) before this Court for temporary relief. Vide order dated 14.12.2016, this Court directed respondent No.2 to act strictly in accordance with the law, and not to harass the petitioner or take adverse action against him.

6. Vide memorandum dated 03.03.2017, respondent No.1 placed the petitioner's name on E.C.L. According to the said memorandum, the petitioner had been accused of misusing his authority in making appointments in the C.C.P., causing a loss to the national exchequer to the tune of Rs.21 million. The petitioner was given no prior notice regarding the placement of his name on the E.C.L. On 14.03.2017, when the petitioner was going to travel from Islamabad to Berlin for a talk at an International Conference organized by the German Cartel Office, he was informed at the immigration counter at the airport that his name

had been placed on E.C.L. The petitioner was stopped from proceeding abroad.

7. On 14.03.2017, the petitioner submitted a representation to respondent No.1. On 16.03.2017, the petitioner submitted another representation to respondent No.1, seeking the removal of his name from the E.C.L. Having not received any plausible response from respondent No.1, the petitioner filed the instant writ petition seeking the removal of his name from the E.C.L.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:-

8. Mr. Farooq Amjed Mir, A.S.C., learned counsel for the petitioner submitted that on 26.07.2013, the position of the Chairman, C.C.P. fell vacant; that the petitioner, being the senior most Member of the C.C.P., was notified by the Federal Government on 22.08.2013 as the Acting Chairman, C.C.P., in which position he served until 22.12.2014, when a regular Chairperson was appointed; that the petitioner has been accused of appointing seven persons in the C.C.P. during the period when the Federal Government had imposed a ban on appointments; that the petitioner was also accused of hiring premises for opening a regional office for the C.C.P. at Karachi, and purchasing furniture for the said office; that the maltreatment meted out to the petitioner by respondent No.2, caused him to file writ petition No.3867/2016 before this Court; that vide interim order dated 14.12.2016, this Court restrained respondent No.2 from *inter alia* taking any adverse measures against the petitioner; and that on the recommendations of respondent No.2, respondent No.1 has placed the petitioner's name on E.C.L.

9. It was further submitted that after the aforementioned interim order dated 14.12.2016 was passed by this Court, respondent No.2 should not have asked respondent No.1 to place the petitioner's name on E.C.L.; that respondent No.2 in its reply to writ petition No.3867/2016, had pleaded that the petitioner had caused a loss of Rs.10 million to the national exchequer; that in contradiction to its said pleadings,

respondent No.2 is now accusing the petitioner of causing a loss of Rs.21 million; that the said contradiction is indicative of *malafides* on respondent No.2's part; that even after the issuance of the call-up notices to the petitioner, the petitioner has travelled abroad on three occasions; that the petitioner is resolute in defending his reputation and clearing his name from all sorts of allegations being hurled by respondent No.2 against him; that the petitioner shall cooperate in the enquiry/investigations against him, and has no intention of staying abroad in order to impede the enquiry/investigation against him; that the petitioner was not given any opportunity of hearing by respondent No.1 before placing his name on E.C.L.; that the petitioner is a frequent flyer and has to proceed abroad to give lectures and attend conferences; that the petitioner's name could not have been placed on E.C.L. as he is alleged to have caused a loss of Rs.21 Million; that the Hon'ble Supreme Court, in the order passed in the case of the State Vs. Hanif Hyder (2016 SCMR 2031) observed that the legislative intent behind the National Accountability Ordinance, 1999, was not that inquiries and investigations be carried out in petty matters involving less than Rs.100 million; that no response was given by respondent No.1 to the petitioner's representations dated 14.03.2017, and 16.03.2017; that since the remedy contemplated under Section 3 of the Exit from Pakistan (Control) Ordinance, 1981, is not adequate and efficacious, the petitioner filed the instant writ petition praying for a direction to respondent No.1 to remove his name from E.C.L; and that the placement of the petitioner's name on E.C.L. has violated his fundamental right of movement, which includes foreign travel. Learned counsel for the petitioner prayed for the writ petition to be allowed by directing respondent No.1 to remove the petitioner's name from the E.C.L.

CONTENTIONS OF THE LEARNED ASSISTANT ATTORNEY-GENERAL:-

10. On the other hand, Chaudhry Abdul Khaliq Thind, learned Assistant A-G. submitted that the petitioner's name had been

placed on E.C.L. for a period of one year in accordance with Section 2 of the Exit from Pakistan (Control) Ordinance, 1981, on the recommendations of respondent No.2; that the allegations against the petitioner were that he had misused his authority by (i) making appointments in the C.C.P., (ii) hiring a building for the regional office for the C.C.P. at Karachi, and purchasing furniture and equipment for the said office, and (iii) authorizing foreign visits of his close subordinates at the expense of the C.C.P.; that by misusing his authority, the petitioner had caused a loss of Rs.21 million to the national exchequer; that law neither obligated respondent No.1 to give reasons for placing the petitioner's name on E.C.L., nor to afford an opportunity of a hearing to the petitioner; and that the petitioner could avail the alternative remedy of filing a review petition against the placement of his name on E.C.L. Learned Assistant Attorney-General prayed for the writ petition to be dismissed.

CONTENTIONS OF THE LEARNED SPECIAL PROSECUTOR, NATIONAL ACCOUNTABILITY BUREAU (RESPONDENT NO.2):-

11. Mr. Imran Shafique, Advocate, learned Special Prosecutor (N.A.B.) submitted that the writ petition instituted by the petitioner was misconceived and amounted to an abuse of the process of the law; that the writ petition was an effort to hamper the proceedings initiated by respondent No.2 against the petitioner; that the questions agitated in the writ petition were factual in nature, and were the subject matter of an investigation; that the proceedings initiated against the petitioner were strictly in accordance with the law; that there was sufficient incriminating material available against the petitioner; and that since the petitioner was involved in corruption and corrupt practices, he should not be granted any relief by this Court.

12. It was further submitted that after a complaint was filed against the petitioner, alleging misuse of authority and commission of corrupt practices, an inquiry was authorized by the competent authority against the petitioner on 28.09.2015; that since the petitioner is also a Canadian citizen, there is an apprehension that he may abscond in order to avoid the pending

inquiry/investigation; that the petitioner's name had been placed on E.C.L. on respondent No.2's request dated 25.08.2016; that the law does not prohibit respondent No.2 from taking cognizance of matters where the loss to the national exchequer caused by corruption and corrupt practices is less than Rs.100 million; and that the necessary authorization/approval for investigating the matter pertaining to the corruption and corrupt practices committed by the petitioner had been obtained from the competent authority.

13. It was further submitted that the petitioner, in his capacity as acting Chairman of the C.C.P., had misused his authority by illegally appointing persons despite a ban on fresh appointments imposed by the Federal Government, vide office memorandum dated 20.06.2015; that the C.C.P., on 30.06.2013, had decided to comply with the said direction issued by the Federal Government; that the petitioner was also responsible for sanctioning unnecessary expenditure by hiring a building and procuring furniture and equipment for establishing the C.C.P.'s office at Karachi; that the said expenditure had caused a loss of Rs.10 million to the national exchequer; and that the petitioner had also sanctioned foreign visits of his close subordinates without the approval of the competent authority. Learned Special Prosecutor prayed for the writ petition to be dismissed.

REBUTTAL ON BEHALF OF THE PETITIONER:-

14. Learned counsel for the petitioner submitted that there was no allegation of embezzlement against the petitioner; that the ban on recruitment imposed by the Federal Government through office memorandum dated 20.06.2015, did not apply to the C.C.P. which is administratively independent and autonomous; that Section 12 of the 2010 Act mandates that the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the C.C.P.; that Section 23 of the said Act, empowers the C.C.P., to appoint such officers, officials, experts, advisors and consultants as it considers necessary; that in view of the said statutory provisions, the ban on recruitments imposed by the Federal Government did not apply to

recruitments in the C.C.P.; that the said decision of the C.C.P. dated 05.07.2013, was in derogation of the said provisions of the statute; that the petitioner had, during his tenure as Acting Chairman C.C.P. terminated the contracts of certain employees in the C.C.P., who had been employed illegally; that as regards the hiring of an office for the C.C.P. at Karachi, this was not the decision of the petitioner alone, but that of the entire Commission; that Section 13 of the 2010 Act authorized the C.C.P. to establish offices at such other places as it considered necessary; that the decision to establish an office at Karachi, and to procure furniture and equipment for it, was made on the recommendation of a Committee headed by a Member of C.C.P.; that the procurement was for an amount of Rs.2.402 million out of which an amount of Rs.1.779 million had been paid; that as regards sanctioning foreign visits of the employees of C.C.P., the Chairman of the C.C.P. is empowered under Regulation No.1 of Chapter No.5 of the Competition Commission (Service) Regulations, 2007, to send employees of the C.C.P. abroad at the expense of the C.C.P.; that the instructions of the Cabinet Division regarding foreign visits of employees is applicable only to Government servants, whereas the employees of the C.C.P. are not government servants; and that the C.C.P. from the date of its inception, has not sought permission from the Cabinet Division for sending its employees abroad.

15. We have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The essential facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 7 above, and need not be recapitulated.

16. It must be borne in mind that these proceedings are regarding judicial review of respondent No.1's decision to place the petitioner's name on the E.C.L., and not a challenge to the substance of the allegations leveled by respondent No.2 against the petitioner. Therefore, we do not deem it necessary to go into the veracity of the allegations of corruption or misuse of authority leveled by respondent No.2 against the petitioner. What

we are concerned with, is whether or not respondent No.1's decision to place the petitioner's name on the E.C.L. is in accordance with the law and procedurally proper.

17. To prevent a man from leaving the country or from entering it is to impose a physical restraint on his person. It is to deprive him of a personal liberty. Freedom to travel, both within and outside the confines of the territory of the State, raises important issues of personal freedom. The right of free movement whether within the country or across its frontiers, either in going out or in coming in, is a personal liberty within the meaning of Article 9 of the Constitution, which says, "No person shall be deprived of life or liberty save in accordance with law." Freedom of movement is said to be the essence of personal liberty. A citizen cannot be deprived of his right to travel abroad except according to the procedure established by law. Reference in this regard may be made to the following judgments of the Superior Courts:-

- (i) In the case of Federation of Pakistan Vs. General (Retd.) Parvez Musharraf (PLD 2016 SC 570), it has been held as follows:-

"12. ...considering the question of inclusion or retaining the name of respondent No.1 in the ECL, thereby restricting his freedom of movement, we also cannot lose sight of the fact that under Article 15 of the Constitution freedom of movement is one of the fundamental rights guaranteed to every citizen of the Country, which cannot be abridged or denied arbitrarily on mere liking or disliking, without any lawful justification for this purpose. More so, when Article 4 of the Constitution further guarantees right to every individual to be dealt with in accordance with law."

- (ii) In the case of Pakistan Muslim League (N) Vs. Federation of Pakistan through Secretary, Ministry of Interior (PLD 2007 SC 642), it has been held as follows:-

"Every citizen has undeniable right vested in him as conferred under Article 15 of the Constitution to go abroad and return back to Pakistan without any hindrance and restraint but it must be kept in view that it is neither absolute nor unqualified as is indicative from the language employed in Article 15 of the Constitution as a specific mention has been made "subject to any reasonable restriction imposed by law in the public interest", meaning thereby that such right is subject to the relevant law which is in existence at

relevant time but "an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Therefore, action taken upon no ground at all or without proper application of the mind of an authority would also not qualify as an action in accordance with law and would, therefore, have to be struck down as being taken in an unlawful manner."
(Emphasis added)

- (iii) In the case of Riaz Ahmed Vs. Government of Pakistan (PLD 2014 Islamabad 29), the petitioner had challenged the placement of his name on the E.C.L. The petitioner's name was said to have been placed on the E.C.L. on the recommendations of Inter Services Intelligence, as he was alleged to have been active in terrorist activities against the security forces in Swat during an operation. The petitioner's repeated representations seeking the removal of his name from the E.C.L. had remained unattended. It was held by this Court that the right to travel was a fundamental right of every citizen guaranteed under Articles 4, 9 and 15 of the Constitution. It was also held to be a universally recognized right enshrined in Article 12(4) of the Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16.12.1966. Furthermore, it was held that no one could be kept in a lurch for an indefinite period, and that the authorities were under an obligation to decide the applications or representations of the general public in a fair and just manner, and within a reasonable time. This Court accepted the petitioner's writ petition and directed the respondents to remove the petitioner's name from the E.C.L., and to return his passport forthwith.
- (iv) In the case of Wajid Shams-ul-Hassan Vs. Federation of Pakistan through Secretary, Ministry of Interior (PLD 1997 Lahore 617), it has been held as follows:-

"14. In view of the above discussion, I have no doubt in my mind that the right of citizen to travel abroad is a fundamental right guaranteed by Articles 2A, 4, 9, 15 and

25 of the Constitution of Islamic Republic of Pakistan, 1973. Abridgment of this fundamental right by the State through the legislative or an executive measure has to be tested on the touchstone of the Constitutional provisions. The life, liberty or property of a citizen cannot be taken away or adversely affected except in accordance with law. However, the "law", I mean, a valid law which does not come in conflict with any of the provisions of the Constitution and should not be a law which is ex facie discriminatory. Section 2 of the Exit from Pakistan (Control) Ordinance, 1981, does not provide any guidelines or reasonable classification for taking the action against a person prohibiting him from travelling abroad. Even the valuable rights of citizens of being heard and of knowing the reasons for such an action have been denied. The provisions of the law are therefore, ex facie discriminatory as also capable of being administered in a discriminatory manner. If no reasons are assigned to an aggrieved person the remedy of review under section 3 of the Ordinance by making a representation becomes redundant. A citizen would not be in a position to make any effective representation in the absence of any reason or a speaking order. Prima facie, it may be difficult to sustain the validity of the Ordinance on the touchstone of Articles 2A, 4, 9 and 25 of the Constitution of Islamic Republic of Pakistan, 1973. Under this law, there is a scope for the executive to adopt a policy of pick and choose in any case without there being any justifiable grounds. I, however, refrain from expressing any final opinion in this regard for the reason that the vires of the Ordinance have not been specifically challenged in the writ petition. The same would be examined in some other appropriate case where a specific challenge to the validity of the said Ordinance is made. However, in the present case, the impugned order dated 14-11-1996 does not contain any reasons in support thereof. It is an arbitrary and a mala fide order. The same is a nullity in the eyes of the Constitution and the law. In the absence of any valid reasons, the validity of the impugned order dated 14-11-1996 cannot be adjudged and the same has, therefore, to be struck down as without lawful authority. Similar is the position of impugned order dated 19-1-1997 whereby the representation of the petitioner was rejected without informing him of any grounds or reasons for its rejection."

(Emphasis added)

The learned author Judge of the said report rose to grace the Hon'ble Supreme Court. Therefore, the said judgment is to be revered and respected.

18. The basic principles enunciated in the afore-referred cases describe a common dictum that freedom to travel abroad is a fundamental protection or right available to a person under Articles 4, 9 and 15 of the Constitution. The grant of such right is

certainly subject to restrictions placed by due process of law. Exit from Pakistan (Control) Ordinance, 1981, sets out the process of law by which a restriction could be placed on a person's right to travel abroad.

19. It may also be mentioned that articulation of the freedom of movement beyond the borders of a State has been made in Clause 42 of the *Magna Carta Libertatum* (the Great Charter of the Liberties), commonly known as Magna Carta. The said Clause provided:-

"(42) In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants - who shall be dealt with as stated above - are excepted from this provision."

20. In the United States, the Fifth Amendment guarantees that no person shall be "deprived of life, liberty or property without due process of law". There can be no doubt that in the United States the right of exit and of entry is regarded as a personal liberty. It has consistently been held that the right to travel or exit the country was a personal right included within the word, "liberty" as used in the Fifth Amendment, and that a citizen could not be deprived such a right without due process of law. Reference in this regard may made to the judgment of the U.S. Supreme Court in the case of Kent v. Dulles, 357 U.S. 116 (1958).

21. The Universal Declaration of Human Rights which was adopted by the United Nations General Assembly on 10.12.1948 and for which Pakistan voted, provides for freedom of movement within each state and also across its frontiers in either direction. Article 3 of the said Declaration is based on the general principle that, "everyone has the right to life, liberty and security of person." Article 13 deals with freedom of movement, and reads thus:-

*"Article 13(1) Everyone has the right to freedom of movement and residence within the borders of each state.
(2) Everyone has the right to leave any country including his own and to return to his country."*

22. Article 13 of the Universal Declaration of Human Rights is akin to Articles 9 and 15 of our Constitution. Since there is no inconsistency between Article 13 of the Universal Declaration of Human Rights and the provisions of our Constitution, the former can be cited and relied upon before Courts in Pakistan. In the case of Al-Jehad Trust Versus Federation of Pakistan (1999 SCMR 1379), the issue before the Supreme Court was whether the people of the Northern Areas of Pakistan (now Gilgit-Baltistan) could enjoy fundamental rights and be governed through their chosen representatives and to have access to justice through an independent judiciary, *inter alia*, for enforcement of their fundamental rights. Paragraphs 15 and 16 of the said report are reproduced herein below:-

“15. We may also observe that even under the Universal Declaration of Human Rights, to which Pakistan is a signatory, human beings have some basic fundamental rights irrespective of their origin or status. In this behalf reference may be made to Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15 and 21 of the Universal Declaration of Human Rights which read as follows:-

“.....

Article 13

Everyone has the right to freedom of movement and residence within the borders of each State.

Everyone has the right to leave any country, including his own, and to return to his country.

.....”

16. The Fundamental Rights enshrined in our Constitution in fact reflect what has been provided in some of the above-quoted Universal Declaration of Human Rights. It may be observed that this Court while construing the former may refer to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations. ...”

23. As a consequence of the enlargement of the concept of ‘freedom’ by judicial pronouncements, respondent No.1 is required to examine the recommendations of N.A.B. to place the name of a person on E.C.L. with a greater caution and care instead of mechanically following such recommendations and depriving a person of his freedom to travel abroad. Default in such objectivity is likely to result in infringement of the fundamental protection and liberty guaranteed to a person under the law and the Constitution. Respondent No.1 while deciding

whether or not to place a person's name on the E.C.L. on the recommendations of N.A.B. or any other agency, has a duty to strike a balance between restriction on the freedom available to a person to travel abroad and the nature and grievousness of the wrongdoing or crime committed by him. The principle of reasonableness has to be borne in mind by respondent No.1 while exercising discretion to restrict the fundamental protection of the right to travel abroad available to a citizen by placing his name on E.C.L. in exercise of power conferred by Section 2 of the Exit from Pakistan (Control) Ordinance, 1981, which is reproduced herein below:-

"2. Power to prohibit exit from Pakistan.— (1) The Federal Government may, by order, prohibit any person or class of persons from proceeding from Pakistan to a destination outside Pakistan, notwithstanding the fact that such person is in possession of valid travel documents.

(2) Before making an order under sub-section (1), the Federal Government shall not be necessary to afford an opportunity of showing cause to the person against the order.

(3) If, while making an order under sub-section (1) it appears to the Federal Government that it will not be in the public interest to specify the ground on which the order is proposed to be made, it shall not be necessary for the Federal Government to specify such grounds."

24. There is no dispute that the inquiry/investigation being conducted by N.A.B. against the petitioner is the only ground which has been treated by respondent No.1 as the reason for placing the petitioner's name on E.C.L., and as the impediment in removing the petitioner's name from E.C.L. Respondent No.1's order whereby the petitioner's name was placed on the E.C.L. is reproduced herein below:-

"It has been decided to place the name of Dr. Joseph Wilson S/o Cecil Wilson (CNIC #34201-4268868-9. Passport # AA6718685-Canadian Passport # GM.678844) r/o Apartment # 18, Block-O/16, 1st Floor, Royal Apartments, Diplomatic Enclave, G-5, Islamabad on Exit Control List under Section 2 of Exit from Pakistan (Control) Ordinance, 1981 for a period of one year on the recommendation of N.A.B. on the charges of misuse of authority regarding illegal appointments in the Competition Commission of Pakistan and causing loss to the national exchequer to the tune of Rs.21 Million."

(Emphasis added)

25. The said order hardly shows any application of mind by respondent No.1 regarding the allegations leveled by N.A.B. against the petitioner. Respondent No.1 appears to have carried out a mechanical exercise of placing the petitioner's name on the E.C.L. simply because N.A.B. asked it to do so. Respondent No.1 has not placed before us any material that would show that it examined and applied its independent mind to the material (if at all any) placed before it by N.A.B. before it made an informed decision to act on N.A.B.'s recommendation to place the petitioner's name on E.C.L.

26. Admittedly, the petitioner's name was placed on the E.C.L. without issuing him a show cause notice and without seeking any clarification or explanation from him. Respondent No.1 could not abridge the petitioner's fundamental rights of travelling abroad without due process. Section 2(2) of the Exit from Pakistan (Control) Ordinance, 1981, in effect, provides that before making an order for the placement of a person's name on E.C.L., it shall not be necessary for the Federal Government to afford an opportunity of showing cause to the person whose name is to be placed on E.C.L. This provision cannot be construed as an open license to respondent No.1 to place any citizen's name on E.C.L. without affording an opportunity of hearing to the person in question. An opportunity of hearing is an essential postulate of due process recognized in Articles 2-A, 4 and 10-A of the Constitution. It has consistently been held that fair opportunity of hearing and due process were fundamental rights of all citizens. The learned Assistant Attorney-General has not placed before us material that shows why respondent No.1 deemed it 'necessary' not to afford an opportunity of hearing to the petitioner before placing his name on E.C.L. In the absence of such material, respondent No.1 could not be absolved from its constitutional obligation of affording an opportunity of hearing to the petitioner whose fundamental right to travel was curtailed.

27. Respondent No.1 ought not to act mechanically in acting upon the recommendations of the N.A.B. It is supposed to record reasons for acting on N.A.B.'s recommendations of placing the

names of citizens of Pakistan on the E.C.L. The recording of reasons has been held to be an essential prerequisite for exercising power conferred under Section 2 of the Exit from Pakistan (Control) Ordinance, 1981. Section 2(3) of the Exit From Pakistan (Control) Ordinance, 1981, provides that it shall not be necessary for the Federal Government to specify the grounds on which an order is made to prohibit any person from proceeding abroad, if it will not be in the public interest to specify such grounds. However, the Federal Government must record reasons for not specifying such grounds. Absence of such reasons would be a stark violation of Section 24-A of the General Clauses Act, 1897. In the case of United Bank Limited Vs. Federation of Pakistan (2014 SCMR 856), the Hon'ble Supreme Court upheld the order passed by the Hon'ble Lahore High Court whereby respondent's name was ordered to be removed from the E.C.L. At paragraph 8 of the said report it was inter alia held as follows:-

"8. On perusal of the memorandum, we have reached the conclusion that the order has been passed in a mechanical manner by the Ministry of Interior without applying its mind and without giving any reason for such decision. This is a bald order and is hit by Section 24-A of the General Clauses Act, 1897 and cannot be sustained."

28. In the case of Mian Ayaz Anwar Vs. Federation of Pakistan through Secretary Interior (PLD 2010 Lahore 230), it has been held as follows:-

"An order under section 2(1) of the Ordinance means a speaking order giving reasons. The order must also sufficiently explain the element of "public interest" that would stand offended if the prohibitory order is not passed under the said subsection."

29. There appears to be consensus of judicial opinion on the point that the mere fact that an inquiry or an investigation was being conducted by N.A.B. or any other agency against the petitioner was not by itself a sufficient reason to place his name on E.C.L. Even the pendency of criminal proceedings, including proceedings before an Accountability Court (without an order or a request from the Court for the curtailment of an accused's freedom to travel abroad) is not considered a sufficient ground

to place a citizen's name on E.C.L. While this has been the general trend of judicial pronouncements, yet each case has to be examined on its own merits, and the peculiar facts of a case may cause a Court of Constitutional causes to decline relief to a petitioner seeking to have his name removed from the E.C.L. At this stage, reference to the following case law on the subject would be apposite:-

- (i) In the case of Shaikh Muhammad Mansoor Vs. Government of Pakistan through Secretary, Ministry of Interior (2008 MLD 955), the petitioner had entered into a plea bargain with N.A.B., but his name was not removed by the E.C.L. The respondents plea was that there were two other enquiries pending against him before N.A.B. It was held by the Hon'ble Lahore High Court that this was not a cogent reason to bypass or ignore the Constitutional provisions enshrined in Articles 4, 9 and 15 of the Constitution. Order passed by the respondents, declining to remove the petitioner's name from E.C.L. was declared without lawful authority.
- (ii) In the case of Sohail Latif Vs. Federation of Pakistan through the Secretary, Ministry of Interior (PLD 2008 Lahore 341), the petitioner's name had been placed on the E.C.L. by the Ministry of Interior at the behest of N.A.B. on the ground that investigation/prosecution against the petitioner was in progress. It was held that no material had been placed before the authorities before the petitioner's right of free movement was curtailed by placing his name on E.C.L. The Hon'ble Lahore High Court declared the respondent's action of placing the petitioner's name on E.C.L. to have been taken without lawful authority and of no legal effect. The right of a citizen to travel abroad was held to be a fundamental right guaranteed by Articles 2-A, 4, 9 and 15 of the Constitution.
- (iii) In the case of Munir Ahmad Bhatti Vs. Government of Pakistan, Ministry of Interior (PLD 2010 Lahore 697), it was held that the involvement of a person in civil or criminal

litigation was not ground to place his name on the E.C.L., unless the court where the matter was subjudice passed a specific order in that regard.

- (iv) In the case of Masood Ahmed Vs. Federation Pakistan through Secretary, Ministry of Interior (2010 YLR 28), it has *inter alia* been held that mere investigation by N.A.B., which had been going on for a long time, would not be a ground for depriving the petitioner of his constitutional right of living as a free citizen of Pakistan and travelling abroad.
- (v) In the cases of Mian Munawar Ahmed Vs. Federation of Pakistan (2008 YLR 1508) and Zurash Industries (Pvt.) Ltd. Vs. Federation of Pakistan through Secretary, Ministry of Interior (PLD 2011 Karachi 385), the Hon'ble High Court of Sindh has held that mere pendency of civil or criminal cases against a citizen is no ground to deny him fundamental right of freedom to travel within or outside Pakistan.
- (vi) In the case of Mst. Nasreen Begum Vs. Ministry of Interior (PLD 2012 Islamabad 17), although no criminal case was registered against the petitioner, his name was placed on the E.C.L. due to a pending inquiry. It was held that *“there is a consistent view of the Courts that mere pendency of inquiry does not justify the denial of fundamental right of travelling guaranteed by the Constitution of a citizen.”*
- (vii) In the case of General (R) Pervez Musharraf Vs. Pakistan, through Secretary Interior (PLD 2014 Sindh 389), it was held as follows:-

“29. ... it is quite clear that registration of a criminal case or institution of criminal proceedings does not automatically imply that the accused should be disallowed to move outside Pakistan and or to put his name on E.C.L. Had it been the intention of legislature then it would have made the corresponding provisions in the Cr.P.C. or any other special enactments made for the trial of offences. Mere registration of F.I.R. does not permit nor warrant the automatic inclusion of any such accused person on E.C.L. but once bail is granted, it is the province of that court to regulate the custody of that particular accused.”

- (viii) In the case of Syed Masood Hussain Shah Vs. Federation of Pakistan (2015 MLD 124), the petitioner's name was placed on the E.C.L. on the recommendations of N.A.B., without any intimation to him. The petitioner had also been associated in an inquiry being conducted by N.A.B. There was an allegation of evasion of tax and custom duties to the tune of rupees thirty million against the petitioner. It was held that the Federal Government had to apply its mind while placing a person's name on the E.C.L., and that such an exercise must not be carried out in a mechanical manner on the mere request of an investigation agency including N.A.B. The insufficiency of the material on the record caused the Hon'ble High Court of Sindh to hold that the petitioner's name had been placed on the E.C.L. by the Ministry of Interior in an arbitrary and purely mechanical manner without applying its own mind and passing any speaking order. Therefore, the Hon'ble High Court accepted the petitioner's constitutional petition and directed the Ministry of Interior to remove his name from the E.C.L.
- (ix) In the case of Mohammad Sadiq Vs. Federation of Pakistan (PLD 2016 Sindh 263), it was held that mere pendency of criminal or civil litigation against a citizen was no ground to deny the freedom to travel within or out of Pakistan. Furthermore, it was held that Articles 4, 9, 15 and 25 of the Constitution have made it clear that every citizen has the liberty to travel abroad and enter Pakistan unless he is precluded under the law made in the public interest.
- (x) In the case of Tanvir Hussain Manji Vs. Federation of Pakistan (2016 CLC 1534), the petitioner's name has been placed on the E.C.L. on the recommendations of N.A.B. No prior notice or hearing was given to the petitioner before placing his name on the E.C.L. No details of allegations, particulars or reasons were given in the memorandum placing his name on the E.C.L. The petitioner had entered into a plea bargain and had paid a partial amount to N.A.B.

The Honourable Lahore High Court directed the Ministry of Interior to remove his name from the E.C.L.

- (xi) In the case of Yousaf J. Ansari Vs. Government of Pakistan through Secretary, Ministry of Interior (PLD 2016 Karachi 388), the petitioner's name was directed to be removed from the E.C.L. despite the fact that a reference had been filed by the N.A.B. against the petitioner wherein, the petitioner, was accused of committing gross mismanagement, cheating public stakeholders, corruption and causing loss of billions of rupees to the national exchequer.

30. It is not disputed that the petitioner had remained a member of the C.C.P. for three consecutive terms of three years each until November 2016. The position of the Chairman of the C.C.P. fell vacant on 26.07.2013. The Federal Government appointed the petitioner as the Acting Chairman of the C.C.P. on 22.08.2013, and he served in that position until 22.12.2014. The petitioner does not deny being a part of the decision making process regarding appointments made at the C.C.P. and the hiring of a building for the C.C.P's office at Karachi. The petitioner also admits that furniture and equipment were procured through a bidding process for the said office, and that some employees of the C.C.P. were sent on foreign visits to attend the O.E.C.D. Korea Workshop. However, the petitioner asserts that such decisions were made in exercise of statutory powers conferred under Sections 12, 13, and 23 of the 2010 Act, and Regulation No.1 of Chapter No.5 of the Competition Commission (Service) Regulations, 2007, and that the furniture and equipment for C.C.P.'s office at Karachi was procured through a tender bidding process. The learned Assistant Attorney-General did not assert that the employees of C.C.P were sent abroad on junkets or pleasure trips, but to attend workshops or conferences. He also did not deny the procurement to have been carried out through a bidding process, but asserted that the procurement was not necessary.

31. As per the documents brought on record by Mr. Ahmed Saeed Wazir, Deputy Director/Investigating Officer, N.A.B., during the period when the petitioner served as Acting Chairman of C.C.P., as many as seven appointments in the C.C.P. ranging from the C.C.P. grade-2 to grade-8, had been made. The contractual employment of two of these employees was regularized after the petitioner was no longer the Acting Chairman of the C.C.P; two other employees resigned while the petitioner was serving as the Acting Chairman; one was relieved on the expiry of his one year contractual appointment; one (photocopier operator) was relieved on 03.06.2016; and one was granted study leave for one year on 01.09.2014, and has not returned. The salaries and the benefits paid to the said seven employees of the C.C.P. have been calculated by respondent No.2 to come to Rs.7,031,541/-. This, respondent No.2 asserts, is the loss caused by the petitioner to the national exchequer. The learned Assistant Attorney-General was unable to explain whether the petitioner was solely responsible for said seven appointments or whether it was a collective decision made by C.C.P. In any case, the petitioner certainly cannot be blamed for the appointment of the two persons whose services were regularized by the C.C.P. after the petitioner was no longer the Acting Chairman. Additionally, respondent No.2 has worked out the loss caused by the petitioner by hiring a building for the C.C.P.'s office at Karachi and the procurement of furniture and equipment, to be Rs.13,880,004/-. The furniture and equipment so purchased is owned by the C.C.P. There is no allegation as to the embezzlement of any amount in the procurement process. It is also not denied that such procurement was carried out through a competitive process. These are all factors that respondent No.1 did not take into account while deciding to place the petitioner's name on E.C.L.

32. N.A.B. is presently conducting an inquiry/investigation regarding the allegations against the petitioner. The learned Special Prosecutor (N.A.B) was not in a position to state as to when the reference against the petitioner would be filed.

Whenever a reference is filed against the petitioner, the learned Accountability Court would be competent to direct that the petitioner's name be placed on the E.C.L. In the case of Federation of Pakistan Vs. General (Retd.) Parvez Musharraf (PLD 2016 SC 570), it has been *inter alia* held as follows:-

“9. In due course, all matters relating to the custody of an accused, restricting his liberty or freedom of movement are to be dealt with by the Courts ceased of the criminal cases against him or by the Federal Government in terms of the Exit from Pakistan (Control) Ordinance, 1981 and the rules framed thereunder. The superior Courts are, therefore, normally reluctant in passing orders of such nature, except in some exceptional circumstances, which is not the position here at this stage, as understandably the Respondent No.1 is facing trial before different criminal Courts/Special Court for the charged offences, which are competent to regulate all issues as regards his custody.”

33. In the Standard Operating Procedures (“SOPs”) issued by the Operations and Prosecution Division of N.A.B. in 2015, it is mentioned that the number of complaints received by the N.A.B. are way beyond its capacity to handle, and that taking on all the complaints is not possible and can adversely affect the standard and quality of inquiries/investigations if cognizance is taken on all the complaints. Furthermore, in the said SOPs, it is observed that complaints are sifted by N.A.B. according to the handling capacity, and to rule out the misuse of discretion and to standardize the selection procedure at N.A.B.’s level, the consideration for cognizance of cases is defined as under:-

- “a. Corruption cases against NAB Officers/Officials/Law Officers/Experts of NAB.*
- b. Cases referred by Hon’ble Supreme Court of Pakistan, High Courts, PM & President Sectt: Govt. Deptts. and Public Accounts Committee (PAC).*
- c. Cases of former / sitting legislators of the National Assembly, Senate and Provincial Assemblies (including Ministers/ Advisers etc.) and elected representatives of local bodies and all others come under the definition of ‘Public Office Holder’ as per NAO 1999 where amount involve is Rs.100 million or above.*
- d. Cases involving interest of members of public at large where the numbers of defrauded persons are more than 50 persons and amount involved is not less than Rs. 100 million.*
- e. Cases against public servants, whether serving or retired, Bankers, Businessmen and*

- Contractors where amount involved is more than Rs. 100 million.*
- f. Cases of willful loan default, loss to financial institutions as referred by State Bank of Pakistan (SBP).*
 - g. Matters covered u/s 31 (a) of the National Accountability Ordinance (NAO), 1999.*
 - h. Cases of STRs/CTRs and money laundering referred by FMU.*
 - i. Any other case falling within the purview of NAB, irrespective of the amount involved and status of accused person, with prior approval of the Chairman”*

34. Indeed, the Hon'ble Supreme Court in its Order passed in the case of the State Vs. Hanif Hyder (2016 SCMR 2031) has been observed that the legislative intent behind the National Accountability Ordinance, 1999, was not that inquiries and investigations should be carried out by N.A.B. in cases involving less than Rs.100 million. However, in the unreported judgment dated 03.05.2017, passed by the Hon'ble Supreme Court in Civil Petition No.1303/2017 titled, “Waqar Ali Awan Vs. Federation of Pakistan and others” it has been *inter alia* held that *“there is no absolute bar on the Chairman, N.A.B. to take cognizance in cases of less than Rs.100 million.”* As the petitioner is alleged to have caused a loss of Rs.21 Million by misusing his authority, in terms of N.A.B.'s own SOPs, the case of the petitioner is a low priority case. Although, the provisions of the National Accountability Ordinance, 1999, do not place any impediment before N.A.B. to take cognizance of cases where the loss caused to the exchequer is less than Rs.100 Million as a consequence of corruption, corrupt practice or misuse of authority (as long as the requisite approvals from the Chairman, N.A.B. are obtained), respondent No.1 ought to have taken into account N.A.B.'s SOPs before restricting the petitioner's fundamental right to travel abroad. Respondent No.1 should have also taken into account that after the commencement of the inquiry against the petitioner, he had proceeded abroad on three occasions and returned to Pakistan.

35. As regards the contention of the learned Assistant Attorney General that the writ petition instituted by the petitioner was not maintainable as he had the alternative remedy of filing a review

petition or a representation in terms of Section 3 of the Exit from Pakistan (Control) Ordinance, 1981, it is not denied that the petitioner had filed representations before respondent No.1 on 14.03.2017, and 16.03.2017 seeking the removal of his name from E.C.L. Respondent No.1 did not respond to the said representations. Section 3(2) of the Exit from Pakistan (Control) Ordinance, 1981, obligates respondent No.1 to afford an opportunity of hearing to the person filing a representation seeking review of the order placing his name on E.C.L. The said representations dated 14.03.2017, and 16.03.2017 are on the record and the learned Assistant Attorney-General did not deny their receipt. At no material stage has respondent No.1 afforded an opportunity of hearing regarding the said representations. Therefore, the remedy of filing a review petition or a representation in terms of Section 3 (2) *ibid* can hardly be termed as efficacious, expeditious or adequate, so as to oust the jurisdiction of this Court in this matter. Since the learned Assistant Attorney-General has vociferously defended respondent No.1's decision to place the petitioner's name on E.C.L., it would not be just and reasonable to throw the petitioner at the mercy of respondent No.1. In the case of Dr. Akhtar Hassan Khan Vs. Federation of Pakistan (2012 SCMR 455), the Hon'ble Supreme Court quoted with approval judgment in the case of Watan Party through President Vs. Federation of Pakistan (PLD 2006 SC 697), wherein it has *inter alia* been held as follows:-

"26. It is important to note that as far as the principle of law discussed in the cases of Anjuman-e-Ahmadiya, Sargodha and Lahore Improvement Trust ibid is concerned, there is no cavil with the same and we with utmost respect approve the same. But at the same time, we have also to keep in mind another very important principle of law enunciated by this Court in the case of Syed Ali Abbas v. Vishan Singh (PLD 1967 SC 294) i.e. petitioner cannot be refused relief and penalized for not throwing himself again (by way of revision or review) on mercy of authorities who are responsible for such excesses. This principle has to be read along with the principle laid down in the case of Anjuman-e-Ahmadiya, Sargodha ibid wherein it has been held that if an adequate remedy provided by law is less convenient, beneficial and effective in case of a legal right to performance of a legal duty, the jurisdiction of the High Court can be invoked. Similarly this principle has been reiterated in The Murree Brewery's case

ibid wherein it has been held that if a statutory functionary acts mala fide or in a partial, unjust and oppressive manner the High Court in exercise of its writ jurisdiction has power to grant relief to the aggrieved party.

27. Thus we are of the opinion that under the circumstances of the case, it would not be in the interest of justice to push the petitioners back to the authority who had already exercised the jurisdiction and is insisting that the action so taken by it is not only in accordance with law as it suffers from no legal discrepancy or infirmity but is also transparent. Therefore under the circumstances, referring the case of the petitioner to the Federal Government or this Court directing investigation under section 27 of the Ordinance would be inappropriate and an exercise in futility and it would also not serve the interests of justice.”

(Emphasis added)

36. In view of the foregoing discussion, the petition is allowed, and the memorandum dated 03.03.2017, issued by respondent No.1 is set aside. Respondent No.1 is directed to forthwith remove the petitioner's name from E.C.L. There shall be no order as to costs. Any observations made herein above shall have no bearing on the inquiry/investigation against the petitioner being conducted by N.A.B.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

(JUDGE)

APPROVED FOR REPORTING