IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR

Constitutional Petition No.19 of 2020
(Under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973. (Amended))

Afiya Shehrbano Zia & others **... Petitioners**

vs

The Hon'ble Supreme Judicial Council & others **... Respondents**

For the Petitioners : Ms. Hina Jilani, ASC
(via Video-Link, Lahore)

For the Respondents : N.R.

Date of Hearing : 13.06.2023

ORDER

Munib Akhtar, J.: Through this petition, filed under Article 184(3) of the Constitution, the petitioners canvass two propositions in relation to Article 209. As is well known, this Article relates to the basis on and the manner in which a Judge of the Supreme Court or a High Court can be removed from office by the President, on a report made by the Supreme Judicial Council ("Council"), a constitutional forum itself created by the said Article. As clause (7) makes clear a Judge "shall not be removed from office except as provided by this Article". Though the propositions are interlinked, they are nonetheless distinct and we propose therefore to take them up seriatim.

2. The "grievance" of the petitioners, if one may call it that, relates to those Judges against whom a complaint (or perhaps even a reference) has been filed before the Council but who either retire or resign before a report is made by the Council to the President or he makes an order thereon. In such a situation, the complaint (which for purposes of this judgment can be taken to include a reference) abates and the matter ends without resolution either way. It appears that in such a situation the complainant is

simply informed that the complaint stands closed. It is this with which the petitioners are “aggrieved”. Learned counsel appearing in the matter submitted that this result was inimical to the access to justice and its safe administration, and indeed the independence of the judiciary. It was emphasized that such situations (which it was submitted were not uncommon) created an impression of impunity. Judges were not immune from proper answerability within the parameters set by the Constitution and complete and effective accountability required that the situation identified be properly rectified. It is to achieve this objective that the propositions were advanced, to which we turn.

3. Learned counsel firstly submitted that even a Judge who had retired or resigned nonetheless remained within the ambit of Article 209 and any complaint pending as on the date of his leaving office could be taken up, deliberated upon and decided by the Council. If the Council concluded that the Judge had been guilty of misconduct it could make the required report to the President in terms of clause (6), who could then make an appropriate order on the same. Having considered the point we are, with respect, unable to agree that it has any merit. Clause (6) provides as follows:

> “If, after inquiring into the matter, the Council reports to the President that it is of the opinion—
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> (a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and
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> (b) that he should be removed from office, the President may remove the Judge from office.”

As is clear it is necessary for the Council, if it forms the necessary opinion, to report to the President that the Judge be removed from office and on such report the President may do so. Thus, the only action permissible to the Council, and hence the President, is the removal of the errant Judge from office. If this is not possible, then clause (6) can have no application. Obviously, this outcome is impossible in relation to a Judge who has already retired or resigned. Therefore, the proposition being advanced is, with respect, constitutionally erroneous.

4. Even otherwise, it is clear that the Constitution draws a distinction between a person who, at the relevant time, holds office as a Judge and one who, having held that office in the past,

does not. Article 209 applies only to the former and not the latter. Thus, e.g., clauses (2) and (3) of Article 202 refer, respectively, to a "person who has held office" "as a Judge of the Supreme Court or of a High Court" or "as a permanent Judge". In similar vein, Article 182 allows, inter alia, for "a person who has held the office of a Judge of [the Supreme] Court" to attend sittings of the Court as an ad hoc Judge, and then goes on the state that "while so attending an ad hoc Judge shall have the same power and jurisdiction as a Judge of the Supreme Court". Other such examples are also to be found. This bolsters the conclusion that Article 209 has no application in the postulated situation. Finally, it must be noted that if accepted the logic of the proposition could be taken to the point that a complaint could even be filed under Article 209 against a Judge who has retired or resigned after he has left office, in relation to allegations of misconduct while in office. This is so because the petitioners advance the proposition on the basis of what they regard to be a matter of principle. If such a principle exists then arguably its application cannot be limited to the fortuitous circumstance as to whether there was a complaint pending against the allegedly errant Judge as on the date he retired or resigned. On the logic of the proposition such a complaint could conceivably be filed even years after the retirement or resignation (i.e., the alleged misconduct). Such an outcome is quite obviously beyond the contemplation of the Constitution. This is yet another reason why the proposition postulated cannot be regarded as correct.

5. Therefore, it is our conclusion that on any view of the matter Article 209 does not apply to a person who has retired or resigned from the office of a Judge of this Court or a High Court.

6. Learned counsel also presented, in this context, an alternative submission. This was to the effect that Article 205 and the Fifth Schedule to the Constitution, which relate to the remuneration and other terms and conditions of service of Judges and in particular their right to pension, ought to be so read as to exclude a person who, though no longer holding office, was found guilty of misconduct by the Council. However, this submission, with respect, runs into the same difficulty as already noted inasmuch as the Council can only make a finding of misconduct in terms of Article 209, which applies only to a Judge still in office at the relevant time and results in his removal from office.

Therefore, it is not possible to accept this alternative formulation of what, in essence, is the same point.

7. No doubt cognizant of these aspects of the proposition just considered learned counsel advanced another one, to which we now turn. In this context, reference was made to the Supreme Judicial Council Procedure of Enquiry 2005 ("2005 Procedure"). These have been framed by the Council for the purpose, as stated in paragraph 2 thereof, "for effective implementation of Article 209 of the Constitution and regulate all inquiries required to be undertaken and all other matters which need to be addressed there under". Learned counsel referred in particular to paragraph 7 which provides for the procedure for scrutinizing any information (a defined term) received in relation to a Judge. It was submitted that suitable directions or guidelines ought to be issued by the Court in relation to how the Council was to take up the information received so that it could be dealt with in a timely and efficient manner. In the present context that meant in particular that the complaint be disposed of before the Judge retired or resigned. Specific reference can be made here to prayer clause B of the petition:

> "... this Honorable Court may graciously be pleased to: ... [B.] Pass directions to structure the Honorable Council's discretion in relation to the priority, listing and hearing of complaints/references and to ensure that the eventual findings of Honorable Council are publicly disclosed and direct the Honorable Council to amend the Supreme Judicial Council Procedure of Enquiry 2005 accordingly."

8. We have carefully considered the submissions made by learned counsel in this regard. In essence the petitioners ask this Court to give directions or guidelines to regulate the case management of the Council's docket. It is our view that, with respect, it would be inappropriate to do so. Firstly, such directions or guidelines would either, in terms, be so general or broad as to end up being essentially no more than mere platitudes, or be so detailed and minute as to essentially take over the functions and powers of the Council. Neither outcome would, for obvious reasons, be desirable. In particular, the latter may be contrary to what is within the jurisdiction of the Court in relation to Article 209. Secondly, if perchance some balance can be struck between these two extremes, there would still be a difficulty. Any directions issued or guidelines laid down would of course hold the field over

time and therefore (and thereby) tend to end up providing too rigid (and even, eventually, ossified) a framework for the Council. This would be so because it would not be possible for the latter to itself alter (or even replace) the framework so erected, in order to meet the inevitable changes over time in its docket (both as to the quantum and the nature of the complaints) and other variations in relevant circumstances. The Council would then have to approach the Court from time to time to seek further suitable directions and guidelines, by way of alterations in, or even substitution of, the framework. Obviously, such an outcome would not be desirable. The Council ought at all times to have the power to control its own docket and manage its affairs in a flexible manner that suits its purposes and allows it to perform the constitutional duties with which it is tasked. We are therefore of the view that it would be inadvisable and inappropriate for the Court to grant the relief sought.

9. Although learned counsel did not refer to it, the decision of the Court in *Justice Shaukat Aziz Siddiqui v Federation of Pakistan and others* PLD 2018 SC 538 should also be considered for completeness. The petitioner then held office as a Judge of the Islamabad High Court, and was being proceeded against under Article 209. (There was also a companion case, that of a Judge in office of the Lahore High Court, which made a similar claim and challenge.) Now, paragraph 13(1) of the 2005 Procedure states that proceedings of the Council are to be "conducted in camera and shall not be open to public". Notwithstanding this, each petitioner applied for the proceedings to be conducted in "open court". The applications were turned down by the Council by its order dated 18.05.2017, and the petitioners sought relief under Article 184(3) of the Constitution. It was claimed that their fundamental rights, in particular in terms of Article 10A, had been denied. The petitioners challenged the vires of the 2005 Procedure, and in particular of paragraphs 7 and 13. It was held that the 2005 Procedure (including the specific paragraphs under challenge) were intra vires, the Court concluding as follows with regard to the relief sought (paras 95-96, pg. 577):

> "95. Paragraph 7 of the SJC Procedure of Enquiry, 2005 is valid and intra vires to the Constitution. Paragraph 13 also does not offend against the Constitution or any provision thereof. The obvious purpose of paragraph 13 is the protection of the rights and reputation of the person whose

> conduct and capacity is being inquired into and the protection of the Institution of the judiciary, including the Members of the SJC, hence, must be interpreted in such context. Therefore, the process of determination whether any prima facie case has been made for proceedings under Article 209 of the Constitution in any event should be held in camera and the subsequent proceedings should also be held in camera unless the person being inquired into waives such right. However, in such circumstances, since in camera proceedings are not alien to our jurisprudence and can always be resorted to by the SJC even in the absence of the consent of the parties for well defined reasons which have been enumerated in the preceding paragraphs, including (but not limited to) in the eventuality of an apprehension that the person whose conduct and capacity is being inquired into or his counsel may resort to baseless, scandalous and scurrilous allegations against the SJC or any of its [members] in order to publicize the same and thereby frustrate the very proceedings of the SJC.
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> 96. Consequently, the question regarding conduct of proceedings through an open justice as requested by the Petitioners needs to be revisited and decided afresh by the SJC notwithstanding and uninfluenced by its Order dated 18.05.2017 in the light of the observations made herein above."

10. It will be noted that in this decision the claim was by the Judges being proceeded against, as to a denial of their fundamental rights. Even then, the Court held (while recognizing that the Judge concerned could waive his right to privacy) that the ultimate decision, as to whether to proceed in terms of paragraph 13 or to allow "open" proceedings, was that of the Council itself. That decision could be taken at any time and even against the wishes of the Judge concerned, for reasons as set out in the earlier part of the judgment. And in respect of the particular cases before it the Court did not make an order of its own, leaving it to the Council to do so in terms of para 96.

11. For the foregoing reasons we conclude, with respect, that neither of the propositions advanced before us is tenable or has merit. Accordingly, this petition is dismissed in limine.

Judge

Judge

Announced in Court at Islamabad on: 27/6/2023

Judge

Approved for reporting