IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial
Mr. Justice Maqbool Baqar
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Sajjad Ali Shah
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Qazi Muhammad Amin Ahmed
Mr. Justice Amin-ud-Din Khan

CIVIL REVIEW PETITION NO.296 of 2020 &

CIVIL REVIEW PETITION NO.297 of 2020 &

CIVIL REVIEW PETITION NO.298 of 2020 &

CIVIL REVIEW PETITION NO.299 of 2020 &

CIVIL REVIEW PETITION NO.300 of 2020 &

CIVIL REVIEW PETITION NO.301 of 2020 &

C.M.A NO.4533 OF 2020 IN CRP NO. NIL OF 2020 &

CIVIL REVIEW PETITION NO.308 of 2020 &

CIVIL REVIEW PETITION NO.309 of 2020 &

CIVIL REVIEW PETITION NO.509 of 2020 &

C.M.A NO.3457 OF 2021 IN C.R.P.296 OF 2020 &

CR. ORIGINAL PETITION NO.10 OF 2021 &

CR. ORIGINAL PETITION NO.11 OF 2021.

Justice Qazi Faez Isa ***... Petitioner(s)***
(in CRP No.296/2020)

Sindh High Court Bar Association ***... Petitioner(s)***
(in CRP No.297/2020)

Mrs. Sarina Isa ***... Petitioner(s)***
(in CRP No.298/2020)

Supreme Court Bar Association — ***... Petitioner(s)*** ***(in CRP No.299/2020)***

Muhammad Asif Reki President Quetta Bar Association — ***... Petitioner(s)*** ***(in CRP No.300/2020)***

Shahnawaz Ismail, VC Punjab Bar Council — ***... Petitioner(s)*** ***(in CRP No.301/2020)***

Balochistan Bar Council — ***... Petitioner(s)*** ***(in CRP No.308/2020)***

Pakistan Federal Union of Journalists — ***... Petitioner(s)*** ***(in CRP No.309/2020)***

Abid Hassan Minto — ***... Applicant(s)*** ***(in CMA No.4533/2020 in CRP No.Nil of 2020)***

Pakistan Bar Council thr. VC — ***... Applicant(s)*** ***(in CRP.509 of 2020)***

Mrs. Sarina Isa — ***... Petitioner(s)*** ***(in Cr.O.P.10/2020)***

Mrs. Sarina Isa — ***... Petitioner(s)*** ***(in Cr.O.P.11/2020)***

VERSUS

The President of Pakistan and others — ***...Respondent(s)*** ***(in CRP.296-301& 308-309 & CRP.509 of 2020)***

The Supreme Judicial Council thr. its Secretary and others — ***... Respondent(s)*** ***(in CMA No.4533 of 2020)***

Ch. Fawad Hussain — ***... Respondent(s)*** ***(in Cr.O.P.10/2020)***

Sami Ibrahim & another — ***... Respondent(s)*** ***(in Cr.O.P.11/2020)***

For the petitioner(s) : Mr. Justice Qazi Faez Isa (in-person)
Assisted by Barrister Kabir Hashmi.
(in CRP.296/2020 & CMA No.3457 of 2021)

Mrs. Sarina Faez Isa (in-person)
(in CRP.298/2020 & Cr.O.P.10-11 of 2021)

Mr. Hamid Khan, Sr. ASC.
Syed Rifaqat Hussain Shah, AOR.
(in CRP.299, 300, 301 & 308/2020)

Mr. Rasheed A. Rizvi, Sr. ASC.
(through Video Link from Karachi).
(in CRP.297 & 309/2020)

Nemo.
(in CMA.4533 of 2020)

Syed Rifaqat Hussain Shah, AOR.
(in CRP.509/2020)

For Federation of Pak.	:	Ch. Aamir Rehman, Addl. AGP.
For President, PM & AGP.	:	Mr. Sohail Mahmood, Addl. AGP.
Dates of hearing	:	15.04.2021; 19.04.2021; 20.04.2021; 21.04.2021; 22.04.2021; 23.04.2021 & 26.04.2021.

JUDGMENT:

UMAR ATA BANDIAL, J.

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"Surah An-Nisa, Verse 135

Believers! Be upholders of justice, and bearers of witness to truth for the sake of Allah, even though it may either be against yourselves or against your parents and kinsmen, or the rich or the poor: for Allah is more concerned with their well-being than you are. Do not, then, follow your own desires lest you keep away from justice. If you twist or turn away from (the truth), know that Allah is well aware of all that you do."

Translation by Abul Ala Maududi
(*emphasis supplied*)

The essence of the controversy in the instant review petitions is whether justice can be dispensed by a court of law by ignoring the truth. The answer to this pivotal question in these proceedings will decide the fate of substantive justice in our legal system.

Factual Background

2. The facts leading up to this long-drawn litigation can be found in paras 3-8 of the Detailed Reasons issued on 23.10.2020 reported as **Justice Qazi Faez Isa Vs. President of Pakistan** (PLD 2021 SC 1). However, for ease of reference they are being briefly recapitulated hereinbelow. On 10.04.2019, the Chairman Assets Recovery Unit (**"ARU"**), situated in PM Secretariat, Islamabad, received a complaint in the form of a letter which alleged that Justice Qazi Faez Isa (**"the learned petitioner"**), who was appointed Chief Justice of the Balochistan High Court on 05.08.2009, owned certain Properties (**"London Properties"**) in the United Kingdom in the name of his wife (**"Mrs. Isa"**) which had not been declared by him. The particulars of these Properties are:

i. 50 Coniston Court: originally leased to Mrs. Isa in 2004 for a sum of £236,000. The lease was later renewed in October 2011 with Mrs. Isa's daughter added as a co-lessee;
ii. 40 Oakdale Road: purchased by Mrs. Isa and her daughter on 27.03.2013 for a sum of £245,000; and
iii. 90 Adelaide Road: purchased by Mrs. Isa and her son on 28.06.2013 for a sum of £270,000.

3. On 16.04.2019, the Law Minister authorised the ARU to inquire into the London Properties, two of which were acquired when the learned petitioner was Chief Justice of the Balochistan High Court. The investigation spearheaded by

ARU confirmed, vide a letter written by the Commissioner, Inland Revenue (**"CIR"**) on 10.05.2019, that neither the learned petitioner nor Mrs. Isa had declared the London Properties in their wealth statements. Ultimately this led to the President filing Reference No.1 of 2019 (**"the Reference"**) against the learned petitioner in the Supreme Judicial Council (**"SJC"**) on 23.05.2019. The Reference mainly alleged that the learned petitioner had violated Section 116(1)(b) of the Income Tax Ordinance, 2001 (**"the Ordinance"**) by failing to declare the London Properties owned by his wife and children. However, during the pendency of the Reference before the SJC, the learned petitioner filed a Constitution Petition before this Court on 07.08.2019 praying for the quashment of the Reference and for restraining the SJC from proceeding in the said matter. Thereafter the matter was heard for ten months by the Full Court during which period the learned petitioner adopted (and maintained) the stance that he was not associated whatsoever with the London Properties that belonged to his financially independent wife.

4. On 19.06.2020 the Short Order reported as **(Mr.) Justice Qazi Faez Isa Vs. President of Pakistan** (PLD 2020 SC 346) was announced by a majority of 7-3. Both the Majority and the Minority quashed the Reference for suffering from legal and jurisdictional defects. However, the Minority also declared the Reference void for being tainted with *malice in fact*. This led to their different treatment of the fact that the

London Properties owned by Mrs. Isa had neither been declared in her wealth statements nor in the wealth statements of the learned petitioner (**"admitted information"**). The Majority (comprised of the seven Judges, including the four signatories to this opinion) was of the view that the allegations levelled against the learned petitioner being based on true information were of a serious nature. Therefore, a probe by the Federal Board of Revenue (**"FBR"**) into the source of funds used for purchasing the London Properties was necessary to ensure that any aspersions cast on the learned petitioner and the Court were dispelled. On the contrary, the Minority (comprised of the three Judges), with the exception of Justice Yahya Afridi, considered the excesses of the Executive to be so serious that they declared the admitted information to have lost all its evidentiary worth. This resulted in strong dissents advocating for the initiation of criminal/disciplinary action against the different public functionaries involved in the preparation of the Reference.

5. Dissatisfied with this result, the learned petitioner and Mrs. Isa, along with the other review petitioners, filed nine review petitions (296, 297, 298, 299, 300, 301, 308, 309 & 509 of 2020) before this Court challenging paras 4-11 of the Short Order dated 19.06.2020 and the Detailed Reasons (**"Majority Judgment"**) issued in support thereof on 23.10.2020. The disputed paras are produced below:

"4. Within 7 days of this Order, the concerned Commissioner of Inland Revenue shall himself (and not some other officer exercising delegated powers) issue appropriate notices under the Income Tax Ordinance, 2001 ("2001 Ordinance") to the spouse and children of the Petitioner to offer an explanation regarding the nature and source of the funds (separately for each property) whereby the three properties in the United Kingdom (viz., No.40, Oakdale Road, London E11 4DL; No.90, Adelaide Road, London E10 5NW; and No. 50, Coniston Court, Kendal Street, London W2 2AN) that are in the names of the spouse and the children were acquired. For purposes of this Order the Commissioner Inland Revenue having jurisdiction over the spouse of the Petitioner (who must be a Commissioner exercising jurisdiction and performing functions at Islamabad) shall be deemed also to be the Commissioner having jurisdiction over the children. (The spouse and children are herein after referred to as "the respondents".) Any notices issued or proceedings taken (or proposed to be issued or taken) under the 2001 Ordinance in relation to any of the respondents in respect, or on account, of the properties aforesaid prior to the date of this Order stand terminated forthwith.

5. The notices shall be served at the official residence of the Petitioner at Islamabad through courier service and such other means as may be considered appropriate and shall be deemed served on the respondents when received at the said address.

6. The respondents shall furnish their replies to the notices along with such material and record as is deemed appropriate. In case any of them is outside the country, it shall be the responsibility of such person to timely file a response, and the proceedings before the Commissioner shall not be adjourned or delayed for the reason of non-availability in Pakistan of such person.

7. Upon receipt of the replies (and of such additional material/record as may be filed in response to such clarification or explanation, if any, as the Commissioner may, in writing, have sought), the Commissioner shall give an opportunity of hearing to the respondents in person or

through an authorized representative/ counsel and shall thereupon make an order in accordance with the 2001 Ordinance.

8. The proceedings shall be concluded before the Commissioner within 60 days of the date of receipt of the notices as aforesaid, and the order shall be issued by him within 75 days of the said date of receipt, and no adjournment or extension in time whatsoever shall be given as affects or extends the aforesaid periods.

9. Within 7 days of the issuance of the order by the Commissioner, the Chairman, Federal Board of Revenue ("FBR") shall submit a report (to be personally signed by him) to the Council through its Secretary (i.e., the Registrar of the Supreme Court) regarding the proceedings as aforesaid, appending thereto the entire record of the said proceedings. The Secretary shall forthwith place such report before the Chairman of the Council (i.e., the Hon'ble Chief Justice of Pakistan) who shall, in such manner as is deemed appropriate, have the report laid before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner as the Council may determine. The receipt of the report, the laying of it before the Council and the action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council thereon shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council.

10. If, within 100 days from the date of this Order, no report as aforesaid is received by the Secretary from the Chairman, FBR, he shall inform the Chairman of the Council accordingly and shall, if so directed by him, write to the Chairman, FBR requiring an explanation as to why the report has not been received. If in reply the report is filed, then the matter shall proceed in terms of para 9 herein above. If a reply is received without the report or no reply is received, then the Secretary shall bring such fact to the attention of the Chairman of the Council who may direct that the matter be placed before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner (or any

> other person as deemed appropriate) as the Council may determine. The action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council. Without prejudice to the foregoing, if at any stage the report is received from the Chairman, FBR, then the matter shall in any case proceed (or be deemed to proceed, as the case may be) in terms of para 9 herein above.
>
> 11. For the removal of any doubts, it is clarified that any of the proceedings under the 2001 Ordinance as herein contemplated on the one hand, and before the Council in terms of para 9 or 10 herein above on the other, are distinct and separate from each other. Accordingly, nothing contained in this Order shall affect or prejudice the right(s) of appeal of any of the respondents under the 2001 Ordinance, if they feel aggrieved by the order made by the Commissioner or (as the case may be) any order made or decision taken at any appellate stage. Any such appeal(s) shall be decided on the merits, in accordance with the 2001 Ordinance. At the same time (and needless to say), the consideration by the Council of any matter placed before it under either para 9 or 10 herein above shall not be affected by the filing or pendency of any appeal as aforesaid. But the Council may, if it deems appropriate, notice such appellate proceedings or orders/ decisions and may (for purposes only of the matter before it) make such orders or give such directions in relation thereto as it deems appropriate."

6. Since all review petitioners were primarily aggrieved by paras 4-11 of the Short Order, these petitions were initially placed on 28.10.2020 before a seven member bench (comprised of the seven Judges who were signatories to these paras of the Short Order and the Detailed Reasons). However, the matter was adjourned to 16.11.2020 to allow

time to the learned counsel to peruse the Detailed Reasons of the Majority Judgment which had been released on 23.10.2020.

7. On the next date of hearing, 16.11.2020, the review petitioners raised a preliminary objection to the composition of the review Bench on account of the exclusion of the three learned Minority Judges. Nevertheless, the matter could not proceed further and was adjourned as Mr. Munir A. Malik, Sr. ASC, counsel for the learned petitioner was unavailable on account of the COVID-19 pandemic. It was after this hearing and before any arguments on this issue had commenced that the learned petitioner and Mrs. Isa filed Additional Reasons in support of their review petitions (Mrs. Isa filed hers on 01.12.2020 whereas the learned petitioner filed his on 04.12.2020) in which they for the first time disputed the dissenting judgments authored by the three learned Minority Judges (the learned petitioner only challenged the judgment authored by Justice Yahya Afridi). The Additional Reasons did not explain the delay of six months in challenging the dissenting judgments. However, their rationale for belatedly questioning these judgments was to bolster the stance of the review petitioners that the three learned Minority Judges (who had struck down the admitted information) should be a part of the Bench hearing the review

petitions. Accordingly, on 08.12.2020 and 10.12.2020 when substantive arguments were made on the composition of the review Bench, Mrs. Isa specifically sought the inclusion of the three learned Minority Judges in the Bench for the reason that she had impugned their judgments while Mr. Munir A. Malik, Sr. ASC for the learned petitioner after expressing some initial doubts conceded that in certain situations dissenting judgments could be reviewed.

8. The decision in that matter i.e., composition of review Benches is reported as **Justice Qazi Faez Isa Vs. President of Pakistan** (PLD 2021 SC 639). It held that: *It is the prerogative of the Hon'ble Chief Justice (**"HCJ"**) to constitute Benches; ordinarily the strength of a review Bench should be equal to the number of Judges who heard the original matter; the review Bench should comprise the author Judge (if available). In his absence any Judge who agreed with the author Judge should be included in the Bench; and a review is contemplated only against judgments of this Court i.e., unanimous and majority verdicts*. This decision also emphasised the restraint and quietude that must be exercised and maintained by a dissenting Judge (or any other Judge not part of the original Bench) sitting in a review Bench (paras 28-30) as review jurisdiction is not akin to appellate jurisdiction. Therefore, any disagreement with the decision of

the Majority that falls short of the test of review should not qualify to set aside a judgment that is otherwise based on correct factual and legal premises. However, as will become clear later in the judgment, this basic principle was disregarded by the learned Minority Judges when the HCJ included them in the review Bench after our aforementioned decision.

9. Subsequently, when hearings resumed before the reconstituted review Bench the learned petitioner obtained leave of the Court on 02.03.2021 to argue his review himself as his counsel could not appear due to poor health and COVID-19 restrictions. At this juncture, instead of commencing his submissions in the review the learned petitioner surprisingly pressed a fresh application (CMA No.1243 of 2021) filed by him which sought public broadcast of the hearings in the review petitions. Pro and contra arguments on this application were heard over the course of five hearings (02, 03, 08, 17 & 18 March 2021) and the application was ultimately dismissed by a short order dated 13.04.2021 with a majority of 6-4 (the detailed reasons are recorded in a separate order).

10. Consequently, it was only on 15.04.2021 that hearings in the review petitions began. By this date only fifteen days were left till the retirement of Justice Manzoor

Ahmad Malik, one of the learned members of the Bench, on 30.04.2021. The learned petitioner and Mrs. Isa made their substantive arguments in person over the course of three days. Perhaps due to their personal involvement in the case and paucity of time both were erratic and emotional whilst addressing the Court. The charged behaviour of the two review petitioners along with the interruptions by a learned Minority Judge, reminding specifically the learned Additional AG to shorten his submissions hindered the latter from arguing the matter freely whilst also disrupting the Court decorum. The resulting tension caused awkwardness and difficulties in the hearings of the review petitions.

Grounds of Review

11. Be that as it may, we have perused the arguments of the learned petitioner and Mrs. Isa presented before us. From these submissions we have gathered the alleged defects in the Majority Judgment that according to them call for its review. These are:

i. The Court lacked jurisdiction to issue directions to the FBR to commence proceedings against Mrs. Isa and her children;
ii. The Court encroached on the jurisdiction of the SJC by issuing a direction to its Secretary to place the Report of the Chairman FBR before the Chairman SJC for the SJC to consider whether to proceed against the learned petitioner;

iii. The directions issued by the Court to the FBR and SJC were invalid as these failed to satisfy the jurisdictional test under Article 184(3) of the Constitution, namely, the violation of a fundamental right which affects the public at large;

iv. The Court did not give Mrs. Isa a hearing before ordering the FBR to initiate proceedings against her thereby violating the principles of natural justice;

v. The Court's finding that the respondents' actions against the learned petitioner were not motivated by *malice in fact* suffers from an error apparent on the face of the record;

vi. The Court having unanimously observed that Mrs. Isa's Regional Tax Officer (**"RTO"**) was in Karachi could not later, by a smaller majority, permit proceedings to be conducted in Islamabad; and

vii. The Court passed the Short Order without hearing the counsel of the learned petitioner on phase II of the arguments, namely, the mala fides of SJC.

12. Mr. Hamid Khan, Sr. ASC, (CRP Nos.299, 300, 301 & 308 of 2020) also addressed the Court. Some of the points argued by him overlapped with those raised by the learned petitioner and Mrs. Isa while a few were concerned with minor procedural technicalities which had no bearing on the review. However, he also emphasised the following issues which had hitherto been untouched:

i. After the Short Order dated 19.06.2020 quashed the Reference, the SJC became *functus officio* and so could not entertain the Report of Chairman

FBR on the same information which had formed the basis of the Reference;

ii. SJC under Article 209 of the Constitution is only competent to hear and decide disciplinary matters pertaining to the Superior Judiciary. It has no jurisdiction over the family members of Superior Court Judges;

iii. A direction/order of this Court cannot form the basis of an information for initiating an inquiry against a Superior Court Judge;

iv. The Report of Chairman FBR cannot be an information under Article 209(5) *ibid* because it contains a tentative opinion based only on the decision of the CIR; and

v. The direction to the FBR is tantamount to the Court passing person specific legislation.

Mr. Rasheed A. Rizvi, Sr. ASC, (CRP Nos.297 & 309 of 2020) adopted the arguments of Mr. Hamid Khan, Sr. ASC.

13. In reply, the learned Additional AG's main contention was that once the Court had reached a conscious and deliberate decision, its judgment could not be set aside unless there was an error apparent on the face of the record [ref: **Engineers Study Forum Vs. Federation of Pakistan** (2016 SCMR 1961) at para 6]. Since the review petitioners had not been able to point out such an error, the review petitions were not maintainable. To fortify his stance, he also made the following submissions:

i. This Court has vast powers under Article 184(3) of the Constitution read with Article 187 *ibid* to issue directions of any nature in a case to do complete justice;

ii. Mrs. Isa was afforded a hearing before the Majority Judgment was issued and in any case the inadequacy of a hearing cannot be a ground of review;

iii. Once SJC had received the Report of the Chairman FBR, it could not be restrained from examining the information provided in the said report, save in exceptional circumstances;

iv. If a ruling is set aside that does not necessarily efface the directions issued in the said judgment; and

v. No direction was issued by the Court to the SJC.

Decision

14. After extensively hearing all the sides, the review Bench vide short order dated 26.04.2021 allowed the review petitions by a majority of 6-4 (however, the Bench was evenly split 5-5 on the learned petitioner's review petition). This order is produced below:

> "**O R D E R**
>
> For reasons to be recorded later, these review petitions are dismissed.
>
> **ORDER OF THE BENCH**
>
> By majority of six to four (Justice Umar Ata Bandial, Justice Sajjad Ali Shah, Justice Munib Akhtar and Justice Qazi Muhammad Amin Ahmed dissenting), these review petitions, except as mentioned below, are allowed.
>
> 2. Civil Review Petition No.296 of 2020 titled Justice Qazi Faez Isa vs. The President of Pakistan & others) is allowed by five and

> dismissed by five Hon'ble members of the Bench.
>
> **SHORT ORDER**
>
> For the reasons to be recorded later, captioned Review Petitions are allowed and the directions contained in paras 4 to 11 of the impugned short order dated 19.06.2020 passed in Const. Petition No.17/2019 and other connected matters, alongwith supporting detailed reasons given in the majority judgment of the same date, are recalled and set-aside. All the subsequent proceedings, actions, orders, information and reports in pursuance of the directions contained in the short order dated 19.6.2020 and the detailed reasons thereof, are declared to be illegal and without any legal effect. Resultantly, any such proceedings, actions, orders or reports cannot be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council.
>
> **Yahya Afridi, J.** For the reasons to be recorded later, all review petitions except C.R.P. No. 296 of 2020, are allowed and the directions contained in paragraphs No. 4 to 11 of the order dated 19.06.2020 and detail judgment dated 23.10.2020 passed in Constitution Petition No. 17 of 2019 and other connected petitions are recalled. Consequently, all the subsequent proceedings, actions, orders and reports made in pursuance to the said directions are declared to be of no legal effect and/or consequences."

It is clear from the foregoing short orders that the learned Judges who had been in the minority (i.e., Justice Maqbool Baqar, Justice Syed Mansoor Ali Shah and Justice Yahya Afridi) were now joined by three Judges who had earlier been part of the majority (Justice Manzoor Ahmad Malik, Justice Mazhar Alam Khan Miankhel and Justice Amin-ud-Din Khan, who had replaced Justice Faisal Arab on the review Bench after the latter's retirement). Justice Yahya Afridi on the one

hand and the other five learned Judges on the other made their own respective short orders. An examination of these short orders shows that there was some, but by no means complete, commonality between them. There was therefore a review majority (in relation only to that which was common between these short orders and nothing else), but only to a limited extent.

Test for Review

15. Before analysing the substantive arguments of the parties, we consider it appropriate to briefly state at the outset the settled parameters of the remedy of review laid down by Article 188 of the Constitution read with Order XXVI, Rule 1 of the Supreme Court Rules, 1980 (**"SCR"**) which stipulate that a review in a civil matter will proceed on grounds similar to those mentioned in Order XLVII, Rule 1 of the CPC. This latter Rule lays down three grounds for review, namely:

i. Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the aggrieved person or could not be produced by him/her at the time when the decree was passed or order was made;
ii. A mistake or error apparent on the face of the record; or
iii. Any other sufficient reason.

16. In the present review petitions, only the second principle was urged by the review petitioners. The Court has on numerous occasions dilated upon the expression 'mistake or error apparent on the face of the record.' However, the judgment in **Abdul Ghaffar-Abdul Rehman Vs. Asghar Ali** (PLD 1998 SC 363) after conducting a detailed survey of the law on the guiding principles of review jurisdiction has explained the phrase comprehensively. These principles have later been followed in and expanded by subsequent cases. For ease of reference, a summary of the principles is produced below:

i. Every judgment pronounced by the Court is to be considered a solemn and final decision on all points arising out of the case [ref: **Ghulam Murtaza Vs. Abdul Salam Shah** (2010 SCMR 1883)];

ii. An error must be obvious and must not require an elaborate discussion to be detected [ref: **Majid Mahmood Vs. Muhammad Shafi** (2008 SCMR 554)];

iii. An error should not only be significant but should also have a material effect on the outcome of the case in that it must change the decision of the case [ref: **Wajihul Hassan Zaidi Vs. Government of the Punjab** (PLD 2004 SC 801)];

iv. A review cannot be sustained merely on the ground that a different decision could have been taken by the Court [ref: **Rashid Ali Channa Vs. Muhammad Junaid Farooqui** (2017 SCMR 1519)]; and

v. A review is not an appeal or a rehearing [ref: **Mukhtar Mai Vs. Abdul Khaliq** (2019 SCMR 1302)].

17. These principles underline the key point that review jurisdiction is limited in nature and a review will only succeed if it can be shown that an error in the judgment has changed the outcome of the case, whether partially [ref: **Shireen Raza Vs. Federation of Pakistan** (2002 SCMR 1218) and **Abdul Ghaffar** case (*supra*)] *or* entirely [ref: **Federation of Pakistan Vs. Muhammad Nawaz Sharif** (PLD 2009 SC 644) and **Fida Hussain Vs. The Secretary, Kashmir Affairs and Northern Affairs Division** (PLD 1995 SC 701)]. It is in this context that the objections urged against the Majority Judgment by the learned petitioner and Mrs. Isa need to be examined.

Objections of the Review Petitioners

CRP Nos.296 & 298 of 2020

A. Directions to FBR and SJC

18. The principal issue highlighted by both the learned petitioner and Mrs. Isa was the lack of jurisdiction of this Court to issue directions to the FBR and the SJC (stated in points i, ii, iii and vi of para 11). It was argued that under Article 175(2) of the Constitution, the Courts of Pakistan can only exercise jurisdiction which is conferred on them by the Constitution and/or the law. Even Article 184(3), it was

stated, was of no help as the two basic requirements, namely, the breach of a fundamental right which affects the people at large and is of public importance, were not satisfied. In simple words, it was maintained that the tax affairs of a private person/citizen could not involve the public interest and therefore trigger Article 184(3). Finally, it was submitted that the Court only had the power to allow or dismiss Const. P. No.17 of 2019 (or grant any of the other prayers) and it could not in its original jurisdiction issue directions to non-parties.

19. There is no cavil with the petitioners' proposition that Courts only have that jurisdiction which is conferred on them by the Constitution and the law. However, whilst deciding Const. P. No.17 of 2019, filed by the learned petitioner, the Court exercised its original jurisdiction conferred under Article 184(3) of the Constitution and its complete justice power under Article 187 thereof. It is by now well-settled that when this Court acts under these provisions it can issue directions which travel beyond the pleas/ pleadings of the parties. Reference is made to the decision in **Muhammad Hanif Abbasi Vs. Imran Khan Niazi** (PLD 2018 SC 189):

> "(106)sic. The whole process entails queries being posed by the Court and directions being issued to persons to produce evidence on record that is relevant to the matters under scrutiny. The queries or directions emanating from the Court may travel beyond the pleas set out in the pleadings of the parties because their answers are necessary to resolve a controversy pending before the Court. Therefore, such queries and directions

> cannot always be anticipated by the persons who are asked to provide evidence or information. It is this feature of the inquisitorial jurisdiction under Article 184(3) of the Constitution that justifies considerable indulgence representing a fair and generous opportunity being granted to a party or person to answer a query or comply a direction that was otherwise unexpected or for which it was unprepared."
>
> (*emphasis supplied*)

Similarly, in **Zulfiqar Ali Babu Vs. Government of the Punjab** (PLD 1997 SC 11) the Court held:

> "9 ...once this Court is seized of a lis competently under the relevant law, its power to grant appropriate relief [under Article 187 of the Constitution] is not controlled by the technicalities of the pleadings or otherwise..."

It is also trite law that in its original jurisdiction the Court can mould the relief 'in accordance with the facts and the circumstances that come to light during the proceedings.' [ref: **Muhammad Asghar Khan Vs. Mirza Aslam Baig** (PLD 2013 SC 1) at para 38]. Therefore, in light of these oft-confirmed principles defining the extent of the Court's original jurisdiction and its complete justice power, the claim of the petitioners that this Court only has the power to grant the relief sought in a petition is devoid of force.

20. Even the argument that the tax affairs of private citizens does not attract Article 184(3) of the Constitution has failed to impress us. The submission may have carried weight if the petitioners involved in the matter were actually private persons. However, the present case is concerned with the financial affairs of the spouse of a Judge of the Supreme

Court. A necessary corollary which flows from the nature of Judges' work and the unique position they occupy in society is that they, like other public servants, are expected to make reasonable efforts to keep themselves informed about the financial affairs of their spouse and other family members who are either dependent on them or with whom they have financial dealings (ref: para 38 of the Detailed Reasons):

> "38. At first glance an obligation to remain informed about the financial affairs of one's family members seems archaic because modern jurisprudence emphasises the protection of the rights of the individual against the State and society. However, to understand the rationale behind the obligation on Judges to make reasonable efforts to be informed about or to watch over the financial affairs of their family members, one has to understand the nexus of this obligation with the nature of Judges work and the position they occupy in society. As has been held above, Judges exercise pre-eminent authority under the law. They adjudicate disputes between litigants, hold parties appearing before them accountable and impose liabilities and grant relief to such parties. With their authority comes an even greater responsibility to decide cases fairly, independently and in accordance with law. In such a situation, it is imperative for a Judge that he should make reasonable efforts to be informed about the financial interests of his family members for the simple reason that if a case comes before him which directly or indirectly involves the pecuniary, proprietary or other personal interests of any of his family members, he can recuse himself...
>
> However, this is not the only object behind imposing such a burdensome obligation on Judges. Another equally, if not more, important reason for requiring Judges to be aware of the financial interests of their family members is that the law's intent is to prevent a Judge's family from becoming a conduit to discreetly influence his opinions and views. This assures the Judges independence and integrity apart from

> safeguarding the institution of the judiciary."
>
> (*emphasis supplied*)

21. This obligation on Judges to be aware of and/or accountable for the financial affairs of their family members can also be found in the laws of Pakistan that govern the realm of unaccounted/unexplained wealth of public servants. For instance, the State Bank of Pakistan (**"SBP"**) in exercise of its powers under Section 41 of the Banking Companies Ordinance, 1962 has framed the Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Regulations for Banks & DFIs (**"Regulations"**) (revised and issued on 13.09.2012). These Regulations, *inter alia*, aim to *establish the source of wealth/funds of certain specific persons* who are customers of Banks and DFIs and include Politically Exposed Persons (**"PEPs"**), a term that is defined to include Judges:

> "**PART – A**
> **DEFINITIONS**
> For the purposes of these regulations-
> .....
> **27) "Politically Exposed Persons or PEPs"** are individuals who are entrusted with prominent public functions either domestically or by a foreign country, or in an international organization, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations/departments/autonomous bodies."
>
> (*emphasis supplied*)

Regulation 1(30) of Part B requires Banks and DFIs to undertake enhanced precautionary measures in relation to

PEPs and their family members. For ease of reference, this provision is produced hereinbelow:

> "**PART-B**
> **REGULATIONS**
> .....
> **Politically Exposed Persons (PEPs)**
> 30. In relation to PEPs and their close associates or family members, banks/DFIs shall:
> (a) implement appropriate internal policies, procedures and controls to determine if a customer or beneficial owner is a PEP;
> (b) obtain approval from the bank's senior management to establish or continue business relations where the customer or a beneficial owner is a PEP or subsequently becomes a PEP;
> (c) establish, by appropriate means, the sources of wealth or beneficial ownership of funds; including obtaining a self-declaration to this effect; and
> (d) conduct during the course of business relations, enhanced monitoring of business relations with the customer."
>
> (*emphasis supplied*)

Since the scope of the term 'family member' was vague and required clarification, the same was subsequently defined in the Regulations (updated version dated 30.09.2020):

> "**PART – B**
> **DEFINITIONS**
> For the purposes of these regulations-
> .....
> **28) "Family member of a PEP"** includes—
> (a) spouse of the PEP; and
> (b) lineal descendants and ascendants of the PEP and siblings of PEP."
>
> (*emphasis supplied*)

22. The rationale behind treating family members as PEPs and subjecting them to the same enhanced precautionary measures can be gathered from the Financial Action Task Force Guidance for PEPs (June 2013):

> "52. The FATF Recommendations require that family members and close associates of PEPs should be determined to be PEPs because of the potential for abuse of the relationship for the purpose of moving the proceeds... or facilitating their placement..."

The fiduciary obligations cast upon public office holders/public servants are also enshrined since long in the Federal and Provincial laws of the country. These make public servants liable for the unexplained assets of their family members. The earliest extant law on the subject is the Prevention of Corruption Act, 1947 (**"PCA 1947"**). Section 5(1)(e) of the said Act sets out the nature and extent of substantive obligations imposed on public servants vis a vis their dependent family members:

> "**5.** (1) A public servant is said to commit the offence of criminal misconduct[:]
> ...
> (e) If he, or any of his dependants, is in possession, for which the public servant cannot reasonably account, of pecuniary resources or of property disproportionate to his known sources of income.
> **Explanation**: In this clause, "dependant" in relation to a public servant, means, his wife, children and step-children, parents, sisters and minor brothers residing with and wholly dependent on him."
>
> (*emphasis supplied*)

Similar liability is also attached to public office holders in respect of their dependents or benamidars in the National Accountability Bureau Ordinance, 1999 (**"NAB Ordinance"**). The relevant portion is produced below:

> "**9.** A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices:-
> ...

> (v) If he or any of his dependents or benamidars owns, possesses, or has or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income;..."
>
> (*emphasis supplied*)

23. The NAB Ordinance and PCA 1947 are not applicable to Superior Court Judges by virtue of the judgment in **Khan Asfandyar Wali Vs. Federation of Pakistan** (PLD 2001 SC 607). Nevertheless, the legal tests and standards applied to other holders of public office/public servants under these laws can be utilised by the SJC to evaluate the conduct of Judges. In fact, previous removal proceedings conducted against Judges confirm this approach. Reference is made to the decision in **The State Vs. Mr. Justice Akhlaque Hussain** (PLD 1960 SC (Pak) 26) in which this Court adjudicated on a charge of tax evasion levelled against a High Court Judge and recommended his removal thereon. Likewise, in **The President Vs. Mr. Justice Shaukat Ali** (PLD 1971 SC 585) the SJC applied the principles of Company Law to recommend the removal of a High Court Judge in respect of allegations that he was involved in activities of trade and industry. Similar examples are also available in foreign jurisdictions such as India and Canada:

i. Justice Soumitra Sen of Calcutta High Court was charged with appropriating around Rs.33 lacs as a

Court appointed receiver in 1993. He was found guilty by an Inquiry Committee constituted by the Chairman of Rajya Sabha on 10.09.2010. He later resigned.
(https://rajyasabha.nic.in/rsnew/judges_inquiry/report_judges_enqury_english.pdf)

ii. Justice Michel Girouard of the Superior Court of Quebec was charged with (amongst other allegations) allegedly purchasing approximately one kilo of cocaine between the years 1987-1992. While he was cleared of this charge on 18.11.2015 ("First Inquiry") by the Inquiry Committee, he was on 20.02.2018, in a Second Inquiry, recommended for removal by both the Inquiry Committee and the Canadian Judicial Council for giving false and deceitful evidence in the First Inquiry (ref: Canadian Judicial Council website). He later resigned.

24. It becomes clear from these illustrations that although Judges may be protected from the ordinary processes of law, they are not subject to separate or lower legal standards of accountability compared to other public servants. They are answerable at the bare minimum against the same benchmarks applied to ordinary public servants. This includes being accountable for the unexplained assets of their spouses and family members. The only difference is that a Judge of a Superior Court is answerable before a specialised forum created specifically for determining complaints of misconduct received against Judges. That SJC is one such forum was affirmed in the **Khan Asfandyar Wali** case (*supra*):

> " ...The Supreme Judicial Council is a unique institution, which comprises the senior most Judges in judicial hierarchy and [is] entrusted with the onerous responsibility of deciding complaints [against Judges] that are referred to it... As held in the case of Zafar Ali Shah (supra), the Judges of the Superior Courts are not immune from accountability. They are accountable only in the manner laid down under Article 209 of the Constitution."
> (*emphasis supplied*)

To treat, at the very least, Superior Court Judges on par with other public servants is not exceptional. In the **Asghar Khan** case (*supra*) Judges were declared to be in the Service of Pakistan (para 78). This is because Judges occupy an office 'in connection with the affairs of the Federation,' a phrase which has been defined by the Court in **Salahuddin Vs. Frontier Sugar Mills & Distillery Ltd** (PLD 1975 SC 244) to mean:

> "Now, what is meant by the phrase "performing functions in connection with the affairs of the Federation or a Province." It is clear that the reference is to governmental or state functions, involving, in one form or another, an element of exercise of public power..."
> (*emphasis supplied*)

25. Taking this analysis a step further, the Detailed Reasons also examined the features of public office and held that Judges in addition to being in the Service of Pakistan were also public servants:

> "83. ...there are five main ingredients present in the office of a public servant. These are:
> a. The office is a trust conferred for a public purpose;
> b. The functions of the office are conferred by law;

> c. The office involves the exercise of a portion of the sovereign functions of Government whether that be executive, legislative or judicial;
> d. The term and tenure of the office are determined by law; and
> e. Remuneration is paid from public funds.
>
> 84. When the office of a Judge of the Supreme Court is scrutinised against these ingredients, it becomes obvious that Judges of this Court are indeed public servants. Their office is created by the Constitution and so are the jurisdiction and powers that they possess. They perform an essential governmental function: the administration of justice for the benefit of the public at large. They have a fixed tenure, prescribed by Article 179 of the Constitution and their emoluments are paid from the Federal Consolidated Fund under Article 81 of the Constitution. As a result, there is no doubt that a Judge of the Supreme Court is a public servant for the purposes of Section 216(3)(p) of the [Income Tax] Ordinance..."
>
> (*emphasis supplied*)

26. In the present case, it is admitted that the three London Properties belong to Mrs. Isa and her children; that two of the Properties, namely, 40 Oakdale Road and 90 Adelaide Road, were purchased in 2013 when the learned petitioner was holding the public office of Chief Justice of the Balochistan High Court; and that the said Properties were undeclared in the wealth statements of Mrs. Isa and the learned petitioner. In these circumstances, the non-disclosure of the London Properties causes suspicion and trepidation. More so when one views Sections 11(5) and 111(1)(d) of the Ordinance which mandate since the promulgation of the Ordinance [in the case of Section 11(5)] and 2011 [in the case of Section 111(1)(d)] that the income of a resident person

includes both his domestic and foreign income and the failure to disclose the same renders a resident person liable to pay the tax evaded:

> "**11. Heads of Income.--**
> ....
> (5) The income of a resident person under a head of income shall be computed by taking into account amounts that are Pakistan-source income and amounts that are foreign-source income.
>
> **111. Unexplained Income or Assets.--** (1) Where--
> (a) ...
> (b) a person has made any investment or is the owner of any money or valuable article;
> (c) ...
> (d) any person has concealed income or furnished inaccurate particulars of income including...
> and the person offers no explanation about the nature and source of the... investment, money, valuable article... suppression of... any amount chargeable to tax and of any item of receipt liable to tax or the explanation offered by the person is not, in the Commissioner's opinion, satisfactory the... value of the investment, money, value of the article... or any amount chargeable to tax or of any item of receipt liable to tax shall be included in the person's income chargeable to tax under head "Income from Other Sources to the extent it is not adequately explained."
> (*emphasis supplied*)

27. Therefore, in such circumstances a question to the learned petitioner about the source of funding of these Properties is natural, relevant and lawful, notwithstanding any procedural lapses committed by the respondents in the preparation of the Reference. That question must not be bypassed because being in the Service of Pakistan, the learned petitioner remains answerable for the unaccounted assets of his spouse. No satisfactory reasoning was put

forward by any review petitioner on why no standards of accountability or separate or lower ones should apply to Judges (who also fall in the category of public servants) and why the SJC should wait for a final determination by the relevant statutory authorities before processing an information received against a Judge on this score.

28. Indeed, it is of vital importance that public office holders, particularly Judges of the Superior Courts, serving the people of Pakistan remain answerable before their relevant forums to safeguard the integrity and credibility of their person as well as of their Court. As custodians of the Constitution and the guardian of peoples' fundamental rights [ref: **Corruption in Hajj Arrangements in 2010** (PLD 2011 SC 963) at para 20] the Courts try people and hold them accountable according to the Constitution and the law. Their judicial orders are accepted and obeyed by the people for their trust in the Courts' moral authority which is dependent upon the personal rectitude of the Judges. If aspersions cast against Judges on the basis of admitted facts are not dispelled, the said moral authority of the Courts is eroded and the execution of their primary function, namely, to decide the peoples' rights and obligations in accordance with the Constitution and the law becomes severely undermined.

29. The obligation on Judges to be transparent in their conduct is also exemplified in the Code of Conduct for

Judges of the Supreme Court and High Court (**"CoC"**) issued by the SJC under Article 209(8) of the Constitution which calls upon Superior Court Judges 'to present before the public an image of justice of the nation.' It is further provided that a Judge must possess 'the highest qualities of intellect and character' and 'keep his conduct in all things, official and private, free from impropriety.' Recalling para 38 of the Detailed Reasons (reproduced above in para 20) it is only fair that Judges conduct themselves in a manner that demonstrates exemplary behaviour for the people to emulate. Consequently, when a Judge and/or his spouse admit to acquiring undisclosed foreign assets and there is an element of indiscretion in their omission to declare the said assets, namely, a violation of the duty under Section 111 of the Ordinance and a failure to live up to the standard of propriety expected of Judges and their spouses under the CoC, an inquiry into the source of acquisition of the undeclared foreign assets serves the public interest and right which according to settled jurisprudence can prevail over the private rights of individuals. Reference is made to the decision in **Pakistan Muslim League (N) Vs. Federation of Pakistan** (PLD 2007 SC 642):

> "28. ...*while "interpreting Fundamental rights guaranteed by the Constitution, a cardinal principle has always to be borne in mind that these guarantees to individuals are subject to the overriding necessity or interest of community. A balance has to be struck between these rights of individuals and the interests of the community. If in serving the interests of the community, an individual or*

> *number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable*"..."
> (*emphasis supplied*)

30. This dictum was subsequently approved in **Mohammad Imran Vs. Province of Sindh** (2019 SCMR 1753) at para 49. Whilst these observations were made in the context of balancing the fundamental rights of individuals on the one hand and the interests of the community on the other, they apply with even greater force in the instant case as no fundamental right of either the learned petitioner or Mrs. Isa has been infringed by our direction to the FBR to investigate the nature and source of funding of the London Properties. This is because there is no fundamental right granted in the Constitution to public servants/citizens to be immune from investigations into their financial affairs. In fact, Section 216(3)(p) of the Ordinance specifically allows such investigations. The only provision which is somewhat relevant to and applicable in the present scenario is Article 4(2)(a) of the Constitution which reads:

> "**4. Right of Individuals to be dealt with in accordance with law, etc.**
> ...
> (2) In particular—
> (a) no action detrimental to the... reputation or property of any person shall be taken except in accordance with law;"

However, as will be discussed later in the judgment our direction to the FBR to commence proceedings against Mrs.

Isa does not adversely affect either her reputation or her property. Therefore, Article 4 *ibid* is not attracted to the facts of the instant case.

31. Further, during the hearing of Const. P. No.17 of 2019, the learned petitioner himself on 17.06.2020 made an oral request on behalf of Mrs. Isa for addressing the Court. The request was granted. Thereafter, in her video link statement on 18.06.2020 (a transcript of which is available with the order sheet), Mrs. Isa expressly asked why she had not been questioned by the tax authorities when the Reference alleged her London Properties to be shrouded in controversy. The assertion that she could fully explain the source of funding of the Properties was implicit in her statement. Equally her stand acknowledged an obligation to justify the same. She also referred to her sources of income that apparently financed the purchase of the London Properties. This indicated that she was prepared for and inclined to answer questions about the London Properties. Therefore, in issuing the direction to the FBR to commence proceedings in respect of the London Properties, the Court was moved by two factors: firstly, that Mrs. Isa be given an opportunity to explain the source of funding of the London Properties so that any stigma surrounding them is erased from the person of the learned petitioner and the Court; and secondly, to redress Mrs. Isa's complaint as expressed in her video link statement of 18.06.2020 made before the Court

that she should have, but had not, been asked about the Properties from the beginning:

> "Judge: ...We understand and we can notice and realize you have a great deal of record showing accrual of income and transfer from your own account to your foreign account and then the purchase of foreign property... We have a little problem; we cannot look at the merits of the case. There are two forums available. Your Hon'ble husband has in his pleadings indicated that this is a matter which should go to the tax authorities but it is a matter concerning your interest and your records; that is one option; and this is something we told the parties two days ago. The second thing is that another forum which is competent to hear you; and I assure you, you will be given a most sympathetic hearing, each and every document you say, will be considered, preserved... And that is the Supreme Judicial Council; you can make the statement there...
>
> Mrs. Isa: Why has no one asked me this from the beginning? Why has the FBR not contacted me: I have waited and waited; 13 months of hell they have put us through; my family and I... I have requested as my husband has, please ask us from the beginning[.] Why after 13 months are you then saying then there are these two forum? Why were we not asked at the beginning...
>
> Judge: We understand what you are saying but even this plea is on the merits. We cannot consider it... but now we will make sure that they will attend to you, they will not be derisory as your husband complained yesterday; they will respect you; they will consider all the documents you have and all this issue of limitation etc. that is something which has to be dealt with in accordance with law...
>
> Judge: ...The point is Madam that we do not have jurisdiction to hear the dispute on merits; and for the Courts of law, jurisdiction is fundamental... Now we don't, we cannot give a finding that you have adequate funds or inadequate funds. These are matters which have to be decided by competent authorities so we are grateful that you came before us."
>
> (*emphasis supplied*)

32. The above-quoted extracts demonstrate that it was made clear to Mrs. Isa that the Court could not decide her case on merits and that the competent authority, whether it be the FBR or the SJC, had the jurisdiction to determine the factual issue of source of funding along with all other ancillary matters. Ultimately, the decision was made to refer the matter to the FBR for reasons already set out in the Majority Judgment:

> "138. ...Our decision to take such a step was primarily based on two grounds: to establish that Judges of the Superior Court are answerable for allegations casting aspersions not only on their personal integrity but also on the integrity of the institution; and to honour the petitioner's plea that the allegation of absence of source of funds and money laundering must be first put to Mrs. Isa who is an independent taxpayer.
>
> ...
>
> 142. Rather than allowing the disturbing allegation against the petitioner and his family to circulate and attract innuendos thereby injuring the reputation and integrity of both the petitioner and this Court, we adopted the fair, impartial and transparent route of allowing Mrs. Isa and her children to disclose the source of their funds to the relevant authorities, namely, the FBR. Such a transparent course of action is consistent with the CoC, the maintenance of institutional integrity and the image of Judges as the neutral and independent arbiters of law and justice... every public office holder including Judges of the Superior Courts, officers of the armed forces, elected representatives and public servants are accountable under the law. Indeed, neither the institution of the judiciary nor the other institutions of Pakistan can tolerate a contrary perception...

> 143. It may be mentioned here that our decision to refer the matter for verification to the FBR grants the petitioner's plea from the very start of the proceedings that his wife and children should be asked about their source of funds for the acquisition of the London Properties. This was reiterated by learned counsel for the petitioner during arguments. He submitted that a determination by the tax authorities was essential to ensure that the due process rights of the petitioner and his family under Article 10A of the Constitution were not violated. Mrs. Isa also adopted a similar stance in her statement, given through video link, on 18.06.2020 to the Court. To our minds the FBR being the premier tax authority in Pakistan is the most well equipped to deal with questions of a financial nature. It not only maintains the complete tax records of taxpayers, including those of Mrs. Isa's, but also employs personnel who are well-versed in comprehending and analysing financial and tax records."
>
> (*emphasis supplied*)

Consequently, having herself demanded why the FBR had not approached her regarding the London Properties, Mrs. Isa cannot now take the contradictory plea that a direction to the FBR to this effect is contrary to law.

33. The next issue which was briefly touched upon during arguments was whether the FBR was even competent to inquire into the London Properties since a period of five years and more had elapsed from the date of purchase of the London Properties. Since this matter directly pertains to the application of the Ordinance to the merits of this case the Court cannot examine it (refer to previous para). This plea therefore also fails.

34. A jurisdictional objection was then raised by Mrs. Isa. She specifically questioned how CIR, Islamabad could proceed against her when her Regional Tax Officer (**"RTO"**) had been relocated to Karachi, as evidenced by the Court's order dated 03.02.2020. To understand why the order dated 03.02.2020 was passed and what it observed, the events that transpired on the previous day of hearing i.e., 29.01.2020 as recorded in the order sheet of that hearing may be examined first:

> "...During the course of his [Mr. Salman Akram Raja's] submissions, it was pointed out that according to the newspaper reports Mrs.Faez Isa had recently approached the FBR in order to obtain information about her Income Tax file which had been transferred from Karachi to Islamabad. The FBR authorities did not lend any assistance in the matter...
> ...
> 3. In view of the above situation, we have asked the learned Additional Attorney General to verify the above from the FBR and to report on the next date of hearing."

It was against this background that the order dated 03.02.2020 made the following observation:

> "2. In pursuance of our earlier order dated 29.01.2020... He [Attorney General] states that vide Notification No.F.No.7(l)Jurisdiction/2018-11922-R dated 30th January 2020, the FBR has redressed her [Mrs. Isa's] grievance and transferred back her RTO from Islamabad to Karachi. This order has been conveyed to the tax advisor of Mrs.Faez Isa."

35. It becomes clear from these two orders that the Court on 03.02.2020 did not decide the question of jurisdiction nor issued any direction in relation to the RTO

who has jurisdiction to assess Mrs. Isa's tax matters. Instead, it merely noted the statement made by the then AG that the FBR had by executive action transferred Mrs. Isa's RTO back to Karachi from Islamabad. This was done to address her grievance. In the absence of a lawful determination by this Court that Mrs. Isa's RTO should be situated in Karachi, the Short Order dated 19.06.2020 cannot be criticised for contravening the order dated 03.02.2020. In any event, Mrs. Isa and her daughter are currently residing in Islamabad. However, there is some confusion regarding the correct home address of Mrs. Isa in Karachi (there appear to be two addresses on record but Mr. Munir A. Malik, counsel for the learned petitioner, submitted during arguments in Const. P. No.17 of 2019 that one of the properties was sold off in 1997). Therefore, it was for their convenience and for the expeditious finalisation of the Chairman FBR's Report that the proceedings were ordered to be conducted in Islamabad. It may also be noted that the direction to CIR, Islamabad is consistent with Section 209(2) of the Ordinance. This provision authorises, *inter alia*, the FBR to confer on any Officer of the Inland Revenue the powers and functions of a Commissioner in respect of any person or classes of persons or areas.

36. Further, the Short Order makes it obvious that CIR, Islamabad has only been granted power to act for the

limited purpose of enquiring about the London Properties and the source of funds used for purchasing the same:

> "4. ...the concerned Commissioner of Inland Revenue shall himself... issue appropriate notices under the Income Tax Ordinance, 2001 ("2001 Ordinance") to the spouse and children of the Petitioner to offer an explanation regarding the nature and source of the funds (separately for each property) whereby the three properties in the United Kingdom... were acquired. For purposes of this Order the Commissioner Inland Revenue having jurisdiction over the spouse of the Petitioner (who must be a Commissioner exercising jurisdiction and performing functions at Islamabad) shall be deemed also to be the Commissioner having jurisdiction over the children..."
>
> (*emphasis supplied*)

Whether such a direction could have been issued is answered by Article 184(3) read with Article 187 of the Constitution. These Articles empower this Court to issue any directions necessary to do complete justice in a matter. It is settled law that the existence and exercise of the Court's power under the Constitution to issue directions is not dependent on express invocation of such power in its order. Not invoking the correct provision of law or citing an incorrect one for sustaining an order is of no consequence if the Court has jurisdiction under the law to pass that very order [ref: **Olas Khan Vs. Chairman NAB** (PLD 2018 SC 40) at para 10].

37. Finally, issue was taken with a presumed direction given to the SJC in the Short Order on account of the instruction to Secretary SJC to place the Chairman FBR's

Report before the SJC. It was argued that the jurisdiction of the SJC had been infringed by taking away its discretion in deciding whether to initiate an inquiry against the learned petitioner. However, it seems that our Short Order has been misconstrued. No direction of any nature is issued to the SJC. In fact, the essence of the Short Order is that Mrs. Isa be given the opportunity to explain the facts to the FBR and the factual findings thereon be placed for the perusal of the SJC. Such process was meant to allay the disquiet of the learned petitioner and Mrs. Isa by securing a finding that settled the allegations levelled against the former. This is precisely why the Short Order simply notes that the Secretary SJC will place the Report of the Chairman FBR before the Chairman SJC for the perusal of SJC. Thereafter, it was for the SJC to act as it deemed appropriate in the matter. Therefore, it is wrong to suggest that the Court has bound the SJC to investigate the learned petitioner. This was also made clear in para 145 of the Detailed Reasons:

> "145. ...However, it is reiterated that our short order dated 19.06.2020 merely issues a direction to the Chairman FBR and in no way obliges the SJC to take any action based on the report. The SJC may do so of its own volition if it considers that the report justifies any action against the petitioner. But it may also file the report if it finds that the same contains no substance/ merit..."
>
> (*emphasis supplied*)

Therefore, the objection regarding encroachment on the SJC's jurisdiction is unfounded. Moreover, it fails to disclose any error apparent on the face of the record justifying interference with the Majority Judgment.

B. No Hearing given to Mrs. Isa

38. A strong grievance was next voiced by the review petitioners against the Short Order dated 19.06.2020 for allegedly exposing Mrs. Isa to scrutiny by a tax forum without giving her a hearing. At the very outset such a plea is legally unsound because on the facts of the present case, the allegation that Mrs. Isa was not given a hearing (or was given an inadequate hearing) is inconsequential. This is because the Short Order is not adverse in nature. It did not affect the person, property or any other right of Mrs. Isa. Instead, it only asked the FBR to initiate proceedings to verify her sources of funding the London Properties. Indeed, it has always been the case of the learned petitioner that before the SJC can commence any proceedings against him for alleged misconduct, Mrs. Isa should in the first instance be asked to explain her independent source of funds used for acquiring the London Properties. We accepted this proposition of the learned petitioner and observed in the Detailed Reasons that:

> "120. ...However, to establish the source of funds for the acquisition of the London Properties, the requirements of due process under Article 4 and Article 10A of the Constitution mandate that the first person concerned, namely, Mrs. Isa ought to be given an opportunity to explain her sources of funding for the London Properties and

> the reasons for not declaring such properties in her wealth statement. Without granting such opportunity, the framing of the Reference against the petitioner was premature, hypothetical and impulsive. Accordingly, even this allegation against the petitioner is entirely presumptive."
>
> (*emphasis supplied*)

39. Hence, any right to be heard that accrued to Mrs. Isa was in the FBR proceedings because the outcome thereof could have either exonerated her or adversely affected her property and reputation [ref: **University of Dacca Vs. Zakir Ahmed** (PLD 1965 SC 90) at pg.103]. The only scenario in which the review petitioners' demand for a comprehensive hearing by the Court would have carried weight was if our Short Order had been dispositive of the merits or substantially affected the outcome of the proceedings before the FBR [**Regina (G) v Governors of X School** ([2012] 1 AC 167) at para 69]. The same view has been reiterated in Halsbury's Laws of England (Volume 61A, 2018):

> "40. ...The rule [to be heard] generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded. However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice."
>
> (*emphasis supplied*)

Even this Court, after reviewing the relevant case-law, held in **Commissioner of Income Tax Vs. Media Network** (PLD 2006 SC 787):

> "26. The rules of natural justice are not inflexible. They yield to and change with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible... Depending upon the facts and circumstances of each case, there is no mandatory requirement of natural justice that in every case the other side must be given a notice before preliminary steps are taken. It might suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him. However, it is not possible to lay down an absolute rule of universal application governing all situations as to the exclusion or otherwise of the audi alteram partem rule during the course of preliminary inquiries or investigations."
>
> (*emphasis supplied*)

40. It is restated that the heart of the controversy in the present case is about the consequences of Mrs. Isa's non-declaration of her foreign assets. Therefore, referring her case to the FBR for verification and scrutiny was wholly in accordance with the scheme of the Ordinance (refer to Section 111(1) of the Ordinance, reproduced in para 26). In no way did the direction to the FBR determine or influence the outcome of the proceedings which were to be conducted under the Ordinance by a CIR who was duly authorised. Such proceedings before a statutory authority were completely independent and separate from the proceedings held before the Court under Article 184(3) of the Constitution. Therefore,

the contention of the review petitioners that Mrs. Isa was not granted a hearing by the Court is baseless and does not disclose any error apparent on the face of the record.

41. In any event, as already discussed above, during the hearing of Const. P. No.17 of 2019, Mrs. Isa made an oral statement on 18.06.2020 through video link that presented her version of the sources of funds used for purchasing the London Properties. She was informed at the outset that her statement will be recorded. She displayed before the camera documents that allegedly explained her sources of funding the London Properties. The Court allowed her to address the Bench for roughly 30 minutes but declined to consider her plea and documents on the ground that jurisdiction to ascertain the facts about the funds used for acquiring the London Properties lay with two fora in her case, namely, FBR (in her capacity as a taxpayer) and SJC (as a witness) both of which were available to her to do. Her statement clearly reflected her knowledge of the crucial issue, namely, her means for acquiring the London Properties and her plea on the subject i.e., her independent means for purchasing the same and her willingness to substantiate this claim. After hearing her, the Court decided to refer Mrs. Isa to a competent forum, the FBR, to explain the nature and source of the funds utilised for buying the London Properties. By following this process, the essential ingredients of the right to be heard, namely, prior notice of the subject-matter and

opportunity of hearing to articulate her plea, were complied with [ref: **Ali Muhammad Vs. State** (PLD 2010 SC 623) at para 11 and **Michael Francis Hamilton v Peter Charles Forrest** ([1981] AC 1038) at pg.1045]. As a result, the due process requirements of Art 10A of the Constitution were fulfilled.

Malice in Fact

42. The learned petitioner argued that the finding recorded in the Detailed Reasons dated 23.10.2020 that the respondents were not guilty of *malice in fact* was an error apparent on the face of the record. He submitted that the filing of the review petitions against the Dharna Judgment, the leaking of the Reference to the public, his vilification at the hands of the respondents and, subsequent to the Short Order, the temporary appointment of the Chairman FBR on 04.07.2020 for a period of 3 months (or till the posting/ appointment of a regular incumbent) [refer to pg.23 of CRP No.296 of 2020] and the selection of Mr. Zulfiqar Ahmad as the relevant CIR, Islamabad all pointed to the irresistible conclusion that the entire exercise against him was motivated by *malice in fact*.

43. Since the learned petitioner has raised several allegations to justify his plea, these are dealt with separately. The temporary appointment of the Chairman FBR and the selection of Mr. Zulfiqar Ahmad as CIR to scrutinise Mrs. Isa's

record for ascertaining the source of funding of the London Properties are events that occurred subsequent to the Short Order dated 19.06.2020. These developments are independent of our Short Order and therefore outside the ambit of review jurisdiction. It is well-settled that in review proceedings the Court can examine only those events which existed at the time when the order was passed. In this regard, reliance is placed on a decision of the Privy Council in **Rajah Kotagiri Venkata Subbamma Rao Vs. Rajah Vellanki Venkateama Rao** [(1900) LR 27 IA 197]:

> "10. ...In the opinion of their Lordships, the ground of amendment must at any rate be something which existed at the date of the decree, and the section does not authorize the review of a decree which was right when it was made on the ground of the happening of some subsequent event..."

This view was affirmed by the Indian Supreme Court in **State of W.B. Vs. Kamal Sengupta** [(2008) 8 SCC 612] at para 17. Therefore, both the executive acts of replacing Chairman FBR and choosing Mr. Zulfiqar Ahmad as CIR, Islamabad are irrelevant for indicating the *malice in fact* of the respondents in filing the Reference.

44. Having said that, even if we ignore the aforenoted defect, the plea raised by the learned petitioner, that the changes in the personnel of the FBR were carried out to continue the persecution of the learned petitioner and his family, is still liable to fail because it is based on unfounded

claims. The learned petitioner has alleged that para 9 of the Short Order does not require the contents of the Report of the Chairman FBR to be based on the findings recorded in the CIR's Assessment Order. This provides the former with the opportunity to manipulate his Report to the detriment of the learned petitioner. It appears, however, that the learned petitioner has ignored the express direction in para 9 of the Short Order that the Chairman FBR should append with his report the entire record of the proceedings conducted before the CIR, Islamabad for submission to the Secretary of SJC. Therefore, any unsubstantiated or biased finding noted in the Report would be easily verifiable from the record. Likewise, para 11 of the Short Order preserves Mrs. Isa's rights of appeal under the Ordinance providing her the full opportunity of challenging the alleged partiality of Mr. Zulfiqar Ahmad, CIR, if she so wished, before the relevant appellate fora. In such circumstances these particular allegations of *malice in fact* are completely fictional, without merit and of no relevance for reviewing the Majority Judgment (especially, as discussed later in the judgment, since the learned petitioner himself after getting these documents summoned in Court objected to their perusal).

45. Insofar as the other allegations of malice are concerned, it may be noticed that the same have been thoroughly examined in the Detailed Reasons dated

23.10.2020. Reference is made to paras 53-55 thereof which discuss the effect of the Dharna Judgment and paras 59-61 which are concerned with the leaking of the Reference. Agitating points that have already been answered in the Majority Judgment amounts to an appeal/re-hearing of the issues involved. This is specifically prohibited in review jurisdiction [noted in para16(v)]. Consequently, these contentions of the learned petitioner also fail the test of error apparent on the face of the record.

C. Arguments of Counsel on Phase II Not Heard

46. Lastly, learned petitioner objected to the Court passing the Short Order dated 19.06.2020 and the Detailed Reasons dated 23.10.2020 without hearing his counsel on phase II of the arguments, namely, the allegation about the mala fides of SJC. Learned petitioner stated that in his Constitution Petition he had framed 55 questions of law, out of which 32 were focused on the conduct of SJC. Therefore, he submitted that by ignoring the arguments on this crucial aspect of the case, particularly when learned counsel had specifically reserved his right to argue on phase II, a factually and legally incorrect judgment had been delivered. The learned petitioner placed reliance on certain submissions made by Mr. Munir A. Malik, Sr. ASC, during the hearings of the Constitution Petition *inter alia* on 17.06.2020 and 18.06.2020 (loose copies of the transcripts were filed during

the hearings of the review petitions) to show that learned counsel intended to argue on phase II.

47. Learned petitioner maintained that his counsel's statements confirm that the latter had in no way given up his right to argue on phase II. The point urged by the learned petitioner is factually correct but it gives an incomplete account. The hearing of 19.06.2020 contains the outcome of the learned counsel's stance:

> "**19 June 2020**
> Mr. Munir A. Malik: If I recall from the Iftikhar Chaudhry case, the case was heard at length for days on what I call both phase 1 and phase 2 of the proceeding. Extensive arguments were made on phase 2 as well. In its infinite wisdom the Supreme Court recorded finding only on phase 1 while it heard arguments on the mala fides of phase 2.
>
> Justice Umar Ata Bandial: You are talking about the attribution of mala fide to the Supreme Judicial Council.
>
> Mr. Munir A. Malik: Yes.
>
> Justice Umar Ata Bandial: Do you you want to do that today?
>
> Mr. Munir A. Malik: May I make a submission?
>
> Justice Umar Ata Bandial: No, no but we would we would like that clarified sir.
>
> ...
>
> Justice Umar Ata Bandial: Because there are certain red lines I have.
>
> Mr. Munir A. Malik: I spoke of the principle of institutional harmony. It was out of respect for this principle that I had proposed to your Lordships that I will take the piecemeal approach and only address arguments on phase 1 but during the course of argument

> your Lordship, Justice Bandial had observed that your Lordships had invited me to address on the Show Cause Notice but I had declined. Most respectfully sir I had not declined. I had only sought a postponement. I am hoping that it will not be necessary for me to go into phase 2. I am hoping so I am in line with my earlier proposal confining myself to arguments on phase 1.
>
> Justice Umar Ata Bandial: I think that's a good idea, good idea.
>
> Mr. Munir A. Malik: If I prevail, if I am able to persuade your Lordships then I would rather rest my case there."
>
> (*emphasis supplied*)

48. This discourse shows that two hurdles prevented learned counsel from arguing phase II:

i. The legal bar contained in Article 211 of the Constitution that had to be crossed before any finding could be given on phase II (this is perhaps why the three learned Minority Judges also did not touch upon phase II in their opinions); and

ii. Learned counsel's own desire to accord due respect to the principle of institutional harmony.

Additionally, learned counsel submitted that if he succeeded in persuading the Bench to pass a favourable order, he would not touch upon phase II. Thus, in effect learned counsel purported to make submissions before the Bench conditionally depending on the outcome of the case. In the absence of either a preliminary issue being framed in this regard or an order by the Court allowing the suggested format, such a presumptuous strategy had no foundation because it was transactional in its purport. The expectation of

learned counsel was therefore fanciful. Nevertheless, this was the course adopted by Mr. Munir A. Malik, Sr. ASC on 19.06.2020. Having made the decision to not argue phase II, learned counsel abandoned the same. Consequently, learned petitioner cannot now plead that his counsel was not heard on phase II.

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D. Status of SJC

49. One of the main points canvassed by Mr. Hamid Khan, Sr. ASC, during arguments was that once the Reference was quashed by the Short Order dated 19.06.2020 the SJC had become *functus officio* and could not proceed further with the matter. According to him, for the SJC to be able to consider the Report of the Chairman FBR it would need to be constituted in terms of Article 209(2) of the Constitution (which details the composition of the SJC). Implicit in the submission is the assumption that SJC is not a permanent body; rather it is a transitory one. However, this view reflects a misunderstanding of the function of the SJC and the scheme of Article 209.

50. The SJC first came into existence by virtue of Article 128(2) of the 1962 Constitution. Prior thereto, Judges of the Supreme Court could only be removed on an address of the National Assembly [Article 151(1) of the 1956 Constitution]. The rationale for creating this autonomous

body was to ensure judicial accountability but away from the reach of the Government (ref: Assembly Debates, National Assembly of Pakistan, 07.04.1973). The incumbent Constitution has retained the SJC (Article 209). As already mentioned above, the composition of SJC has been fixed in Article 209(2) which reads as follows:

> "**209. Supreme Judicial Council.**
> ...
> (2) The Council shall consist of—
> (a) the Chief Justice of Pakistan;
> (b) the two next most senior Judges of the Supreme Court; and
> (c) the two most senior Chief Justices of High Courts.
>
> Explanation— For the purpose of this clause, the *inter se* seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice otherwise than as acting Chief Justice, and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts."

Similarly, Article 209(3) identifies the course of action that has to be adopted if any member of the SJC is unable to perform his/her functions because he/she is the subject-matter of a complaint, is un-well or absent for any other reason. Clearly then, Article 209 caters for every contingency that can arise in relation to the composition of the SJC. Additionally, the SJC works continuously in the performance of its duties and functions. This includes its substantive duty of hearing and deciding actionable information received against Judges and its preliminary duty of processing and

collecting material for evaluating the cognisability of an information. It also has the responsibility of updating judicial standards of conduct by amending the CoC. Indeed, Parliament (since 1962) has not found it necessary to delegate to any authority the power to constitute the SJC on a case-to-case basis because the SJC already stands constituted as a permanent body empowered to perform its substantive duties, including matters ancillary thereto.

51. Additionally, when the Constitution intends any of its provisions to be immediately operational '[so that] the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced without the aid of a legislative enactment' such provisions are termed self-executory [ref: **Hakim Khan Vs. Government of Pakistan** (PLD 1992 SC 595) at para 16]. The test to determine whether a Constitutional provision is self-executing was also explained in the same case:

> "16. ...The question whether a Constitutional provision is self-executing is always one of intention, and to determine intent, the general rule is that Courts will consider the language used, the objects to be accomplished by the provision, and surrounding circumstances. Extrinsic matters may be resorted to where the language of the Constitution itself is ambiguous."
>
> (*emphasis supplied*)

Having regard to the level of detail with which Article 209 is drafted, the object that it sets out to achieve, namely, judicial

accountability and the manner and circumstances in which the SJC has been functioning since its inception in 1962, it is evident that in respect of the SJC's formation Article 209 is self-executory giving the body a permanent status.

52. Insofar as the argument of *functus officio* is concerned, it first needs to be examined what this phrase entails. Black's Law Dictionary (10th Edn) defines this term as follows:

> "Pg.787: [Latin "having performed his or her office"]... (Of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."
>
> (*emphasis supplied*)

Similarly, Jowitt's Dictionary of English Law (5th Edn) states:

> "An expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted..."
>
> (*emphasis supplied*)

Likewise, Stroud's Judicial Dictionary (10th Edn) explains *functus officio* to mean:

> "Functus officio means no more than that a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it..."
>
> (*emphasis supplied*)

53. What becomes clear from these definitions is that a body (or an authorised person) only becomes *functus officio* once it has passed an order or made a decision which is final so that no power is left with the said body to take any further

action. This was confirmed in **Iqbal Pervaiz Vs. Harsan** (2018 SCMR 359):

> "8. ...Once a case is finally decided, the Court becomes *functus officio*. The only provision which allows to make change in the final order is the provision of review, scope of which is very limited i.e. to correct an error that is floating on the face of the record..."
> (*emphasis supplied*)

However, in the present case the SJC never issued a final decision regarding the learned petitioner's alleged misconduct. Prior to any verdict of the SJC the learned petitioner filed a Constitution Petition before this Court challenging the Reference pending in the SJC. The fact that by our Short Order dated 19.06.2020 the Reference was quashed and its proceedings in the SJC were abated simply means that the SJC cannot proceed further in the Reference and not that it has become *functus officio*. The Short Order also did not destroy the admitted information. Instead, the same was specifically preserved and forwarded by the Court to the FBR for verification. Any contrary interpretation of the directions given in the Short Order is erroneous. A summary of these directions is set out below:

i. The admitted information was preserved;
ii. The said information was referred to the FBR for verification;
iii. The subsequent Assessment Order of the CIR and its record together with the Report of the Chairman FBR were to be forwarded to the SJC as 'information' under Article 209 of the Constitution; and

iv. It was left to the discretion of the SJC to either proceed with the matter or file the information.

Since the FBR's findings would only supplement the admitted information, such consolidated information (which had not previously been available) was sent to the SJC for its perusal. In these circumstances, the SJC which has not previously expressed its views on such information cannot legally be said to have become *functus officio*.

E. Jurisdiction of the SJC

54. The next argument by learned counsel that the Short Order has authorised the SJC to proceed against Mrs. Isa and her children is based on a misconception. The jurisdiction of the SJC under Article 209(5) is limited to inquiring into matters concerning a Judge of the Superior Courts. Only to the extent that the financial matters and activities of the family are intertwined with the affairs of a Judge, does such information become cognisable by the SJC. Otherwise, the SJC does not have jurisdiction to investigate into the affairs of a Judge's family members. This is why the Majority Judgment has not entrusted any matter in this behalf to the SJC. Para 145 of the Detailed Reasons (reproduced above in para 37) explicitly acknowledges that if the SJC finds that the Report of the Chairman FBR justifies any action, it can proceed of its own volition against the learned petitioner. No mention in this respect is made of the learned petitioner's family members.

55. Be that as it may, it is clarified that whilst the SJC only has jurisdiction to examine the conduct and/or capacity of Judges of the Superior Courts, it may secure the attendance of any relevant person or the discovery/ production of any document whilst conducting an inquiry against a Judge (ref: Article 210 of the Constitution). Therefore, in exercise of this power the SJC may yet examine persons, who are not Judges, or their record for understanding or deciding a pending information.

F. Directions by this Court

56. Learned counsel also criticised the direction issued in the Short Order dated 19.06.2020 that the SJC could proceed against the learned petitioner on the basis of the findings recorded in the Report of the Chairman FBR. Two primary objections were taken:

i. The Supreme Court cannot be a source of information under Article 209(5) of the Constitution; and

ii. In **Muhammad Ikram Chaudhry Vs. Federation of Pakistan** (PLD 1998 SC 103), this Court categorically held that Article 209(5) *ibid* does not permit the filing of a Constitution Petition praying for a direction to either the SJC or the President to initiate an inquiry against a Judge of the Superior Courts (para 11).

57. With regard to the first point, Article 209(5) reads:

> "**209. Supreme Judicial Council.**
> ...
> (5) If, on information from any source, the Council or the President is of the opinion that

> a Judge of the Supreme Court or of a High Court—
>
> (a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or
>
> (b) may have been guilty of misconduct,
>
> the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter."
>
> (*emphasis supplied*)

It is a basic rule of interpretation that words are generally to be given their ordinary and natural meaning except when such construction gives rise to absurdity or renders certain words meaningless [ref: **Federation of Pakistan Vs. Durrani Ceramics** (2014 SCMR 1630) at para 31]. Unless the aforesaid exceptional consequences follow, the basic rule must be adhered to. The term 'any' in Article 209(5) is of significance in the present context. It has been defined by Stroud's Judicial Dictionary (10th Edn) as follows:

> " ...a word which excludes limitation or qualification...; "as wide as possible..."""

It may be noticed from the above-stated meaning that 'any' is a comprehensive term. Since the legislature itself consciously chose to keep the source of information in Article 209 open-ended, it will be contrary to the spirit of the provision to hold otherwise and prevent the Superior Courts from taking judicial notice of information and/or from forwarding the same for perusal and consideration of the SJC when no such restriction exists in Article 209(5) itself.

58. With regards to the case of **Muhammad Ikram Chaudhry** (*supra*), that is authority for the proposition that if a person has a grievance against a particular Judge the appropriate forum for redressal is the SJC (and not the Supreme Court) and that neither the Supreme Court nor the High Court can record even a tentative finding that a Superior Court Judge has committed misconduct. There can be no cavil with this ruling of the Court. However, in the instant case no adverse finding has been recorded against the learned petitioner and no direction has been issued to the SJC to take any action against him on the basis of the information forwarded by the FBR (refer to para 37 for a detailed discussion on this topic). Therefore, in the absence of such a finding and/or direction to the SJC, the principle laid down in the **Muhammad Ikram Chaudhry** case (*supra*) has not been contravened.

G. Report of Chairman FBR

59. Learned counsel then submitted that no proceedings could be initiated against the learned petitioner based on the Chairman FBR's Report because it does not express a final opinion and so cannot qualify as information under Article 209(5). It was argued that the said Report was based on the order of the CIR which was amenable to appeal (and was in fact appealed against by Mrs. Isa). There was a possibility that the findings recorded by the CIR may be set aside rendering the Report of the Chairman FBR irrelevant.

However, this concern has already been answered in the Detailed Reasons:

> "146. ...To our minds, the two directions, namely, the filing of the report by the Chairman FBR before the SJC and the protection of the affected persons right to appeal, issued by us were necessary in the interests of justice. The jurisdiction of the FBR is concerned with taxing income whereas the jurisdiction of the SJC is related only with the misconduct of a Judge. Therefore, the proceedings and/or the outcome before one forum do not affect those of the other forum. However, the SJC may if so inclined in the exercise of its *suo motu* jurisdiction conferred by the Constitution take into consideration any proceedings before the tax authorities or orders passed by them."
>
> (*emphasis supplied*)

60. The above-quoted extract notes that the respective jurisdiction, object and authority of the SJC and FBR differ significantly. Consequently, the findings of the CIR and the Report based thereon by Chairman FBR merely provide information and have no binding effect on the SJC. The apprehension of learned counsel that the findings of FBR and SJC may differ and therefore the Short Order has created an anomalous situation is fanciful. In its proceedings against a learned Judge the SJC scrutinises the factual narrative presented by an information. In the present case the Report of the Chairman FBR and the material attached to it would verify and present the facts from a tax perspective. This information may or may not satisfy the parameters for the SJC to take cognisance of the matter. There is nothing in the Short Order of 19.06.2020 that expects the SJC to accept the

contents of that Report to be a binding depiction of the facts or as actionable material for its purposes. The outcome regarding tax liability (if any) imposed on Mrs. Isa in the hierarchy of tax fora does not concern the SJC. Such a determination has remedies before higher fora, as have been availed by Mrs. Isa.

61. It is also trite law that proceedings based on the same factual matrix and pending in different legal fora may arrive at divergent outcomes because the jurisdiction, object and authority of each forum may be distinct under the Constitution and the applicable law. A common example of this can be seen in the concurrent initiation of criminal and disciplinary proceedings in relation to service matters [ref: **Muhammad Iqbal Vs. District Police Officer, Sahiwal** (2011 SCMR 534) at para 8]. Therefore, the fate of the CIR's findings, if any on the sources of funds used for purchasing the London Properties, in the appellate tax fora will have no bearing on how the SJC evaluates such information, in the shape of Chairman FBR's Report, for its own purpose and jurisdiction. Accordingly, the objection raised by learned counsel is without force.

H. Person Specific Legislation

62. Lastly, learned counsel argued that the direction to the FBR to proceed against Mrs. Isa and her children was tantamount to person specific legislation. It was further

contended that the issuance of a timeline was violative of the Ordinance which does not provide for a deadline for concluding tax proceedings. With respect to the first objection, it has already been noted in para 31 of this judgment that Mrs. Isa had herself questioned why she had not been asked by the FBR at the outset about the London Properties for which she possessed sufficient material to establish her sources of funding. Only the scrutiny of this record could confirm whether or not the learned petitioner had any connection with funding the London Properties, and if so whether he was answerable to the SJC for the same. In view of, *inter alia*, this background, the Court referred the matter to the FBR, being the relevant and competent fact-finding authority, for verification so that the controversy surrounding the learned petitioner and the Court could be put to rest promptly. In these circumstances, the judicial direction issued to the FBR under Articles 184(3) and 187 of the Constitution was factually and legally well-founded.

63. Precisely for this very reason, the Court also laid down a timeline in the Short Order for the FBR to follow whilst conducting the proceedings against Mrs. Isa. The issuance of such a direction is lawful and valid as exemplified by the judicial precedents of this Court [ref: **Imran Ahmed Khan Vs. Muhammad Nawaz Sharif** (PLD 2017 SC 692) at para 14(g) and **Muhammad Khalid Vs. National Accountability Bureau** (2017 SCMR 1340) at para 5]. The

rationale behind passing these directions is also well-documented and was aptly explained in the case of **Muhammad Nawaz Sharif Vs. Imran Ahmed Khan Niazi** (PLD 2018 SC 1):

> "14. ...The argument that the direction to the trial court for deciding the References within 6 months from the date of filing them also tends to prejudice the fair trial of the petitioner is also misconceived as the purpose behind such direction is not to prejudice the trial but to ensure expeditious conclusion of the case which more often than not has been extended even in the past by this Court, if the trial was delayed by any hardship or anything imponderable..."
>
> (*emphasis supplied*)

Conversion of Dissenting View into Majority Opinion

64. After the Reference was quashed, the Majority and Minority differed in their treatment of the admission by the learned petitioner and Mrs. Isa that the latter owned undeclared foreign properties. In this regard, the dissenting opinion held that:

i. The tax information of the learned petitioner and Mrs. Isa as well as their passport details and travel history were illegally collected; and
ii. The learned petitioner and his family were subjected to covert surveillance.

In light of the said findings, the dissenting opinion of two learned Judges concluded that such illegally collected evidence was inadmissible for all purposes and that the acts of the respondents demonstrated their *malice in fact*. Insofar as the Majority is concerned, the allegations of covert

surveillance and *malice in fact* were dismissed for reasons already stated in the Detailed Reasons (refer to paras 46-64 for *malice in fact* and paras 78-88 for covert surveillance). However, the Majority also held that the legal and jurisdictional defects in the preparation of the Reference amounted to *malice in law*. Nevertheless, as such a finding is materially different from *malice in fact* (refer to paras 140 and 141 of the Detailed Reasons) the admitted information was not destroyed as a result. The said information, therefore, could not be ignored because such admission of the truth cast a shadow on the integrity of the learned petitioner and the Court. Accordingly, the information called for an explanation before the competent forum i.e., the FBR.

65. With regards to the investigation carried out against the learned petitioner by the ARU, the Majority opined that the same was not authorised by the President. Instead, it was the Law Minister who had permitted ARU to inquire into the financial affairs of the learned petitioner. Due to the incompetence of the Law Minister to direct an investigation against a Judge of the Supreme Court, the search of the learned petitioner's and Mrs. Isa's tax records was declared unlawful. Accordingly, such tax records were not considered by the Majority for reaching its decision. During the present hearing, the alleged illegal collection and therefore the inadmissibility of such material was re-emphasised to attack the direction given to the FBR. Consequently, it has now

become imperative to consider this issue because statedly it bars the issuance of the impugned direction to the FBR to verify the source of funding of the undeclared London Properties.

66. There are two important aspects of this subject that require our attention:

i. The rule regulating the admissibility of illegally collected evidence in Pakistan and comparable jurisdictions; and
ii. The prohibition against illegal search and seizure prescribed in the Fourth Amendment to the US Constitution.

67. Taking the first point, the general test for admitting evidence in Pakistan and comparable jurisdictions is whether the evidence is relevant to a fact in issue. This is evident from Article 18 of the Qanun-e-Shahadat Order, 1984 (previously this principle was enunciated in Section 5 of the now repealed Evidence Act, 1872) which reads:

> "**18. Evidence may be given of facts in issue and relevant facts.-** Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others."

What becomes clear from the aforenoted rule is that ordinarily in both criminal and civil matters evidence which is connected to a fact in issue or a relevant fact is admissible simpliciter. Reliance in this regard is also placed on the jurisprudence and laws of Pakistan, Privy Council, India,

United Kingdom, Canada and Australia. A few examples from these jurisdictions are produced below:

i. Pakistan

Bisvil Spinners (Pvt) Ltd Vs. Pakistan (PLD 1992 SC 96):

> " ...if a piece of evidence is otherwise relevant and pertinent for the decision of an issue, it is untenable argument that: notwithstanding the fact that it is genuine and otherwise reliable it should not be made use of because in the process employed for the collection of the material an irregularity or for that matter an illegality was committed." [This dictum was approved in **Muhammad Ijaz Ahmad Chaudhry Vs. Mumtaz Ahmad Tarar** (2016 SCMR 1) at para 12].

ii. Privy Council

Kuruma v The Queen ([1955] AC 197):

> "In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained... There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused..."

iii. India

R.M. Malkani Vs. State of Maharashtra (AIR 1973 SC 157):

> "24. ...There is warrant for proposition that even if evidence is illegally obtained it is admissible... The Judicial Committee in Kuruma, Son of Kanju v. R. [1955] A.C. 197... held... that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against

> the accused. That caution is the golden rule in criminal jurisprudence."

Pooran Mal Vs. Director of Inspection (Investigation), New Delhi (AIR 1974 SC 348):

> "24. ...Now, if the Evidence Act 1872 which is a law consolidating, defining and amending the law of evidence, no provision of which is challenged as violating the Constitution- permits relevancy as the only test of admissibility of evidence (See Section 5 of the Act) and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence..."

iv. United Kingdom

R v Sang [1979] 2 All ER 1222 (HL)

> "...However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason..."

v. Canada

R v Grant (2009 SCC 32):

> "[71] ...When faced with an application for exclusion under s.24(2) , a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter* -infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter* - protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits..."

vi. Australia

Evidence Act 1995

> "**138 Discretion to exclude improperly or illegally obtained evidence**
> ....
> (3) Without limiting the matters that the court may take into account under subsection (1) [exercise of discretion to exclude or admit illegally collected evidence], it is to take into account:
> (a) the probative value of the evidence; and
> (b) the importance of the evidence in the proceeding; and
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
> (d) the gravity of the impropriety or contravention; and
> (e) whether the impropriety or contravention was deliberate or reckless; and
> (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
> (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
> (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law."

68. A perusal of these cases and laws demonstrates that in both criminal and civil matters either there is no bar to the admission of evidence collected by any means [except for the absolute prohibitions enshrined in the Constitution such as the protection against self-incrimination (Article 13(b)), the inviolability of dignity of man (Article 14(1)) and the prohibition of torture for the purpose of extracting evidence (Article 14(2)] as long as it is relevant and genuine (Pakistan, UK, Privy Council and India) or a balancing exercise needs to be carried out by the Courts to determine the admissibility of the disputed evidence (Canada and Australia). However, in neither of these countries is there an absolute bar to the admission of illegally collected evidence.

69. In contrast, the United States follows what is known as the exclusionary rule which outrightly prohibits the admission of evidence collected via an illegal search and seizure. The rationale behind this strict approach is the Fourth Amendment to the US Constitution, inserted in 1791, which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated... but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The rule, as explained by the Supreme Court in **Weeks v United States** [232 US 383 (1914)], was enacted to limit the power of the Government to invade the home and privacy of a citizen and seize his/her private papers under the authority of general warrants. However, the rule has been made applicable only to criminal matters [it was first applied by the Supreme Court in the case of **Weeks v United States** (*supra*)]. This was affirmed by the Supreme Court in **United States v Janis** [428 US 433 (1976)]:

> "In the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state."

This dictum was later reiterated by the Supreme Court in **INS v Lopez-Mendoza** [468 US 1032 (1984)]. The restrictive application of the exclusionary rule only to criminal matters

was explained by the Supreme Court in **Pennsylvania Board of Probation and Parole v Scott** [524 US 357 (1998)]:

> " ...Moreover, because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its "substantial social costs.."
> Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials...
> As in *Calandra, Janis,* and *Lopez-Mendoza,* we are asked to extend the operation of the exclusionary rule beyond the criminal trial context. We again decline to do so...
> Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions... Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's "costly toll" upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule..."
>
> (*emphasis supplied*)

70. Further, even in the context of criminal proceedings the Courts in the United States have recognised exceptions to the exclusionary rule to allow the admission of illegal evidence in such matters:

i. If the illegal evidence is later discovered from an independent source [ref: **Silverthorne Lumber Co, Inc v United States** (251 US 385 (1920))];

ii. If the illegal evidence would inevitably have been discovered by a lawful mean [ref: **Nix v Williams** (467 US 431 (1984))];

iii. The chain of causation between the illegal action and the tainted evidence is so attenuated that the

taint stands dissipated [ref: **Brown v Illinois** (422 US 590 (1975))];

iv. The search warrant was not based on probable cause but was executed by government agents in good faith [ref: **United States v Leon** (468 US 897 (1984))]; and

v. To impeach the credibility of the defendant [ref: **Walder v United States** (347 US 62 (1954))].

71. The United States by virtue of the Constitutional command in the Fourth Amendment is one of the strongest proponents of the exclusionary rule. Yet it has not transposed the approach of excluding illegal evidence to civil proceedings; and in criminal matters has qualified the severity of the rule due to its adverse effect on discovering the truth. There is no reason why in our jurisdiction where there is no such Constitutional or statutory obligation to exclude illegally collected evidence, the said rule should be adopted mechanically. As already stated, the jurisprudence of Pakistan and other comparable jurisdictions also points towards the admissibility of genuine and relevant evidence, namely, truthful evidence in civil proceedings. Consequently, applying a more stringent criteria for determining the admissibility of illegally collected evidence in removal proceedings against Judges is not justifiable. More so, when this Court in the case of **Chief Justice of Pakistan Iftikhar Muhammad Chaudhry Vs. President of Pakistan** (PLD 2010

SC 61) has held that an inquiry against a Judge is merely an administrative matter:

> "98. ... I am of the opinion that the true status of the Supreme Judicial Council is the one suggested by Syed Sharif-ud-Din Pirzada... while placing reliance on MR. JUSTICE SHAUKAT ALI'S CASE (PLD 1971 SC 585 at 602) wherein the said status had been determined as under:--
>
> > "Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceedings, but it is, in our opinion, mainly an ADMINISTRATIVE PROCEEDINGS conducted by a DOMESTIC FORUM to examine the professional fitness of a Judge. The subject-matter of these proceedings is neither civil rights and duties nor criminal liabilities. It is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary..."
>
> (*emphasis supplied*)

72. In the present case, it was argued by the learned petitioner that the search of his and Mrs. Isa's tax records was illegal. The Minority agreed with this contention whereas the Majority did not issue any opinion on this matter because it did not take the tax records into consideration. Instead, it directed the FBR to verify the source of funding of the London Properties in accordance with the Ordinance, specifically Section 216(3)(a) which reads:

> "**216. Disclosure of information by a public servant--** ...
> (3) Nothing contained in sub-section (1) shall preclude the disclosure of any such particulars--
> (a) to any person acting in the execution of this Ordinance, where it is necessary to disclose the same to him for the purposes of this Ordinance;"
>
> (*emphasis supplied*)

By virtue of this provision CIR, Islamabad could lawfully access the tax records of Mrs. Isa to arrive at the true picture of who funded the London Properties and with what money. Indeed, the Holy Quran has ordained the believers to uphold the balance of justice and equity by seeking the truth because only by relying on the truth can justice be served:

> "Surah Al-Ma'idah, Verse 8
>
> O YOU who have attained to faith! Be ever stead fast in your devotion to God, bearing witness to the truth in all equity;"
>
> Translation by Muhammad Asad
> (*emphasis supplied*)

Maintainability of the Constitution Petition

73. During the hearings of the present review petitions crucial information surfaced which reinforces our direction to the FBR, to verify the source of funding of the London Properties, issued in the Majority Judgment. The new material that has come to light also significantly prejudices the maintainability of the Constitution Petition filed by the learned petitioner. A brief background of what this information is and how it was acquired is set out hereinbelow.

74. Mrs. Isa whilst making her submissions in the review on 19.04.2021 frequently referred to the Assessment Order dated 14.09.2020 passed against her by Mr. Zulfiqar Ahmad, CIR. The primary purpose for quoting from this Assessment Order, as stated by Mrs. Isa, was to show that

the FBR had acknowledged that Mrs. Isa had transferred £737,503/- and $17,966/- to the UK between the tax years of 2003-2013 which confirmed that she had the requisite sum of money to purchase the London Properties, namely, 50 Coniston Court; 40 Oakdale Road; and 90 Adelaide Road (total value: £751,000/-). However, she informed that although the Assessment Order was partially favourable to her, she had filed an appeal against it on other points. Additionally, both Mrs. Isa and the learned petitioner complained that they were unaware of the Report sent by Chairman FBR to the Secretary SJC. They had not been provided a copy of his Report even though Mrs. Isa had specifically asked for it (ref: pgs.559 and 562 of CMA No.7602 of 2020 filed by Mrs. Isa). To redress this grievance, the Court passed a unanimous order on 19.04.2021 directing the Secretary of SJC to:

> "2. ...prepare 13 copies of the FBR report along with its attached record submitted to the SJC. He shall ensure that the said documents are made available in Court tomorrow at 11:30 a.m. for the perusal of the learned members of the Bench, the two petitioners and the learned Additional Attorney General."

75. The next day, namely, 20.04.2021 the documents were duly provided to all thirteen concerned persons mentioned in the order of 19.04.2021. These documents included the Assessment Order passed by the CIR, the Report of the Chairman FBR and certain ancillary material such as the banking documents of Mrs. Isa. It was in this data that

the relevant information was discovered. The first piece of information which is of significance is a 'Procuration and Delegation of Authority Form' in connection with Mrs. Isa's Foreign Currency Account No.05386055801 in Standard Chartered Bank (**"Bank"**), World Trade Centre, 10-Khayaban-e-Roomi, Block-5, KDA Scheme 5, Clifton, Karachi. It is from this very account through which Mrs. Isa transferred £737,503/- and $17,966/- to different accounts in the UK statedly for the purchase of the London Properties. The Form, printed on the Bank's stationery, is signed by both Mrs. Isa and the learned petitioner and is dated 15.12.2003. It grants extensive powers to the learned petitioner, in relation to Mrs. Isa's Foreign Currency Account in the Bank. Some of these are:

i. Issuing cheques on behalf of the account holder;
ii. Depositing cash funds in the account;
iii. Issuing instructions for the transfer of funds from the account; and
iv. Issuing instructions for issuance of statements of account.

76. The Form can be found in Book-IV, Volume No.3, pg.135 (one of the files in the record forwarded by the SJC). Similarly, cheques amounting to £125,000/- in value were credited into the Foreign Currency Account of Mrs. Isa by Mr. Ahsan Zahir Rizvi, the learned petitioner's former partner at his law firm. Copies of these cheques are contained in the same Book-IV on pgs.22 and 47: £100,000/- [Cheque No.SA-

1736344 drawn on NIB Bank, DHA-26th Street Branch-Khi (**"NIB"**) and deposited on 03.09.2009] and £25,000/- [Cheque No.SA-1736340 drawn on NIB on 11.04.2008].

77. Having perused the material, when the Bench assembled in Court at 11:30 a.m. on 20.04.2021 to resume the hearing of the review, Mrs. Isa commenced her submissions by requesting the Bench to return the material received from the SJC. This request to the members of the Bench was also repeated by the learned petitioner at the very end of the hearing. In the midst of these objections one of us, on the basis of the newly unearthed material received earlier in the day from the SJC, posed three questions to the learned petitioner regarding the Foreign Currency Account in the Bank, Pakistan through which Mrs. Isa had transferred the £737,503/- and $17,966/- that she asserted were later used to purchase the London Properties. For completeness, those three questions are produced below:

i. Did learned petitioner have authority to operate the Foreign Currency Account?
ii. Did learned petitioner have anything to do with the credits made in the Foreign Currency Account?
iii. Did learned petitioner have anything to do with the debits from the Foreign Currency Account?

At this stage, the learned petitioner inquired whether he should answer the questions straightaway or tomorrow. To

give the learned petitioner time to recollect his thoughts, the matter was deferred to the next day. Thereafter, a written document was submitted on 21.04.2021 in which the learned petitioner neither answered the questions in the affirmative or negative. Instead, the following response was given:

> "20. ...it came as a complete surprise to the petitioner that the Hon'ble Mr. Justice Umar Ata Bandial, just before rising on Tuesday, 20 April 2021, asked a number of questions of fact which apparently emanated from Mr. Zulfiqar Ahmad's *order* and/or from the FBR Chairman's report; the petitioner was ready to respond but his lordship told him to do so on the next date of hearing which will be '*tomorrow at 9.30*'...
> 21. That since Mrs. Sarina Isa and the petitioner give no credence to Mr. Zulfiqar Ahmad's *order* and the report of the FBR Chairman, with utmost respect, the questions should not have been put. If the petitioner submits to them and answers them he will effectively be endorsing a patent illegality and undermine his own case that nothing can be added to the Reference. It is further respectfully submitted that it is not appropriate to introduce the report at the stage of hearing of the said review applications..."

78. The purpose of asking these questions was to simply check whether the learned petitioner would admit his connection with Mrs. Isa's Foreign Currency Account, a fact which was by now known to the members of the Bench because of the material produced on Court's order by the SJC. However, since the learned petitioner avoided a response the matter was not pursued further in Court. In any event, a majority of the Bench vide an additional note issued subsequently on or about 05.05.2021, attached to the order

of 20.04.2021, returned the documents procured from the SJC and objected to the questions posed to the learned petitioner.

79. What is perhaps puzzling about learned petitioner's refusal to answer the queries is its direct contradiction with his consistent stance (maintained before the SJC and throughout the hearings of Const. P. No.17 of 2019 and the review petitions) that he has no knowledge regarding the funding of the London Properties that are owned by his financially independent wife. Reference is made to his preliminary response, dated 31.07.2019, (para 56, pg.300 of Const. P. No.17 of 2019, Part III) to the Show Cause Notice (**"SCN"**) issued by the SJC on 17.07.2019:

> "56. ...The particulars as to the price of the three properties, payment and matters pertaining thereto would be in the knowledge of their owners. The Respondent neither is, nor has ever been, the owner of the three properties or of any one or more of them..."
> (*emphasis supplied*)

A similar statement to this effect can also be found in his Constitution Petition filed before this Court (para 14, pg.18 of Const. P. No.17 of 2019, Part I). It would, therefore, appear that if the learned petitioner was in fact unaware of the London Properties and its related details, he simply had to answer 'No' to each question posed to him. But as stated above such a reply was not forthcoming.

80. As has become clear from the discussion in paras 75 and 76, the reluctance of the learned petitioner in answering the Court's questions was his association with and knowledge of Mrs. Isa's Foreign Currency Account. This fact, however, is not reflected in his stand taken before the Court. The said omission adversely affects the maintainability of his Constitution Petition and review petition filed before the Court because knowledge of the Account demolishes the underlying basis of his Constitution Petition that he is not answerable before the SJC as he has no concern with the London Properties. As Mrs. Isa and her children are admittedly the owners of the London Properties, the pivotal issue in the present matter has always been the source of funds used for purchasing these Properties. Mrs. Isa has explained to CIR, Islamabad that the requisite funds were transferred to the UK from her Foreign Currency Account. The Procuration and Delegation of Authority Form in favour of the learned petitioner confers several powers on him giving him access and authority to issue directions regarding movement of funds in the Account (stated above in para 75). Further, his former partner deposited a large sum of £125,000/- in the said account. It is to be noted that the learned petitioner took oath as Chief Justice of the Balochistan High Court on 05.08.2009. The bulk of the funds, £100,000/- were transferred into the Foreign Currency Account by the learned

petitioner's former partner barely a month later, vide cheque deposited on 03.09.2009. Clearly, the learned petitioner had to exit the partnership firm on his assuming public office. Now, when a partner leaves a firm there is a settling of accounts and the outgoing partner has to be given his due from the firm's capital etc. Was this payment into Mrs. Isa's account in substance part of that settlement? Or was it a payment for some bona fide arm's length transaction between the former partner and Mrs. Isa? Either way, it *prima facie* stretches credulity that the learned petitioner would not be aware of or linked to such a transaction. The other payment, of £25,000/- was made vide cheque drawn on 11.04.2008, when the learned petitioner was a partner at the firm. The question, *prima facie*, of knowledge if not linkage arises again with regard to this deposit.

81. It goes without saying that according to Mrs. Isa's version the funds that were credited to her Foreign Currency Account could only have contributed towards the acquisition of two of the London Properties in the year 2013 after the learned petitioner assumed public office. The foregoing facts *prima facie* suggest that in relation to the Foreign Currency Account, the learned petitioner at the very least knew the material facts at all relevant times. That he maybe even had a link with the funds that went into it. Therefore, a discrepancy now exists between the new information (which indicates the

connection of the learned petitioner with the London Properties) and the stance of the learned petitioner (that he has no link whatsoever with the funding of the London Properties). These are quite obviously tentative observations and queries in view of what has come to light. They require a clear response or answer before the competent forum. If the matter had been left to the SJC to deal with at its own discretion in terms of the Short Order dated 19.06.2020 then perhaps the controversy could have been resolved.

82. However, the review majority vide the additional note issued on or about 05.05.2021 ordered the return of the material forwarded by the SJC and attempted to restrain various fora and authorities from scrutinising the same vide short order dated 26.04.2021. Nevertheless, this material can be considered by us for two reasons:

i. The review majority's direction cannot stand in our way as Judges sitting in the same Bench (in dissent though we may be) from accessing and evaluating the material which is available on the record, and passing judgment thereon or with reference thereto. This is necessary to protect the Judicial Independence of all members sitting in the Bench. No hurdles on the ability of dissenting Judges to express their views on the basis of available record can be imposed, especially if the dissent is specifically with the direction(s) issued by the majority. In

any event, whilst 5 members of the majority have declared the banking information to be illegal and of no legal effect, none of them (including the 6th member) have restrained any forum or authority from considering or acting upon the said information. Therefore, the said material can be examined by us and any relevant forum or authority, including the SJC; and

ii. It may be recalled from para 15(i) that Courts can review a judgment if new and important evidence is produced which although existed at the time when the order was made could not be accessed and therefore produced. In the present case, new material has surfaced during the proceedings of CIR, Islamabad. Both documents that we have referred to (the Procuration and Delegation Form and the cheques issued by the former partner of the learned petitioner) existed on the day the Short Order dated 19.06.2020 was passed. However, as these were confidential documents of Mrs. Isa they were not in the knowledge of the other parties. It was only when the direction to the FBR was issued vide Short Order dated 19.06.2020 to proceed with the verification of the funding of the London Properties owned by Mrs. Isa that the CIR, Islamabad made a request for information to her banks under Section 176 of the Ordinance. The documents produced by Mrs. Isa's Bank revealed the connection of the learned petitioner with her Foreign

> Currency Account. Resultantly, the perusal of and reliance on these documents in review jurisdiction is competent, relevant and critical for verifying the propriety of this Court's direction to the FBR. Their contents are also crucial for arriving at an informed decision in the review petitions.

83. Be that as it may, by accepting the review petitions and seeking to prevent a consideration of the freshly discovered relevant and genuine information, the review majority has created an anomalous situation whereby a process of this Court in aid of justice has been turned into a process shrouding the truth under legal niceties. Reference is made to Verse 135 of Surah An-Nisa, quoted at the start of this judgment which directs searching for the truth in order to do justice. An unsatisfactory state of affairs, therefore, exists which unless explained casts an impression that the Court has adopted a different standard for one of its own. Judges occupy an exalted position in society as dispensers of justice. They are amongst the elites in society. Therefore, neglecting their duty to search and confront the truth goes against the express command of Almighty Allah who has warned against providing preferential treatment to privileged persons:

> "Surah Al-Isra, Verse 16
>
> When We decide to destroy a population, We (first) send a definite order to those among

> them who are given the good things of this life and yet transgress; so that the word is proved true against them: then (it is) We destroy them utterly."
>
> Translation by Abdullah Yusuf Ali

84. We must not falter in the face of such a powerful command. Judges, like all other persons in the Service of Pakistan and holding public office, are answerable for their errors and omissions. In the instant case there is material that calls for an explanation before the SJC which must be provided to protect the learned petitioner and the Court from aspersions cast on their integrity.

Conclusion

85. In view of what has been discussed, all the nine review petitions are dismissed. Accordingly, the Short Order dated 19.06.2020 and the Detailed Reasons dated 23.10.2020 are upheld in their entirety.

Sd/-
JUDGE

Sd/-
JUDGE

I agree. I have added a note of my own.
Sd/-
JUDGE

Sd/-
JUDGE

Islamabad,
26.04.2021

APPROVED FOR REPORTING.

MUNIB AKHTAR, J.

86. After we had finalized our reasons as above but before the release thereof, our learned colleagues, Justice Maqbool Baqar, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan on the one hand, and Justice Yahya Afridi on the other, released their reasons vide their respective judgments on 29.01.2022. The judgment of the former does not identify any particular learned Judge as the author and therefore, for convenience, I respectfully refer to that decision as "the Four Member Judgment".

87. I of course fully respect the right of my learned colleagues to support their respective short orders with such reasoning in such manner as they deem appropriate. However, I have noted with concern one aspect of the Four Member Judgment. It is that that decision has (and I say this with all due respect) purported to be signed also by our learned former colleague Justice (R) Manzoor Ahmad Malik, who has expressed his agreement with the same. Our learned former colleague was of course a signatory to one of the short orders (as noted above in para 14) but he retired on 30.04.2021, i.e., several months ago. He could not, as a matter of law, have signed the judgment. The justification as to why he could do so is given in para 55 of the Four Member Judgment. In my view, our learned colleagues, with respect, erred in law in presenting/sending their judgment to our learned former colleague. The matter is important and needs

to be addressed. I do so in this additional note appended to our judgment.

88. The reason offered in the aforementioned para 55 is as follows:

> "55. ... Our learned brother, Manzoor Ahmed Malik, J., (who has since retired) was a signatory to the above short order; therefore, following the precedents of *Al-Jehad Trust v. Federation* (PLD 1996 SC 324) and *CJP Iftikhar Muhammad Chaudhry v. President of Pakistan* (PLD 2010 SC 61), the office is directed to place these detailed reasons recorded in support of that order before his lordship, for his consideration whether he agrees with the detailed reasons."

For reasons that follow I am, respectfully, unable to concur in what has been said and done. In particular, in my view the cited cases do not offer any precedent as could be applied to, and followed in, the circumstances of the present case.

89. In my view the settled position is that once a Judge of this Court has retired he cannot thereafter give, make or sign any judgment, order or decree, and certainly not in such manner as has, or can have, operative effect. Upon retirement he has left office and thereafter cannot, as it were, return to service, whether of his own volition or at the request of any Judge(s) on the Court, unless the Constitution itself so allows. The Constitution does so provide in Article 182, which relates to ad hoc Judges. It provides, inter alia, that a Judge of this Court who has ceased to hold office (three years having not elapsed since retirement) may be requested "to attend sittings of the Supreme Court as an ad hoc Judge for such period as may be necessary and while so attending an ad hoc

Judge shall have the same power and jurisdiction as a Judge of the Supreme Court". Our learned former colleague is not an ad hoc Judge. By efflux of time he retired, period. As a matter of law he could not have signed the Four Member Judgment.

90. Before proceeding to consider the justification offered in the aforementioned para 55 certain points which, while both settled and self-evident, need to be made. Firstly, in any case heard by a multi-member Bench (i.e., a Bench comprising of more than one Judge, whether of even or odd numbered strength) the operative decision (whether judgment, decree or order) must have the support of a majority. Even fifty percent is not enough: that is only a plurality. The majority threshold must be crossed. Of course in most cases there is unanimity. But unanimity is, at least as relevant here, conceptually only a "special" situation of a majority (i.e., all the members of the Bench constitute the "majority"). The "general" rule is that there must be at least a majority. If there is no majority then there is no operative order or decree, or in the case of a judgment no *ratio decidendi* of the Court, although there is of course a *ratio* of such judgment(s) as may have been delivered. Secondly, if there are multiple judgments or orders (short or otherwise) it is only the one which commands the support of the majority that has operative effect as the decision of the Court. If there be no such single judgment then it is the commonality (if any) between them such as commands the support of the majority that has operative effect. Anything (whether determination or decision on a legal point in issue, enunciation of any rule or principle of law or order) that falls short of this mark (i.e., is outside or beyond

that what is common) is not the decision of the Court and has no operative effect.

91. The points just made can be easily demonstrated by looking at the petitions at hand. They were heard and decided by a 10-member Bench. The majority therefore had to comprise of at least six Judges. Three short orders were made, which have been set out in para 14 above. The short order made by us had the support of only four Judges and can be put to one side. When the remaining two are considered it is seen that one commanded the support of five learned Judges (Justice Maqbool Baqar, Justice Manzoor Ahmad Malik, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan) while the other was made by one learned Judge (Justice Yahya Afridi). Neither of these short orders had the support of six Judges and hence was not operative in and of itself. Rather, the two orders had to be considered in conjunction. What had operative effect was only that which was common between them. This was because it was only the commonality that commanded the support of a bare majority (i.e., six Judges) and therefore, and for that reason alone, had operative effect. What was it that was in common? For convenience I reproduce the orders in tabular form (emphasis supplied):

Short order of Maqbool Baqar, Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ.	Short order of Yahya Afridi, J.
For the reasons to be recorded later, captioned Review Petitions are allowed and the directions contained in paras 4 to 11 of the impugned short order dated	For the reasons to be recorded later, all review petitions except C.R.P. No. 296 of 2020, are allowed and the directions contained in paragraphs No. 4 to 11 of the order

19.06.2020 passed in Const. Petition No.17/2019 and other connected matters, alongwith supporting detailed reasons given in the majority judgment of the same date, are recalled and set-aside. All the subsequent proceedings, actions, orders, information and reports in pursuance of the directions contained in the short order dated 19.6.2020 and the detailed reasons thereof, are declared to be illegal and without any legal effect. *Resultantly, any such proceedings, actions, orders or reports cannot be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council.*	dated 19.06.2020 and detail judgment dated 23.10.2020 passed in Constitution Petition No. 17 of 2019 and other connected petitions are recalled. Consequently, all the subsequent proceedings, actions, orders and reports made in pursuance to the said directions are declared to be of no legal effect and/or consequences.

As is obvious from even a bare perusal, the portion emphasized is *not* common between the two orders. It therefore did *not* command the support of the majority, but only of, at most, a plurality (i.e., five Judges). It did *not* therefore have operative effect. Any relevant forum or authority including the SJC is therefore *not* precluded or prevented from considering, acting upon or pursuing any information or material contained in or to be obtained from "any such proceedings, actions, orders or reports". Some of that information or material, at least prima facie, may be such as has been identified in paras 75 to 81 above.

92. While the point is clear and self-evident from a bare perusal of the short orders the matter has been put beyond any conceivable doubt by Justice Yahya Afridi in para 13 of his judgment which, as relevant for present purposes, is set out below (emphasis supplied):

> "13. As for the effect of the above declaration *qua* the allegation of misconduct against the Petitioner Judge,

> suffice it to state that it does not diminish or dilute the constitutional authority of the Council to consider, on its own motion, an "information" received from "any source", whatever it may be, *including the "information" contained in the report received from the tax official*, for deciding to initiate an inquiry, or otherwise, into the conduct of the Petitioner Judge...."

93. This brings me to para 55 of the Four Member Judgment and the justification sought to be given, on the basis of two earlier cases, as to why our retired learned colleague could sign the same. I begin with the second cited case, *CJP Iftikhar Muhammad Chaudhry v. President of Pakistan* (PLD 2010 SC 61). Now this was a decision of a 13-member Bench. A majority thereon had to comprise of at least 7 Judges. The short order was made by a majority of 10 Judges, with three in dissent. It therefore commanded the support of the majority and had operative effect. By the time the detailed reasons came to be written, the three learned Judges in dissent had retired. It appears that they did not release any reasons, whether before or after retirement. In addition, three of the learned Judges who were part of the 10-member majority had also retired. It was in these circumstances that the learned author-Judge of the main judgment, Justice Khalil-ur-Rehman Ramday, observed as follows:

> "205. I, along with the Chief Justice of Pakistan and some other learned brothers, got restored to office in March, 2009 and it is thereafter that I got down to collecting the lost, the forgotten and the scattered threads and this is what I have been able to produce now.
>
> 206. But in the meantime, some of us of this Bench had superannuated which includes three Hon. Members of the ten Members forming the Majority view in this case. In the AL-JEHAD TRUST's case (supra), two Hon.

> Judges who had signed the short judgment, had retired before the detailed reasons were recorded yet they signed the said reasons. Following the said precedent, I am offering these reasons even to the superannuated Honourable Judges, namely, Mr. Justice Muhammad Nawaz Abbasi, Mr. Justice Syed Jamshed Ali and Mr. Justice Hamid Ali Mirza, leaving it to them to decide whether they would or would not like to be party to these detailed reasons."

In the event all three of the learned retired Judges signed the main judgment and one of them (Justice Muhammad Nawaz Abbasi) even sent in a concurrence. In my respectful view, as a matter of law, Justice Khalil-ur-Rehman Ramday could, and ought, not to have sent the judgment to the three learned retired Judges and they could not have signed it. However, be that as it may, the crucial point is that their signatures (and also, with respect, the purported concurrence) were of no legal relevance or consequence. The reason is that the *detailed judgment commanded the support of seven learned Judges who were still on the Court, i.e., there was a majority in support thereof regardless of the three retired Judges*. Even if all three of the retired Judges had not signed the judgment it would not have made the slightest difference. The main judgment commanded the support of the majority that had heard and decided the case and hence had operative effect, i.e., it was the judgment of the Court. As a matter of law therefore, what was done was a mere courtesy, a gesture that was (respectfully) empty and devoid of any and all operative effect. It made not an iota of difference.

94. I turn to the other case, *Al-Jehad Trust v. Federation* (PLD 1996 SC 324). As will be seen the circumstances there were much more complex and (with respect) quite different from what was believed by Justice Khalil-ur-Rehman

Ramday, as set out in para 206. As I show below, this case did not provide any precedential support for what was done through the aforesaid para. In order to fully satisfy myself, I have examined the original record of the case. The following position emerges.

95. The decision was of a learned 5-member Bench, comprising the then Chief Justice Sajjad Ali Shah, Justice Ajmal Mian, Justice Fazal Ilahi Khan, Justice Manzoor Hussain Sial and Justice Mir Hazar Khan Khoso. A majority therefore had to comprise of at least 3 Judges. Now, the short order was made on 20.03.1996 and, interestingly, was signed by four of the learned Judges. Justice Mir Hazar Khan Khoso did not sign the short order. However, since it commanded the support of the majority it had operative effect. Of the four learned Judges who signed the short order the first three were on the Court at all material times, their respective dates of leaving office being 16.02.1998, 30.06.1999 and 31.12.1997. What is crucial for present purposes is the retirement of Justice Manzoor Hussain Sial, who left office on 24.03.1996. Justice Mir Hazar Khan Khoso was at that time an ad hoc Judge and his term expired on 29.09.1996. Thus, contrary to what Justice Khalil-ur-Rehman believed, there was only one Judge whose retirement date was of any significance.

96. The record shows that on 28.03.1996, Justice Ajmal Mian sent the following note to the office (emphasis supplied):

> "I am enclosing herewith the original judgment in Civil Appeal No. 805 of 1995 and Constitution Petition No.29 of 1994 *duly signed by me and by Mr. Justice*

> *Fazal Ilahi Khan and Mr. Justice Manzoor Hussain Sial, which is lying with me since 24th March, 1996, awaiting the opinion of Hon.C.J*.
>
> Hon.C.J has told me that his opinion would also be ready by Saturday, the 30th March, 1996 and if the same would not be ready by then, the above joint opinion is to be released to the parties and to the Press on the above date. Since I would be leaving for Lahore on 30.3.1996 at 1.10 p.m., you may get the signature on it of Hon.C.J. on 30.3.1996 and then release the same to the learned counsel for the parties, amicus curiae and to the Press. 20 photostat copies are also enclosed hereto."

As is clear from the foregoing, three learned Judges had already signed the judgment authored by Justice Ajmal Mian, including Justice Manzoor Hussain Sial. Crucially for present purposes, the latter signed the judgment on his last day in office, i.e., *when he was still on the Court*, which means that *the judgment authored by Justice Ajmal Mian commanded the support of the majority of the Bench*. While it is not clear when the judgment of the Chief Justice was released it is clear from the foregoing note that that was after the date on which Justice Manzoor Hussain Sial stood retired. I will assume that the date was 30.03.1996. Now, the judgment of the Chief Justice was, in addition to himself, signed by three Judges (see at pg. 411): Justice Ajmal Mian, Justice Fazal Ilahi Khan and Justice Manzoor Hussain Sial. However, Justice Ajmal Mian made the following note above his signature (emphasis supplied):

> "I had recorded my separate reasons copy of which sent to H.C.J. HJ(5) and then HJ(6). *The latter two agreed with me and signed the same on 24-03-1996. I adhere to my above reasons*."

It will be seen that the judgment of the learned Chief Justice was supported by only two Judges who were on the Court on 30.03.1996, being himself and Justice Fazal Ilahi Khan. The signing by Justice Manzoor Hussain Sial could not be taken into account as he had retired by then. Thus, this judgment did *not* command the support of a majority of the Bench. It is to be noted that Justice Manzoor Hussain Sial also gave his own judgment and indeed specifically noted that he would be doing so when signing the judgments of the Chief Justice and Justice Ajmal Mian (see at pp. 411 and 522). However, with respect, this is of no relevance for present purposes. Finally, for completeness I may note that the record shows that Justice Mir Hazar Khan Khoso gave his own judgment, dated 26.05.1996 (i.e., when he was still an ad hoc Judge). However, the judgment appears not to have been reported. Again, with respect, this judgment is not relevant for present purposes: Justice Mir Hazar Khan Khoso did not sign the judgments of either the Chief Justice or Justice Ajmal Mian.

97. The position that emerges from the foregoing is therefore as follows. There was a judgment, that of Justice Ajmal Mian, which commanded the support of the majority of the Bench *as it was signed by three learned Judges all of whom were on the Court when they signed it*. The judgment of the learned Chief Justice, it appears, was only supported by two learned Judges. Of the five Judges who comprised the Bench it was the retirement of only one learned Judge (Justice Manzoor Hussain Sial) that had relevance and not two as erroneously concluded by Justice Khalil-ur-Rehman Ramday. Furthermore, this retirement was relevant only in

relation to the judgment of the Chief Justice. It was of no consequence for the judgment of Justice Ajmal Mian since the learned Judge signed the same on his last day in office. Two conclusions therefore follow. Firstly, in *Al-Jehad Trust v. Federation* (PLD 1996 SC 324) there was both an operative short order and an operative judgment of the Court. Secondly, with respect, Justice Khalil-ur-Rehman Ramday did not properly and fully appreciate the circumstances of that case. It is therefore clear, in my respectful view, that it provided no precedent whatsoever to support what his Lordship sought to do in terms of para 206 of his judgment.

98. The situation in the case at hand is however completely different from both decisions. There are in all three judgments. One is of course by us and has the support of four Judges. Like our short order it can be put to one side for present purposes. Of the two remaining judgments one is by one learned Judge, Justice Yahya Afridi. The other is by four learned Judges still on the Court, Justice Maqbool Baqar, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan. *There is therefore no judgment that commands the support of the majority of the Judges who heard and decided the review petitions and are still on the Court*. In this situation, the (with respect) purported signing of the Four Member Judgment by our retired learned colleague can potentially have a material legal effect. It is not of no legal consequence or significance, and it is not merely by way of a courtesy or a (legally) empty gesture, as was the situation in the second cited case. (The first cited case is of course irrelevant for present purposes.) If the signature of our retired learned colleague is regarded as

having legal effect then the situation may be materially altered. This is so because the Four Member Judgment will now have the support of a plurality (five Judges). That of course would still not be a majority, and in and of itself the Four Member Judgment would not be the judgment of the Court. However, now that portion of its reasoning and *ratio* as is common with the judgment of Justice Yahya Afridi would command the support of a bare majority (six Judges). This commonality would then be the operative judgment or *ratio* of the Court. As is obvious this would produce a situation materially different from (indeed, at odds with) the two cases cited by way of precedent. There an operative *ratio* or judgment of the Court came about without taking the retired Judge(s) into any account whatsoever. Here, it would only be with the inclusion of our retired learned colleague that an operative *ratio* or judgment of the Court could come about; without him it would be impossible. The circumstances of the cited cases were not at all the same as the situation here. They cannot therefore offer any support for the conclusion sought to be drawn in, and what was done through, para 55. I have already set out, in para 89 above, the general rule. In view of the same our learned retired colleague could not, in law, have signed the Four Member Judgment. With respect, his purported act of doing so, and expression of agreement, are in law *non est* and of no legal consequence, effect or operation. The Four Member Judgment remains precisely that: a judgment that has the support of only four of the Judges who heard and decided the review petitions. It further follows from this that the reasoning and *ratio* as is common between the Four Member Judgment and the judgment of Justice Yahya Afridi has the support of only a plurality, i.e.,

five Judges. *Since even the commonality does not command the support of the majority it is not the judgment or* ratio *of the Court*.

99. It is obvious that one consequence of the conclusion just reached is that there is no operative reasoning or *ratio* of the Court. Of course, there is an operative order in the field which, as explained above, is that what was common between the two short orders. It is not therefore the situation that the decision is bereft of any legal effect at all. Rather, the result is that the legally operative "short order" (i.e., the commonality) is not supported by any operative judgment (i.e., reasoning or *ratio*). This result is certainly startling. It has been brought about by a highly unusual confluence of three facts: that these matters were heard by an even numbered Bench; the decision was by short order for which there was an operative (though bare) majority in terms as explained above; before the detailed reasons could be released one of the Judges retired. That is what the position is. It cannot be altered by the expedient, as it were, of bringing back the retired learned Judge to temporarily fill the office that he has long since vacated. Each of the three judgments has its own *ratio* and reasoning. There may even be a *ratio* and reasoning that is supported by a plurality. But that is the extent of it. There is nothing that commands the support of even a bare majority. There is no *ratio* or reasoning that has operative effect as being that of the Court. *With respect, it therefore necessarily follows that neither the Four Member Judgment nor that of Justice Yahya Afridi nor such reasoning or* ratio *as may be common between them have any binding precedential effect or*

value. That is where the matter ends, and that is where it must lie.

Let this be circulated among
my learned colleagues.
Sd/-
JUDGE

I agree.
Sd/-
JUDGE

I agree.
Sd/-
JUDGE

I agree with the reasoning recorded by
my learned brother Munib Akhtar, J.
Sd/-
JUDGE