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JUDGMENT SHEET

LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Writ Petition No. 48765/2021

Ameer Hussain

Vs.

Government of Punjab etc.

JUDGMENT

Date of hearing	01.10.2021
Petitioner by:	Mr. Burhan Moazzam Malik, Mian Pervaiz Hussain, Mian Tabbasum Ali and Ms. Saima Arif, Advocates.
Respondents 1 & 2 by:	Mr. Ahmad Awais, Advocate General Punjab; Malik Javed Akhtar, Additional Advocate General; Mr. Zafar Hussain Ahmad, Additional Advocate General and Rai Shahid Saleem, Assistant Advocate General with Zahoor Hussain, Special Secretary (Home Department) and Irshad Ahmad, Section Officer (Internal Security).
Respondent No.3 by:	Mr. Asad Ali Bajwa, Deputy Attorney General and Mr. Muhammad Haider Kazmi, Assistant Attorney General.

> "The Rule of Law concept, in essence, embodies a number of important interrelated ideas. First, there should be clear limits to the power of the State. A government exercises its authority through publicly disclosed laws that are adopted and enforced by an independent judiciary in accordance with established and accepted procedures. Secondly, no one is above the law; there is equality before the law. Thirdly, protection of the rights of the individual."[1]
>
> – S. Jayakumar

Tariq Saleem Sheikh, J. This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (the "Constitution"), impugns order dated 10.7.2021 (the "Impugned Order") issued by Respondent No.2 (Deputy Commissioner, Lahore) directing detention of Hafiz Saad Hussain Rizvi under section 11-EEE of the Anti-Terrorism Act, 1997 (the "ATA"), and seeks his immediate release.

[1] https://www.mlaw.gov.sg/news/speeches/keynote-address-by-dpm-prof-s-jayakumar-at-the-iba-rule-of-law-symposium

Facts

2. Hafiz Saad Hussain Rizvi is the Ameer of *Tehreek-e-Labaik Pakistan* (TLP). He demands expulsion of the French diplomat from Pakistan as a mark of protest against publication of irreverent caricatures in France. The Government of the Punjab (the "Punjab Government") was moved when he held a meeting with his party's top leaders at Sabzazar, Lahore, on 11.4.2021 and announced country-wide agitation, including march to Islamabad, to press for the aforesaid demand. The Deputy Inspector General of Police (Operations) addressed Letter No. 2048/DSP-L-Ops dated 12.4.2021 to Respondent No.2 for Rizvi's detention under section 3 of the Punjab Maintenance of Public Order Ordinance, 1960 (the "MPO"). Keeping in view the sensitivity of the matter, Respondent No.2 immediately convened a meeting of the District Intelligence Committee (DIC) and on its recommendations, vide Order No. RDM/35 dated 12.4.2021, directed that Rizvi should be arrested and detained in the Central Jail, Kot Lakhpat, Lahore, for 30 days. Although he was arrested, the TLP activists came out on the streets and resorted to vandalism. They also protested against his detention. The following week saw complete breakdown of law and order in the province. According to the Punjab Government, three police officials were killed, 303 were injured and 28 were abducted in various incidents. Besides, 16 police vehicles, two oil tankers and the Orange Train Stations were damaged. Roads were blocked and private property worth crores of rupees, including cars and motorcycles, were set ablaze. The Additional Chief Secretary (Home Department) extended Rizvi's detention for a further period of 30 days vide Order dated 11.5.2021. The Petitioner, who is his paternal uncle, filed Writ Petition No. 31145/2021 in this Court challenging his detention but it was dismissed vide Order dated 24.5.2021. Subsequently, the Home Department ordered another 30 days extension which took the aggregate of his detention period under the MPO to 90 days.

3. Article 10(4) of the Constitution mandates that a person cannot be detained under any preventive detention law beyond three months unless his case is reviewed by the prescribed Review Board and

authorized by it. In view of this constitutional command, the Punjab Government made a reference under section 3(5) of the MPO to the Provincial Review Board consisting of three Hon'ble Judges of this Court. The Board opined that there wasn't any sufficient ground for Rizvi's further detention and, vide Order dated 02.07.2021, declined the Government's request for extension and directed his immediate release. The Punjab Government did not assail that order before the competent court.

4. Rizvi's 90 days detention period under the Ordinance was to expire on 10.7.2021 but before he could be released Respondent No.2, purportedly in exercise of the powers under section 11-EEE read with section 33 of the ATA, issued the Impugned Order directing his detention for three months. Hence, this petition.

5. It is important to point out that on 13.7.2021 Rizvi made a representation to the Secretary (Home Department), Government of the Punjab, which he did not decide. Finally, vide Letter No. SO(IS-1)3-41/2021 (TLP) dated 2.9.2021, he was informed that it was not maintainable and was advised that the "concerned forum for the subject-matter may be approached for its adjudication."

6. When this petition came up for regular hearing this Court observed that representation of Federation of Pakistan was necessary. Accordingly, the Petitioner was directed to implead it as Respondent No.3. The Court also felt that substantial questions as to interpretation of constitutional law were involved in this case so notices were issued to the Attorney General for Pakistan and the Advocate General Punjab in terms of Order XXVII-A CPC.

7. The Respondents submitted report and parawise comments to this petition which were placed on record.

Arguments

8. The learned counsel for the Petitioner, Mr. Burhan Moazzam Malik, Advocate, contended that the Impugned Order was void *abinitio* because the Home Department's Letter No.

SO(Jud-III)7-1/2014(P) dated 10.7.2021 from which Respondent No.2 derived authority to pass the said order was bad in law. On merits, the learned counsel submitted that Rizvi was a patriot and a practicing Muslim. He loved Prophet Muhammad (PBUH) and had a constitutional right to protest if there is any irreverence to him, more particularly against the sacrilegious publications in France. Nevertheless, he did not exceed that fundamental right and there was not a whit of evidence that he incited his party workers or other activists to resort to arson and vandalism. The Provincial Review Board had rejected the Punjab Government's reference under section 3(5) of the MPO and held that the grounds of his detention were flimsy. He contended that after the Board's decision it was not possible for it to detain Rizvi under the MPO so it resorted to section 11-EEE of the ATA to frustrate it which could not be permitted. He maintained that the Impugned Order was out-and-out *malafide* and to highlight the point referred to three orders of the Home Department, i.e. Order No. SO(IS-1)4-10/2020(P-1) (Lahore)-1 dated 21.1.2021; Order No. SO(IS-1)4-10/2020(P-1)(Lahore)-9 dated 18.2.2021; and Order No. SO(IS-1)4-10/2020(P-1) dated 16.4.2021. The first order proscribed Rizvi under section 11-EE of the ATA and placed his name in the list maintained under the Fourth Schedule of the Act while the second order annulled the action after 28 days. The third one re-proscribed him.

9. The learned Deputy Attorney General for Pakistan submitted that Rizvi was a fire-band speaker and had great influence on his party workers. His detention averted his plan to march to Islamabad but violent protests were witnessed throughout the Punjab. Keeping his nefarious activities in view, the Federal Government proscribed him under section 11-EE of the ATA which he had not challenged so far. The learned Law Officer added that the Federal Government supported the Impugned Order as it had credible intelligence reports that Rizvi would create mischief again if he was released.

10. The learned Advocate General vehemently opposed this petition. He argued that this petition was not maintainable as Rizvi had not exhausted administrative remedy which was adequate as well as

efficacious. He controverted the Petitioner's contention that Respondent No.2 was not competent to issue the Impugned Order and submitted that the Punjab Government had delegated its powers to him under section 33 of the ATA in accordance with the law declared by the Hon'ble Supreme Court of Pakistan in ***Messrs Mustafa Impex, Karachi, and others v. The Government of Pakistan through Secretary Finance, Islamabad and others*** (PLD 2016 SC 808). On facts the learned Advocate General contended that Rizvi's preventive detention was imperative in the prevailing circumstances. He was a big threat to the public peace and the country's security owing to which the Federal Government had proscribed his party, TLP, under section 11-B and his person under section 11-EE of the ATA. He added that there were intelligence reports that the Majlis-e-Shura and the leadership of the defunct TLP were desperately waiting for Rizvi's release to chalk out their next line of action. They were likely to incite party workers and create law and order situation again.

The law and jurisprudence

11. Rule of law connotes "the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a non-arbitrary form of government, and more generally prevents the arbitrary use of power."[2] Personal liberty is one of the basic human rights and the principle that the governments cannot deprive individuals of that right is central to the concept of rule of law.[3] "First recognized in the *Magna Carta Libertatum* in 1215, this basic human right has in no small measure defined the proper juridical relationship between citizens and their governments. Indeed, this principle is now explicitly recognized in most constitutions and several international human rights treaties, declarations and resolutions."[4] Nevertheless, the right to personal liberty is not an unqualified right and in some compelling circumstances a State may have to put curbs on an individual and resort to what is called preventive (or preventative) detention.

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[2] Choi, Naomi. "Rule of law". *Encyclopedia Britannica*, https://www.britannica.com/topic/rule-of-law
[3] Derek P. Jinks, *The Anatomy of an Institutional Emergency: Preventive Detention and Personal Liberty in India*, 22 Mich. J. Int'l L 311 (2001).
Available at: https://repository.law.umich.edu/mjil/vol22/iss2/3
[4] *ibid*

12. There is no standard definition of "preventive detention." Justice Fazal Karim opines that it is a species of custody or arrest. He writes: "An order restricting a person's movement may amount to a detention order, if under the law the person is so restricted, if he leaves that place, can be brought by physical force of if he can be punished for so leaving, for in that case the place to which his movements are restricted will constitute a sort of prison."[5] However, in the international documents the "preventive detention" refers to "persons arrested or imprisoned without charge."[6] The International Committee of Red Cross, which terms preventive detention as internment, states that it is an "exceptional measure of control that may be ordered for security reasons in armed conflict, or for the purpose of protecting State security or public order in non-conflict situations provided the requisite criteria have been met.[7]

13. Quite often the term "preventive detention" is used interchangeably with the expression "administrative detention" and the two are considered synonymous. However, Stella opines:[8]

> "Although there are exceptions, the term 'administrative detention' is more frequently employed in civil law countries, and the term 'preventive' or 'preventative' detention is used more often in common law countries. This apparently innocuous distinction is nonetheless important, as the differing terms 'administrative' and 'preventive' are intrinsically value-laden, suggesting, in the case of the former, that detention is a tool of the administration or bureaucracy, and, in the case of the latter, that detention is necessary to 'prevent' a potential threat or danger from occurring."

14. It follows from the above discussion that preventive detention is a measure whereby the executive takes a person into custody to prevent a future harm. He may not have committed a crime but there is apprehension that he would indulge in acts that are prejudicial to public peace. Lord Atkinson considered the justification for preventive detention in ***R v. Halliday***, [1917] AC 260, and observed:

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[5] Fazal Karim, *Judicial Review of Public Actions*, First Edition, 2006 p. 630

[6] Elias, Stella Burch, *Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects* (May 18, 2009). Columbia Human Rights Law Review, Vol. 41, 2009. Available at SSRN: https://ssrn.com/abstract=1406814

[7] https://www.icrc.org/eng/assets/files/other/icrc_002_0892.pdf

[8] See note 6, *ibid*.

> "… where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is, under this statute, inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defence of the realm."

15. In *Halliday*, Lord Finlay pointed out that the object of preventive detention is not to punish a person for an offence committed by him but to forestall mischief. He said:

> "Any preventive measure even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State."

16. The Indian Supreme Court echoed the same thought in ***Union of India v. Paul Manickam and another*** (AIR 2003 SC 4622) when it ruled:

> "In case of preventive detention no offence is proved, nor any charge is formulated and the justification of such detention is suspicion or reasonability and there is no criminal conviction which can only be warranted by legal evidence. Preventive justice requires an action to be taken to prevent apprehended objectionable activities … The compulsions of the primordial need to maintain order in society, without which enjoyment of all rights, including the right of personal liberty would lose all their meanings, are the true justifications for the laws of preventive detention. This jurisdiction has been described as a 'jurisdiction of suspicion', and the compulsions to preserve the values of freedom of a democratic society and social order sometimes merit the curtailment of the individual liberty."

17. Similarly, in ***Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and others*** (AIR 1981 SC 746) the Indian Supreme Court held:

> "[I]t is necessary to bear in mind the distinction between 'preventive detention' and 'punitive detention' when we are considering the question of validity of conditions of detention. There is a vital distinction between these two kinds of detention. 'Punitive detention' is intended to inflict punishment on a person, who is found by the judicial process to have committed an offence, while 'preventive detention' is not by way of punishment at all, but it is intended to pre-empt a person from indulging in conduct injurious to the society. The power of preventive detention has been recognized as a necessary evil and is tolerated in a free society in the larger interest of security of the State and maintenance of public order."[9]

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[9] This view was reiterated in *Anukul Chandra Pradhan v. Union of India and others* (AIR 1997 SC 2814)

18. International human rights law does not proscribe preventive detention. Nevertheless, it must be in accordance with and the grounds prescribed by law.[10] Arbitrary detention is prohibited. The UN General Assembly has adopted *"Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment"*[11] which are required to be followed in all cases.

19. The Universal Declaration of Human Rights (UDHR), which is the "milestone document in the history of human rights"[12] and sets out "a common standard of achievements for all peoples and all nations",[13] states that "no one shall be subjected to arbitrary arrest, detention or exile."[14] Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) reiterates this principle. It reads: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." In terms of Article 4 of ICCPR derogation from this obligation is permissible only in an extreme situation and subject to the following conditions: (a) there is a public emergency which threatens the life of the nation; (b) the state of emergency is officially proclaimed; (c) the derogation is to the extent required by the exigencies of the situation; and (d) the measures taken by the State should not be inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion or social origin.

20. According to Claire Macken, there are two possible interpretations of the term "arbitrary". If narrowly interpreted it would mean an arrest which is not in accordance with the procedure prescribed by law and thus out-and-out unlawful. On the other hand, in the wide sense, an arrest or detention is arbitrary if it is unlawful or unjust, that is,

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[10] Diane Webber, *"Extraordinary measures – A comparative approach to crafting a new legal framework for preventive detention of suspected terrorists".* Available at: https://repository.library.georgetown.edu/bitstream/handle/10822/1047843/webber_diane_dissertation.pdf?sequence=1&isAllowed=y

[11] Resolution 43/173 of 9 December 1988.

[12] https://www.un.org./en/about-us/universal-declaration-of-human-rights

[13] *ibid*

[14] Article 9,UDHR

under a law which is contrary to the principles of justice or derogates the right to liberty and security of person.[15] General Comment No. 35 of the Human Rights Committee of the ICCPR favours the latter construction. Paragraph 12 thereof states that "an arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality."[16]

21. In ***Hugo Van Alphen v. the Netherlands*** the Human Rights Committee (HRC) while interpreting "arbitrary detention" in ICCPR observed:

> "The drafting history of Article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."[17]

22. The Working Group on Arbitrary Detention set up by the UN Commission on Human Rights in 1991 states that "deprivation of liberty is arbitrary if a case falls in one of the following three categories: (a) when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him); (b) when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by Articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR and, insofar as States parties are concerned, by Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR; and (c) when the total or partial non-observance of the international norms relating to the right to a fair

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[15] Claire Macken, *"Preventive Detention and The Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966."* Available at: http://classic.austlii.edu.au/au/journals/AdelLawRw/ 2005/1.pdf

[16] General Comment No.35 dated 16 December 2014 on Article 9 (Liberty and security of person). Available at: https://www.icj.org/wp-content/uploads/2015/04/General-Comment-CCPR-35-2014-eng.pdf

[17] *Van Alphen v. The Netherlands* (Communication No. 305/1988) CCPR/C/39/D/305/1988, UN Human Rights Committee (HRC), 23 July 1990, available at https://www.refworld.org/cases.HRC.525414304.html [accessed 2 October 2021]

trial, spelled out in the UDHR and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character."[18]

23. In ***A v. Australia***[19] the HRC iterated that the element of proportionality is also relevant for determining whether detention is arbitrary within the meaning of Article 9(1) of ICCPR. Relevant excerpt is reproduced below:

> "[T]he Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."

24. The European Convention on Human Rights permits detention only on the six grounds specified in Article 5(1) in accordance with the procedure prescribed by law. Albeit "the word 'proportionality' is nowhere to be found in the European Convention, but the idea it expresses appears as a central principle in the jurisprudence of the ECHR. Proportionality analysis may consist of (1) suitability (the limiting measure must be capable of achieving the (legitimate) aim pursued); (2) necessity (the limiting measure must be the least restrictive means to achieve the relevant purpose); and (3) proportionality in the narrow sense (there must be a reasonable balance between the limiting measure and the aim pursued). However, a fair or reasonable balance must be struck between the rights of individuals and the general public interests of society. In the context of preventive detention of terror suspects, a proportionate balance is required between preventive detention and prevention of terrorism."[20]

25. The jurisprudence developed under the American Convention on Human Rights also interdicts arbitrary detention and holds that the principle of proportionality would apply even where the

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[18] UN Office of the High Commissioner for Human rights (OHCHR), Fact Sheet No.26, The Working Group on Arbitrary Detention, May 2000, No.26, available at http://www.refworld.org/docid/479477440.html [accessed 2 October 2021]
[19] *A v. Australia*, HRC Communication No.560/1993, (April 30, 1997)CCPR/C/59/D/560/1993,¶9.2.
[20] See note 10, *ibid*.

authorities claim that it is legitimate. In ***Lopez Alvarez v. Honduras***[21] the Inter-American Court of Human Rights said:

> "67. The preventive detention is limited by the principles of legality, the presumption of innocence, need, and proportionality, all of which are strictly necessary in a democratic society. It is the most severe measure that can be applied to the person accused of a crime, reason for which its application must have an exceptional nature. The rule must be the defendant's liberty while a decision is made regarding his criminal responsibility.
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> "68. The legitimacy of the preventive detention does not arise only from the fact that the law allows its application under certain general hypotheses. The adoption of this precautionary measure requires a judgment of proportionality between said measure, the evidence to issue it, and the facts under investigation. If the proportionality does not exist, the measure will be arbitrary."

26. In Indo-Pak sub-continent the history of preventive detention can be traced to Bengal Regulation III of 1818 which was applicable to three presidencies of Calcutta, Bombay and Madras. However, the principal legislations were the Defence of India Act of 1915, the Anarchical and Revolutionary Crimes Act of 1919 (popularly known as the Rowlatt Act), The Government of India Act, 1935, and the Defence of India Act of 1939. Pakistan retained the concept of preventive detention after the Independence and gave it constitutional imprimatur. Article 10 of the Constitution of 1973 directly addresses preventive detention whose language has remained the same over time except for minor amendments.

27. Article 10(4) of the Constitution mandates that a law providing for preventive detention can be made only to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of the country, or public order, or the maintenance of supplies or services. It further says that no law shall authorize the detention of a person for a period exceeding three months unless the appropriate Review Board sanctions it and, if the government requires any further extensions for a sufficient cause, they would also be subject to review by the Board after every three months. Article 10(5) stipulates that when any person is detained under a preventive detention law, the authority making the order shall within

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[21] Case of Lopez-Alvarez, Inter-Am.Ct.HR, Judgment of Feb. 1, 2006, ¶¶67,68 (Honduras). Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_141_ing.pdf

fifteen days communicate to him the grounds on which it has made the order and shall afford him the earliest opportunity to make a representation thereagainst. Article 10(7) prescribes the maximum period for which a person may be detained under the preventive detention law. Article 10(9) adds that the provisions of Article 10 do not apply to enemy aliens. It may not be out of place to mention that the Constitution of Pakistan (1973) contains express provisions regulating declaration of emergency and the rights that can be suspended in that event. Article 10 goes beyond the existence of any particular emergency.[22]

28. In the instant case, the Punjab Government has detained Rizvi under section 11-EEE of the ATA. It is reproduced below for facility of reference:

> **11-EEE. Power to arrest and detain suspected persons –** (1) Government if satisfied that with a view to prevent any person whose name is included in the list referred to section 11-EE, it is necessary so to do, may, by order in writing, direct to arrest and detain, in such custody as may be specified, such person for such period as may be specified in the order, and Government if satisfied that for the aforesaid reasons it is necessary so to do, may, extend from time to time the period of such detention for a total period not exceeding twelve months.

Clause (i) of section 2 of the ATA defines "Government" as:

> (i) 'Government' means the Federal Government or, as the case may be, the Provincial Government.

29. In ***Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v. Amatul Jalil Khawaja and others*** (PLD 2003 SC 442) after a detailed analysis of the judicial precedents the Hon'ble Supreme Court of Pakistan ruled that an order of preventive detention must conform to the following criteria:

> "(i) the Court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention;
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> (ii) the satisfaction should be established with regard to each of the grounds of detention, and, if one of the grounds is shown to be

[22] Paper on Preventive Detention in Pakistan, available at: rsilpak.org/ wp-content/uploads/2019/01/Preventive Dentetion-Maria-Article-ICRC.pdf

bad, non-existent or irrelevant, the whole order of detention would be rendered invalid;

(iii) the initial burden lies on the detaining authority to show the legality of the preventive detention;

(iv) the detaining authority must place the whole material, upon which the order of detention is based, before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence of the Court to decide;

(v) the Court has further to be satisfied, in cases of preventive detention, that the order of detention was made by the authority prescribed in the law relating to preventive detention and that every requirement, of the law relating to preventive detention had been strictly complied with;

(vi) the 'satisfaction' in fact existed with regard to the necessity of preventive detention of the detenue;

(vii) the edifice of satisfaction is to be built on the foundation of evidence because conjectural presumption cannot be equated with satisfaction; it is subjective assessment and there can be no objective satisfaction;

(viii) the grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detenue to make representation against his detention to the authority, prescribed by law;

(ix) the grounds of detention had been furnished within the period prescribed by law, and if no such period is prescribed, then 'as soon as may be'."

30. "The history of liberty is history of procedural safeguards."[23] In ***The Government of East Pakistan v. Mrs. Rowshan Bijaya Shaukat Ali Khan*** (PLD 1966 SC 286) the Hon'ble Supreme Court held that preventive detention makes an inroad on the personal liberty of a person without the safeguards of a formal trial so it must be jealously kept within the legal confines. Where the government feels compelled to deprive a person of his liberty, it "must strictly and scrupulously observe the forms and rules of law".[24] And whenever this is not done, the Court will set the prisoner at liberty in a proceeding for *habeas corpus*.[25]

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[23] *Kamleshkumar Ishwardas Patel v. Union of India and others* (1995) 4 SCC 51
[24] *Ram Narayan Singh v. The State of Delhi and others (*AIR 1953 SC 277) and *Union of India v. Paul Manickam and another* (AIR 2003 SC 4622)
[25] *Maqbool Hussain v. State of Bombay (*AIR 1953 SC 325)

The case on hand

31. I first take up the learned Advocate General's objection regarding maintainability of this petition. According to him, Rizvi made a representation against the Impugned Order before the Home Secretary which was returned to him vide letter dated 2.9.2021 on the ground that it was not maintainable and he was advised to approach the competent forum. He contends that Rizvi must exhaust the administrative remedy in the first instance – which, on my query, he said lies before Respondent No.2. I am afraid, I cannot subscribe to this argument. The learned Advocate General has failed to explain as to how Rizvi's representation before the Home Secretary was wrong. The ATA does not contain any specific provision regarding representations against the preventive detention orders issued under section 11-EEE. This right is read into it through sub-section (2) of that section which stipulates that Article 10 of the Constitution shall apply *mutatis mutandis* to such orders. Article 10(5) of the Constitution enjoins that the authority making an order of preventive detention shall afford the detenue an "earliest opportunity of making a representation against the order." If it is assumed, as the learned Advocate General wants me to do, that the representation against the Impugned Order lies before Respondent No.2, the Home Secretary should have forwarded Rizvi's application to him or returned it forthwith. He should not have sat over it till 2.9.2021. The contention of the learned counsel for the Petitioner that the conduct of the government functionaries smacks of malice is, *prima facie*, not unfounded.

32. The constitutional law recognizes the doctrine of exhaustion of statutory remedies. However, the courts generally distinguish between cases seeking enforcement of fundamental rights and those in which no such issue is involved. Justice Fazal Karim explicates:

> "Fundamental rights are fundamental because they have been guaranteed by the fundamental law, that is, the Constitution. As a general rule, as regards them, the only adequate remedy is the one provided by the Constitution itself, and no question of another remedy, e.g. statutory, being an adequate remedy can arise. The Supreme Court of India has repeatedly declared 'that the existence of such a remedy was not a matter which was relevant to be considered

> when the citizen complained of the infringement of his fundamental rights.' "[26]

33. This petition is in the nature of *habeas corpus*. According to Basu, "*habeas corpus* is not a part of the judicial review procedure, although the grounds of issuing it are probably the same, as those of judicial review."[27] He further states: "*Habeas corpus* is a writ *'of right'* and not a writ *'of course'*, and not a discretionary writ. The court is bound to issue the writ if on return, no cause or no sufficient cause appears and cannot refuse it on the ground of existence of alternative remedy."[28] In ***Union of India v. Paul Manickam and another*** (AIR 2003 SC 4622), the Indian Supreme Court held that when the Constitution declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was required to examine the question of illegal detention with promptitude. The writ of *habeas corpus* is a device of that nature. In ***Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v. Amatul Jalil Khawaja and others*** (PLD 2003 SC 442), which was a case of preventive detention under the Security of Pakistan Act, 1952, the Hon'ble Supreme Court of Pakistan held:

> "The right of a person to a petition for *habeas corpus* is a high prerogative right and is a constitutional remedy for all matters of illegal confinement. This is one of the most fundamental rights known to the Constitution. There being no limitation placed on the exercise of this right, it cannot be imported on the actual or assumed restriction which may be imposed by any subordinate legislation. If the arrest of a person cannot be justified in law, there is no reason why that person should not be able to invoke the jurisdiction of the High Court immediately for the restoration of his liberty which is his basic right. In all cases where a person is detained and he alleges that his detention is unconstitutional and in violation of the safeguards provided in the Constitution, or that it does not fall within the statutory requirements of the law under which the detention is ordered, he can invoke the jurisdiction of the High Court under Article 199 and ask to be released forthwith. (PLD 1965 Lah. 135). He need not wait for the opinion of the Advisory Board before praying for a *habeas corpus*. (AIR 1952 Cal. 26)."

34. The learned Advocate General has referred to the cases titled ***Muhammad Siddiq Khan v. District Magistrate*** (PLD 1992 Lahore 140) and ***Sheikh Rashid Ahmad v. D. M. Rawalpindi etc.*** (PLJ

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[26] Fazal Karim, *Judicial Review of Public Actions*, Second Edition, Vol III, p. 1457
[27] Durga Das Basu, *Commentary on the Constitution of India*, 9th Edition, Vol. 10 page 10389.
[28] *ibid*, at page 10579 (internal citations omitted).

2004 Lahore 1221) decided by a Division Bench and five-member Larger Bench of this Court respectively which take a contrary view. These judgments are at variance with the dictum laid down by the Hon'ble Supreme Court in *Amtul Jalil Khawaja's* case so they cannot be followed. Article 189 of the Constitution mandates that any decision of the Supreme Court, insofar as it decides a question of law or is based upon or enunciates a principle of law, is binding on all the courts in the country. Interestingly, even in *Muhammad Siddiq Khan* the learned Division Bench left a window open for exercise of constitutional jurisdiction by the High Court when it held:

> "As already held that Article 10(5) of the Constitution and section 3(6) and (6-a) of the Punjab Maintenance of Public Order Ordinance, grant a right to detenu to make a representation which must be decided by the Government. That being so we are of the view that the remedy provided by Article 10(5) and sub-sections (6) and (6-a) of section 3 of the Ordinance is adequate within the meaning of Article 199 of the Constitution. By so observing we do not find to lay down an inflexible rule and we should not be taken to have held that in no case a constitutional petition can be filed without filing a representation. There may be cases where it can be demonstrated that it is not possible to file a representation for example, where no grounds of detention are communicated to the detenu or where the filing of the representation would be a mere exercise in futility. Similarly, there may be other cases like complete lack of jurisdiction in the authority passing the order of detention where the filing of representation may not be necessary. In the ultimate analysis the question as to whether it would be necessary to file a representation in a given case would depend upon the facts of that case."

35. In the instant case, the Petitioner has specifically pleaded that the Impugned Order is without jurisdiction, *coram non judice* and *malafide*. Therefore, it also falls within the exceptions contemplated by *Siddiq Khan*. The learned Advocate General's objection is accordingly repelled.

36. Let us now turn to the Petitioner's challenges to the Impugned Order. ATA is a federal law which aims to check terrorism, sectarian violence and provides for speedy trial of heinous offences.[29] A careful study of the ATA would show that the Federal and the Provincial Government have concurrent jurisdiction over some subjects while others fall exclusively in the former's domain. Nevertheless, the learned

[29] Preamble of the ATA.

Advocate General argues, it may even delegate these to the Provincial Government under section 33 of the Act.[30]

37. Section 11-EE of the ATA stipulates that the Federal Government may, by order published in the official Gazettee, proscribe a person and put his name in the list maintained in terms of the Fourth Schedule of the ATA on the grounds mentioned in sub-section (1) of the said section. This entails the consequences detailed in other clauses of that section. The Federal Government, purportedly in exercise of the powers under section 33, issued SRO dated 29th October 2014 to delegate functions under section 11-EE of the ATA to the Provincial Home Secretaries and the Chief Commissioner, Islamabad. Then, through another notification dated 24th August 2020 it authorized these functionaries, *inter alia*, to constitute Proscription Review Committees contemplated in the Act within their respective jurisdictions. The Punjab Government has proscribed Rizvi vide Order No. SO(IS-1)4-10/2020 (P-1)(Lahore)-1 dated 16.4.2021 in exercise of its delegated authority. Inasmuch as the said order has not been challenged in these proceedings, I would not comment on it lest it may prejudice the parties. Nevertheless, I do make one point. The learned Advocate General contends that in ***Qari Muhammad Arif v. Secretary Home Department and others*** (PLD 2021 Lahore 499) this Court has declared the aforesaid delegation of powers valid. This is incorrect. The constitutionality of the said notifications was neither questioned nor considered in that case so it is yet to be debated.

38. Section 11-EEE of the ATA speaks of preventive detention and empowers the "Government" to arrest and detain the person proscribed under section 11-EE if it is satisfied that he is likely to indulge in the verboten activities and it is necessary to prevent him from

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[30] Section 33 of the ATA reads as under:

> **33. Delegation.–** The Government may, by notification, delegate, subject to such a condition as may be specified therein, all or any of the powers exercisable by it under this Act.
>
> Clause (i) of section 2 of the ATA defines "Government" as:
>
> "Government" means the Federal Government or, as the case may be, the Provincial Government.

doing so. Keeping in view the definition in clause (i) of section 2, there is nothing in section 11-EEE to restrict the power to order preventive detention to the Federal Government. It can be legitimately exercised by the Provincial Government in its own right without any delegation from the Federal Government under section 33. However, this holding does not conclude the discussion on the point. Respondent No.2 has issued the Impugned Order purportedly in exercise of the powers conferred on him by the Government of the Punjab, Home Department, vide Letter No. SO(Judl-III)7-1/2014(P) dated 10.7.2021. It is to be determined whether that conferment is valid.

39. In ***Messrs Mustafa Impex, Karachi, and others v. The Government of Pakistan through Secretary Finance, Islamabad and others*** (PLD 2016 SC 808) the Hon'ble Supreme Court held that the Constitution (Eighteenth Amendment) Act, 2010, has made fundamental changes in the Constitution which, *inter alia*, include channelizing the executive power of the government. With reference to the Federal Government, the Court ruled that it consists of the Prime Minister and the Federal Ministers (i.e. the Cabinet) but does not include the President who is the Head of the State. Neither a Secretary nor a Minister nor the Prime Minister are the Federal Government and they cannot exercise powers on its behalf. The august Supreme Court further held that the Rules of Business, 1973, are binding on the Federal Government and must be followed in all eventualities in letter and spirit. Rule 16 thereof gives the Prime Minister discretionary power in respect of the matters to be brought before the Cabinet but the exercise of that discretion is subject to two conditions: firstly, he must consciously apply his mind to every case and justify through a reasoned and formal order where he thinks that reference to the Cabinet is not necessary; and secondly, the matter should not be such regarding which Cabinet decision is compulsory under the Constitution. The same principles apply to the Provincial Government.

40. As adumbrated, the Federal and the Provincial Government have concurrent powers under section 11-EEE of the ATA to detain a proscribed person. The Punjab Government delegated its powers under

that section to the Deputy Commissioners vide Notification No. SO(Jud-III)7-1/2014 dated 24.2.2017 issued by the Secretary, Home Department. On 7.7.2021 the Additional Chief Secretary (Home) moved a summary to the Chief Minister that the said notification was not in order as it did not have the Cabinet's approval which was imperative in terms of the law declared by the Hon'ble Supreme Court in the *Mustafa Impex* case. He solicited his approval to place the matter before the Provincial Cabinet through circulation in terms of Rule 25(1)(b) of The Punjab Government Rules of Business, 2011 (the "Punjab Rules of Business"), for seeking:

i) *Ex-post facto* approval of notification dated 24.2.2017 issued by the Home Department.

ii) *Ex-post facto* approval of all the orders issued by the Deputy Commissioners in exercise of the powers delegated in the aforementioned notification.

41. The Chief Minister approved the summary on 8.7.2021. However, before proceeding further it is necessary to see how the Cabinet is required to conduct business.

42. Rule 25(1) of the Punjab Rules of Business lays down that the cases referred to the Cabinet shall be disposed of:

(a) by discussion at a meeting of the Cabinet;

(b) by circulation amongst the Ministers; and

(c) by discussion at a meeting of a Committee of the Cabinet.

Rule 25(2) states that unless the Cabinet authorizes otherwise, the decisions of a Committee of Cabinet shall be ratified by the Cabinet. Rule 25(3) provides that the Cabinet may constitute Standing or Special Committees and may assign to them a class of cases or a particular case.

Rule 27 prescribes the procedure for Cabinet decision by circulation. Rule 27(1) stipulates that when a case is circulated to the Cabinet for recording opinion, the Chief Secretary shall specify the time

by which the opinion should be communicated to him. If a Minister does not furnish his opinion by that time, he shall be deemed to have accepted the recommendations contained in the summary. Rule 27(2) enjoins that after the opinions of all the Ministers have been received, or the time specified has expired, the Chief Secretary shall–

(a) in the event of full agreement to the recommendation in the summary, treat it as a Cabinet decision and proceed further in terms of Rule 28(12); and

(b) in the event of a difference of opinion, obtain the direction of the Chief Minister whether the case shall be discussed at the meeting of the Cabinet or the recommendations of the majority of the Ministers be accepted and communicated as a Cabinet decision.

Rule 27(3) lays down that if the Chief Minister directs that the recommendations of majority of Ministers be accepted as a Cabinet decision, the Chief Secretary shall proceed under Rule 28(12). If, however, the Chief Minister directs that the case shall be discussed at a meeting of the Cabinet, he shall circulate the opinions recorded by the Ministers in the form of a supplementary summary.

Rule 28(12) requires the Chief Secretary to circulate the Cabinet decision to the Ministers and Rule 28(15) mandates that he shall send a copy thereof, and whenever considered necessary, to the Secretary of the Department concerned for giving effect to it. Finally, Rule 30(1) ordains that when the Cabinet decision on a case is received by the concerned Department, it shall acknowledge its receipt and take prompt action for its implementation.

43. The documents submitted by the learned Advocate General in this Court show that the Punjab Rules of Business have not been followed in the instant case. To start with, it is observed that the Chief Secretary fixed two days' time under Rule 27(1) for the Provincial Ministers to communicate their opinion whereupon the Cabinet Wing issued them circular letters (the "Circular") on 8.7.2021. However, they were incongruous and did not give the same time line. Some of them required the Ministers to communicate their opinions in two days while the others stipulated three days for it. Secondly, the Punjab Cabinet has

36 Ministers and out of them only 19 responded and even they dealt with the matter nonchalantly. Only three of the Ministers wrote "approved" while signing their names while the others simply put their signatures on the Circular and sent it back. It needs to emphasized that the Cabinet cannot dispose of matters by circulation in that manner. Rule 27 of the Punjab Rules of Business expressly requires the Ministers to "record opinion" which implies that they must apply their mind and give reasons for or against the motion when it is laid before them. In the circumstances, in law, there is no approval of the recommendation in the summary. Thirdly, the Chief Minister invoked Rule 27(3) prematurely when he directed that the "recommendations of the majority of Ministers be accepted and communicated as Cabinet decision." As noted above, the Cabinet Wing circulated the summary to the Ministers on 8.7.2021. Even if it is assumed that they were to respond in two days, the Chief Minister could not proceed on 10.7.2021. Lastly, perusal of the record evinces that the Cabinet decision was received in the Home Department in terms of Rule 28(15) on 13.7.2021. There is no explanation as to how it issued Letter No. SO (Jud-III)7-1/2014(P) on 10.7.2021.

44. The Punjab Rules of Business have been framed under Article 139 of the Constitution. *Mustafa Impex* held that such constitutionally mandated rules are twined with the concept of good governance and are mandatory. The Punjab Government has committed gross violations in the present case which renders the entire exercise nugatory.

45. Confronted with the above situation the learned Advocate General contended that the Chief Minister is not obligated to bring every matter to the Cabinet. Rule 24 enumerates the cases which need to be placed before the Cabinet for decision. He argued that *ex-post facto* approval of notification dated 24.2.2017 and the orders issued by the Deputy Commissioners exercising delegated powers in pursuance thereof did not require the Cabinet's nod. Therefore, if there are any irregularities in the issuance of Letter No. SO (Jud-III)7-1/2014(P) dated 10.7.2021, they can be ignored. This argument is fallacious. Admittedly,

Chief Minister referred the case to the Cabinet under clause (i) of Rule 24(1) which reads as follows:

> **24. Cases to be brought before the Cabinet–** (1) The following cases shall be brought before the Cabinet:
>
> (i) any case desired by the Chief Minister to be referred to the Cabinet; and

46. Once the Chief Minister refers a case to the Cabinet, he cannot withdraw it at his whim. He should have strong reasons for withdrawal which he must put in writing. In the instant case, it is to be assumed that he took the matter in issue to the Cabinet after due application of mind. A U-turn cannot be permitted at this juncture.

47. Let us now look at the merits of the Impugned Order. Rizvi was detained under section 3 of the MPO on 12.4.2021 for 30 days but that period was extended twice and he remained in custody for three months. On 25.3.2021 the Punjab Government submitted reference under section 3(5) of the MPO and Article 10(4) of the Constitution before the Provincial Review Board seeking authorization for continuing his preventive detention for three more months. It urged eight grounds in support of its request. The Board considered them one by one and concluded that the reference was based on "apprehensions of the security agencies" and there was no material to justify Rizvi's further detention. Accordingly, vide Order dated 2.7.2021, the Board declined the Government's request and directed his release. After this failure, the Government invoked section 11-EEE of the ATA to keep Rizvi in custody. Legally speaking, a person released from preventive detention under a provincial law can be taken into custody again under a federal law provided it can be justified. In the instant case, it is observed, the Impugned Order is founded on the same grounds which were rejected by the Provincial Advisory Board. It could be justified only if new circumstances had arisen after its order.

48. As stated above, Rizvi is a proscribed person. Under section 11-EE(2) of the ATA, the Government may require him to: (a) execute a bond with one or more sureties to the satisfaction of the District Police

Officer for his good behaviour and undertaking that he shall neither involve in any act of terrorism nor advance the objectives of any organization banned or kept under observation; (b) restrict his movements to any place or area and/or report to a designated officer at certain times or places; (c) refrain him from visiting or going to certain public places. The Government may also direct probe into his assets and his immediate family and monitor his activities for a period of three years. Violation of any direction of the Federal Government or the terms of the aforesaid bond is an offence under section 11-EE(4) and punishable with either description for a term which may extend to three years, or with fine, or with both. The proscription order has syncopated Rizvi's fundamental rights guaranteed under Articles 9 & 15 of the Constitution. Preventive detention squeezes him more. It is not called for. Even if he is released, the Government would have complete check, nay control, over him. The jurisprudence discussed in the earlier part of this judgment holds that preventive detention is limited by the principles of legality, need and proportionality. In the instant case, the balance tilts in Rizvi's favour on all these counts.

49. In view of the foregoing, this petition is **accepted**. The Impugned Order dated 10.7.2021 is declared to be without lawful authority and set aside. Hafiz Saad Hussain Rizvi shall be released from jail forthwith if not required to be detained in some other case.

(Tariq Saleem Sheikh)
Judge

Approved for reporting

Judge

Naeem