

# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Muhammad Ali Mazhar and Agha Faisal, JJ.**

CP D 4140 of 2018	:	Allah Bux Khan Unar vs. Sohail Anwar Siyal & Others.
CP D 4223 of 2018	:	Muhammad Zubair vs. Syed Nasir Hussain Shah Rizvi & Others
CP D 4226 of 2018	:	Mir Punhal Khan Talpur vs. Manzoor Hussain Wassan & Others
CP D 4229 of 2018	:	Syed Mureed Ali Shah vs. Election Commission of Pakistan & Others.
CP D 4284 of 2018	:	Moazam Abbasi vs. Faryal Talpur & Others
For the Petitioners	:	Mr. Khawaja Shamsul Islam, Advocate (CP D 4140 & 4284 of 2018)  Mr. Haq Nawaz Talpur, Advocate (CP D 4226 of 2018)  Mr. Syed Mureed Ali Shah, Advocate (CP D 4229 of 2018 in person)  Mr. Basil Nabi Malik, Advocate (CP D 4223 of 2018)
For the Respondents	:	Mr. Ishrat Zahid Alavi Assistant Attorney General  Barrister Jawad Dero Additional Advocate General Sindh  Barrister Makhdoom Ali Khan (CP D 4229 of 2018)  Barrister Farooq H. Naek (CP D 4226 & 4284 of 2018)  Barrister Khalid Javed Khan (CP D 4226 and 4140 of 2018)  Barrister Zameer A. Ghumro (CP D 4223 of 2018)
Dates of Hearing	:	16.11.2018, 23.11.2018, 01.02.2019, 15.02.2019, 26.04.2019, 10.05.2019, 06.08.2019, 09.08.2019, 30.08.2019, 06.09.2019, 18.10.2019, 15.11.2019, 13.12.2019 & 20.12.2019
Date of Announcement	:	16.03.2020

## JUDGMENT

**Agha Faisal, J.** These *quo warranto* petitions seek the permanent disqualification of members of the Provincial Assembly of Sindh, being the contesting respondents in each petition respectively, from holding public office on account of alleged non-disclosure of an *iqama* in their nomination forms. Since the subject matter is common *inter se*, therefore, these petitions were heard conjunctively and shall be determined vide this common judgment.

### *Factual context*

2. These petitions, filed on or around the last day of the tenure of the Provincial Assembly 2013 – 2018<sup>1</sup>, assailed the qualification of the members, upon the anvil of Article 62(1)(d)<sup>2</sup> & (f)<sup>3</sup> of the Constitution, on account of alleged non-disclosure of *iqama*.

In CP D 4140 of 2018 (“Siyal”), CP D 4229 of 2018 (“Chandio”) and CP D 4284 of 2018 (“Faryal Talpur”), the petitioners alleged that the contesting respondents, being Sohail Anwar Siyal, Nawab Ghaibi Sardar Khan Chandio and Faryal Talpur respectively, failed to disclose their *iqama* and other assets in the nomination forms and / or in the statement of assets accompanying the same, hence, could not be considered *sadiq* and *ameen*<sup>4</sup>. On the contrary it was averred on behalf of the contesting respondents that firstly an *iqama* was not an asset; secondly that there was no requirement / provision to disclose the same in the relevant nomination papers; and finally that all the respective assets had been duly disclosed.

In CP D 4223 of 2018 (“Nasir Shah”), it was alleged that the contesting respondent, Syed Nasir Hussain Shah Rizvi, had an *iqama* prior to the 2013 general election and the onus of proof would now lie thereupon to demonstrate that the said instrument did not subsist / get

---

<sup>1</sup> Tenure of the Provincial Assembly of Sindh 2013 – 2018 expired on 28<sup>th</sup> May 2018.

<sup>2</sup> “he is of good character and is not commonly known as as one who violates Islamic Injunctions”.

<sup>3</sup> “he is sagacious, righteous, non-profligate, honest and amen, there being no declaration to the contrary by a court of law”.

<sup>4</sup> Per Article 62(1)(f) of the Constitution.

extended post expiration thereof. It was further argued that since there was an *iqama* then it could be presumed that there was an underlying income or asset, which was never disclosed. The contesting respondent challenged the displacement of burden of proof and termed it contrary to the settled principles of law. It was demonstrated from the record that the old expired *iqama* was in fact disclosed, as the same was appended to the passport (copies) submitted with the nomination papers. It was also demonstrated, from the copies of passports, that the said respondent obtained the relevant visas on numerous subsequent occasions and there would have been no such requirement had he remained an *iqama* holder.

In CP D 4226 of 2018 (“Wassan”), the petitioner sought the disqualification of Manzoor Hussain Wassan, notwithstanding the fact that the said respondent was no longer a holder of public office. Per the record, findings of a learned Election Appellate Tribunal<sup>5</sup> had been rendered there against, which findings were upheld by this High Court<sup>6</sup>, judgment whereof was the subject matter of an appeal<sup>7</sup> before the Supreme Court. It was argued on behalf of the contesting respondent that a private person was not amendable to the writ jurisdiction of this court, more so in *quo warranto* proceedings when he admittedly was not a holder of public office.

3. We have heard the respective learned counsel and have also considered the law, precedent and documentation to which our surveillance was solicited. In order to determine these petitions, we do hereby frame the following points for determination:

- a. *Whether the present petitions are maintainable, even though they had been filed on the last date of the tenure of the previous assembly.*
- b. *Whether an iqama has been demonstrated by the petitioners to be an asset, non-disclosure whereof*

---

<sup>5</sup> *Mir Zaheer Abbas Talpur vs. ECP & Others (Election Appeal 100 of 2018)*, in respect of his candidature for the 2018 General Elections.

<sup>6</sup> *Manzoor Hussain Wassan vs. Election Tribunal Sukkur & Others (CP D 1285 of 2018)*.

<sup>7</sup> *Manzoor Hussain Wassan vs. The Registrar Appellate Tribunal & Others (CP 1058-K of 2018)*.

*would render a person unqualified per Article 62(1)(f) of the Constitution.*

### *Maintainability*

4. The primary issue before us is with respect to maintainability of the present petitions in view of Article 225 of the Constitution, which explicates that no election to the house or a provincial assembly shall be called into question except by an election petition presented to such tribunal and in such manner as may be determined by an act of Parliament<sup>8</sup>. The present petitioners seek to displace the constitutional bar by resorting to the writ of *quo warranto*, being a judicial remedy by virtue whereof a holder of public office may be called upon to demonstrate the right where under he held office, failing which he may be ousted from such office<sup>9</sup>.

5. In the *Farzand Ali* case<sup>10</sup> the Supreme Court held that a dispute raised after an election is not a dispute relating to or arising in connection with an election but a dispute regarding the right of the person concerned from being a member of an Assembly. An election dispute is raised by a voter or a defeated candidate in his individual capacity under the statute. It determines the private rights of two persons to the same office but a proceeding for an information in the nature of *quo warranto* is invoked in the public interest. The latter seeks to determine the title to the office and not the validity of the election. These are two distinct and independent remedies for enforcing independent rights, and the mere fact that the disqualification has been overlooked or what is worse, illegally condoned by the authorities who were responsible for properly scrutinizing a person's right to be enrolled as a voter or his right to be validly nominated for election would not prevent a person from challenging in the public interest his right to sit in the house even after his election if that disqualification is still continuing.

---

<sup>8</sup> Representation of People Act 1976; repealed and replaced by the Elections Act 2017.

<sup>9</sup> Per *Mansoor Ali Shah J.* in *Barrister Sardar Muhammad vs. Federation of Pakistan & Others* reported as *PLD 2013 Lahore 343*.

<sup>10</sup> Per *Hamood ur Rehman CJ.* in *Lt. Col. Farzand Ali & Others vs. Province of West Pakistan* reported as *PLD 1970 Supreme Court 98*.

The Supreme Court has maintained<sup>11</sup> that if the lack of qualification of a person was overlooked, illegally condoned and / or went unquestioned on the nomination day before the returning officer or before the election tribunal, such deficiency could still be challenged under Article 199(1)(b)(ii)<sup>12</sup> of the Constitution. The law, as it stands, stipulates that in circumstances where an unqualified or disqualified person manages to escape through the net and trespassed into the parliament or a provincial assembly, the Constitutional jurisdiction of the High Court, under Article 199, could be invoked<sup>13</sup>.

The judgments relied upon supra also recognized the jurisdiction of the Supreme Court, under Article 184(3) of the Constitution, to look into the qualification, or lack thereof, of a member of parliament / provincial assembly in displacement of the bar contained in Article 225 of the Constitution. In the *Shakeel Awan case*<sup>14</sup> a minority dissenting view was expounded<sup>15</sup> wherein the applicability of Article 184(3) of the Constitution was questioned with respect to individual election disputes. However, the observations were the minority view and the majority view remained that the bar contained in Article 225 of the Constitution was not absolute and could be displaced under Article 199(1)(b)(ii) and Article 184(3) of the Constitution.

6. The next issue that follows is that since the subject petitions were preferred on the last day of the tenure of the provincial assembly then would the *lis* subsist post expiration of the tenure of the relevant house. In this regard it may be appropriate to initiate the deliberation by adverting to the precise verbiage to Article 199(1)(b)(ii):

“(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,...

(b) on the application of any person, make an order...

(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what

<sup>11</sup> Per *Ejaz Afzal Khan J.* in *Imran Ahmad Khan Niazi vs. Mian Muhammad Nawaz Sharif* reported as *PLD 2017 Supreme Court 265*.

<sup>12</sup> Being the provision in respect of *quo warranto*.

<sup>13</sup> Per *Shaikh Azmat Saeed J.* in *Sher Alam Khan vs. Abdul Munim & Others* reported as *PLD 2018 Supreme Court 449*, in reliance upon *PLD 2018 Supreme Court 114*, *PLD 2018 Supreme Court 189*, *PLD 2017 Supreme Court 265* and *PLD 2010 Supreme Court 817*.

<sup>14</sup> *Malik Shakeel Awan vs. Sheikh Rasheed Ahmed & Others* reported as *PLD 2018 Supreme Court 643*.

<sup>15</sup> Per *Qazi Faez Isa J.*

authority of law he claims to hold that office;”

(Underline added for emphasis.)

It is *prima facie* apparent from the foregoing that the applicability of the aforesaid provision of the law is attracted in the event that a person is holding public office.

7. *Hamood ur Rehman CJ.* in the *Farzand Ali* case<sup>16</sup>, albeit in the analogous context of the 1962 Constitution, relied upon *Halsbury’s Laws of England* to maintain that even in a case where an election petition is the only remedy when an election is objected to on the ground that the person whose election is questioned was disqualified at the time of the election, yet the remedy by injunction in lieu of *quo warranto* is available where a person becomes disqualified after election or where there is a continuing disqualification. It was held that there is no reason why relief by way of *quo warranto* should not be available in a case where the remedy by way of an election petition is no longer possible or is not the appropriate remedy or the disqualification is a continuing one which debars a person not only from being elected to an office but also from holding that office.

The subsequent developments in the law have now settled the principle that a lack of qualification or disqualification is inherent in nature and if an unqualified or disqualified person is allowed to adorn the house than same would be contrary to the mandate of the Constitution<sup>17</sup>. It would follow that if the absence of qualification or the existence of a disqualification is determined then such a person could not be permitted to continue to act in a capacity for which he has been adjudged unqualified / disqualified.

The Supreme Court recently addressed the matter of whether a pre-electoral issue could lead to the disqualification of a member of a subsequent house in the *Imran Niazi case*<sup>18</sup> by concluding that

---

<sup>16</sup> *Lt. Col. Farzand Ali & Others vs. Province of West Pakistan* reported as *PLD 1970 Supreme Court 98*.

<sup>17</sup> *Per Saqib Nisar CJ. in Muhammad Hanif Abbasi vs. Jahangir Khan Tareen* reported as *PLD 2018 Supreme Court 114*.

<sup>18</sup> *Per Faisal Arab J. in Muhammad Hanif Abbasi vs. Imran Khan Niazi* reported as *PLD 2018 Supreme Court 189*.

dishonesty can be attributed to a member for an act committed prior to his election if it has been so adjudicated by a court.

It is thus established that a culpable act or omission of a person, undertaken prior to holding public office, could conceivably lead to his disqualification from holding a public office subsequently acquired. Siyal, Chandio, Faryal Talpur and Nasir Shah are presently holders of public office, as they were elected to the Provincial Assembly of Sindh in the 2018 general elections, hence, the *quo warranto* petitions<sup>19</sup> are maintainable there against, notwithstanding the fact that the non-disclosure / concealment alleged was with respect to nomination forms filed in respect of a previous election.

8. The case of Wassan is at variance to the matters determined to be maintainable supra, primarily because Wassan is admittedly not a holder of public office and since the same issue is admittedly pending adjudication before the Supreme Court.

*Cornelius CJ.* illuminated the parameters of a writ of *quo warranto*<sup>20</sup> and held that it was in the nature of an information against a person who claimed or usurped an office, franchise or liberty and was intended to enquire by what authority does he support his claim. It was then specified that it was imperative for the issuance of the writ that the office be one that is created by the State, by charter or by statute and the duty should be of a public nature. It was expounded that it was necessary that the respondent should be in possession of an office in the nature so defined. There is a preponderance of subsequent authority<sup>21</sup> to maintain that a writ of *quo warranto* may not be issued in respect a person who is not holding a public office. In the present context it may be pertinent to refer to the *Malik Nawab Sher case*<sup>22</sup> wherein *Nasir ul Mulk J.* held that since the relevant person did not hold elected office, therefore, a writ of *quo warranto* could not be issued there against.

---

<sup>19</sup> CP D 4140 of 2018, CP D 4223 of 2018, CP D 4229 of 2018 & CP D 4284 of 2018.

<sup>20</sup> *Masudul Hasan vs. Khadim Hussain & Another* reported as *PLD 1963 Supreme Court 203*.

<sup>21</sup> *Khuda Baksh vs. Mir Zafarullah Khan Jamali* reported as *1995 CLC 1860*.

<sup>22</sup> *Malik Nawab Sher vs. Chaudhry Munir Ahmed & Others* reported as *2013 SCMR 1035*.

Upon a specific query addressed to the learned counsel<sup>23</sup>, with regard to how the petition was maintainable since the respondent was private person<sup>24</sup> and not a holder of public office, we were informed that the petitioner was no longer seeking a writ of *quo warranto*, as argued earlier, and instead sought to agitate the *lis* in the general public interest. Learned counsel argued that it was just and proper for this Court entertain the petition on its merits, however, remained unable to demonstrate as to how, in the absence of invocation of Article 199(1)(b)(ii) of the Constitution, the petition could be considered in view of the bar contained in Article 225 of the Constitution.

9. In so far as the merits of the Wassan petition are concerned it is an admitted fact that a learned Election Appellate Tribunal<sup>25</sup> had rejected the nomination of the said respondent, upon grounds inclusive of that agitated before us. It is also demonstrated before us that the aforesaid order were upheld by this High Court<sup>26</sup>, judgment whereof was the subject matter of an appeal<sup>27</sup> before the Supreme Court<sup>28</sup>. In such a scenario there is no justification to invoke the jurisdiction of this Court to determine an issue pending adjudication before the Supreme Court.

In view hereof it is our considered view that the petitioner has been unable to satisfy this Court with regard to the maintainability of the petition<sup>29</sup>, hence, the same merits dismissal.

### *Iqama*

10. The next issue to deliberate is whether the learned counsel for the petitioners have been able to demonstrate whether an *iqama* is an asset, non-disclosure whereof would render a person unqualified / disqualified to hold a public office per Article 62(1)(f) of the Constitution.

---

<sup>23</sup> Mr. Haq Nawaz Talpur, Advocate.

<sup>24</sup> *Pakistan Olympic Association & Others vs. Nadeem Aftab Sindhu & Others* reported as 2019 SCMR 221.

<sup>25</sup> *Mir Zaheer Abbas Talpur vs. ECP & Others (Election Appeal 100 of 2018)*, in respect of his candidature for the 2018 General Elections.

<sup>26</sup> *Manzoor Hussain Wassan vs. Election Tribunal Sukkur & Others (CP D 1285 of 2018)*.

<sup>27</sup> *Manzoor Hussain Wassan vs. The Registrar Appellate Tribunal & Others (CP 1058-K of 2018)*.

<sup>28</sup> Specifically pleaded by the respondent in paragraph 13 of his counter affidavit, to the petition being CP D 4226 of 2018, to which no rejoinder was ever filed.

<sup>29</sup> CP D 4226 of 2018.



Per learned counsel of the petitioners, an *iqama* was an asset, which merited disclosure in the nomination forms / statement of assets accompanying the nomination forms<sup>30</sup>. Learned counsel<sup>31</sup> had argued that since the *iqama* was issued on payment of a fee, therefore, it constituted an asset. It was further argued that purportedly an *iqama* was issued on the basis of employment and / or ownership of immovable assets, therefore, existence of an *iqama* was *prima facie* proof of assets<sup>32</sup>, either crystallized or receivable, and non-disclosure thereof was a culpable act.

The learned counsel for the contesting respondents argued that an *iqama* was a mere visa / entry permit and under no circumstances did it fall within the definition of an asset<sup>33</sup>. Learned counsel argued that a fee is generally paid for visas, however, a visa is not declared as an asset in the respective wealth statement. It was argued that a visa was a mere license, for ingress and egress into a country, analogous to a license to practice law or medicine which also requires payment of a fee, however, the licensee is not obliged to declare the same as an asset in his nomination form<sup>34</sup>.

11. Our attention was also drawn to the then prevalent law<sup>35</sup> to demonstrate that there is no provision requiring declaration of any visas / entry permits therein. Same is the case with respect to law in respect of submission of the yearly assets and liabilities<sup>36</sup>, wherein no such provision is apparent. In addition thereto the learned counsel for the petitioners were unable to identify any requirement in the relevant nomination forms for declaration of *iqama* / visas / entry permits.

The Supreme Court has recently delved into this issue, in the present context, in the *Nawaz Sharif case*<sup>37</sup> and recognized that the word *asset* had not been defined in the *Representation of People Act 1976*, therefore, employed the relevant definition per *Black's Law*

<sup>30</sup> Mr. Khawaja Shamsul Islam, Advocate.

<sup>31</sup> Mr. Mureed Al Shah, Advocate.

<sup>32</sup> Mr. Basil Nabi Malik, Advocate.

<sup>33</sup> Barrister Makhdoom Ali Khan.

<sup>34</sup> Barrister Khalid Jawed Khan.

<sup>35</sup> Section 12(2)(f) of the Representation of People Act 1976.

<sup>36</sup> Per Section 42A of the Representation of People Act 1976.

<sup>37</sup> Per *Ejaz Afzal Khan J. in Imran Ahmed Khan vs. Muhammad Nawaz Sharif* reported as *PLD 2017 Supreme Court 692*.

*Dictionary*, wherein it has been circumscribed as something physical such as cash, machinery, inventory, land and building; an enforceable claim against others such as accounts receivable; rights such as copyright, patent trademark etc.; and / or an assumption such as goodwill. Subjecting the averments of the learned counsel for the petitioners to the determinants recognized by the Supreme Court, we observe that the learned counsel for the petitioners have been unable to justify the inclusion of an *iqama* within the definition of an asset.

12. The contiguous argument to consider is whether the existence of an *iqama*, even if the same is not an asset *per se*, would be sufficient proof of underlying assets, whether crystallized or receivable.

In the *Khawaja Asif case*<sup>38</sup> the existence of an *iqama* was manifest from the record as was the existence of agreements stipulating payment of monthly salary, which was undisclosed in the nomination forms. Nothing turned upon the mere existence of an *iqama*, however, even the existence of agreement/s stipulating payment of salary was deemed insufficient to disqualify a member of the house as it was held that there had been no proof of whether any salary proceeds, either in cash or kind or in the form of receivables, existed at the time of filing of the nomination papers and as a consequence thereof no case for concealment or non-disclosure was made out.

In the present facts and circumstances there is no demonstrable existence of any asset, either crystallized or receivable, and on the contrary this court is called upon to enter into an exercise for such a determination. Notwithstanding the settled principles of law that facts about disqualification of a member of a house must be based on affirmative evidence and not upon presumptions, inferences and surmises<sup>39</sup>; that settlement of factual<sup>40</sup> / contractual<sup>41</sup> issues were discouraged in the exercise of Constitutional jurisdiction; the Supreme Court has specifically observed, in the *Khawaja Asif case*, that the court

---

<sup>38</sup> Per *Faisal Arab J.* in *Khawaja Muhammad Asif vs. Muhammad Usman Dar* reported as *PLD 2018 Supreme Court 2128*.

<sup>39</sup> Per *Umar Ata Bandial J.* in *Muhammad Siddiq Baloch vs. Jahangir Khan Tareen & Others* reported as *PLD 2016 Supreme Court 97*.

<sup>40</sup> *2015 PLC 45 & 2015 CLD 257*.

<sup>41</sup> *PLD 2011 SC 44 & PLD 2007 SC 642*.

in proceedings in the nature of *quo warranto* may not take such a task upon itself.

13. In the *Nawaz Sharif case*<sup>42</sup> it was maintained that the court was empowered to issue a writ of *quo warranto*, in respect of a member of a house<sup>43</sup>, in the presence of admitted facts and / or irrefutable direct evidence available on the record to justify disqualification. Admittedly there is a *prima facie* absence of any admitted facts and irrefutable direct evidence with respect to the allegations against the contesting respondents, in the petitions under scrutiny.

In the *Khawaja Asif case*<sup>44</sup> the Supreme Court held that mere omission to list an asset cannot be labelled as dishonesty unless some wrongdoing is associated with its acquisition or retention, as attribution of dishonesty to every non-disclosure was never the intention of the Parliament. The aforementioned ratio was reiterated in the *Nida Khuhro case*<sup>45</sup>. In the petitions under consideration the respective counsel have been unable to demonstrate the admitted or irrefutable existence of any undisclosed assets, therefore, had no occasion to associate the same with any malfeasance.

14. It is our deliberated view that the petitioners<sup>46</sup> have been unable to demonstrate that an *iqama* is an asset. No requirement<sup>47</sup> for disclosure of an *iqama* in the nomination form or statement of assets accompanying the same was placed before us. There is no admission or irrefutable direct evidence placed on file to demonstrate the existence of any undisclosed assets, crystallized or receivable, non-disclosure whereof would render a member unqualified to hold public office per Article 62(1)(f) of the Constitution, hence, these petitions<sup>48</sup> are hereby determined to be devoid of merit.

---

<sup>42</sup> Per *Ijaz ul Ahsan J.* in *Imran Ahmed Khan Niazi vs. Muhammad Nawaz Sharif* reported as *PLD 2017 Supreme Court 265*.

<sup>43</sup> *Mehmood Akhtar Naqvi vs. Federation of Pakistan & Others* reported as *PLD 2012 Supreme Court 1089* (partially reviewed vide unreported *Order* dated 02.05.2018 authored by *Ijaz ul Ahsan J.* in *Civil Review Petition 242 of 2012 & Others*).

<sup>44</sup> Per *Faisal Arab J.* in *Khawaja Muhammad Asif vs. Muhammad Usman Dar* reported as *PLD 2018 Supreme Court 2128*.

<sup>45</sup> Per *Ijaz ul Ahsan J.* in *Nida Khuhro vs. Moazzam Ali Abbasi* reported as *2019 SCMR 1684*.

<sup>46</sup> In *Siyal, Nasir Shah, Chandio & Faryal Talpur*, being CP D 4140 of 2018, CP D 4223 of 2018, CP D 4229 of 2018 & CP D 4284 of 2018.

<sup>47</sup> Per the Representation of People Act 1976.

<sup>48</sup> CP D 4140 of 2018, CP D 4223 of 2018, CP D 4229 of 2018 & CP D 4284 of 2018.

15. In view of the discussion and reasoning delineated supra, the petitions under scrutiny are determined in seriatim as follows:

- a. CP D 4226 of 2018 is determined to be *prima facie* misconceived and not maintainable, hence, dismissed.
- b. CP D 4140 of 2018, CP D 4223 of 2018, CP D 4229 of 2018 and CP D 4284 of 2018 are determined to be devoid of merit, hence, dismissed.

J U D G E

J U D G E

*Farooq PS/\**