

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH, KARACHI**

**Suit No. 559 of 2024**

Southern Network Limited

vs.

Federation of Pakistan & Others

---

1.For hearing of CMA No.8438/2024.  
2.For hearing of CMA No.10019/2024.  
(Notice issued for 19.07.2024)

Plaintiff : Through its authorised officer Muhammad Masood Latif.

Defendant No.1 : Nemo.

Defendant No.2 : Through Mr. Zahid F. Ibrahim, Advocate.

Defendant No.3 : Through Mr. Saad Siddiqui, Advocate along with Ali Akber Sahito, Deputy Director Law.

Defendant No.4 : Through Mr. Ali Haider holding brief for Mr. Kashif Hanif, Advocate.

Date of hearing : 11 July 2024 and 19 July 2024

Date of Order : 30 October 2024

**ORDER**

**MOHAMMAD ABDUR RAHMAN, J.** By this Order I will be deciding CMA No. 8438 of 2024 being an application maintained by the Plaintiff under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 and whereby the Plaintiff seeks to restrain the Defendants from withdrawing or interfering with the Plaintiff's use and utilisation of its existing radio frequency bandwidth namely 2556-2619 MHz for the cities of Lahore and Islamabad, 2668-2689 MHz for the city of Rawalpindi and 2550-2690 MHz for the city of Karachi.

**A. Introduction**

**(i) SNL and the Original Licenses Granted**

2. The Plaintiff is a company that was originally named Pay TV (Private) Limited and which subsequently changed its name to Shaheen Pay TV Limited and thereafter further changed its name to Southern Network Limited (hereinafter

referred to as “SNL”). SNL currently subsists and is incorporated under the Companies Act, 2017 and is engaged in the business of media, telecommunications and business relating to the internet.

3. SNL applied for and was on 20 March 1995 granted, by the Defendant No. 1, a license under Section 4 of the Telegraph Act, 1885 to establish a Cable Television Network to “under Multi-Channel Multi Point Distribution Service” (hereinafter referred to as “MMDS”). Three Separate licenses were applied for and issued to SNL on 28 January 1996, under Section 5 of the Wireless Telegraphy Act, 1933, by the Pakistan Wireless Board to utilize the frequency bandwidth of 2556-2619 MHz for Lahore and Islamabad, the frequency bandwidth 2668-2689 MHz for the city of Rawalpindi and the frequency bandwidth 2550-2690 MHz for the city of Karachi.

## **B. The Reorganisation of the Telecommunication Sector in Pakistan**

### **(i) the Pakistan Telecommunications (Reorganization) Act, 1996**

4. The promulgation of the Pakistan Telecommunications (Reorganization) Act, 1996 (hereinafter referred to as the “Act, 1996”) reorganised the administration of the telecommunication sector in Pakistan and created various regulatory bodies including, but not limited to, two regulatory bodies i.e. The Pakistan Telecommunication Authority (hereinafter referred to as the “PTA”) constituted under Section 3 of the 1996 Act and the Frequency Allocation Board (hereinafter referred to as FAB”) constituted under Section 42 of the Act, 1996. While the Act, 1996 did not repeal either the Telegraph Act, 1885 or the Wireless Telegraphy Act, 1933 on account of Section 58 of the Act, 1996 clarifying that the provisions of the Act, 1996 would “*have effect notwithstanding anything contained in the Telegraph Act, 1885 (XIII of 1885), the Wireless Telegraphy Act, 1933 (XVII of 1933), or any other law containing any provision inconsistent to this Act*” it is considered that both the PTA and FAB could act on their powers and functions, as contained in the Act, 1996, notwithstanding the provisions of the Telegraph Act, 1885 and the Wireless Telegraphy Act, 1933 continuing to subsist.

5. The functions of the PTA were prescribed in Section 4 of the Act, 1996 and which *inter alia* included:

“ ... 4. Functions of the Authority.-

The Authority shall- ...

(b) receive and expeditiously dispose of applications for the use of radio-frequency spectrum; ...”

The powers conferred on the PTA by that Act, 1996 were prescribed in Section 5 of the Act, 1996 and which *inter alia* included:

- “ ... 5. Powers of the Authority.-
- (1) The Authority shall exercise all powers as shall enable it to effectively perform its functions specified in section 4.
- (2) In particular, and without prejudice to the generality of the foregoing power, the Authority shall-
- (a) grant and renew licences for any telecommunication system and any telecommunication service on payment of such fees as it may, from time to time, specify; ...
- (c) receive applications for the use of radio frequency spectrum and, subject, where applicable, to grant of licences under clause (a), refer such applications to the Board for assignment of spectrum within a period of thirty days;
- (d) modify licences or conditions thereof in accordance with section 21 or section 22; ...”

6. The powers and functions of FAB were detailed in Section 43 of the Act, 1996 and which read as hereinunder:

- “ ... 43. Powers and functions of the Board.-
- (1) The Board shall have exclusive authority to allocate and assign portions of the radio frequency spectrum to the Government, providers of telecommunication services and telecommunication systems, radio and television broadcasting operations, public and private wireless operators and others.
- ...
- (4) In exercise of its powers under subsection (1), the Board shall be guided by the applicable recommendations of the International Telecommunication Union or any of its standing committees or organizations including the International Consultative Committee on Telecommunication, International Consultative Committee on Radio, the International Frequency Registration Board and other similar international organizations.
- (5) Every application for allocation and assignment of radio frequency spectrum shall, in the first instance, be made to the Authority which shall, after such inquiry as it may deem appropriate, refer the application to the Board within thirty days from receipt of such application.
- (6) On receipt of application under subsection (5), the Board shall classify the telecommunication services and may allocate or assign specific frequencies to the applicant:
- Provided that the Board shall intimate the applicant status of the application within three months.
- (7) The Board may, with the approval of the Federal Government, make regulations for exercising its powers and performance of its business.

7. It would therefore seem that at this time the power to regulate licenses came to be regulated by the PTA and FAB under the provisions of the Act, 1996.

(ii) **The Pakistan Electronic Media Regulatory Authority Ordinance, 2002**

8. The issue of regulation was certainly not simplified by the promulgation of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (hereinafter referred to as "PEMRA Ordinance, 2002") which created the Pakistan Electronic Media Regulatory Authority (hereinafter referred to as "PEMRA") a regulatory authority constituted to control broadcast and media distribution services and which under Section of the PEMRA Ordinance, 2002 conferred the right on PEMRA to issue licenses for the establishment and operation of all broadcast media and distribution services and which reads as hereinafter:

" ... **19. Licence to broadcast or operate.-**

(1) *The Authority shall have exclusive right to issue licences for the establishment and operation of all broadcast media and distribution services, provided that this exclusive right shall be used by the Authority in conformity with the principles of fairness and equity applied to all potential applicants for licences whose eligibility shall be based on prescribed criteria notified in advance and that this shall be done through an open, transparent bidding process:*

*Provided that the bidding shall be held if the number of applications exceeds the number of licences to be issued by the Authority.*

(2) *No person shall engage in any broadcast media or distribution service except after obtaining a licence issued under this Ordinance.*

(3) *Every licence shall be subject to such terms and conditions as may be prescribed.*

(4) *The Authority shall have the power to determine number of licences to be issued in each category or sub-category and charge fees at such rates as the Authority may fix from time to time for the grant of a licence and for its annual renewal.*

(5) *The Authority shall devise a Code of Conduct for programmes and advertisements for compliance by the licensees."*

In addition, Section 37 of the PEMRA Ordinance, 2002 specifically clarified that the provisions of that statute were to have effect over any other law. While Proviso (a) to Sub-Section (1) of Section 37 of the PEMRA Ordinance, 2002 clarified that national broadcasters would be regulated by their constituting statutes, Proviso (b) regulated existing private broadcasters or CTV operators and clarified that:

" ... (b) *other existing private broadcasters or CTV operators who had been granted respective monopolies in multi-modal distribution system, cable TV and in FM radio shall henceforth be regulated by this Ordinance except in respects where specific exemptions are granted by the Authority."*

It would therefore seem that after promulgation of the PEMRA Ordinance, 2002 the regulatory bodies that would control the licenses issued to SNL would henceforth be PEMRA. Additionally, under Sub-Section (2) of Section 19 of the PEMRA Ordinance, 2002 a statutory prescription was introduced whereby it was mandatorily required for any person engaging in "broadcast media or distribution

service” to operate under a license issued by PEMRA under the PEMRA Ordinance, 2002.

**C. Disputes with PEMRA and FAB**

9. SNL applied to PEMRA for a License to operate an MMDS TV Channel Distribution Station and which was duly granted on a “non exclusive basis” for two consecutive terms and which period very recently lapsed on 20 May 2024 and which contains the following condition:

“ ... *The License shall come into force from the day of its issue and shall be valid for Ten Years, subject to the annual renewals. The License is further subject to the provisions of the Ordinance, the Rules & Regulations and also to the terms and conditions as contained in the License document by the Licensee.*”

**(i) CP No. D- 482 of 2007 before the High Court of Sindh, Karachi and CPLA No. 722 of 2024 before the Supreme Court of Pakistan**

10. It seems that on 25 July 2007, FAB had held its 29<sup>th</sup> Meeting and whereat it had been considered that as the value of MMDS bandwidth had increased substantially, the existing licenses for such bandwidth should be “vacated” and auctioned so as to increase revenue. This apparently led to SNL taking a position that as the original license dated 28 January 1996, issued by the Pakistan Wireless Board, did not specify a term, the licenses issued in their favour for the MMDS bandwidth and locations were for perpetuity and hence did not require renewal and maintained C.P. No.D-482 of 2007 in respect of this dispute before this Court.

11. C.P. No.D-482 of 2007 was disposed of on 14 December 2023 in the following terms:

“ ... *After hearing all the learned counsel for the parties at length, for the reasons to be recorded later on, instant petition is dismissed along with pending applications. However, the Plaintiff may approach PEMRA under Rule 6 of PEMRA Rules 2009 within 15-days by filing application for grant of MMDS License to operate broadcast media or distribution service, as the case may be, and also to approach Frequency Allocation Board (FAB) for allocation of frequency, which application(s) shall be decided in accordance with law at an early date, however, not late than 100 days as provided under Rule 9 of PEMRA Rues, 2009, however till decision on such application(s) of the Plaintiff, no adverse action shall be taken against the Plaintiff. It is however, clarified that in case the Plaintiff does not approach the PEMRA authorities within fifteen (15) days from the date of this order in the above terms, Defendants may be at liberty to proceed in accordance with law and relevant rules.*”

A Civil Petition for Leave to Appeal bearing No.722 of 2024 challenging the Order dated 14 December 2023 passed in C.P. No. D-482 of 2007 has been preferred before the Supreme Court of Pakistan but on which no order, to date, has been passed.

(iii) **Application before PEMRA on the basis of the Order passed in C.P. No.D-482 of 2007**

12. As per the directions given by this Court in its Order dated 14 December 2023 passed in C.P. No. D-482 of 2007, SNL “without prejudice to its rights”, filed an application before PEMRA seeking the “grant/renewal/revalidation” of its MMDS for a further period of ten year ending on 20 May 2034 and to which application PEMRA on 2 January 2024 responded stating that as the allocation of the frequency for MMDS came within the domain of FAB, SNL should first maintain an application to FAB. SNL, forthwith complied with such a direction and maintained an application before FAB and to which application a contradictory reply was first received on 4 January 2024 from FAB directing SNL to maintain the application before PEMRA and thereafter a further clarificatory letter was addressed by FAB to SNL on 23 January 2024 confirming that while the application would be presented to PEMRA, it would forwarded to FAB who would thereafter decide the application.

(iv) **Order passed in Suit No. (-198) of 2024**

13. SNL contends that despite having maintained such an application, a letter was received by it from FAB on 29 January 2024 clarifying that no application had been maintained by SNL before PEMRA as directed in the Order dated 14 December 2023 passed by this Court in C.P. No. D-482 of 2007. This letter led SNL to maintain a suit bearing Suit No. (-198) of 2024 entitled **Southern Network Limited vs. Federation of Pakistan and others** before this Court as against PEMRA, PTA and FAB alleging mala fide on the part of PEMRA and FAB on account of their purported contradictory conduct as detailed hereinabove and on which an interim order was passed on 6 February 2024 as hereinunder:

“ ... At the outset learned counsel or the Plaintiff while referring order dated 14.12.2023 passed in C.P. No.D-482/2007 whereby that petition was disposed of with direction to Plaintiff to approach Frequency Allocation board (FAB) or allocation of frequency with rider that application shall be decided at an early date, however, not later than 10 days as provided under Rule 9 of PEMRA Rules, 2009 in between no adverse action shall be taken against the Plaintiff. Accordingly, Plaintiff approached to the Frequency Allocation Board (FAB) and according to FAB matter pertains to PEMRA whereas; plea of PEMRA is that matter pertains to FAB. Despite approaching to both authorities that Plaintiff has not been heard and yet both authorities have not decided Plaintiff's application on merit; on the contrary they issued impugned letter dated 29.01.2024 containing therein that the Plaintiff will require to apply and provide all requisite formalities for the MMDS service as well as allocation of frequency at the earliest but not later than five days of the issuance of this letter enabling PEMRA to proceed further in accordance with law. In case of failure it will be assumed that the company is no longer interested and case will be decided accordingly as per law. According to counsel both authorities are reluctant to decide application in view of direction of Division Bench of this Court and having no other alternative the Plaintiff has approached this Court. Accordingly, issue notice to Defendants as well as DAG for a date to be fixed by the office. This Court is conscious that already in Division Bench direction were issued that no adverse action shall be taken against the

*Plaintiff. In same terms direction are hereby issued to both authorities to decide the fate of application subject to compliance of all requisite formalities, however, meanwhile no adverse action shall be taken against the Plaintiff."*

**(iv) PEMRA and FAB Implementation of the Orders passed by this Court in in C.P. No. D-482 of 2007 and in Suit No. (-198) of 2024**

14. The order dated 6 February 2024 passed by this Court in in Suit No. (-198) of 2024 prompted PEMRA on 7 February 2024 to send a letter to SNL contending that as per the Order dated 14 December 2023 passed by this Court in C.P. No. D-482 of 2007 and as per the Order dated 6 February 2024 passed in Suit No. (-198) of 2024 it was inviting SNL to attend a hearing on 14 February 2024 on its application but which letter contained a caution that the application that had been presented by SNL was incomplete.

15. In response to this letter SNL contended that while it had made an application for **renewal** of its licenses under Rule 12 of the Pakistan Electronic Media Regulatory Authority Rules, 2009 (hereinafter referred to as the PEMRA Rules, 2009) PEMRA was treating the application made by SNL as one for a **fresh license** under Rule 6 of the PEMRA Rules, 2009. In addition, SNL raised a further objection that while they were being directed to forward their application to FAB through PEMRA, such directions were violative of Sub-Section (5) of Section 43 of the Act, 1996 and which they contended mandated that a **renewal** application was to be made to PTA and not PEMRA and which directions were therefore illegal. SNL concluded by stating that having already been granted licenses and which had in the past been renewed, it was not open for either PEMRA or FAB to treat the application maintained by them as one for a new license and which must therefore be treated as an application for the renewal of the licenses and in respect of which their applications complied with the prescriptions of Rule 12 of the PEMRA, 2009.

**(v) The Decision of PEMRA on the Applications maintained by SNL**

16. That pursuant to the hearing that took place on 14 February 2024, PEMRA had on 22 February 2024 issued a decision in the following terms:

*" ... The requests of company referred to in Paragraph 9 above do not meet the requirements given in Rule 6, 7 and are hereby regretted."*

SNL has, under Section 30-A of the PEMRA Ordinance, 2002, maintained an Appeal bearing M.A. NO. 52 of 2024 before this Court as against the Order dated 22 February 2024 passed by PEMRA.

**(vi) The Decision of PEMRA on the Applications maintained by SNL**

17. It seems that in the interim FAB had entertained SNL application for the allocation of frequencies in various cities to SNL. During the hearing the Executive Director/Vice Chairman of FAB had contended that:

- “ ...
- i. *MMDS technology was introduced in 1980's for provision of terrestrial broadcasting service (Wireless cable TV), primarily in rural areas utilizing 2600 MHz band globally, Said technology being obsolete, 2600 MHz band is no more used for provision of broadcast TV globally, rather has been repurposed for IMT services.*
  - ii. *In accordance with Section 43 (4) of Pakistan Telecommunications (re-organization) Act, 1996, “In exercise of its powers under sub – Section (i), the Board shall be guided by the applicable recommendations of the International Telecommunications Union (ITU)”. As per International Table of Frequency Allocations (ITFA) in Article-5 of Radio Regulations of ITU, this band has been allocated to MOBILE service along with other services excluding terrestrial BROADCASTING. Additionally, as per Footnote 5.384A of the ITFA, the 2600 MHz band (2500 – 2690 MHz) is identified globally for IMT.*
  - iii. *In accordance with sub-Regulation 1 of the Regulation 7 of ibid Regulations of FAB “The Pakistan Table of frequency allocations, hereinafter called the Table, shall be the broadest level document to be referred in assigning the radio frequencies in Pakistan”. As per Pakistan Table of Frequency Allocations (PTFA), this band has been allocated to MOBILE service along with other services excluding terrestrial BROADCASTING service. In addition to that as per Footnote PAK34 to PTFA, 2600 MHz band (2500 – 2690 MHz) is identified in Pakistan for IMT. Moreover, Section 8.7.4 of the Telecom Policy 2015 duly approved by the Federal Government also directs that any methods of assigning and pricing spectrum shall be in accordance with PTFA.*
  - iv. *As per Section 8.6.1 of Telecom Policy 2015, Federal Government has decided that MMDS spectrum will also be reallocated to telecommunications/converged services to achieve international best practice and to maximize benefits of spectrum.*
  - v. *Rolling Spectrum Strategy (2020-2023) approved by the Federal Government has also approved this band (2500 – 2690 MHz) for allocation to IMT and termed as crucial for mobile.*
  - vi. *The Federal Government Policy Directive for “Test and Development of Future Technologies Particularly for 5<sup>th</sup> Generation (5G) Wireless Networks in Pakistan” (16<sup>th</sup> October 2017), identified 2600 MHz band for trials of 5G networks and its further consideration for IMT auction. Accordingly in line with directions of Federal Government, PTA in June 2019 formulated a Framework for subject purpose and included 2600 MHz band for 5G test/trials.*
  - vii. *“5G Readiness Plan for Pakistan” prepared by Consultant of World Bank and submitted to MOIT&T in August, 2021, recommended to adopt Band n41 TDD in 2600 MHz for IMT.*
  - viii. *As per GSMA Intelligence report (November, 2023 edition), a total of 299 4G networks, while 24 5G networks have been launched globally in 2600 MHz band till 30<sup>th</sup> September, 2023.*
  - ix. *Notwithstanding above, sub-Regulation 6 of Regulation 10 “Frequency approval and assignment procedures” of FAB Regulations 2021, states that “Any request of spectrum for inefficient or obsolete technologies shall not be encouraged”*
  - e. *ED/VC further informed that in order to provide fair opportunity to M/s SNL and to meet all ends of justice, representatives of M/s SNL were requested to visit FAB HQs Islamabad on 26<sup>th</sup> February 2024, along with all relevant technical details, regarding needful deliberation on their spectrum request. However, no response was received neither anyone from M/s SNL visited FAB. In the interest of justice, the management of M/s SNL was once again requested to visit FAB*



HQs Islamabad on 29<sup>th</sup> February 2024, along with desired technical details vide FAB Letter Dated 26<sup>th</sup> February, 2024. Representatives of M/s SNL visited FAB HQs on 29<sup>th</sup> February 2024, however, no technical details or documents pertaining to their network were provided. M/s SNL agreed to provide required technical details along with spectrum requirement proposal by 4<sup>th</sup> March 2024. The facts highlighted in preceding paragraphs pertaining to their spectrum request were shared with representatives of M/s SNL in detail. Detailed Minutes of the said meeting were issued (Dated 1<sup>st</sup> March, 2024) and shared with M/s SNL.

f. ED/VC informed that M/s SNL submitted additional information and spectrum requirements proposal (Dated 4<sup>th</sup> March, 2024), whereby requesting following (the same were already circulated to Members of the Board);

- M/s SNL may be allocated 2556 – 2620 MHz (64 MHz) for five years free of cost for Karachi, Islamabad and Lahore.
- In the second phase, M/s SNL shall be allowed to expand its network to all over Pakistan along with grant of country wide WLL license.
- Compensation must be granted to M/s SNL due to reduction in bandwidth, existing equipment going to be obsolete and new additional equipment to be purchased.

g. ED/VC opined that above mentioned spectrum requirement proposal of M/s SNL is not tenable and is almost reiteration of their earlier demands/stance, which has already been dismissed by the Honourable Sindh High Court in C.P. No.D-482 of 2007. This spectrum belongs to the state of Pakistan and should be utilized for the best socio-economic interest of the country.”

And proposed that:

“ ... j. ED/VC proposed that further allocation of 2600 MHz band for introduction of latest services / technologies in Pakistan in line with existing government laws, policies, regulations and ITU guidelines / recommendations would be considered under Agenda Item No.6 of this meeting.”

The Chairman FAB supported the contentions of the Executive Director/Vice Chairman of FAB and stated that:

“ ... i. Chairman FAB observed that the decision of PEMRA to regret the license application of M/s SNL provides ground to regret spectrum assignment request of M/s SNL. However, in compliance to the orders of Honourable Sindh High Court, the request of M/s SNL was thoroughly evaluated by the Board on merits as explained by ED/VC in preceding paras.”

On this basis an order dated 22 March 2024 was passed by FAB and whereby FAB had declined to allocate the frequencies applied for by SNL identifying in its minutes the following reasons for refusal:

“ ... **Decision of the Board:**

i. In pursuance to the decisions of Honourable Sindh High Court in C.P. No.D482 of 2007 and Suit No. 198 of 2024, the request of M/s Southern Networks Limited (SNL) for assignment of frequency in 2600 MHz band for MMDS service (wireless cable TV broadcasting) was duly considered by the Board. After detailed deliberations in accordance with the prevailing laws, policies and regulations inter-alia (Telecom Act 1996, Telecom Policy 2015, Spectrum Rolling Strategy 2020-23, FAB Technical Regulations 2021, Pakistan Table of Frequency Allocations (PTFA), ITU International Table of Frequency Allocations (ITFA)

*and global best practices, the Board decided that the request of M/s SNL for frequency assignment in 2600 MHz band is not viable and tenable, therefore regretted.*

*ii. Since PEMRA has already rejected the M/s SNL application on 22.02.2024, therefore, PEMRA may consider lawful enforcement action against M/s SNL in order to cease usage of frequency in 2600 MHz band without a license, as per applicable PEMRA laws and regulations.*

*This is for your kind information and compliance, please."*

SNL impugn this order in this Suit and have maintained the Application under order seeking the following relief from this Court:

*" ... to restrain the Defendants, during the pendency of the suit, from withdrawing or interfering with the Plaintiff's use and utilization of its existing radio frequency bandwidth namely 2256-2619 MHz and 2668-2689 MHz for Lahore and Islamabad/Rawalpindi respectively and 2550 MHz -2690 MHz for Karachi."*

#### **D. Submissions on Behalf of SNL**

18. This matter was first listed on 31 May 2024 and on which date the following order was passed:

*" ... Be that as it may, let notice be issued to the defendants as well as DAG for 25.06.2024 and till the said date subject to the plaintiff coming up with the required payment of amounts that may be due and available in accordance with earlier practices to be first deposited with the concerned defendants or their non-entertainment / receiving with the Nazir of this Court, defendants are restrained from taking any adverse action against the plaintiff.*

19. On 25 June 2024 on account of Mr. Salahuddin Ahmed, who was representing SNL, having been granted general adjournment when the hearing of the application was pressed for by the Defendant No.2, Defendant No. 3 and the Assistant Attorney General for Pakistan the following order was passed:

*"..... Counsel holds brief for Mr. Salahuddin Ahmed and requests for adjournment as he is on general adjournment. On the other hand, learned counsel appearing for Defendant No.3 as well as Defendants No.2 and 4 including learned Assistant Attorney General plead urgency on the ground that ad-interim order has been obtained after dismissal of a Petition on a similar ground and the continuance of the ad-interim order is causing hindrance and is an impediment in policy decisions of the Defendants, whereas, due to enjoyment of a frequency band of 2600 MHz by the Plaintiff, the Government is unable to award contract for 5G internet / mobile service.*

**Since the Counsel is not available, adjourned to 02.07.2024 when Counsel for Plaintiff shall proceed or some alternate arrangement may be made as counter affidavits have already been filed and exchanged. Interim order to continue till the next date."**

20. On 2 July 2024 on account of Mr. Salahuddin Ahmed unavailability the matter was adjourned to 8 July 2024. On 8 July 2024 once again Mr. Salahuddin Ahmed was not available and the earlier order dated 25 June 2024 was reiterated to caution SNL as to the urgency of the hearing of the application. On 11 July 2024 an application was moved under Rule 50 of the Sindh Chief Court Rules by "MAC

Law Associate” of which Mr. Salahuddin Ahmed is a partner, seeking to withdraw their Vakalatnama and which was granted and following the earlier order of 25 June 2024 and 8 July 2024 the matter was taken up and the arguments of Mr. Zahid F. Ibrahim and Mr. Saad Sididqi were heard. However, showing grace, once again time was granted to SNL permitting them to engage a counsel who would be ready to proceed with the matter and the matter was adjourned to 19 July 2024. On 19 July 2024 an undertaking was given on behalf of Mr. Farooq H. Naek, a senior advocate of the Supreme Court of Pakistan, stating that he would be entering appearance on behalf of the Plaintiff but that he would not be able to argue the application on account of being on general adjournment until 30 July 2024. This Court while always willing to grant indulgence to any counsel, especially a senior counsel of the Supreme Court of Pakistan, finding itself bound by its earlier order declined such a request and directed SNL to proceed with the application and after the officer of SNL indicated his inability to decide such an application, was constrained to decide the application on the basis of the material available on record.

21. From the affidavit filed in support of the application under order, it is apparent that the Plaintiff has contended that:

- (i) the meeting that was held by FAB on 29 February 2024 was an eyewash as no hearing was given to SNL to present its case before the FAB Board who was the actual decision maker rendering the order as *coram non judice*;
- (ii) SNL was not afforded an opportunity to rebut any of the documents and polices relied on by the Executive Director / Vice Chairman of FAB;
- (iii) that the order passed by FAB was in excess of its jurisdiction and mala fide *in law*.
- (iv) FAB had already predetermined that the applications maintained by SNL were to be rejected; and
- (v) FAB had not given any reason in its order for declining the applications of SNL

**E. Submissions on Behalf of FAB**

22. Mr. Zahid F. Ebrahim entered appearance on behalf of FAB and contended that this suit was just another attempt by SNL to delay the process for the auction

of the MMDS frequencies that had been “forcibly” retained by it under cover of various interim orders that had been granted by this Court in numerous proceedings in an attempt to secure compensation from the Federal Government. He contended that SNL merely having a license had no vested right to the MMDS frequencies and having been afforded a hearing before FAB had no basis for maintaining the Application under order.

23. Reiterating the contentions of the Executive Director/Vice Chairman of FAB, Mr. Zahid F. Ebrahim submitted that:

- (i) the MMDS frequencies when allocated to SNL were initially granted in 1996 for the broadcast of television globally, but which frequencies had since been repurposed for International Mobile Telecommunication Systems post the advent of internet and mobile technology;
- (ii) sub-Regulation 6 of Regulation 10 of the Radio Frequency Spectrum (Allocation, Management and Monitoring) Regulations, 2021 clarified that:
 

*“ ... Any request of spectrum for inefficient or obsolete technologies shall not be encouraged”*
- (iii) while considering an application for renewal under Sub-Section (4) of Section 43 of the Act, 1996, FAB was bound to give credence to the recommendations of the International Telecommunications Union and which in Article 5 of their Radio Regulations had allocated the frequencies held by SNL for Mobile Telecommunications and the 2600 MHz band (2500 – 2690 MHz) specifically for International Mobile Telecommunication;
- (iv) pursuant to such international standards in clause 8.6.1 of the Telecommunication Policy, 2015 the Ministry of Information Technology had mandated that:

*“ ... 8.6.1 The use of digital technologies had dramatically changed the way in which telecommunication and broadcast services are delivered to and accessed by users. During the Policy period FAB will determine the spectrum allocated to analogue UHF TV services that may be reallocated either wholly or in part to telecommunication services, in order to achieve a digital dividend. MMDS spectrum will also be reallocated to telecommunication/converged services to achieve international best practice and to maximize the benefit of the spectrum.”*

and had developed a policy for allocating frequencies and which clarified that:

“ ... 8.7.4 Any methods of assigning and pricing spectrum used will be consistent with the following principles:

- **Be in accordance with Pakistan Table of Frequency Allocations;**
- *Be fair, transparent and non-discriminatory;*
- *Encourage fair competition where appropriate;*
- *Establish a fee which is economically justified when balanced with the investment*
- *Take account of any roll-out obligations specified;*
- *Be simple to execute;*
- *Discourage collusion and predatory behaviour.”*

As such the allocation of frequencies had to be made by FAB in accordance with the Pakistan Table of Frequency Allocations which paralleled with the recommendations of the International Telecommunications Union;

- (v) similarly in the Rolling Spectrum Strategy 2020-2023, developed by the Ministry of Information Technology and Telecommunication, it was clarified that:

“ ... 2500 MHz, The 2500MHz offers 190 MHz of bandwidth (2500-2690 MHz) and it is allocated in many countries for mobile services.. This is 3G)) Band 7 For FDD (2500-2570 MHz paired with 2620-2690 Mhz) and Band 38 for TDD (2570-2620 MHz). In Pakistan the 2500 MHz band is currently occupied by Southern Network Limited (SunTV) for operating its MMDS system that is used to deliver Pay-TV services. The PTA/FAB is in the process of reframing the 2500 MHz band and plans to recover the band but the timing is dependent on the judiciary process. The band has also been identified by ITU for IMT (5G) deployment. GoP in its Policy Directive for Test and Trials of Future Technologies, has also identified it as potential band for IMT deployment in Pakistan.

*Recommended Actions: This band should be a high priority after the 1800 MHz has been fully assigned. This band is not being used in many countries for LTE systems, and often being aggregated with other bands to deliver faster LTE speeds. This is crucial for mobile operators in Pakistan. Mobile Operators have also applied with PTA.FAB to conduct 5 G trials in this band.”*

- (vi) Similar recommendations had been made in the Federal Government Policy Directive for “Test and Development of Future Technologies Particularly for 5<sup>th</sup> Generation (5G) Wireless Networks in Pakistan” (16<sup>th</sup> October 2017) and which had identified the 2600 MHz band for trials of 5G networks and its further consideration for International Mobile Telecommunication auction;
- (vii) The “5G Readiness Plan for Pakistan” prepared by Consultant of World Bank and submitted to the Ministry of Information Technology and Telecommunications in August, 2021 had also recommended to adopt Band n41 TDD in 2600 MHz for IMT;

- (viii) The Association Global System for Mobile Communications in the GSMA Intelligence report (November, 2023 edition) had clarified that a total of 299 4G networks, while 24 5G networks had been launched globally in 2600 MHz band till 30 September, 2023.

24. Mr. Zahid F. Ebrahim contended that while SNL had no vested right to the frequencies allocate to it, the pendency of the interim orders by this Court were directly interfering in the auction of frequencies to forward 5G technology in Pakistan. While this in itself proved that SNL did not have a prima facie case, it was clear that the intent of SNL was solely to frustrate this process for financial gain and which could not be sustained. Mr. Zahid F. Ebrahim did not rely on any caselaw in support of his contentions.

#### **F. Submissions on Behalf of PTA**

25. Mr. Saad Siddiqui entered appearance on behalf of PTA and contended that while the PTA had no direct role in the allocation of frequencies, it adopted the contentions of Mr. Zahid F. Ebrahim and prayed for the dismissal of the application under order. He also did not rely on any caselaw in support of his contentions

26. I have heard Mr. Zahid F. Ebrahim, Mr. Saad Siddiqui and have considered the contentions of SNL as recorded in their affidavit in support of the application under order.

#### **G. The Order of this Court**

27. This Suit seems to be a continuation of a series of litigations that have taken place before this Court and before the Supreme Court of Pakistan as between SNL, PEMRA, FAB and the PTA and which to my mind either directly or indirectly relate to the allocation of the frequency bandwidth that had been licensed to SNL in the mid 1990's.<sup>1</sup>

##### **(i) The Application and Jurisdiction of the Board of FAB**

28. We have considered the order passed by a Division Bench of this Court in CP No. D-482 of 2007 and which had afforded SNL an opportunity to appear before PEMRA and FAB and make an application for the renewal of its license. As is apparent there was a dispute as between PEMRA and SNL as to whether the

<sup>1</sup> See C.P No. D of 1995, C.P.No. D- 482 of 2007; C.P. No. D-4274 of 2014, M.A. 15 of 2014, M.A. No. 7 of 2017, **Pakistan Electronic Media Regulatory Authority PEMRA) through Chairman, Islamabad and others vs. Southern Networks Limited, Karachi** 2023 SCMR 1348, M.A. No. 52 of 2024 and Suit. No (-198) of 2024

application that had been maintained should be an application for a new license or an application for the renewal of a license and which having been denied by PEMRA is now sub-judice before this Court in MA. No. 52 of 2024. That being the case it is clarified that this order will only examine the adjudication made by the Board of FAB on the application made by SNL for the renewal of their license for their MMDS frequencies.

29. There is no dispute as between SNL and FAB as to the fact that the original allocation of the MMDS frequencies had been made in favour of SNL by the Federation of Pakistan. It also seems that on account of the growth of the telecommunication sector, there has been a change in the policies of the Federal Government of Pakistan, Ministry of Information Technology and Telecommunications resulting in the MMDS frequencies that had been allocated to SNL to being reallocated to the telecommunication sector and which are proposed to being auctioned by the Federal Government to mobile companies to advance the 5G Spectrum in Pakistan. It therefore remains to be seen as to whether SNL has a right to retain the MMDS frequencies that initially been allocated to it.

30. The right to allocate such MMDS frequencies vests, under the provisions of Section (1) of Section 43 of the Act, 1996, with the Board of FAB and which reads as hereinunder:

“ ... 43. *Powers and functions of the Board.*

*(1) The Board shall have exclusive authority to allocate and assign portions of the radio frequency spectrum to the Government, providers of telecommunication services and telecommunication systems, radio and television broadcasting operations, public and private wireless operators and others.”*

The discretion conferred on the Board of FAB to “allocate and assign” the MMDS frequency is fettered by Sub-Section (4) of Section 43 of the Act, 1996 and which reads as hereinunder:

“ ... *(4) In exercise of its powers under subsection (1), the Board shall be guided by the applicable recommendations of the International Telecommunication Union or any of its standing committees or organizations including the International Consultative Committee on Telecommunication, International Consultative Committee on Radio, the International Frequency Registration Board and other similar international organizations.”*

Regulations known as the Radio Frequency Spectrum (Allocation, Management and Monitoring) Regulations, 2021 (hereinafter referred to as the “Regulations 2021”) have been framed under Sub-Section (3) of Section 42 of the Act, 1996 by the Board of FAB and within which clause (1) and (2) of Regulation 8 prescribes that:

“ ... 8. *Application for assignment of radio frequency spectrum.*

*(1) Every application for assignment of radio frequency spectrum or modification or **renewal** thereof shall, in the first instance, be made on the specified application forms to the Authority or PEMRA, as the case may be, along with such facts as to character, financial, technical and other qualifications of the applicant to operate the station.*

*(2) The Authority or, as the case may be, the PEMRA shall on receipt of such application for assignment of radio frequency, after such inquiry as it may deem appropriate, refer the application to the Board within thirty days from receipt of such application. ...”*

As is apparent, under the provision’s clause (1) of Regulation 8 of the Regulations, 2021, the application for renewal of the MMDS frequency had to be maintained by SNL before PTA or PEMRA and which authority would thereafter forward the same to FAB and whose Board would thereafter decide the application. In the event of an applicant being aggrieved by such a decision, a right of review is found in clause (7) of Regulation 8 of the Regulations, 2021 and which is to be adjudicated by the Board in terms of Clause (8) of Regulation 8 of the Regulations, 2021 and which decision as per the prescriptions of Clause (9) of Regulation 8 of the Regulations, 2021 would be treated as a final decision.

**(ii) The Implied bar of Section 9 of the Code of Civil Procedure, 1908 on the basis of the failure to maintain an application for Review**

31. The provisions of Section 9 of the Code of Civil Procedure, 1908 provides that:

“ ... 9. *The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.*”

It is therefore left to be seen whether the failure on the part of SNL to avail the remedy of review would disentitle them to maintain this *lis* or whether it would be impliedly barred.

32. There are two decisions of the Supreme Court of Pakistan which have clarified the scope of what is an express bar and what is an implied bar as contained in Section 9 of the Code of Civil Procedure, 1908. Firstly, in **Abbassia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus and 5 others**<sup>2</sup> a clarification was made as to how the jurisdiction of a civil court under Section 9 of the Code of Civil Procedure, 1908 would be excluded, it being held that:

---

<sup>2</sup> PLD 1997 SC 3



“ ... *"It is also well-settled law that where the jurisdiction of the Civil court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or action taken by the authority or the tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or the tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated."*

As is apparent, if the authority has not been legally constituted or the authority being exercised by it and which are under challenge are “*coram non judice*” a civil courts jurisdiction to maintain a *lis* against such a cause of action would be maintainable. Similarly, if there is an averment made in the plaint of mala fide, the Court would also retain its jurisdiction. Finally, if the authority exercised violates the Rules of Natural Justice the *lis* would also be maintainable under Section 9 of the Code of Civil Procedure, 1908. The second decision of the Supreme Court of Pakistan regarding the interpretation of Section 9 of the Code of Civil Procedure, 1908 is **Searle IV Solution (Pvt.) Ltd. and vs. Federation Of Pakistan and Others**<sup>3</sup> wherein while considering as to what would constitute “mala fide” it was held that”

“ ... *Although the appellants have also relied on the exception where an action/order is tainted with mala fide, no proof or tangible argument in this regard has been raised besides blowing smoke of the allegedly prevalent corruption in the Customs Department. Therefore we conclusively hold that the appellants do not fall within the ambit of the exceptions carved out by the judgments of this court with respect to a bar to the jurisdiction of civil courts."*

It is therefore clear that where the Plaintiffs pleadings of mala fide are vague then the Courts jurisdiction under section 9 of the Code of Civil Procedure, 1908 cannot be sustained so as to bring the cause before the Court. To do so, the Plaintiff would be responsible not to make just a bare allegation against the authority of mala fide but rather to expressly make a tangible argument supported by proof.

33. The exceptions mentioned above and their applications applying to both “express” and “implied” bars contained in the law. It is left to consider what would be an express bar and what would be an implied bar. It is clear that an “express” bar would be one of the nature of an “ouster” clause where a statute specifically prohibits a Court from having jurisdiction over the authority. By contrast, an example of what constitutes an “implied” bar has been dilated on by my learned brother Adnan Iqbal Chaudary, J. in the decision reported as **Syed Zain ul Abideen Versus Federal Board Of Revenue, Islamabad**<sup>4</sup> wherein he held that:

<sup>3</sup> 2018 SCMR 1444

<sup>4</sup> PLD 2021 Sindh 130

“ ... 9. Thus, the ratio decidendi of *Searle IV Solution* is that even though an ouster clause in a special statute barring the jurisdiction of a ‘civil court’ did not apply to the High Court of Sindh at Karachi dealing with civil suits, there was nonetheless an ‘implied’ bar to jurisdiction as contemplated under section 9 CPC, arising as a consequence of special law which envisaged exclusive jurisdiction by a special forum, which implied bar could only be circumvented if the plaintiff demonstrated that the case attracted one of the established exceptions to the ouster of jurisdiction highlighted in para 7 above.”

I am in agreement with my learned brothers finding with regard to the finding that unless the cause of action as pleaded in the plaint comes within the exceptions as clarified by the Supreme Court of Pakistan in **Abbassia Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus and 5 others**<sup>5</sup> and **Searle IV Solution (Pvt.) Ltd. and vs. Federation Of Pakistan and Others**<sup>6</sup> the provision of a special forum that has been created by the enabling statute to redress the cause would impliedly oust the jurisdiction of a civil court from hearing the matter.

34. I have perused the provisions of the Act, 1996 and note that there is no express bar contained in that statute to prevent the institution of this Suit. It therefore remains to be seen as to whether the failure on the part of SNL to maintain a review under clause (7) of Regulation 8 of the Regulations, 2021 as against the order dated 22 March 2023 would preclude the maintainability of this Suit or as to whether there is sufficient pleading regarding mala fide as against the Board of FAB to sustain these proceedings. In this regard I have perused the Plaint and note that specific allegations of mala fide have been maintained as against the board of FAB in Paragraphs 13, 14,15, and 17 of the Plaint where allegations of mala fide are specifically pleaded and which are supported by evidence relied on by the Plaintiff and hence cannot in any manner be considered vague. The Suit is therefore maintainable and is not impliedly barred under Section 9 of the Code of Civil Procedure, 1908.

**(iii) Vested Right of Renewal**

35. On a perusal of the provisions of the Act, 1996 and the Regulations, 2021 it is apparent that SNL does not have a mandatory right of renewal guaranteed to it either under that Statute or under those Regulations. Whether or not such a right is an “automatic” right was considered by the Supreme Court of Pakistan in the decision reported as **Riaz Ahmed and others vs. Government of Pakistan**<sup>7</sup> wherein while refusing leave to appeal from an order of a Division Bench of this Court passed in CP No. D 1724 of 1990 it was opined that:

---

<sup>5</sup> PLD 1997 SC 3

<sup>6</sup> 2018 SCMR 1444

<sup>7</sup> 2000 SCMR 1181

“ ... 2-A. At the hearing learned counsel for the petitioner vehemently contended that the petitioners by virtue of paying rent to the Railways Authorities had acquired the status of lawful tenants in respect of their respective stalls thus they could not be dislodged in the manner proposed by the respondents. There is no gain saying that seemingly the status of the petitioners is no better than licensees as admittedly there is no agreement of tenancy between any of the petitioners and the respondents to uphold the claim of the petitioners. If the respondents acting in the larger public interest have decided to do away with the practice of renewal of existing licences in favour of the petitioners which policy was highlighted in the case reported as *Shaukat Hayat v. Government of Pakistan through Pakistan Railways (PLD 1997 SC 342)* no lawful exception can be taken to the course of action adopted by' the respondents. Obviously petitioners do not have any vested legal right of holding perpetual licence to carry on their business without the participation of anyone else. Such licences, in law are always revocable after reasonable notice and in due process of law. View taken by the learned High Court is, therefore not open to any exception and we do not feel inclined to interfere with the exercise of discretion which was neither arbitrary nor in violation of the settled principles of law.”

The decision of the Supreme Court of Pakistan while clarifying that there exists no vested right to a license, has also clarified that it is open to the executive to change its policy and thereby deprive a person of their license, provided that such an act is revoked “after reasonable notice and in due process of law.” Prima facie it would therefore seem that aside from not being able to claim any statutory right, it would also not be open for SNL to claim any vested right, for the renewal of its licenses for the MMDS frequencies.

#### (iv) **The Doctrine of Legitimate Expectation and Change in Policies**

36. The Doctrine of Legitimate Expectation is now well-recognised in Pakistan.<sup>8</sup> A legitimate expectation may arise where a public body has a discretionary power and it represents to the general public or to a particular person that it will exercise that power in a specific way. Such representations may be express, in the form of an explicit promise or statement, or they may be implicit, in the form of, for example, a consistent past practice. Where a legitimate expectation arises, the public body will be required to give effect to it **unless circumstances entitle the public body to resile from it.**

37. Legitimate expectations are broadly categorized as either “procedural” legitimate expectations, where the expectation is that the public body will follow a particular

<sup>8</sup> See *Chairman, Evacuee Trust Property Board, Lahore vs. Sufi Nazir Ahmed* 2024 SCMR 622; National Database and Registration Authority (NADRA) vs. Jawad Khan 2023 SCMR 1381 *President National Bank Of Pakistan vs. Waqas Ahmed Khan* 2023 SCMR 766, *District Education Officer (Female), Charsadda Versus Sonia Begum* 2023 SCMR 217, *Federation Of Pakistan Through Secretary, Ministry Of National Health Services vs. Jahanzeb* 2023 PLC(CS) 336, *Uzma Manzoor vs. Vice-Chancellor Khushal Khan Khattak University, Karak* 2022 SCMR 694, *Pakistan Telecommunication Employees Trust (Ptet) Through M.D., Islamabad vs. Muhammad Arif* 2015 SCMR 1472, *Secretary, Government Of Punjab, Finance Department vs. M. Ismail Tayer* 2014 SCMR 1336, *Syed Mubashir Raza Jaffri vs. Employees Old-Age Benefits Institutions (EOBI)* 2014 PLC 428, *Nadeem Ahmed vs. Federation Of Pakistan* 2013 SCMR 1062, *Application By Abdul Rehman Farooq Pirzada Versus Begum Nusrat Ali Gonda vs. Federation Of Pakistan* PLD 2013 SC 829, *Reference No.01 Of 2012* PLD 2013 SC 279; *Government Of Sindh vs. Abdul Jabbar* 2004 SCMR 639

procedure before it takes a decision e.g. such as giving notice, allowing representations to be made, affording a hearing, or engaging in consultation, or “substantive” legitimate expectations, where the expectation is that the public body will reach a particular decision as a matter of substance e.g. to grant a license. The existence of the latter category of legitimate expectations was clarified by the Court of Appeal in the decision reported as **R v North and East Devon Health Authority, ex p Coughlan**<sup>9</sup> and wherein it was clarified that:

“ ... **Legitimate Expectation – The Court’s Role**

55. In considering the correctness of this part of the judge’s decision it is necessary to begin by examining the court’s role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success, as Mr Goudie and Mr Gordon accept.

56. What is still the subject of some controversy is the court’s role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in *Findlay v Secretary of State for the Home Department* [1985] 1 AC 318, [1984] 3 All ER 801 at page 338 of the former report, “But what was their legitimate expectation?” Where there is a dispute as to this, the dispute has to be determined by the court, as happened in *Findlay*. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

57. There are at least three possible outcomes.

(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds. This has been held to be the effect of changes of policy in cases involving the early release of prisoners (see *Re Findlay* [1985] AC 318; *R v Secretary of State for the Home Dept, ex parte Hargreaves* [1997] 1 All ER 397, [1997] 1 WLR 906.)

(b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontroversial that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, [1983] 2 All ER 346) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires.

(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

58. The court having decided which of the categories is appropriate, the court’s role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. In the case of the second category the court’s task is the conventional one of determining

<sup>9</sup> [1999] EWCA Civ 1871

whether the decision was procedurally fair. In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised.

59. In many cases the difficult task will be to decide into which category the decision should be allotted. In what is still a developing field of law, attention will have to be given to what it is in the first category of case which limits the applicant's legitimate expectation (in Lord Scarman's words in *Re Findlay*) to an expectation that whatever policy is in force at the time will be applied to him. As to the second and third categories, the difficulty of segregating the procedural from the substantive is illustrated by the line of cases arising out of decisions of justices not to commit a defendant to the Crown Court for sentence, or assurances given to a defendant by the court: here to resile from such a decision or assurance may involve the breach of legitimate expectation. (See *R v Reilly* (1985) 1 Cr App R(S) 273, 276; *R v Dover Magistrates' Court, ex parte Pamment* (1994) 15 Cr App R(S) 778, 158 JP 665, page 781-2 of the former report). No attempt is made in those cases, rightly in our view, to draw the distinction. Nevertheless, most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. We recognise that the courts' role in relation to the third category is still controversial; but, as we hope to show, it is now clarified by authority."

38. The Privy Council in a decision reported as **The United Policyholders Group and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)**<sup>10</sup> had occasion to restate the law and in which Lord Neuberger opined that:

" ... 37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, para 60.

38. Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty - see eg *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 636, per Lord Fraser of Tullybelton. **Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or a fortiori should, reasonably decide not to comply with the statement.**

39. Quite apart from these points, like most widely expressed propositions, the broad statement set out at the beginning of para 37 above is subject to exceptions and qualifications. It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to the procedure to be adopted in a particular context (see again *Ng Yuen Shiu* [1983] 2 AC 629, 636). However, it is unclear quite how far it can be applied in relation to statements as to substantive matters, for instance statements in relation to what Laws LJ called "the macro-political field" (in *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131), or indeed the macro-economic field. As the cases discussed by Lord Carnwath show, such issues have been considered by the Court of Appeal of England and Wales, perhaps most notably, in addition to *Begbie*, in *R v North and East Devon Health*

<sup>10</sup> [2016] UKPC 17

*Authority, Ex p Coughlan [2001] QB 213, R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363, and R (Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755, and also by the Board in Paponette v Attorney General of Trinidad and Tobago [2012] 1 AC 1.*

The opinion of Lord Carnwath as referred to hereinabove clarified the context in which, despite their being a statement that “*clear, unambiguous and devoid of relevant qualification,*” the public body making such a representation was still able to resile from such a statement without falling afoul of the doctrine of legitimate expectation and *inter alia* considered that:

“ ... 117. *Laws LJ was right in Begbie to contrast the narrow basis of the decision in Coughlan with cases at the opposite end of the spectrum involving much wider issues such as matters of national economic policy, exemplified by R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521. In such cases, the court will not intervene outside of “the extremes of bad faith, improper motive or manifest absurdity” (R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521, 596-597 per Lord Bridge of Harwich; see also Kennedy v Information Comr (Secretary of State for Justice intervening) [2014] UKSC 20; [2015] AC 455 para 53 per Lord Mance).*”

39. I have considered the provisions of the Act, 1996, the PEMRA Ordinance, 2002, the Regulations, 2021 and the appended correspondence as between SNL and PEMRA and FAB and I am clear that no statement that is “*clear, unambiguous and devoid of relevant qualification*” can be found therein on the basis of which a “procedural” legitimate expectation can be found and which can be said to have been violated by any of those authorities. While, clearly, the right to renew a license may well fall within the purview of a “substantive” legitimate expectation but that only exist where PEMRA, PTA or FAB may have made a statement to SNL that it would mandatorily renew the license of SNL and which statement would have had to be “*clear, unambiguous and devoid of relevant qualification.*” I have considered the Act, 1996, the PEMRA Ordinance, 2002, the Regulations, 2021 and the appended correspondence as between SNL and PEMRA and FAB and I am clear that no statement that is “*clear, unambiguous and devoid of relevant qualification*” by SNL is found ensuring SNL a right of renewal of its MMDS frequency Licenses. I would however add, that even if there was such a statement, keeping in mind the various policies that have been presented by Mr. Zahid F. Ebrahim on behalf of FAB, I would prima facie have been of the opinion that FAB would have been well within its right to deviate from such a statement on the basis of the stated economic policies of the Federal Government as clearly no element of “bad faith, improper motive or manifest absurdity” could be found in those policies so as to disentitle the Federal Government from acting thereon.

(v) **Malice in Law**

40. Whenever an act of a public authority afflicts an injury on a person illegally i.e. in violation of a law such an act is to be considered an action which amounts to “Malice in law.”<sup>11</sup> A summation of the law on this issue has been made by the Supreme Court of Pakistan in the decision reported as **Said Zaman Khan and others vs. Federation of Pakistan through Secretary Ministry of Defence and others**<sup>12</sup> and in which the Supreme Court of Pakistan has *inter alia* approved the decision of the House of Lords reported as **Shearer and another vs. Shields**<sup>13</sup> in which while explaining the difference between “malice in fact” and “malice in law” held as follows:

" ... *Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently.*"

As such where an action of a public functionary inflicts injury on a person illegally, then that illegal action being premised either through a deliberate act or in innocence of the law or in ignorance of the law; must be considered to be an action which can be impugned as being “malice in law”.

41. it is alleged by SNL that the actions of the PEMRA and FAB are mala fide in law and which I understand to be referring to “malice in law. I have considered the order dated 22 March 2024 passed by the Board of Fab and which I am, prima facie, of the opinion was within the jurisdictional competence of the Board of FAB to pass. The decision being premised on the policies of the Federal Government, Ministry of Information Technology and Telecommunications and as per Sub-Section (4) of Section 43 of the Act, 1996 on Article 5 of their Radio Regulations of the International Telecommunications Union<sup>14</sup> each of which specifically clarify that the MMDS frequency currently allocated to SNL is to be repurposed for International Mobile Telecommunication Systems, I therefore can, prima facie, not see any malice in law that existed in the order dated 22 March 2024 passed by FAB rejecting the applications of SNL for the renewal of the MMDS frequencies that had previously been allocated to it.

<sup>11</sup> See **Messrs Airport Support Services vs. The Airport Manager, Quaid e Azam International Airport, Karachi and others** 1998 SCMR 2268, **Justice Qazi Faez Isa vs. The President of Pakistan** PLD 2021 SC 1; **Messrs Wak Orient Power and Light Limited through Chief Executive Officer Lahore vs. Government of Pakistan Ministry of Water and Power through Secretary, Islamabad and 2 others.** 1998 CLC 1178

<sup>12</sup> 2017 SCMR 1249

<sup>13</sup> 1914 A.C. 808

<sup>14</sup> <https://www.itu.int/pub/R-REG-RR-2024>

(vi) **Rules of Natural Justice**

42. The final ground for consideration, is as to whether the Board of FAB violated any of the Rules of Natural Justice while passing the order dated 22 March 2024 rejecting the applications of SNL for the renewal of the MMDS frequencies that had previously been allocated to it. A summation of the applicability of the Rules of Natural Justice in respect of the renewal of Licenses has been made in **De Smith Judicial Review** and wherein it is stated that:<sup>15</sup>

“ ... *Because the interest of the claimant, rather than the discretionary power of the decision maker now founds a right to a fair hearing, a hearing is required in most situations where licenses or other similar benefits are revoked, varied, suspended or refused, even where the decision power affords wide discretion to the decision-maker. Thus a strong presumption exists that a person whose license is threatened with revocation should receive prior notice of that fact and opportunity to be heard.* ...

*Non renewal of an existing license is usually a more serious matter than refusal to grant a license in the first place. Unless the licensee has already been given to understand when the license was granted that renewal is not to be expected, non renewal may seriously upset plans cause economic loss and perhaps cast a slur on reputation. It may therefore be necessary to imply a duty to hear before a decision not to renew irrespective of whether there is a legitimate expectation of renewal even though no such duty is implied in the make of the original decision to grant or refuse the license.”*

SNL raises two separate objections in this regard. It first contends that the hearing conducted was an eyewash as the Board of FAB had predetermined the outcome of the applications maintained by SNL. I am not convinced by this contention. It is apparent that the order dated 22 March 2024 that was made by the Board of FAB was premised on the policies of the Federal Government, Ministry of Information Technology and Telecommunications and as per Sub-Section (4) of Section 43 of the Act, 1996 on Article 5 of the Radio Regulations of the International Telecommunications Union and which prima facie would show that the decision while as against SNL was not predetermined rather it was structured on the mandate conferred on the Board of FAB under its constituting statute.

43. However, regarding affording SNL a hearing, while information was provided by SNL to FAB through its Executive Director/Vice Chairman and where after a hearing was held on the application of FAB by the Board of FAB, it is apparent from the Order dated 22 March 2024 that no **personal hearing** was granted by the Board of FAB to SNL as at the Meeting that was held on 12 March 2024 of the Board of FAB **as only the contentions of the Executive Director/Vice Chairman of FAB appear therein**. It would therefore seem that prima facie the contention of SNL that they are not afforded the opportunity of a

<sup>15</sup> Hare KC, Ivan, Donnelly SC Catherine, and Bell Joanna (2023) **De Smiths Judicial Review**, (9th Edition) London, at pg. 474-475



hearing to contest the contentions of the Executive Director/Vice Chairman of FAB is correct. Keeping in mind the policies that have been brought to this Courts notice by Mr. Zahid F. Ebrahim, I cannot understand what could possibly be said to counter such contentions, however that is not for me to adjudicate on. Rather it is open to SNL to be presented with the contentions of the Executive Director/Vice Chairman of FAB and thereafter after being afforded a hearing for the Board of FAB to pass a decision on those contentions as held by the Supreme Court of Pakistan in the decision reported as **Mollah Ejahar Ali vs. Government of East Pakistan and others**<sup>16</sup> wherein it was opined that:

“ ... *To deal with the second contention first, there is no doubt that the High Court’s order which is unfortunately perfunctory gives the impression of a hasty off-hand decision which, although found to be correct in its result, is most deficient in its content. If a summary order of rejection can be made in such terms, there is no reason why a similar order of acceptance, saying “there is considerable substance in the petition which is accepted” should not be equally blessed. This will reduce the whole judicial process to authoritarian decrees without the need for logic and reasoning which have always been the traditional pillars of judicial pronouncements investing them with their primary excellence of propriety and judicial balance. Litigants who bring their dispute to the law Courts with the incidental hardships and expenses involved do expect a patient and a judicious treatment of their cases and their determination by proper orders. **A judicial order must be a speaking order manifesting by itself that the Court has applied its mind to the resolution of the issues involved for their proper adjudication.** The ultimate result may be reached by a laborious effort, but if the final order does not bear an imprint of that effort and on the contrary discloses arbitrariness of thought and action, the feeling with the painful results, that just has neither been done nor seems to have been done is inescapable. When the order of a lower Court contains no reasons, the appellate court is deprived of the benefit of the views of the lower Court and is unable to appreciate the process by which the decision has been reached.”*

(Emphasis is added)

44. It is well settled that the principles of natural justice, unless prohibited by the wording of a statute, has to be read into each and every statute.<sup>16</sup> The right of personal hearing to anyone against whom an adverse order may be made has been equated by the Supreme Court of Pakistan as a fundamental right guaranteed under Article 10 A of the Constitution of the Islamic Republic of Pakistan, 1973 and an adverse order made without affording an opportunity of a personal hearing is to be treated as a void order.<sup>17</sup> If the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of departure from these essential principles of natural justice. A decision taken in violation of the principles of natural justice must be declared to be no decision.<sup>18</sup> Violation of the principle of *audi alteram partem* would be enough to vitiate even the most solemn proceedings. It

<sup>16</sup> See **Anisa Rehman vs. P.I.A.C and another** 1994 SCMR 2232; **Abdul Majeed Zafar Vs. Governor of the Punjab** 2007 SCMR 330

<sup>17</sup> **Nazir Ahmad Panhwar Vs. Government of Sindh** 2005 SCMR 1814

<sup>18</sup> **Ashiq Muhammad Khan Mazari Vs. Chairman Federal Land Commission** PLD 1977 Lahore 461

would therefore seem that prima facie the hearing conducted by the Board of FAB on 22 March 2024 has unfairly prejudiced SNL as they were not afforded with an opportunity to contest the contentions of the Executive Director/Vice Chairman of FAB before the Board of FAB.

45. I must admit that I find myself in two minds when considering whether or not to grant any interim relief to SNL. Prima facie SNL has been deprived of an opportunity to contest the contentions of the Executive Director/Vice Chairman of FAB that had been presented to the Board of FAB and of a hearing to advance their contentions. Without such contentions having been recorded and considered, it would therefore seem that an adjudication on the issues cannot be determined by the Board of FAB. That being said, keeping in mind the various policies that have been forwarded by FAB I cannot see what possible arguments could possibly be raised by SNL to counter such contentions. However, that is not for me to trouble myself with at this stage. Suffice to say, SNL is under the rules of Natural Justice entitled to a hearing and which they have prima facie been deprived of and hence entitled to interim relief as by denying them such an opportunity their final right to have their licenses renewed would be lost and in respect of which they would suffer irreparable loss and as such the balance of convenience must also be found in their favour.

46. In the circumstances as a hearing had not been afforded to SNL, the application is allowed and the Order of the Board of FAB dated 22 March 2024 is suspended and no adverse action should be taken as against SNL on the basis of that Order. However, this order will not come in the way of the Board of FAB to hold a fresh meeting and after affording SNL a hearing on the contentions raised by the Executive Director/Vice Chairman of FAB to pass a speaking order on the existing applications of SNL for the renewal of their MMDS frequencies. Application stands allowed in the above terms with no order as to costs.

**JUDGE**

Karachi dated 30 October 2024

**ANNOUNCED BY**

**JUDGE**