

## **IN THE HIGH COURT OF SINDH AT KARACHI**

Present:

*Mr. Justice Mohammad Karim Khan Agha*  
*Mr. Justice Yousuf Ali Sayeed*

### **CONST. PETITION NO.D-7422 OF 2019**

Petitioner: Justice Retd. Abdul Waheed Siddiqui s/o  
Shafi Muhammad Siddiqui through Mr.  
Saadat Yaar Khan, Advocate.

Respondents: Through Ms. Wajiha M. Mehdi, Assistant  
Attorney General.

### **CONST. PETITION NO.D-7423 OF 2019**

Petitioner : Justice Retd. Zahoor Ahmed Shahwani s/o  
Malik Noor Ahmed Shahwani through  
Malik Naeem Iqbal, Advocate.

Respondents: Through Ms. Wajiha M. Mehdi, Assistant  
Attorney General.

### **CONST. PETITION NO.D-7424 OF 2019**

Petitioner : Justice Retd. Rizwan Ali Dodani s/o Ali  
Akbar Dodani through Malik Naeem Iqbal,  
Advocate.

Respondents: Through Ms. Wajiha M. Mehdi, Assistant  
Attorney General.

Date of Hearing: 13.02.2025, 18.02.2025, 27.02.2025 and  
10.03.25

Date of Announcement: 23.04.2025

## **J U D G M E N T**

**Mohammed Karim Khan Agha J.** The main grievance of all the petitioners who are all former Judges of the Federal Shariat Court are that their post retirement pensionary benefits are not being paid to them by the respondents.

2. The brief facts of the case are that all the petitioners were advocates who were all elevated as Judges to the Federal Shariat Court (FSC) under the relevant Articles of the Constitution for a term of three years each which they all

completed and then returned to practice. When, however, they claimed their pension which they allege was due to them as FSC Judges the same was not paid to them despite repeated reminders to the respondents who did not even reply to their request for the payment of their pensionary benefits and thus they were left with no other option but to approach this Court in its Constitutional jurisdiction to secure their pensionary benefits which according to them they were entitled to following their service at the FSC.

3. Learned counsel for the petitioners contended that under Article 203 (9) of the Constitution the petitioners were entitled to be paid pensionary benefits; that they were not contract workers in the real sense as they had not signed any contract and had been appointed as FSC Judges as per the relevant provisions of the Constitution albeit for a fixed tenure; that other High Court Judges who had not completed 5 years in service had been receiving pension on a pro rata basis as per order of the Lahore High Court (LHC) dated 07.07.2018 which was upheld by the Supreme Court vide order dated 27.03.2019 and as such they were entitled to equal treatment under the law and be paid a pro rata pension based on their three years of service; it was even contended that one retired Judge of the FSC who had been a practicing advocate prior to his elevation as a judge of the FSC, like the petitioners, who had served 5 years as a Judge of the FSC was being paid a pension and as such their case fell on the same footing and as such the petitioners were entitled to a pro rata pension based on their length of service. In support of their contentions they relied upon various Articles of the Constitution of the Islamic Republic of Pakistan 1973 (the Constitution), **Ahmed Ali U Qureshi v. Accountant General Sindh and others** (PLD 2008 SC 522), **Justice (Retired) Professor Abdul Waheed Siddiqui V Federation of Pakistan** (2009 CLC 76), Order passed in the case of **Justice (R) Rauf Ahmad Sheikh and others V. Accountant General of Punjab** in W.P. No.105298/2017 passed by a larger Bench of the Lahore High Court dated 07.07.2018 and Order dated 27.03.2019 passed by the Supreme Court in the case of **Government of Punjab V Justice (R) Rauf Ahmad Sheikh and others in appeal from the earlier cited case of Justice (R) Rauf Ahmad Sheikh and others (Supra)** and **I.A.Sherwani V Government of Pakistan** (1991 SCMR 1041).

4. On the other hand learned DAG contended that the petitioners being contract employees were not entitled to any payment of pension; that their service could not be considered on par as a permanent High Court Judge who started as an Additional Judge and later based on their performance had to be confirmed as a permanent Judge under Article 175 (A) of the Constitution; even otherwise the Constitution did not envisage the entitlement of a judge of the FSC to a pension as



there was no mention of a FSC judge in the fifth Schedule of the Constitution that dealt with retired Judges pension entitlements; that even other wise the issue of entitlements to a pension for those judges who had less than three years in service had been excluded by an authoritative pronouncement of the Supreme Court on this point which enunciated principles of law/precedent unlike the orders of the Lahore High Court and the Supreme Court which were relied upon by the petitioners which were only consent orders and laid down no principle of law or legal precedent on this point and which under instructions she stated the Federal Government no longer supported; that the definition of “remuneration” in Article 260 of the Constitution which included pension had to be read in context as Article 260 specifically stated before the definitions were set out, “unless the context so requires” and in this case the context did not require pension to be linked with remuneration; that the term remuneration had to be equated to the definitions of pay, salary and pension as set out in the Civil Service regulations; that pension was always linked to longevity of service and a three year tenure was not long enough to qualify for a pension . In support of her contentions she placed reliance on various provisions of the Constitution and **Reference No.1 of 2012** (PLD 2013 SC 279), **Pakistan Tehrik-E-Inqilab V Election Commission of Pakistan** (1997 MLD Lah.3167), Government of Pakistan, Finance Division Civil Service Regulations (C.S.R.) Updated Edition 2018, Judgment dated 04.03.2021 passed by the Hon’ble Supreme Court of Pakistan in Civil Appeal No.827 of 2020 **re: Government of KPK through Chief Secretary and others v. Syed Sadiq Shah and others**. Order dated 17.05.2022 passed by the Divisional Bench of High Court of Sindh in C.P. No.D-1364 of 2020 **re: Yasmin and 327 others V. Government of Sindh and others**. Judgment dated 24.08.2012 passed by the Divisional Bench of High Court of Sindh in C.P. Nos.D-3876 & 3877 of 2011 **re: Junaid & M/s. Al Raziq Pvt. V. Federation of Pakistan & Others**, the case “Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges” (PLD 2013 SC 829), a Division bench order of this court in the case of **Qazi Khaid Ali V Federation of Pakistan** in CPD No.2901/22 dated 18.01.23 and numerous correspondence between the Ministry of law and the Registrar of the FSC and the Accountant General’s office of Pakistan.

5. We have heard the parties, examined the record and reviewed the relevant case law.

6. There appear to be three main issues before us (a) whether under the Constitution a FSC Judge who was appointed from amongst advocates (like the petitioners) can be treated on the same footing as a confirmed High Court Judge in terms of his remuneration and (b) If so, would such FSC Judges (like the

petitioners) be entitled to a pension under the Constitution or (c) If they (the petitioners) were not entitled to a pension under the Constitution whether they would they be entitled to receive a pro rata pension based on a Federal Government pension package which other retired High Court Judges were receiving who were not entitled to a pension under the Constitution as they had less than five years service.

Turning to the first issue whether under the Constitution a FSC Judge who was appointed from amongst advocates (like the petitioners) can be treated on the same footing as a confirmed High Court Judge in terms of his remuneration.

7. The petitioners were appointed as Judges of the FSC by way of Notification similar to one of the petitioners under Article 203(c) (2) as set out below

**"Government of Pakistan**  
**Law, Justice and Parliamentary Affairs Division**  
\*\*\*\*\*

Islamabad the 28<sup>th</sup> June, 2011

**NOTIFICATION**

*No.F.53(1)/2011-A.II- In exercise of the powers conferred by clause (2) of Article 203C of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following persons as Judge/Alim Judge of the Federal Shariat Court for a period of three years with effect from the date they make oath of their offices:-*

- i. Mr. Rizwan Ali Dodani as Judge
- ii. Mr. Justice (Retd) Dr. Fida Muhammad Khan as Alim Judge

Sd/-  
(Muhammad Masood Chishti)  
Secretary

8. All the petitioners assumed charge as per similar Notification as is set out below:

**"Government of Pakistan**  
**Law, Justice and Parliamentary Affairs Division**  
\*\*\*\*\*

Islamabad the 11<sup>th</sup> July, 2011

**NOTIFICATION**

*No.F.53(1)/2011-A.II- Pursuant to this Division's Notification No.53(1)/2011-A.II dated 28<sup>th</sup> June, 2011 Mr. Rizwan Ali Dodani and Mr. Justice (Retd) Dr. Fida Muhammad Khan have assumed the charge of the Judge and Alim Judge respectively of the Federal Shariat Court for a period of three years in the forenoon of 5<sup>th</sup> July 2011.*

Sd/-  
(Muhammad Siddique)  
Section Officer



9. All the petitioners relinquished charge after completing their term in office as per Notification or similar as is reproduced below.

**"TO BE PUBLISHED IN THE GAZETTE OF PAKISTAN PART –III**

**Government of Pakistan**  
**Law, Justice and Human Rights Division**  
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Islamabad the 22<sup>nd</sup> July, 2014

**NOTIFICATION**

*No.F.53 (1)/2011-A.II- Consequent upon completion of three years tenure appointment, Mr. Justice Rizwan Ali Dodani, Judge of the Federal Shariat Court relinquished the charge of his office on 4<sup>th</sup> July 2014.*

**(Izaz ul Haq Shah)**  
Section Officer

10. Thus, it undisputed that all the petitioners were Judges of the FSC appointed under the Constitution and completed their full tenure as per original notification of appointment being 3 years which was not extended.

11. In essence we are required to determine whether a FSC Judge is on the same footing as a permanent Judge of a High Court under the Constitution for the purposes of remuneration.

12. In terms of Constitutional/statutory interpretation it was held as under in the case of **Justice Khurshid Anwar Bhinder V Federation of Pakistan** (PLD SC 2010 483).

*"The language as employed in Article 188 of the Constitution is very plain and simple and there is absolutely no confusion on the basis whereof different interpretation could be made. "A fundamental principle of constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it. As has been aptly observed, "the pole star in the construction of a Constitution is the intention of its makers and adopters." When the language of the statute is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation. Such language best declares, without more, the intention of the lawgivers, and is decisive of it. The rule of construction is "to intend the Legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Therefore if the meaning of the language used in a statute is unambiguous and is in accord with justice and convenience, the Courts cannot busy themselves with supposed intentions, however admirable the same may be, because, in that event they would be travelling beyond their province and legislating for themselves. But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean then the Court must interpret that language in accordance with*



*the intention of the Legislature so plainly given." (Shah Jahan Begum v. Baloch PLD 1975 Lahore 390, Faiz Muhammad v. Soomar PLD 1972 Karachi 459), Abdul Hameed v. Municipal Committee PLD 1973 Lahore 339). It may be kept in view that "the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act." (Ahmad Hassan v. Government of Punjab 2005 SCMR 186). The judicial consensus seems to be that "the essence of law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nevertheless in all ordinary cases the Courts must be content to accept the *littera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must, in general, taken it absolutely for granted that the Legislature has said what it meant, and meant what it has said. Its *scriptum est* is the first principle of interpretation. Judges are not at liberty to add to or take from or modify the letter of the law simply because they have reason to believe that the true *sententia legis* is not completely or correctly expressed by it. That is to say, in all ordinary cases grammatical interpretation is the sole form allowable. It is no doubt true that the felt necessities of the times must, in the last analysis, affect every judicial determination, for the law embodies the story of a nation's development through the centuries and it cannot be dealt with as if it contains only axioms and corollaries of a book of mathematics. A Judge cannot stand aloof on chill and distant heights. The great tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judge by. But at the same time, the Judge must remember that his primary function is to interpret the law and to record what the law is. He cannot allow his zeal, say, for social or agrarian reform, to overrun his true function. He does not run a race with the Legislature for social or agrarian reform. His task is a more limited task; his ambition a more limited ambition. Of course in this process of interpretation he enjoys a large measure of latitude inherent in the very nature of judicial process. In the skeleton provided by the Legislature, he pours life and blood and creates an organism which is best suited to meet the needs of society and in this sense he makes and moulds the law in a creative effort. But he is tied by the basic structure provided by the Legislature which he cannot alter and to appeal to the spirit of the times or to the spirit of social or agrarian reforms or for the matter of that any other reform for the purpose of twisting the language of the Legislature is certainly a function which he must refuse to perform"*

13. Keeping in view the above principle on Constitutional/statutory interpretation, namely that the words used must be given their plain meaning and interpretation is only required when the words are ambiguous and only then the intent of the legislature is sought to be ascertained, at this stage it would be advantageous to reproduce Article 203 C of the Constitution which permits the appointment of Judges to the FSC under the Constitution which is set out below for ease of reference;



**203C. The Federal Shariat Court.--** (1) There shall be constituted for the purposes of this Chapter a Court to be called the Federal Shariat Court.

**[(2) The Court shall consist of not more than eight Muslim [Judges], including the [Chief Justice], to be appointed by the President *[in accordance with Article 175A].***

**[(3) The Chief Justice shall be a person who is, or has been, or is qualified to be, a Judge of the Supreme Court or who is or has been a permanent Judge of a High Court [or a Judge of the Federal Shariat Court qualified to be a Judge of the Supreme Court].**

**(3A) Of the Judges, not more than four shall be persons each one of whom is, or has been, or is qualified to be, a Judge of a High Court and not more than three shall be *Ulema* [having at least fifteen years experience in Islamic law, research or instruction].**

**(4) The [Chief Justice] and a [Judge] shall hold office for a period not exceeding three years, but may be appointed for such further term or terms as the President may determine:**

Provided that a Judge of a High Court shall not be appointed to be a [Judge] except with his consent and [except where the Judge is himself the Chief Justice,] after consultation by the President with the Chief Justice of the High Court.

**[(4A) The [Chief Justice], if he is not a Judge of the Supreme Court, and a [Judge] who is not a Judge of a High Court, may, by writing under his hand addressed to the President, resign his office.]**

**[(4B) The Chief Justice and a Judge shall not be removed from office except in the like manner and on the like grounds as a Judge of the Supreme Court.]**

**(6) The principal seat of the Court shall be at Islamabad, but the Court may from time to time sit in such other places in Pakistan as the [Chief Justice] may, with the approval of the President, appoint.**

**(7) Before entering upon office, the [Chief Justice] and a [Judge] shall make before the President or a person nominated by him oath in the form set out in the Third Schedule.**

**(8) At any time when the [Chief Justice] or a [Judge] is absent or is unable to perform the functions of his office, the President shall appoint another person qualified for the purpose to act as [Chief Justice] or, as the case may be, [Judge].**

**[(9) A Chief Justice who is not a Judge of the Supreme Court shall be entitled to the same remuneration,**

***allowances and privileges as are admissible to a Judge of the Supreme Court and a Judge who is not a Judge of a High Court shall be entitled to the same remuneration, allowances and privileges as are admissible to a Judge of a High Court:***

***Provided that where a Judge is already drawing a pension for any other post in the service of Pakistan, the amount of such pension shall be deducted from the pension admissible under this clause.] (bold and italics added)***

14. The Constitution provides for the appointment of High Court, Supreme Court and FSC Judges through Article 175 (A) of the Constitution and it appears that all such appointed judges (including the petitioners) underwent a similar process of appointment under Article 175 (A) of the Constitution.

15. Admittedly, as a matter of prevailing practice High Court Judges are initially appointed as Additional Judges under Article 197 and might later become permanent Judges if confirmed by the Judicial Commission of Pakistan (JCP) under Article 193 of the Constitution. With regard to Judges of the FSC no such process exists. We find that for the purposes of remuneration FSC Judges can be treated on the same footing as confirmed Judges of a High Court from the date of their appointment albeit for a fixed tenure subject to extension as in the case of a FSC Judge there is no concept of an additional FSC judge and his subsequent confirmation. In this regard we are fortified by the decision of the Supreme Court in the case “**Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges**” (PLD 2013 SC 829) where an additional judge was held to be equivalent to a confirmed judge in respect of pensions rights in the following terms at para 85;

*“85. In view of the foregoing discussion, we find that Additional Judge of the High Court will be entitled for equal treatment like a permanent Judge of the High Court for his right to pension, but subject to subsisting determination of such right by the President in terms of Article 205, read with Fifth Schedule of the Constitution and the applicable President's Order”.*

16. Another important aspect of all these three kinds of superior court Judges is that they all have to take an Oath upon entering office which for a Judge of the FSC is in the following terms;

CHIEF JUSTICE OR JUDGE OF THE FEDERAL SHARIAT COURT.

*[Article 203C (7)]*

*(In the name of Allah, the most Beneficent,  
the most Merciful.)*



I, \_\_\_\_\_, do solemnly swear that I will bear true faith and allegiance to Pakistan:

*That, as Chief Justice of the Federal Shariat Court (or a Judge of the Federal Shariat Court), I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic republic of Pakistan and the law:*

*That I will not allow my personal interest to influence my official conduct or my official decisions:*

*That I will abide by the code of conduct issued by the Supreme Judicial Council:*

*That I will preserve, protect and defend the Constitution of the Islamic republic of Pakistan:*

*And that, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.*

*May Allah Almighty help and guide me (A'meen).J* (bold added)

17. This oath is similar to that taken by a High Court and Supreme Court Judge and all such judges are bound to discharge their duties in accordance with the Constitution and are bound by the same code of conduct for Judges.

18. Similarly, a Judge of the FSC can only be removed in the same manner as a Judge of the High Court or Supreme Court under Article 209 of the Constitution as is provided for in Article 203 (c) (4) B of the Constitution as was reproduced earlier.

19. In terms of the remuneration to be paid to a Judge of the FSC who is not a Judge of a High Court (**as in the case of the petitioners**) they shall be entitled to the same **remuneration, allowances and privileges as are admissible to a Judge of a High Court** as per Article 203 (c) (9) of the Constitution as reproduced earlier (bold added)

**“Provided that** where a Judge is already drawing a pension for any other post in the service of Pakistan, the amount of such pension shall be deducted from the pension admissible under this clause”.

20. The language of the above **proviso** suggests that a pension would be permissible to a Judge of the FSC who was not already in receipt of a pension, as is the case of the petitioners, as otherwise the proviso would be redundant. This is fortified by the definition of *remuneration* under Article 260 of the Constitution which is set out below for ease of reference;

**“remuneration” includes salary and pension** (bold added)

21. Pension is also defined in Article 260 of the Constitution as under;

*“pension” means a pension, whether contributory or not, of any kind whatsoever payable to, or in respect of, any person and includes retired pay so payable, a gratuity so payable, and any sum or sums so payable by way of the return, with or without interest thereon or any addition thereto, of subscriptions to a provident fund;*

22. A Judge of the FSC is clearly a Constitutional appointee and is governed by the Constitution, his oath of office and Code of Conduct and not by the Government service rules.

23. The importance of the word “*remuneration*” when determining whether a pension was payable to a statutory tenured appointee was high lighted in the case of **Qazi Khaid Ali V Federation of Pakistan** in CPD No.2901/22 dated 18.01.23 whereby a Division bench of this court was determining whether the tenured post of the Chairman Federal Service Tribunal was entitled to a pension on the basis that his *pay*, allowances and privileges were to be those as were admissible to a High Court Judge where it was held in effect in the following terms that **without the word “remuneration”** being referred to in his notification (and instead the word “pay” and “salary” being referred to) he would **not** be entitled to a pension as this was defined in the Constitution.

*“We have considered parties contentions and have perused pleadings filed by them including the case law cited at bar. Petitioner's claim to pension is mostly founded, firstly, on the notification dated 22.04.2019 appointing him as the Chairman FST that stipulates further his entitlement to **such pay, allowances and perquisites as are admissible to a judge of High Court**. And secondly, among others, rule 5 of Federal Service Tribunal (Chairman and Members) Service Rules, 1983 denoting 'if a person who is neither a judge or retired judge of a High Court nor is or has been in the service of Pakistan is appointed a Chairman he shall be entitled to **such salary, allowances and privileges as are admissible to a judge of a High Court**'. Neither the notification nor the above quoted rule bears any mention of entitlement of the petitioner to the pension, which has been defined in Article 260 of the Constitution separately on the one hand and on the other as remuneration that in a word would mean to pay an equivalent for a service, loss, or expense. Both the said instruments indicate his entitlement to only pay, allowances and perquisites against the service rendered by him in the office and that these privileges professedly do not include pension, which is to be paid on retirement either on attaining age of superannuation or after rendering requisite qualifying service, is not hard to understand”.*

24. As a matter of constitutional interpretation, if such interpretation is needed, the word “*remuneration*” used in Article 203 (c) (9) and the proviso to Article 203 (c) (9) cannot be simply ignored and rendered redundant and must be considered in interpreting the Constitution along with its definition under Article 260 which includes pension. In the case of **Shaukat Aziz Siddiqui V Federation**



of Pakistan (PLD 2018 SC 538) it was held that no part of the Constitution could be held redundant in the following terms;

*“63. In various judgments of this Court, it has been held that there can be no interpretation of the Constitution which may lead to redundancy of any of its provision. In the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (supra), it was observed that:*

*“68.....Every student of law is expected to know the principle which is too well established by now that no redundancy or surplusage could ever be attributed to a draftsman much less to the one drafting the Constitution.....”*

*Similarly, in the case reported as Regarding Pensionary Benefits of the Judges of Superior Courts from the date of their Respective Retirements, Irrespective of their Length of Service as Such Judges, etc. (PLD 2013 SC 829), it was observed as follows:*

*“69.....when we revert to some well recognized principles of interpretation of statute, we find the following basic principles outlined for this purpose.*

*g. It is cardinal rule of construction of statutes that no words are to be added or omitted or treated as surplusage or redundant.”*

*64. In the case of Shahid Nabi Malik and another vs. Chief Election Commissioner, Islamabad and 7 others (PLD 1997 SC 32), it was observed by this Court that:*

*“6. ....It is well-established principle that while interpreting a Constitutional provision it must be remembered that a Constitution unlike a statute cannot be changed or amended frequently. A document of such a basic nature is not merely the imprisonment of past but is also alive to the future aspiration and need of the nation. Therefore, while interpreting a Constitutional document it must be read and considered as a whole to discover the true intention of its framers. It is for these reasons that no redundancy, surplusage, absurdity or inconsistency can be attributed to the framers of the Constitution.....” (bold added)*

25. Another point of significance is that the FSC was incorporated into the Constitution for the first time through a Constitutional Amendment in 1980 (The Constitution (Amendment) Order 1980 (P.O.No.1 of 1980)) and hence not only the FSC came into being but the concept of a FSC Judge. The word “remuneration” had been used throughout the Constitution in terms of High Court and Supreme Court Judges payment and had been defined accordingly in Article 260 of the Constitution to include pension before the FSC was incorporated into the Constitution. However at the time of the establishment of the FSC in 1980 at time the word “remuneration” was not included in Article 203 (c) (9) instead the word “salary” was used for the payment of FSC Judges when the FSC first became a part of the Constitution which was not defined in the

Constitution and thus it might not have been the intent of the makers of the amendment that a FSC judge be treated the same as a High Court judge in terms of payment of a pension. It appears, however, that the word "salary" in Article 203 (c) (9) *was purposefully substituted by the word "remuneration"* through the Legal Framework Order 2002 (LFO) (Chief Executive's Order No.24 of 2002), as validated under Article 270AA of the Constitution added through the 17<sup>th</sup> amendment and as such it seems that the legislature intended by substituting the word "salary" with "remuneration" to entitle FSC Judges to a pension through the definition of remuneration in Article 260 which includes pension as otherwise there would have been no need to change the word "salary" to that of "remuneration" **unless** this was the legislative intent. Furthermore, if the makers of the amendment in 1980 which created the FSC and the legislature which protected the LFO 2002 through 17<sup>th</sup> Amendment which was protected by Article 270 AA of the Constitution did not intend for FSC judges to receive a pension they could have expressly made this amendment to the Constitution which they deliberately omitted to do or even amend the LFO in the 17<sup>th</sup> Amendment by re-amending Article 203 (c) (9) to replace the word "remuneration" with the earlier word which was used being "salary" which they failed to do **or specifically state that a FSC judge would not be entitled to a pension.**

26. The above view is fortified by an opinion contained in a letter dated 29.10.2007 which was sent by the Ministry of Law to the Registrar of the FSC regarding a pension being permissible to a judge of the FSC which is reproduced below for ease of reference;

**"F.No.10(1)/2003 – L.R.  
Government of Pakistan  
Ministry of Law Justice & Human Rights.**

Islamabad, the 29<sup>th</sup> October 2007.

To

The Registrar,  
Federal Shariat Court,  
ISLAMABAD.

SUBJECT: **ISSUANCE OF NOTIFICATION OF RETIREMENT  
IN RESPECT OF HON'BLE MR. JUSTICE CH-  
EAJAZ YOUSAF, EX-CHIEF JUSTICE, FEDERAL  
SHARIAT COURT, ISLAMABAD.**

Dear Sir,

*I am directed to refer to the correspondence resting with Federal Shariat Court, Islamabad, letter No. F.(391)/97-Admn:FSC dated 11.05.2006, on the above subject, and to say that the question of entitlement of Pension to the Judges of the Federal Shariat Court, has been under consideration in this Division. It has been observed that Proviso to Clause (9) of Article 203 (C) added through amendment by Legal Framework Order 2002, validated by 17th amendment of the*



*Constitution, suggests that the Judges of the Federal Shariat Court can draw Pension. However, initially the word "Salary" was used in Clause (9) of Article 203 (C) subsequently substituted with the expression "remuneration" vide aforesaid amendment. The expression "remuneration" is defined in article 260 of the Constitution to include "Salary and Pension". Supreme in Pakistan Lawyers Forum [case 205 SCJ 739] also observed that service of the judges of the Federal Shariat Court was made pensionable under the amendment made through LFO, 2002, as validated under Article 270AA of the Constitution added through the 17th amendment. It has therefore been decided that the Judges of the Federal Shariat Court are entitled to Pension after rendering qualifying service of not less than five years as specified for a judge of High Court in the Fifth Schedule to the Constitution.(bold added) (sic)*

Yours faithfully,

Sd/-

(Muhammad Afzal Rana)  
Section Officer

27. One of the *potential* impediments however when it comes to the entitlement of pensionary benefits to a Judge of the FSC *might* to be that the appointment of a FSC Judge is for a fixed term and is not based on resignation or superannuation as set out in Article 195 of the Constitution read with Article 205 of the Constitution both of which are set out below for ease of reference;

**“Article 195. Retiring age.** A Judge of a High Court **shall hold office until he attains the age of sixty-two years**, unless he sooner resigns or is removed from office in accordance with the Constitution”.(bold added)

**205. Remuneration etc., of judge.-** the remuneration **and other terms and conditions of service** of a Judge of the Supreme Court or of a High Court shall be as provided in the Fifth Schedule.(bold added)

28. Article 205 does **not** include a FSC Judge and the Fifth schedule in terms of pension is silent as regards any pension to be paid to a judge of the FSC whilst dealing only with the pension of High Court and Supreme Court Judges. The general understanding is that pension as per Article 195 is paid after a Judge superannuates, resigns or is removed from office not after the expiry of a fixed term tenure. **A plain reading of the Constitution** however makes it clear that a FSC Judge is entitled to the same **remuneration** of a High Court judge which term as mentioned earlier includes pension so it is difficult to deny a pension to a FSC judge on this ground. We consider that the concept of reading in should be rarely used especially into the Constitution which is the Supreme law of the land and as Judges it is not our function to re write or amend the Constitution but only to apply and interpret it if such interpretation is required. In this case we do not consider that much interpretation is required due to the reasons discussed above in terms of the similarities between a FSC Judge and permanent High Court Judge.



29. Again, as a matter of constitutional interpretation, if such interpretation is needed, if two Articles of the Constitution as alluded to above were in conflict then attempts should be made to reconcile them. In this case we do not find that the Articles alluded to above, that is Articles 195, 205 and 203 (c) (9), are in conflict but in any event the aforesaid Articles can be reconciled by giving a harmonious interpretation of all such Articles read with Article 260 would be to allow FSC Judges to be treated as High Court Judges in terms of pension rights within the definition of remuneration under Article 260 of the Constitution.. In this respect reliance is placed on the case of **Shahid Nabi Malik V Chief Election Commissioner** (PLD 1997 SC 32) which held as under;

*“7. A perusal of the above-quoted extracts from the aforesaid treatises indicates that even when there is a conflict in Constitutional provisions, efforts should be made to reconcile the same but where it is not possible, the provision which relates to a lesser right will yield to the provision which contains a higher right. In the case of Al-Jehad Trust (supra), since clause (7) of Article 209 of the Constitution related to the security of tenure of the Judges of the superior Courts which is sine qua non for ensuring independence of judiciary as enjoined and guaranteed by the Constitution, it is a clause containing a higher right relating to one of the dominant objects of the Constitution, whereas the clauses contained in Article 203-C of the Constitution as to the appointment of a sitting Chief Justice of a High court or a sitting Judge of a High Court to the Federal Shariat Court without his consent for a period of two years (which makes him susceptible to clause (4-B) of Article 203-C, which empowers the President to modify the terms of appointment of a Judge or assigned to a Judge any other office and require a Judge to perform such other functions as the President may deem fit or to pass such other order), are provisions containing a lesser right. In this view of the matter, the former provision, namely, clause (7) of Article 209 was to prevail over the latter provision.”*

30. Even other wise in terms of Constitutional interpretation it was held as under in the case of **Al-Jehad Trust v Federation of Pakistan** (PLD 1996 SC 324) that a dynamic interpretation of the Constitution is required;

*“The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the superior Judiciary. The relevant constitutional provisions are to be construed in a manner which would ensure the independence of Judiciary. A written Constitution is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in*



*which, they are employed. In other words, their colour and contents are derived from their context”.*

31. Thus, if need be, by employing a dynamic, progressive approach which is oriented with the desire to meet the situation, which has arisen, effectively i.e. to treat the FSC Judges on the same footing as permanent High Court Judges for remuneration and pension purposes and by adopting a broad as opposed to a narrow and pedantic interpretation of the Constitution we find that this gives further weight to the contention that a FSC Judge appointed under the Constitution is on a par with a permanent High Court Judge appointed under the Constitution through the same appointment mechanism in terms of entitlement to a pension.

32. Other Statutory post tenures to other officers are not particularly relevant as these are statutory rather than Constitutional posts. For example, the Chairman of the National Accountability Bureau under Section 6 (b) (v) of the National Accountability Ordinance 1999 holds office for a non extendable term of 3 years and shall not be removed except under Article 209 of the Constitution like High Court judges. His appointment is non extendable and there is no provision for any pension. His remuneration is also not fixed by the Constitution. He is also not a Judge. Likewise under the Anti Terrorism Act 1999 (ATA) under Section 14 (iii) an advocate may be appointed as an Anti Terrorism Court (ATC) Judge if he has more than 10 years practice as a high court advocate however his mode of appointment is different. He is appointed for a renewable tenure of 2 and a half years but his method of payment is not fixed by the Constitution, for payment purposes he is entitled to the pay of a grade /BPS 21 officer and his pensionary benefits, if any, are governed by the rules and policy of the Government of Sindh and not by the Constitution and once his tenure expires an ATC Judge who was appointed as an advocate can continue to practice before the same high court from which he was appointed. He is not a judge appointed under the Constitution but by Statute only which differs from the position of a FSC Judge. As such comparisons with other tenured posts we find of little, if any, assistance. The most relevant Constitutional tenure post is that of the Chief Election Commissioner (CEC) who is appointed under Article 213 of the Constitution for a fixed tenure of 5 years. He, however, is not appointed under the Constitution in the same manner as a High court, Supreme Court or Judge of the FSC and although he can only be removed under Article 209 of the Constitution he is **not** a Judge like a FSC or High Court Judge and there is no provision for him to be paid any pension and as such the post of the CEC, despite being fixed term, does not equate to a superior

court judge appointed under the Constitution and once again is of no assistance to the petitioners.

33. We have considered the correspondence between the Ministry of Law and the Registrar of the FSC. This correspondence seems to accord with the relevant Supreme Court authorities which held the field from time to time and also differing interpretations from time to time as such there are some differences in the stance taken by the Ministry of Law on this issue of whether a FSC judge was entitled to a pension or not but the **predominant and latest opinions** we find to be is that FSC Judges were entitled to a pension provided that they completed 5 years of service just like a High Court Judge. For example, following the case of **Ahmed Ali U Qureshi v. Accountant General Sindh and others** (PLD 2008 SC 522) where the Supreme Court had held that a Judge of the High Court and FSC were entitled to a pension provided that these judges had completed two years service all such judges were being paid a pension. However after the Supreme Court case of **“Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges”** (PLD 2013 SC 829) the correspondence indicates no judge would receive a pension who had less than 5 years service as a High or FSC Judge to his credit. The last letter (the third letter as set out below) however we find to be of the **greatest significance** in terms of whether a FSC Judge was entitled to a pension as it was written by the Ministry of law **after** the case **“Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges”** (PLD 2013 SC 829) and fortifies the petitioner’s stance that as FSC judges they are entitled to receive a pension. Two out of the three relevant letters (the other one being the first in the chronology having been reproduced earlier in this Judgment at para 26) from the Ministry of law are set out below in this respect.

34. First letter of Ministry of Law *opining that FSC Judges are entitled to a pension* dated 29.10.2007 as reproduced earlier at para 26 of this Judgment.

35. Second letter of Ministry of Law *opining that FSC Judges are not entitled to a pension* dated 25.03.2014 (later partially modified by the third letter, which is later in time dated 16.04.2014 which is reproduced after this letter below) which was *after* case of **“Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges”** (PLD 2013 SC 829).



Government of Pakistan  
Law, Justice and Human Rights Division

No.F.51(1)/2011-A.II (Vol-I)  
2014

Islamabad the 25th March,

From: Muhammad Mushtaq,  
Section Officer.

To Syed Gulzar Hussain  
Director General Pakistan Revenues,  
AGPR,  
Islamabad

Subject: CONSTITUTION PETITION NO.127 OF 2012  
(REGARDING PENSIONARY BENEFITS OF THE JUDGES OF  
SUPERIOR COURTS FROM THE DATE OF THEIR RESPECTIVE  
RETIREMENTS, IRRESPECTIVE OF THEIR LENGTH OF SERVICE  
AS SUCH JUDGES)

Dear Sir,

*1. I am directed to refer to AGPR's letter No. PFC/50114787/IBD/PN-11/8282/PR, dated 06.03.2014 on the subject noted above and to state that for the pensionary benefits to Chief Justice or Judge of Federal Shariat Court, reference is made to clause (4) of Article 203C of the Constitution which says that the Chief Justice and a Judge shall hold office for a period not exceeding three years, but may be appointed for such further term or terms as the President may determine. This provision abundantly manifests that the appointment of the Chief Justice and a Judge of Federal Shariat Court is of contractual nature and is not regular appointment leading to retirement because in case of judges of the apex Court Article 179 of the Constitution and in respect of Judge of High Court Article 195 of the Constitution provide for retirement of Judges but no such provision exists in the Constitution regarding the retirement of the Chief Justice and the Judge of the Federal Shariat Court. The case under reference has been carefully examined in this Division and it has been held that the expression "remuneration" has been defined in Article 260 of the Constitution (subject to the rider that, unless the context otherwise required, the following expression have the meaning respectively assigned to them). The expression "remuneration" includes "salary and pension". In this connection reference is made to a case reported as [1997 MLD 3167 at page 3185-G] it has been laid down therein that the expression defined in Article 260 of the Constitution are subject to the context of the provisions of the Constitution where such expression has been used.*

*2. It, therefore, follows that if by specific provision of the Constitution an expression defined in this Article has different meaning then the technical meaning given in Article 260 will have to be ignored and those appearing from the particular context will have to be adopted. If word has been used in a particular sense in particular provision of the Constitution then word has to be interpreted in that sense.*

*In clause 9 of Article 203C the expression "remuneration" has been used in ordinary sense and will receive dictionary meaning i.e. according to new Oxford dictionary of English (1998 edition) i.e. money paid for work or a service. The expression "remuneration" by no stretch of imagination equated with the word pension because had the intention of the Constitution makers been to mean pension they should have used word pension instead of remuneration.*

3. *It is, therefore, clarified that since the appointments of the Chief Justices and that of Judges of Federal Shariat Court have a fixed term or terms these are contract appointments and contractual appointments, do not confer continuity in service which is the basis of retirement and post retirement benefits, therefore, the Chief Justice and Judges of Federal Shariat Court are not entitled to post retirement benefits including pension.* (bold added)

Yours faithfully  
Sd/-  
(Muhammad Mushtaq)  
Section Officer

36. Third letter of Ministry of Law opining that FSC Judges are entitled to a pension dated 16.04.2014. (Partially modifies above Second letter dated 26.03.2014)

Government of Pakistan  
Law Justice and Human Right Division  
No.F-51(1)/2011-A.II(Vol-I) Islamabad the 16<sup>th</sup> April, 2014

From: Muhammad Mushtaq,  
Section officer

To Mr. Justice Dr. Fida Muhammad Khan,  
Honorable Judge,  
Federal Shariat Court,  
Islamabad

Subject: PAYMENT OF PENSION AND PENSIONARY BENEFITS TO THE JUDGES OF FEDERAL SHARAIT COURT

Dear Sir,

*I am directed to refer to FSC letter No. 1(286)/2011-Admn-FSC, dated 26.03.2014 on the subject noted above and to say that in partial modification of this Division's letter of even umber dated 25.03.2014, the competent authority, on reconsideration of the case, has held that in terms of clause (9) of Article 203C of the Constitution of Islamic Republic of Pakistan, a judge of Federal Shariat Court shall be entitled to pension and pensionary benefits on rendering not less than five years service as such a judge, as specified for High Court judges in clause (3) of Fifth Schedule to the Constitution.* (bold added)

Yours faithfully  
Sd/-  
(Muhammad Mushtaq)  
Section Officer



37. We are further fortified by the case of **Pakistan Lawyers Forum vs. The Federation of Pakistan** (PLD 2005 S.C 719), where the 17<sup>th</sup> Constitutional Amendment was upheld which also found that through the Amendment the position of a FSC Judge was pensionable at para 36 in the following terms:

*"36. A new provision was inserted for the old Article 63-A, which provided for disqualification on grounds of defection. Under Articles 70 and 71, a Mediation Committee has been set up and under Article 73 the Senate is enabled to make recommendations in respect of Money Bills. On the return of a bill by the President under Article 75 the requirement that it be considered by a Joint Sitting of the Parliament has been omitted and bills are now to be reconsidered by the Parliament sitting in separate Houses. By an amendment in Article 101, the Governor of a Province is now to be appointed by the President in consultation with the Prime Minister and under Article 140-A Local Government has been entrenched in the Constitution. Article 152-A relating to the National Security Council inserted in the Constitution by the LFO was omitted by the Seventeenth Amendment. The clog on the power of the High Court not to pass an interim order for a period of more than six months was removed. **The service of the Judges of the Federal Shariat Court was made pensionable.** The Supreme Judicial Council was given suo motu powers. The composition of the Election Commission of Pakistan was changed. In Article 224 specific powers were conferred on the President to appoint a Care-taker Cabinet on the dissolution of the National Assembly and on the Governor to appoint such a Cabinet at the provincial level with the approval of the President. Under Article 243 the appointments of the Chairman, Joint Chiefs of Staff Committee and the <sup>1</sup>three service Chiefs are now to be made by the President in consultation with the Prime Minister. By an amendment in Article 268 of the Constitution, entries 27 to 30 and 35 in the Sixth Schedule are to stand omitted after six years".(bold added)*

38. We find the second letter's opinion that the ordinary dictionary meaning of remuneration should be used as being misconceived as the word "remuneration" is specifically defined in Article 260 of the Constitution which must be applied.

39. **Interestingly**, the report of the statement filed by the Ministry of law in the instant petition states as under at para's 7, 8 , 9 and 10;

*"7. That Law and Justice Division vide letter dated 29-10-2007 (Annex-VIII) conveyed to the Registrar, **FSC that Judges of the Federal Shariat Court are entitled to Pension after rendering qualifying service of five years as specified for a Judge of High Court in the Fifth Schedule to the Constitution of the Islamic Republic of Pakistan.** Accordingly, retirement Notification upon expiry of tenure of Mr. Justice Ejaz Yousaf, former Chief Justice, Federal Shariat Court was issued vide Notification dated 26-12-2007 (Annex-IX).*

*8. That in the meantime, the Hon'ble Supreme Court of Pakistan vide Judgment dated 06.03.2008 passed by three Members Bench, in case titled "Accountant General Sindh vs Ahmed Ali U. Qureshi" reported as PLD 2008 SC 522, held that the Chief Justice and Judges of the Federal*



*Shariat Court notwithstanding the tenure appointment are entitled to pension and pensionary benefits, in terms of Article 205 read with Fifth Schedule to the Constitution read with P.O. 8 of 2007 and proviso to clause 9 of Article 203C of the Constitution. After announcement of the said Judgment of Hon'ble Supreme Court, Judges of the Federal Shariat Court started drawing pension and pensionary benefits.*

9. *That later on, P.O. 8 of 2007 was declared illegal, void ab-initio by the Hon'ble Supreme Court vide Judgment dated 31-07-2009 [PLD 2009 SC 879]. However, the Judgment reported as PLD 2008 SC 522 was in field and the Chief Justices/Judges of the Federal Shariat Court continued to draw pension.*

10. *That likewise Mr. Justice Ejaz Yousaf, Ex-Chief Justice Federal Shariat Court, the Registrar, FSC vide letter dated 22-06-2009 (Annex-X) requested the Law and Justice Division to issue retirement Notification of Mr. Justice Dr. Fida Muhammad Khan, on expiry of tenure appointment w.e.f. 02-10-2000, after completion of twelve (12) year continues service. He was appointed as Judge of the Federal Shariat Court at the age of 50 years on 02-10-1988 vide Notification dated 29-09-1988 (Annex-XI). Accordingly, retirement Notification of Mr. Justice Dr. Fida Muhammad Khan was issued vide Notification dated 06-07-2009 (Annex-XII) w.e.f. 20-10-2000." ( bold added)*

40. This reveals that at the time when the 18<sup>th</sup> Constitutional Amendment was promulgated in 2010 the FSC Judges were receiving a pension on the same basis as a Judge of the High Court provided that they had completed over 5 years service and it was the length of service which was the criteria for pension and not their status as FSC judges as compared to High Court Judges. The 18<sup>th</sup> Amendment **after a detailed review of the entire Constitution** by a bi-partisan Committee of the Parliament generally referred to as the "Rabbani committee" recommended numerous amendments in the Constitution and based on such recommendations the Legislature made many amendments to the Constitution **however** such amendments did **not** exclude the FSC judges from being treated differently than a High Court judge and barring FSC judges from receiving a pension. Since the Ministry of Law **knew prior to the 18<sup>th</sup> Amendment** that at the time the FSC judges were treated at a par with High Court Judges and were entitled to receive a pension and many prominent lawyers including the law minister were included in the "Rabbani Committee" to review and make suitable amendments to the entire Constitution why were amendments not made to specifically/expressly exclude the FSC Judges from receiving a pension or specifically/expressly make it clear that the appointment of FSC judges was on a lesser footing/status as a High Court judge which would not entitle a FSC judge to a pension if they wanted to exclude FSC Judges from receiving a pension. **If the legislature would have wanted to do so the legislation could have done so and as such it appears that the legislative intent was that the FSC judges like High Court Judges were on the same footing and could continue to receive a**



**pension provided that they had served the required number of qualifying years of service.**

41. The fact that one Judge of the FSC who was originally an advocate (like the petitioners) and later became Chief Justice of the FSC (Mr. Justice (Rtd) Ch. Ejaz Yousaf) and who served for an uninterrupted period of over 5 years (in this case 9 years) as FSC Judge was only entitled to a pension based on his length of service **indicates a minimum tenure of 5 years of service is required to qualify for a pension as a FSC Judge, just like a High Court Judge**, and in this respect a FSC Judge can be treated at par with a permanent High Court Judge in terms of remuneration and pension as opined by the Ministry of Law in its letter dated 16.04.2014 which is reproduced above as the third letter and is the latest opinion of the Ministry of law on this subject **after the case “Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges” (PLD 2013 SC 829)** which ruled that a minimum of 5 years service was required for any Superior Court Judge to be entitled to receive a pension under the Constitution .

42. In fact, it appears to us that it has hardly been disputed by the respondents that a FSC Judge is on a different footing to a High Court judge except that his tenure is fixed and most of the correspondence which we have seen which has been placed on record by the Ministry of law indicates that a FSC judge would be entitled to a pension provided that he had completed the minimum period of service which would entitle him to a pension which was 5 years even if he had been appointed as an advocate (like the petitioners) as is the case of Mr. Justice (Rtd) Ch. Ejaz Yousaf who served over 9 years as a FSC judge and thus was entitled to a pension under the Constitution. **The crucial aspect appears to be length of service being over 5 years in the case of High Court and FSC Judges to entitle them to a pension under the Constitution.**

43. As such, based on our above discussion, when considered in a holistic manner along with the relevant provisions of the Constitution and applying the general rules/principles of Constitutional interpretation in how the Constitution deals with High Court, Supreme Court and FSC Judges and the opinions of the Ministry of law and relevant case law **we find that FSC Judges are on the same footing as permanent High Court Judges under the Constitution** for purposes of remuneration and would be entitled to a pension under the Constitution **if they had fulfilled the required qualifying years of service being 5 years.**

Turning to the second issue (after finding that the petitioners as FSC Judges are on the same footing as permanent High Court judges under the Constitution) in terms of remuneration whether the petitioners are entitled to a pension under the Constitution keeping in view their own particular facts and circumstances.

44. It is an admitted position that the petitioners only served as FSC Judges for a period of 3 years. We have already found their status to be on a par with that of a High Court judge under the Constitution for the purposes of remuneration. Whether or not the petitioners would be entitled to a pension under the Constitution, whether a FSC or High Court Judge, was finally settled by a five member larger bench of the Supreme Court in its exhaustive judgment in the case “Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges” (PLD 2013 SC 829) where it was held unequivocally that length of service was an important component in determining the eligibility for pension and that in the cases of superior court Judges *a minimum of 5 years service* was required for *any* superior court judge to qualify for a pension which would include a FSC Judge and the petitioners a material part of such judgment is set out below;

*“72. Reverting to the language of paragraph-3 of Fifth Schedule to Article 205 of the Constitution of 1973, we find that in its original text, paragraph-3 had different phraseology, but it was subsequently amended in the present form by 12<sup>th</sup> Amendment Act of 1991. However, in both the situations, right to pension of a retired High Court Judge was made conditional to not less than five years actual service, while a further table was provided for increase in the percentage of pension depending upon the length of his service as a Judge of the High Court upto the maximum of 80 percent of his salary. Thus, the two paragraphs 2 and 3 of Fifth Schedule to Article 205 of the Constitution either read separately/conjunctively or disjunctively, do not alter/change in any manner the requirement of minimum five years length of actual service for every Judge of the High Court as one of the basic condition to earn the right to pension.” (bold added)*

45. In effect this decision of the Supreme court ruled out any chance of a judge of the FSC qualifying for/being entitled to a pension whose term was only 3 years, like that of the petitioners in this case, under the Constitution.

Turning to the third issue whether the petitioners would be entitled to receive a pro rata pension based on a pension package established by the Federal Government which other retired High Court Judges were receiving who were not entitled to a pension under the Constitution as they had less than five years service.

46. The saga however did not end there as notwithstanding the above Supreme Court Judgment a number of retired Judges of the Superior judiciary



who had less than 5 years service approached the Lahore High Court for pensionary benefits whereby the following order dated 07.07.2018 was passed by a larger bench of the Lahore High Court apparently mitigating the earlier Supreme Court Judgment as referred to above which is set out for ease of reference below;

Form No.HCJD/C-121

**ORDER SHEET**

**IN THE LAHORE HIGH COURT LAHORE**

**JUDICIAL DEPARTMENT**

W.P. No.105298 OF 2017

**Justice (R) Rauf Ahmad Sheikh etc. .Versus.... Accountant General of Punjab etc.**

S. No. or order / proceedings	Date of order / Proceedings	Order with signature of Judge, and that of parties counsel, where necessary
07.07.2018		Mr. Mahmood A. Sheikh Advocate for petitioner. M/s. Imran Aziz Khan and Nasar Ahmad, DAG. Mr. Muhammad Naseem Butt, Accounts Officer O/O A.G. Punjab.

*This writ petition and connected writ petitions (W.P. Nos.105307 & 115014 of 2017), inter alia, seek a direction from this Court to the respondents to fix the pension of the petitioners, who are all retired judges of this Court, in accordance with length of their service.*

2. *The learned Deputy Attorney General has today placed on record a statement in writing by the Secretary Law and Justice, Government of Pakistan, giving details of the pension package to the retired Judges of this Court. The relevant portions of the statement read as under:-*

3. *The permanent judges under section 474(b) of CSR are entitled to receive proportionate pension at the rate of 17.5% per annum for each year of service and the period of service above 6 months is to be reckoned as 1 year of service of pension.*

4. *the retired Judges from the district judiciary, in addition to their pension as a judge of High Court shall also receive 2% extra pension for each completed year of service of Pakistan. The maximum pension not exceeding 70% of salary payable to a judge.*

3. *Learned counsel for the petitioners is satisfied with the pension package mentioned in the written statement and has no objection if the petition are disposed of in view thereof.*

4. *Justice (R) Mian Saeed-ur-Rehman Farrukh was appointed on 29.08.1992 for a period of two years. He was then appointed again on 10.10.1996 to 31.07.1998 with the total length of period of service coming to three years, nine months and twenty one days, which period shall be reckoned for the purpose of pension.*

5. *The above mentioned pension package shall also ensure to the benefit of all those retired judges of this Court who are not parties before this Court and to whom this package is applicable.*

6. *Disposed of in terms of the afore-mentioned statement in writing filed by the Secretary Law and Justice, Government of Pakistan.* (bold added)

47. In effect the Federal Government had established a pension package for those superior Court Judges and District Court Judges who lacked the qualifying pension period as per the requirements of the Constitution being 5 years of service and as interpreted in the case of “Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges” (Supra) which essentially enabled a High Court judge who had less than 5 years qualifying service for pensionary purposes under the Constitution to receive a pro rate pension based on the number of years of service which they had served as High Court Judges payable by the Federal Government.

48. This order of the Lahore High Court was later affirmed by the Supreme Court by order dated 27.03.2019 which is set out below for ease of reference.

“IN THE SUPREME COURT OF PAKISTAN  
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Sh. Azmat Saeed  
Mr. Justice Mazhar Alam Khan Miankhel  
Mr. Justice Syed Mansoor Ali Shah

Civil Appeals No. 140-L to 142-L/2018  
(Against the order dated 7.07.2018 passed by the  
Lahore High Court, Lahore in W.Ps. No.105298, &115014/17)

Government of the Punjab through Secretary,  
Finance Department, Lahore, etc Appellants (In all cases).

VERSUS

(Retd.) Rauf Ahmad Sheikh, etc. (in C.A.140-L/18)

(Retd.) Rustam Ali Malik, etc. (in C.A.141-L/18)

(Retd.) Khan Riaz-ud-Din Ahmad, etc. (in C.A.142-L/18)

Respondents

ORDER

*Sh. Azmat Saeed, J.- The learned Attorney General for Pakistan, present in Court, states that the Federal Government stands by the statement made before the Lahore High Court.*



*2. The learned Advocate General, Punjab states that he has no objection or grievance against the order but states that immediate payment of arrears may be difficult. In these circumstances, it is suggested by the learned Attorney General for Pakistan that the arrears may be paid in the next three years. The respondents are not averse to this idea. These appeals are disposed of in the above terms with the consent of the parties.”(bold added)*

49. The interesting aspect of both the aforesaid orders, both Lahore High Court and Supreme Court, is that they appear not to enunciate any binding proposition/principle of law/precedent and appear to be by consent. Neither Court gave any direction to the Federal Government to make any payments. The petitions were disposed of in terms of a statement filed by the Federal Government which all the contesting parties being satisfied with the same and by consent. Be that as it may it appears that the **Federal Government of its own accord, rather than entitlement under the Constitution, has seen fit to devise a pension package** for all retired permanent High Court judges who had less than 5 years service and both the Lahore High Court and the Supreme Court have no objection to this arrangement.

50. Hence we are clear in our mind that the retired High Court judges who have less than 5 years of service as provided by the Constitution and as determined in the case “**Regarding pensionary benefits of the Judges of Superior Court from the date of their respective retirements, irrespective of their length of services as such Judges**” (Supra) are not entitled to pensionary benefits as Judges on the basis on any Constitutional entitlement *but rather on the basis of a pension package devised by the Federal Government of its own accord which appears to be a policy decision to pay such judges a certain amount of pension on a pro rata basis based on their years in service.*

51. Many retired permanent High Court Judges with less than 5 years service are currently receiving a pro rate pension under the Federal Government’s pension package. The question then arises as to why the petitioners should also not be entitled to the benefit of this Federal Government pension package since they were also superior court judges appointed under the Constitution who had less than 5 years service who we have found to be on the same footing as permanent judges of the High Court for the purposes of remuneration?

52. The petitioners in this case are entitled to equal treatment under the law in terms of Article 25 of the Constitution. As we have already found that the status of a FSC Judge is at par to that of a confirmed High Court Judge in terms of remuneration why should a permanent Judge of a High Court be receiving

perhaps two fifths of a pension on a pro rata basis when he may only have served as a High Court Judge for two years whilst the petitioners receive nothing at all in terms of pension despite the fact that they served in the same role under the Constitution for three years? This approach in terms of payments being made out of the Federal Government's pension package appears to be discriminatory with respect to the petitioners.

53. The law regarding discrimination under Article 25 of the Constitution is settled and was well set out in the classic case of **I.A.Sherwani V Government of Pakistan (1991 SCMR 1041)** which held as under:

*26. From the above cited cases the following principles of law are deducible:-*

*(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;*

*(ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;*

*(iii) that different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes;*

*(iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;*

*(v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;*

*(vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;*

*(vii) that in order to make a classification reasonable, it should be based—*

*(a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;*

*(b) that the differentia must have rational nexus to the object sought to be achieved by such classification.*

*27. The learned Attorney-General has also referred in extenso certain passages from V.N. Shukla's Constitution of India, 7th Edition. Suffice to refer a passage wherein the learned author has inferred following principles as to classification with reference to various judgments of the Indian Supreme Court on Article 14 of the Indian Constitution:-*



*"(a) A law may be constitutional even though it relates to a single individual if, on account of some special circumstances, or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself.*

*(b) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The person, therefore, who pleads that Article 14 (corresponding to Art. 25 of Pakistan Constitution) has been violated, must make out that not only has he been treated differently from others but he has been so treated from persons similarly circumstanced without any reasonable basis and such differential treatment has been unjustifiably made. However, it is extremely hazardous to decide the question of the constitutional validity of a provision on the basis of the supposed existence of facts by raising a presumption. Presumptions are resorted to when the matter does not admit of direct proof or when there is some practical difficulty to produce evidence to prove a particular fact.*

*(c) It must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds.*

*(d) The Legislature is free to recognise the degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest.*

*(e) In order to sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.*

*(f) While good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of the constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.*

*(g) A classification need not be scientifically perfect or logically complete.*

*(h) The validity of a rule has to be judged by assessing its overall effect and not by picking up exceptional cases. What the Court has to see is whether the classification made is a just one taking all aspects into consideration."**(bold added)***

54. This Judgment has remained good law ever since and was followed in the cases of **Government of Balochistan V Azzizullah Memon** (PLD 1993 SC 341) and by a full bench of the Hon'ble Supreme Court in the case of **Dr. Mubashir Hasan V Federation of Pakistan** (PLD 2010 SC 265) and is still followed today.

55. Thus, based on the above settled law on this issue, and bearing in mind that we are in the equitable jurisdiction, based on the particular facts and

circumstances of the case, we find that the petitioners whose status we have already found to be on a par with that of a confirmed High Court Judge under the Constitution have been discriminated against by the Respondents under Article 25 of the Constitution as there seems to be no intelligible differentia which distinguishes these petitioners from receiving pensionary benefits from the respondents to those retired Judges of the High Court who the respondents are already making pensionary payments to on a pro rate basis on the back of the Federal Government's pension package which is paid on a pro rata basis depending on length of service which is under 5 years.

### **Conclusion**

56. Thus, to sum up we find that;

- (a) The petitioners as FSC Judges are on equal footing to confirmed High Court Judges under the Constitution for the purposes of remuneration as defined in the Constitution and;
- (b) Since the petitioners have only 3 years of service as FSC Judges they have no entitlement to a pension under the Constitution.
- (c) The petitioners are being discriminated against by the respondents as they are being excluded from the Federal Government pro rata pension package which is available to other High Court Judges who had less than 5 years service.
- (d) That if the petitioners apply to the Ministry of law under the Federal Government's pro rata pension package their applications shall be decided by the respondents along with the amount of any relevant entitlements within 3 months of receipt of such applications and will be decided on the same basis as that of a permanent judge of a High Court with 3 years of service.

57. A copy of this Judgment shall be sent to the Secretary Ministry of law for information and compliance if an application is received from the petitioners in respect of their pensionary entitlements.