

571

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Mohammed Karim Khan Agha

C.P. No.D-6758 of 2015

Kifayatullah

Vs.

Federation of Pakistan & others

Date of hearing:	03.05.2016.
Date of Order	24.05.2016.
Petitioner:	Through Mr. Shaukat Hayat, Advocate.
Respondents:	Through Muhammad Javed K.K. Standing Counsel, Abdul Karim Lohrani, Sr. Prosecutor NAB Sukkur a/w Ms. Seema Razaque, AD, NAB/IO.

ORDER

Mohammed Karim Khan Agha, J. The petitioner seeks bail after arrest on medical grounds in National Accountability Bureau (NAB) Reference No.16 of 2014 The State v. Zubair Ali Almani & others, wherein 16 accused persons have been charged by the NAB in respect of corruption and corrupt practices under section 9(a) of the National Accountability Ordinance 1999 (NAO) which is punishable under section 10 of the said Ordinance.

2. The allegation against the petitioner as per reference are that the National Bank of Pakistan Sukkur Region lodged a complaint with FIA Sukkur dated 24.06.2014. The FIA registered FIR No.51/2014 and filed challan before the Special Court (Offences in Banks), Karachi. The subject case was transferred from Special Court (Offences in Banks) to Accountability Court No.1, under section 16-A(a) of NAO, 1999 which is pending before the Hon'ble Accountability Court in Reference No.16 of 2014. A Suspicious Transaction Report (STR) was received from Financial Monitoring Unit (FMU) regarding huge deposits in the bank accounts of Zubair Ali Almani (accused No.1) maintained at HBL Pano Aqil and Freer Road Sukkur. An inquiry was authorized which was converted into investigation vide letter No.242059/1/FCIW/CO-A/NAB

44

572

Sindh/2014/K-4085 dated 23.10.2014 by the Director General National Accountability Bureau (Sindh).

3. The role of each accused has been specifically stated in different paragraphs of Reference No.16/2014 and the role given to the petitioner is found in para 11 of the said reference as under:-

"11. That the investigation report reveals that Kafayatullah Shaikh, OG-I (accused No.7/the petitioner) was posted as Cashier in NBO Pano Aqil Branch from 17.03.2011 to 01.08.2011. He has signed RBV singly and jointly without proper verification of instruments/vouchers on different dates which shows that he has failed to conduct his duties and malafidely assisted the accused No.1 in this fraud. The entry which was passed / signed by the accused No.7/the petitioner is given in IR Para 33 (a). Moreover he/the petitioner also worked as Remittance Incharge / Clearing Agent from 13.05.2011 to 07.09.2012, wherein he was assigned to receive the cheques in clearing for posting in account books and further clearing payments. However accused No.7/the petitioner did not check the accounts against which said cheques were drawn and cleared all those cheques mentioned in para 33 (a) of Investigation Report"

4. In the light of above, according to the NAB it has been established from the investigation that the accused No.1 to 16 (including the petitioner) in connivance with each other fraudulently embezzled an amount of Rs. 687.4 million from NBP Pano Aqil Branch and caused loss to the government exchequer. Thus the accused persons have committed the offence of corruption and corrupt practices as envisaged under section 9(a) of the NAO, 1999, punishable under section 10 of the said ordinance.

5. Learned counsel for the petitioner pointed out that interim pre-arrest bail was rejected vide order of this Court dated 07.10.2015 passed in C.P. No.D-6197/2014, thereafter the petitioner was arrested on the same day.

6. Leaned counsel for the petitioner has applied for bail solely on the basis that he is entitled to bail on medical grounds due to his poor health. He submitted that Medical Superintendent GMC Hospital, Sukkur had sent a report to learned Accountability Judge, Sukkur, on 21.10.2015 wherein it was stated that the petitioner is suffering from end stage kidney disease and needs life long dialysis twice or thrice in a week, besides, Medical

27

(573)

Superintendent further stated that the above UTP/petitioner is a known case of diabetic mellitus hypertension and renal failure and at present he is on hamodialysis from 29.09.2015. As such learned Counsel for the petitioner contended that the petitioner should be enlarged on bail on medical grounds

7. In support of his submissions learned counsel for the petitioner placed reliance on the following cases. **Muhammad Aslam v. The State & others** (PLD 2015 S.C. 41), **The State v. Haji Kabeer Khan** (PLD 2005 S.C. 364), **Muhammad Saeed Mehdi v. The State & two others** (2002 SCMR 282), **Mian Manzoor Ahmed Watto v. The State** (2000 SCMR 107), **Muhammad Ali Athar v. Director General NAB Punjab, Thokar Niaz Baig Lahore & two others** (2013 P.Cr.L.J. (Lahore) 58) and **Peer Mukram-ul-Haq v. NAB through Chairman & others** (2006 SCMR 1225).

8. On the other hand, learned counsel for the respondents vehemently opposed the grant of bail on the ground that the petitioner has been assigned a specific role in the commission of the offence, that his earlier bail application on merits was rejected by this Court and that he is not sufficiently unwell that he cannot be provided adequate medical treatment in prison for his various ailments which are not life threatening and as such the petitioner is not entitled for concession of bail on either medical or any other ground.

9. We have considered the submissions raised by learned counsel for the parties, perused the record and the case law cited by them at the bar.

10. The first bail petition moved by the petitioner was rejected on merits. However learned counsel for the petitioner categorically stated at the bar that he will confine his arguments in this second bail petition to bail on medical grounds (which he did) which was not used as a main ground when his earlier bail petition was dismissed. This being the case we find this petition for bail to be maintainable as fresh grounds in terms of the petitioner's deteriorating medical condition have been pressed.

11. Since this petition relates only to the grant of bail on medical grounds we shall not consider the material placed on record in

v

relation to the offense with which the petitioner is charged. The sole issue before us is to consider whether the petitioner's medical condition entitles him to bail on medical grounds based on the relevant law concerning the grant of bail on medical grounds and the material produced by the petitioner in support of his medical condition.

12. The statutory basis for the grant of bail on medical grounds can be found in the first proviso to S.497 Cr.PC which provides as under:

"497. When bail may be taken in case of non-bailable offence. (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years.

Provided that the Court may direct that any person under the age of sixteen years or any woman **or any sick or infirm person accused of such an offence be released on bail.**" (bold added)

13. The question which therefore emerges is how have the Courts interpreted the above proviso to section 497 (1) Cr.PC and what is the test for determining whether a person is entitled to bail on medical grounds on account of him being sick or infirm bearing in mind that there are likely to be different stages and levels of sickness and infirmity.

14. In our view the test for determining whether or not a person could be released on bail on medical grounds or not was initially laid down as long ago as 1995 by the Hon'ble Supreme Court in the case of **Mohammed Yousafullah Khan V State** (PLD 1995 SC 58) where it was held at P.65 as under:

"From the above discussed position it is clear to us that the bail on medical ground can be granted under section 497, Cr.P.C. if the Court reaches the conclusion on the basis of medical report that the ailment with which the accused is suffering is such that it cannot be properly treated while in custody in Jail. The fact that the appellant is not suffering from any particular type of injury (as observed by the learned Judge that there was no fracture of bone in

575

that case), would not be a ground either to refuse or grant the bail on medical ground. **The correct criteria for grant of bail to an accused in a non-bailable case, on medical ground, in our view, would be that the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail and that some specialized treatment is needed and his continued detention in Jail is likely to affect his capacity or is hazardous to his life".** (bold added)

15. The test would therefore appear, in non bailable cases such as the instant case, to have the following limbs as set out below all of which in turn the court would need to be satisfied of, based on the medical reports, before the Court before bail on medical grounds can be granted under the first proviso to S.497 (1) Cr.PC

- (a) the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail **and**
- (b) that some specialized treatment is needed **and**
- (c) his continued detention in Jail is likely to affect his capacity **or** is hazardous to his life

16. This test was followed in the case of **Mian Manzoor Ahmed Watto V State** (2000 SCMR 107) and the **State V Haji Kabeer Khan** (PLD 2005 SC 364) where at P.371 in Haji Kabeer's case (Supra) it was observed as under:

"In addition to it we may observe that when it has been established as a matter of fact that the respondent has been getting proper treatment in the hospital or in Jail he would not be entitled for grant of bail as it has been held in the case of Zarin Khan v. The State 1980 SCMR 305."

17. Interestingly the Supreme Court in the 2002 case of **Muhammed Saeed Mehdi V State** (2002 SCMR) P.282 held as under at P.289 at Para 9.

"9. Medical ground urged in support of the prayer for bail has also not been controverted by the prosecution. It was rather conceded that the petitioner requires immediate treatment, hospitalization and close monitoring by Specialists in a well-equipped hospital. The object obviously cannot be achieved by detaining the petitioner in jail indefinitely or to refer him to a hospital for the purpose of treatment for a limited time. Since the petitioner has been found to be entitled

5

(576)

to the concession of bail on variety of grounds and the grant of bail cannot be withheld by way of punishment, we hold that petitioner has made out a case for grant of bail."

18. In the later case of **Peer Mukaram Ul Haq V NAB** (2006 SCMR P.1225) it appears at first instance that a three member Bench of the Hon'ble Supreme Court may have slightly watered down the test laid down in Mohammed Yousafullah's case (Supra) by emphasizing the need of specialized treatment which could not be provided in jail (as in Saeed Mehdi's case (Supra)) by holding at P.1228 as under:

"We have carefully examined the respective contentions as agitated on behalf of the parties in the light of relevant provisions of law and record of the case. There is no denying the fact that the petitioner has undergone a substantive portion of sentence and the medical certificates are indicative of the ailment which appears to be somewhat serious. In this regard the medical opinion furnished by Dr. Tariq Niazi can be referred who had recommended shifting of petitioner to some care health facility where a team of the diabetologist, neuro-physician and cardiologist are available. The above Specialists are not available in D.H.Q. Hospital, Mianwali. It is also not disputed that during the recent past the petitioner was hospitalized and remained under treatment in the Department of Urology. We have no hesitation in our mind to hold that requisite medical facilities, modern techniques, up to date operation skill and know-how are not available in the D.H.Q. Hospital, Mianwali which aspect of the matter has been ignored by the learned High Court. We are conscious of the fact that the grant of bail and suspension of sentence is discretionary matter but such discretion should have been exercised in accordance with the substantive provision of law and the principle settled by this Court."

At P. 1229, Para 7 "It is also to be kept in view that this Court being at the apex has constitutional duty to impart complete justice and therefore, it cannot be inhibited by any restraint or restriction and has abiding duty to consider all the pros and cons of the matter and to take an overall view of the case while dispensing justice. It may not be out of place to mention here that pursuant to the provisions contained in section 497(1), Cr.P.C. "a sick or infirm person may be released on bail even where there are reasonable grounds for believing that he has been guilty of an offence punishable with death or life imprisonment. It is now well-settled that where a statute itself lays down certain principles for doing some acts they may be taken as a guideline for doing something of the same nature which is in the

28

577

discretion of the Court." Maqsood v. Ali Muhammad 1972 SCMR 657. It is well-entrenched legal proposition that powers conferred upon section 426, Cr.P.C. are not controlled by the provisions of section 496 and 497, Cr.P.C. but the principles enunciated therein can be taken into consideration while granting or refusing bail. If any authority is required reference can be made to Bashir Ahmad v. Zulfiqar PLD 1992 SC 463.

Keeping in view the nature of ailment, medical opinion furnished by Dr. Tariq Niazi, non-availability of necessary facilities in D.H.Q. Hospital, Mianwali, expiry of substantive portion of the awarded sentence, we are inclined to convert this petition into appeal which is accepted."

19. However, bearing in mind that in **Saeed Mehdi's case (Supra)** the bail on medical grounds was unopposed and it was **conceded** by the prosecution that the petitioner requires immediate treatment, hospitalization and close monitoring by specialists in a well-equipped hospital **and other grounds for bail had also been made out** and the case of **Peer Mukaram (Supra)** concerned bail under S.426 Cr.PC and that he was **also granted bail on account of his having served a substantial portion of his sentence** and as such his medical condition, as in Saeed Mehdi's case (Supra), was not the sole ground for the grant of bail we are of the view that the complete original test as laid down in **Mohammed Yousafullah's case** and as affirmed in **State V Haji Kabeer Khan's case** remains the test to be adopted even if greater emphasize is to be placed on the sickness not being able to be properly treated in the jail premises. In our view what the cases of **Saeed Mehdi (Supra)** and **Peer Mukaram (Supra)** tell us is that each case must be judged against the test for bail on medical grounds on its own particular facts and circumstances and that no single case is likely to be the same

20. In the 2013 case of **Muhammad Ali Athar V Director General NAB Punjab** (2013 PC.R.LJ 58) with respect to bail on medical grounds a Divisional Bench of the Lahore High Court granted bail on medical grounds based on medical reports which provided as under in the following terms at P.60.

"The petitioner admittedly showed signs of fragility and poor health when taken into custody on 1-2-2012. A Medical Board constituted under a direction of this court at Service Hospital, Lahore examined the

W7

petitioner on 12-7-2012 and formulated the following report:--

578

- "* He is diagnosed case of HTN + chronic smoker. He developed recent stroke leading to progressive deterioration in memory behavioral disturbance. He also has poor sphincteric control.
- * He is a case of Multi-infarcts dementia that has led to irreversible change to brain. (Clinical as well as investigations).
- * No active management is required right now.
- * However, he needs one attendant whole time for routine activities in jail."

Thereafter another Medical Board comprising senior medical-men, was constituted at Kind Edward Medical University, Lahore, the members whereof medically examined the petitioner on 9-8-2012 in the light of investigation including C.T. Brain, M.R.I. Brain etc. and they after thorough checkup, arrived at the following conclusions:--

"He is a case of Hypertension, chronic heavy smoker and had history of ischemic stroke with left sided weakness about a year ago and since then there is history of progressive memory deterioration, poor sphincter control and behavior disturbance.

The Board is of the opinion that Mr. Muhammad Ali Athar is suffering from Vascular Dementia due to multiple small cerebral infarcts.

The condition is likely to persist and may get worse with time. He needs good control of blood pressure, lipids, use anti platelets and abstain from smoking.

He needs psychiatric opinion for control of hallucinations and behavior disturbance."

The above said reports categorically revealed that the disease, **the petitioner suffers from require constant care** including periodical tests and treatment, **around the clock attendant**, special diet and availability of quick medical advice etc. **which are not available in jail.** The age of the petitioner, 60 years, as stated by his learned counsel, renders him an elderly man faced with such an ailment which requires advance medical treatment, advice and psycho therapy. The jail is certainly not a place where such a facility can be extended to the petitioner. (bold added)

21. So turning to the medical evidence which has been provided in respect of the petitioner's health.

22. The first medical report on record in respect of the petitioner is dated 21-10-15 and was sent to the Accountability Court Sukkur by the Ghulam Muhammed Mahar Medical College Hospital Sukkur (GMC Hospital) which reads as under:

"OFFICE OF THE MEDICAL SUPERINTENDENT
GHULAM MUHAMMAD MEDICAL COLLEGE HOSPITAL SUKKUR
No:MS/GSM/Med Exam/13381/82 Date 21 _____ THE 10 2015

To,

The Honourable,
Judge, Accountability Court Sukkur.

SUBJECT: COMPREHENSIVE/COMPLETE MEDICAL REPORT OF
UTP/ACCUSED KAFAYATULLAH S/O INAYAT.

Honourable Accountability court letter No: Ref:
AC/S/1182/2015 dated 15.10.2015.

It is submitted in the honourable court that the accused/UTP Kafayatullah S/o Inayat by caste Shaikh was produced on 10.10.2015 by the Sr. Superintendent Central Prison Sukkur with escort vide letter No: UTP/-13498/99 dated 10.10.2015 and he was examined by the physician Dr. Khalil Ahmed of this hospital.

The above named UTP is already known case of diabetic mellitus hypertension and renal failure. At present he is on haemodialysis from 29.09.2015.

His investigation like (CBC, Renal profile, serum electrolytes, blood sugar, x-ray chest, ECG) were done.

After detailed examination of the above named UTP, going through relevant record and investigation, it seems that patient suffering from End stage kidney disease and needs life long dialysis twice or thrice in a week.

Further it is submitted in the honourable court that facility of haemodialysis is not available in GMC Hospital Sukkur. For other ailments physician advised the treatment. (bold added)

Sd/-
MEDICAL SUPERINTENDENT
GMC HOSPITAL SUKKUR

Copy to Sr. Superintendent Central Prison Sukkur for information w/r letter No: cited above.

MEDICAL SUPERINTENDENT
GMC HOSPITAL SUKKUR.

23. Pursuant to the petitioner's further concerns about his medical condition and treatment he was ordered by this Court to receive appropriate treatment in Sukkur where after the following

report was filed by Sindh Institute of Urology and Transplantation (SIUT)(Sukkur) on 11-3-16.

"SINDH INSTITUTE OF UROLOGY AND TRANSPLANTATION
KARACHI
CONTINUATION SHEET

11/3/16

Patient named Kafayatullah S/o Inayatullah aged 57 year, diagnosed case of Diabetes Mellitus and Hypertension **and on maintenance haemodialysis twice per week at Chablani Medical Center SIUT.** Today he came for his routine dialysis as per schedule. He has no complaint regarding his health. **His today's Dialysis session done uneventfully. Currently he don't need any hospital admission.** (bold added)

Sd/-
Dr. Syed Hidayat Ali
Senior Registrar
Nephrology SIUT"

24. As per extract of Register No.44 recorded by the Chief medical officer of Sukkur prison dated 11-3-16 it was confirmed that the petitioner's dialysis was carried out twice a week at SIUT Sukkur.

25. On 28-3-16 notwithstanding the above report and after hearing the submissions on the medical condition of the petitioner, by way of abundant caution and to ensure the well being of the petitioner, the following order was passed by this Court:

"Mr. Shoukat Hayat, advocate submits that petitioner namely Kifayatullah son of (late) Inayatullah Shaikh, is known patient of kidney failure and requires regular treatment, besides he used to undergo dialysis twice a week. **He further submits that though the treatment is available at Sukkur, however, the health condition of petitioner Kifayatullah is deteriorating day by day and he may lose his life at any time. Learned Special Prosecutor, NAB did not controvert the above.** (bold added)

Keeping in view the nature of disease of petitioner namely Kifayatullah son of (late) Inayatullah Shaikh, Superintendent, Central Prison, Sukkur is directed to shift the above petitioner from Central Prison, Sukkur to Central Prison, Karachi, who, in turn, **shall shift the said petitioner to Sindh Institute of Urology and Transplantation, Karachi, for proper treatment under proper security.**"(bold added)

26. Pursuant to this order, the petitioner was shifted from Central Jail, Sukkur to Central Jail, Karachi and then to Sindh

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Institute of Urology and Transplantation, Karachi for proper treatment.

27. By order of this Court dated 21st April, 2016 the Administrator/Incharge, SIUT, Karachi was directed to submit a report as to the health condition of the petitioner. He was directed that the report must specifically state whether the petitioner is required to be admitted in the hospital or his confinement in jail would be fatal to his life.

28. In response to the aforesaid order, the Sindh Institute of Urology and Transplantation (SIUT), Karachi by letter dated 26th April, 2016 reported to the Assistant Registrar (Writ), High Court of Sindh, Karachi as under:

Dear Sir,

With reference to your letter No.C.P.No.D-6758 of 2015, dated 21st April, 2016. Mr. Kifayatullah S/o Azam Khan came for evaluation at SIUT on 21-04-2016. He is suffering from end stage kidney failure and therefore, dialysis was initiated. He was dialyzed for three consecutive days as inpatient. He needs long term maintenance dialysis. **This has been planned on out patient basis twice weekly and he will get regular dates for it. He was discharged on 23-04-2016 and should attend on his regular appointment days at our dialysis unit.**

All patients suffering from end stage kidney failure have to follow some dietary precautions and are prescribed medicines. So long as this can be ensured, his place of stay should not be detrimental to his health.(bold added)

Sd/-

For Institute of Urology and Transplantation"

29. In determining whether an accused is genuinely entitled to bail on medical grounds under the law is often a difficult decision for the Courts to make in our particular environment. We have observed on numerous occasions that a number of people who were quite fit and healthy and attending their offices before being involved in a NAB inquiry all of a sudden became quite unwell and often required hospitalization for various ailments which were either not present before or at least did not seem to trouble them unduly in their every day life prior to the NAB inquiry.

30. In this respect it is observed with great pain that from time to time the Courts do not appear to receive either entirely reliable or accurate medical diagnosis' or prognosis' from the concerned Doctors not withstanding their hippocratic oath, expertise,

21/

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experience and good standing in society. Under these circumstances we consider that the Courts need to be cautious in granting bail on medical grounds especially if it would disrupt the whole trial process through long delays and thereby in itself lead to the ends of justice being defeated especially in cases such as this where there are many accused. It appears to us that a balance needs to be struck between taking a humanitarian approach in accordance with the law and ensuring that the Courts are not duped into granting bail on account of sickness/ailment where one of the main objects behind the application is to delay and disrupt the trial to the benefit of the accused and to the detriment of the prosecution as opposed to genuine health reasons.

31. It would seem to us that the safest course in such cases is for the Court to convene a medical board with the specific terms of reference to opine (a) whether the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail and (b) whether some specialized treatment is needed and (c) whether the persons continued detention in jail is likely to affect his capacity or is hazardous to his life. Such opinion on these aspects would greatly assist the Court in determining whether bail on medical grounds may be applicable in the given case depending on its particular facts and circumstances.

32. Turning to the present case it would appear to us from the medical reports which we have examined that the petitioner is suffering from a genuine serious ailment in respect of his kidney's and this ailment appears to be of a long term nature.

33. In terms of the grant of bail on medical grounds in accordance with the earlier cited test the next questions are interlinked in respect of whether the petitioner can properly be treated for his ailment within the premises of the jail and whether some specialized treatment is needed.

34. Based on the facts and circumstances of this case it would appear that specialized treatment is required which cannot be provided in jail and prima facie it would appear that these two grounds for the grant of bail on medical grounds are met.

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35. However, the matter becomes less straight forward when the medical reports are considered in detail. The first issue is that as per the SIUT reports of both Sukkur and Karachi the petitioner does not have to remain in hospital as an in patient on a full time basis. It appears that he can be adequately treated whilst in jail on the basis that he is taken for dialysis twice a week by the concerned jail authorities as was happening in Sukkur. Whilst in jail he can also be prescribed and provided with the necessary diet and medicines for his ailment.

36. Thus, if the petitioner can be provided with (a) twice weekly dialysis as was being done in Sukkur and (b) he can be provided with the necessary diet and medicines, which he can be, as opined by the SIUT Karachi his place of stay (i.e. where he stays) should not be detrimental to his health.

37. As such under the conditions mentioned in para 36 above, which were all being or can be provided to the petitioner whilst in Sukkur jail, it would appear that the final part of the test for bail on medical grounds may not have been fully satisfied.

38. However, we note that the petitioner is suffering from end stage kidney failure which seems to be both a genuine and serious ailment which will require regular dialysis, special diet and medication which the Court cannot lightly ignore from a humanitarian perspective. As such in passing this order we seek to strike a balance between the test for bail on medical grounds and thereby ensure the health of the petitioner and the need in borderline cases such as this where there are multiple accused for the trial not to be delayed on account of the petitioner's absence.

39. Since it is apparent that the required treatment is available in Sukkur SIUT from where the petitioner can receive treatment on an out patient basis as he is currently doing in Karachi we hereby grant the petitioner conditional bail on medical grounds subject to the condition that he attends on each and every day when proceedings are fixed in court and no delay is caused on account of his absence. In the event that the petitioner absents himself from court proceedings or causes delay in the court proceedings the prosecution shall be at liberty to move this court for the

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584

cancellation of this bail granted to the petitioner on medical grounds. In addition the petitioner shall furnish solvent surety of RS 2,000,000 (two million) and PR bond in the like amount to the satisfaction of the Nazir of this Court and deposit his original passport(s) with the Nazir of this Court.

40. A copy of this order shall be provided by the office immediately to the concerned Accountability Court as well as DPGA NAB (Karachi) for information and to the Secretary Ministry of Interior who is directed to forthwith place the name of the petitioner on the ECL and ensure that no fresh/duplicate passports are issued to the petitioner.

Dated: 24-05-2016