JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 2225/2022

Shoukat Ali
Vs.
Government of Pakistan through Secretary Interior, Ministry of Interior, Islamabad & others

PETITIONER BY:	Raja Rizwan Abbasi and Mr. Babar Manzoor, Advocates.
RESPONDENTS BY:	Mr. Muhammad Usman Warraich, Assistant Attorney General. Mr. Mudassar Khalid Abbasi and Barrister Syed Ali Asghar, Advocates for PEMRA. Mr. Mazhar Yasin Khan Wattoo, Joint Secretary, Ministry of Interior, Islamabad. Mr. Tahir Farooq and Mr. Mohsin Hameed Dogar, Representatives on behalf of PEMRA.
DATE OF HEARING:	23.01.2023.

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BABAR SATTAR, J.- The petitioner is aggrieved by U.O.No.9/270/2019-S-III, dated 21.01.2021, issued by respondent No.1), whereby respondent No.1 has stated the petitioner has not been granted security clearance for purposes of issuance of a Satellite TV license.

2. The learned counsel for the petitioner submitted that the petitioner was a successful bidder for grant of Satellite TV Licence Rights and deposited substantial fee for such purpose. But there is an informal and unwritten requirement, which is being followed as a matter of practice, to seek security clearance from the Ministry of Interior, Islamabad, prior to the issuance of licence rights by the Pakistan Electronic Media Regulatory

Uncertified

Authority (PEMRA). He submitted that such obligation is not mentioned in Sections 24 and 25 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ***("Ordinance")***. And that in view of the dis-qualifications mentioned in Section 25 of the Ordinance, none are attracted to the petitioner's case. He further submitted that rule 9 of the Pakistan Electronic Media Regulatory Authority Rules, 2009 ***("Rules)***, prescribes conditions for grant of licence, which vests in the authority the power to refuse grant of licence for conditions to be recorded in writing if it is found that denial of licence is in public interest. But such power can only be exercised after meeting the requirements of natural justice and granting an applicant the right to be heard. He submitted that the impugned order is not a reasoned order and is not backed by the authority of law. He further submitted that the petitioner had also impugned the vires of rule 9(5) of the Rules as PEMRA, being a regulatory authority, could not abandon its duty and power to grant licenses under Section 19 read together with Sections 24 and 25 of the Ordinance or outsource the question of entitlement to be granted a licence either to the Federal Government or any intelligence agency on grounds of seeking security clearance. He submitted that after the initial refusal by the Ministry of Interior to grant security clearance through the impugned letter dated 21.01.2021 the letter dated 16.12.2022 had been issued during the pendency of the petition granting security clearance with the observation that such clearance may be recalled in future. He relied on ***Independent Music Group SMC Private Limited and another vs. Federation of Pakistan and others (PLD 2011 SC 805)*** for

Uncertified

the proposition that High Court could issue a writ of mandamus directing PEMRA to issue a licence in accordance with law. He relied on ***Independent Music Group, SMC Private Limited and another vs. Federation of Pakistan through Secretary Ministry of Interior, Islamabad and another*** ***(PLD 2011 Karachi 494)*** and ***Messrs Labbaik Private Limited through Authorized Officer vs. Pakistan Electronic Media Regulatory Authority through Chairman and 2 others*** ***(PLD 2017 Sindh 661)*** for the proposition that PEMRA and the Ministry of Interior were under obligation to document reasons for refusing security clearance to an applicant. He then relied on ***State vs. Asfandyar Wali and 2 others*** ***(1982 SCMR 321)*** to submit that evidence based on intelligence reports was not admissible as it was hearsay evidence. He relied on ***Muhammad Hanif vs. Islamic Republic of Pakistan, Islamabad and 5 others*** ***(2001 YLR 834)*** for the same proposition, wherein the learned Lahore High Court held that no reliance could be placed on intelligence reports while seeking the disqualification of the candidate for such reports which are hearsay in nature.

3. The learned Assistant Attorney General assisted by Mr. Mazhar Yasin Khan Wattoo, Joint Secretary, Ministry of Interior, Islamabad, submitted that as a matter of practice a request for security clearance received from the PEMRA is forwarded to intelligence agencies for their feedback and the responses received by the intelligence agencies are one-line responses, which do not detail the reasons on the basis of which recommendations with regard to security clearance are made. He further submitted that the Ministry of Interior, Islamabad,

Uncertified

does not question intelligence agencies on their recommendation and approves the reports received from intelligence agencies and approves or denies security clearance accordingly.

4. The learned counsel for PEMRA submitted that rule 7 of the Rules required that the credibility and track record of an applicant for a licence be scrutinized and such scrutiny was undertaken by the Ministry of Interior in view of information provided by Intelligence Agencies. He further submitted that under regulation 7(ii) of the PEMRA Eligibility Criteria Regulations, 2019, profiles of applicants seeking licenses from PEMRA were to be referred to the Ministry of Interior for security clearance. He contended that such clearance was required in view of Section 25 of the Ordinance, which provided that a licence could not be issued to a person who was funded or sponsored by foreign government or organization and it was to ensure that an applicant for a license was not disqualified under Section 25(d) of the Ordinance that requirements had been framed to seek security clearance from the Ministry of Interior under rule 9(5) of the Rules. In order to support the legality of the department seeking security clearance from the Ministry of Interior and Intelligence Agencies he relied on the regime for grant of licenses as followed in India as well as the United States. He finally submitted that by letter dated 16.12.2022 the Ministry of Interior had granted security clearance to the petitioner.

5. After hearing the learned counsel for the parties, in order dated 31.10.2022 this Court observed that, *"prima facie it*

Uncertified

appears that the reports sought from the intelligence agencies are not in pursuance or compliance with the requirements of Sections 25 of the Ordinance. And further, to the extent that there is need to ensure that an applicant is only disqualified on the basis of the negative list contained in Section 25 of the Ordinance, the relevant considerations are not being taken into account by PEMRA and by the Ministry of Interior in processing the security clearance. It further appears that the Ministry of Interior has simply outsourced its obligations under the Ordinance read together with rule 9(5) of the Rules to Intelligence Agencies and such further delegation of its function also seems to be in breach of law. As a consequence, it appears, that the Ministry of Interior is issuing or denying security clearance for reasons that it is not aware of, which orders are also prima facie in breach of Section 24A of the General Clauses Act, 1897."

6. Notices were also issued to the Attorney General for Pakistan under Order XXVII-A of the Code of Civil Procedure, 1908, to assist the Court on whether rule 9(5) of the Rules was ultra vires the provisions of the Ordinance. The learned Attorney General for Pakistan submitted written arguments and took the position that for purposes of security clearance the Ministry of Interior after receiving any application from PEMRA forwards the same to the intelligence agencies, including the Intelligence Bureau (IB) and Inter-Services Intelligence (ISI) for their input, and issues or declines the issuance of security clearance based on the information received from such agencies. He further submitted that a sub-statutory instrument could only be struck

Uncertified

down if such provision was in conflict with the provisions of the parent Act or were uncertain or unreasonable or had been enacted in breach of requirements of statutory procedure. It was submitted that rule 9(5) of the Rules was not inconsistent with constitutional provisions or provisions of the Ordinance.

7. The Parliament enacted the Ordinance to create PEMRA an independent regulatory authority for the purposes of regulating electronic media in Pakistan, while leaving the Federal Government with the power to issue directives to PEMRA on matters of policy. Section 19 of the Ordinance vests in PEMRA, *"exclusive right to issue licences for the establishment and operation of all broadcast media and distribution services, provided that this exclusive right shall be used by the Authority in conformity with the principles of fairness and equity applied to all potential applicants for licences whose eligibility shall be based on prescribed criteria notified in advance and that this shall be done through an open, transparent bidding process."* Section 20 of the Ordinance prescribes and regulates the terms and conditions of a licence. Section 22 of the Ordinance mandates that PEMRA *"shall take decision on the application for a licence within one hundred days from the receipt of the application."* Section 23 of the Ordinance bars the existence of monopolies within electronic media. Section 24 of the Ordinance provides the manner in which PEMRA is to process applications and the terms of licenses. Section 25 of the Ordinance contains prohibition against issuance of licence to certain persons and states the following:

Uncertified

> ***Certain persons not be granted licence.-*** *A licence shall not be granted to—*
>
> *(a) a person who is not a citizen of Pakistan or resident in Pakistan;*
>
> *(b) a foreign company organized under the laws of any foreign government;*
>
> *(c) a company the majority of whose shares are owned or controlled by foreign nationals or companies whose management or control is vested in foreign nationals or companies; or*
>
> *(d) any person funded or sponsored by a foreign government or organization.*

Section 33A of the Ordinance provides that Officers of the Federal Government, Provincial Governments and Local Governments are obliged to assist PEMRA and its officers in discharge of its functions. Section 39 of the Ordinance vests in PEMRA the power to make rules with the approval of the Federal Government to carry out the purposes of the Ordinance.

8. The provisions of the Ordinance as discussed above provide that PEMRA as an independent statutory regulator has the exclusive authority to receive applications for grant of licences, to evaluate them and to render its decision with regard to grant of a licence or refusal to grant a licence within a period of one hundred days from the receipt of the applications. While the Federal Government can issue the policy directives to PEMRA under Section 5 of the Ordinance, the power to evaluate applications cannot be abandoned by PEMRA or relinquished in favor of the Federal Government or a Division of the Federal Government, nor can the obligation to assess an application and

Uncertified

determine the fitness of an applicant be subdelegated or outsourced to anyone including the Federal Government. In view of the provisions of the Ordinance, the power to frame rules and regulations under the Ordinance cannot also be used to outsource exclusive functions vested in PEMRA to the Federal Government or a Division of the Federal Government or any Intelligence Agency. Provisions of the Ordinance envisage a level playing field for grant of licences in a fair and transparent manner as provided in Section 19(1) of the Ordinance and Section 23 of the Ordinance explicitly excludes monopolies. The issuance of broadcast or media licenses cannot be treated as state largess to be granted at the whim of state officials or intelligence operatives such that it undermines principles of transparency or competition.

9. The question before this Court is not simply one of abandonment of a regulatory function by PEMRA as a statutory authority or the exercise of discretion by the Federal Government or the Interior Division in an unreasoned and opaque manner. The question is whether Federal Government has been vested by the Constitution and the law with the authority to exercise a veto over grant of media licenses and pick and choose the players within the media by facilitating grant of licenses to some and summarily denying the opportunity to others to host a media platform by refusing issuance of security clearance.

10. The more fundamental question is whether the right to liberty guaranteed by Article 9 of the Constitution, the right to

Uncertified

freedom of trade, business and profession guaranteed by Article 18 of the Constitution and the right to equality guaranteed by Article 25 of the Constitution are meant to be foundational rights that then facilitate and uphold the right to freedom of speech and information guaranteed by Article 19 of the Constitution. Does our Constitution vest in the Federal Government or any of its instrumentalities, including intelligence agencies, the power to outrightly banish someone from engaging in the business of media? The short answer must be an emphatic no.

11. The rationale for free speech is at least threefold. One, human beings have agency and can distinguish between truth and falsehood. Two, in a marketplace of ideas where all sorts of desirable and undesirable ideas are available, truth will eventually drive out falsity. And three, the standards for enforcing fundamental rights to equality, dignity and liberty evolve over time. As dissenters challenge existing ideas, social consciousness grows, the condition of human existence and rights improve and society progresses.

12. Thus, it is in society's collective interest that the right to dissent be upheld, even though critical ideas might seem unpalatable. It is therefore in the state's own interest to tolerate ideas critical of it. Criticism of the state and its policies is a natural outcome of the democratic system of governance and does not produce a national security predicament. National security is a meaningful concept and must not be bandied about in a trivial manner or used as a prop to defeat fundamental rights of citizens, including the right to free speech and

Uncertified

information. Further, the security of the state must not be projected by the state itself to be so fragile that critical speech or a level-playing field for the media would shake its foundation.

13. In 1644, Milton sought *"the liberty to know, to utter and to argue freely according to conscience, above all liberties"*. The logic and concept of 'marketplace of ideas' is especially sound in this age of technology and social media: in a marketplace with limited barriers to entry, let all ideas be expressed and debated and let superior ideas drown out inferior ones. This is not to say that speech is not impactful or that human beings suffer criticism willingly. This is why the history of free speech has been more a history of censorship of speech.

14. The debate even within the domain of liberalism doesn't claim the right to free speech to be without restraints. John Stuart Mill defined the scope of restraint using the 'harm principle': *"the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."* As citizens don't exist in isolation, the fundamental rights of citizens compete with those of other citizens. The freedom to speak freely is a fundamental right. But it can't be used such that it breaches the fundamental right of another to dignity, privacy, life or liberty.

15. There appears to exist near consensus even within developed democracies that some speech is so harmful or offensive that it is to be prohibited. Courts in the United States employ the "clear and present danger" and "imminent lawless action" tests i.e. speech that creates a clear and present danger

Uncertified

for others (the metaphor coined by US Supreme Court's Justice Oliver Wendel Holmes, Jr. was 'shouting fire in a crowded theatre') or incites violence doesn't enjoy protection.

16. Justice Holmes noted in ***Abrams v US*** **(250 U.S. 616 (1919))** that, *"to allow opposition by speech seems to indicate that you think the speech impotent…But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to let itself accepted in the competition of the market."*

17. As far back as 1958, it was held in ***East and West Steamship Company vs. Pakistan*** ***(PLD 1958 SC 41)*** that *"a 'reasonable restriction' … is one which is imposed with due regard to the public requirement which it is designed to meet…anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantage imposed upon the subject in relation to the advantage which the public derives, it is necessary that the court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public interest."*

Uncertified

18. Unreasonableness is an established ground for judicial review of executive action. And courts undertake strict scrutiny of such unreasonableness where it has the effect of impinging on fundamental rights of citizens. In ***Pakistan Muslim League v Federation (PLD 2007 SC 642)*** it was stated that, *"the idea behind the concept of fundamental rights is that the preservation of certain basic human rights against state interference is an indispensable condition of free society"* and that *"a restriction is unreasonable if it is for an indefinite or an unlimited period or a disproportionate to the mischief sought to be prevented or if the law imposing the restrictions has not provided any safeguard against arbitrary exercise of power".*

19. On free speech Justice Munib Akhtar writing for Sindh High Court held in ***All Pakistan Muslim League through Chief Organizer Sindh vs. Government of Sindh through Home Secretary and 3 others (2012 CLC Sindh 714)*** that, *"fundamental rights have been placed in the constitution not merely to protect acts, conduct and views that we may approve of but also, and especially, to protect views with which we may disagree or which we may even find unpleasant or unacceptable. In the context of freedom of speech (and expression of views at a political meeting is one form of speech), which of course engages Article 19, what therefore is protected is not merely speech that the listener may approve of or agree with, but also speech that he may disagree with or even hate."*

20. In other words, disagreeable or critical speech does not fall within the category of speech that is unprotected under

Uncertified

Article 19 of the Constitution. The right to free speech guaranteed under Article 19 is subject to *"reasonable restrictions imposed by law in the interest of… integrity, security or defense of Pakistan or… public order, decency or morality, or in relation to contempt of court…"* The text of Article 19 cannot be used to rob the very freedom it seeks to protect: the categories of less protected speech that it identifies can only be regulated subject to certain conditions.

21. One, any restrictions on speech must be imposed by law i.e. by parliament. Two, restrictions must be reasonable and satisfy the tests of necessity and proportionality i.e. only such limited restrictions should be imposed that are absolutely necessary to achieve a legitimate state purpose. The legislature has already enacted laws that prohibit, amongst other things, hate speech, incitement of violence, defamatory speech and speech that brings the judiciary into disrepute. A subset of speech falling within the prohibited speech category is 'hate speech'.

22. Clause 23 of the Electronic Media Code of Conduct, 2015 defines hate speech as *"any expression that may incite violence, hatred or discrimination on the basis of religion, ethnicity, color, race, gender, origin, caste, mental or physical disability."* Sub-clauses (2) and (3) of Clause 23 state that, *"the licensee shall not relay allegations that fall within the spectrum of hate speech, including calling someone anti-Pakistan, traitor or anti-Islam",* and *"where hate speech is resorted to by any guest, the channel and its representative must stop the*

Uncertified

participant and remind him and the audience that no one has the authority to declare any other citizen as a kafir or enemy of Pakistan, Islam or any other religion."

23. Why are the restrictions imposed by Article 19 of the Constitution, the Ordinance and the PEMRA Code of Conduct relevant for our present purposes? Because PEMRA as media regulator has been endowed by Parliament with sufficient tools to apply post facto control over illegal speech (and licensees allowing it to proliferate) that falls within the prohibited categories. The mere fact that speech remains a powerful tool in the 21st century doesn't create a public policy imperative to create a barrier to entry into media to protect legitimate state interest. Allowing the government to do so would tantamount to legitimizing a form of prior restraint that is neither permissible under the Constitution nor under the Ordinance. The legislature in its wisdom has promulgated the Ordinance and created PEMRA as the regulator of media that breathes life into the fundamental right to speech and information. These rights are then linked to the fundamental right to liberty and freedom of conscience. The regulatory function vested in PEMRA is performed through a licensing regime that falls within the exclusive remit of PEMRA. Permitting the Federal Government or intelligence agencies to usurp such licensing function or acquire a veto over it by slipping in a requirement for licensees to seek security clearance or otherwise convince the Federal Government of their eligibility to be awarded a license is tantamount to playing a fraud on the statutory scheme to uphold and regulate the fundamental right to free speech and information.

Uncertified

24. Other than the constitutional and statutory scheme for protection of the fundamental rights of speech and information, of relevance for the present petition is the scope of delegated legislation and the manner in which discretionary authority is to be exercised where it is duly vested by statute or subsidiary legislation enacted in exercise of power delegated by the legislature. Let us first consider relevant case law on the scope of delegated legislation and the dos and don'ts of exercising discretionary authority.

25. In ***Pakistan v. Aryan Petro Chemical Industries (Pvt.) Ltd. (2003 SCMR 370)***, it was held that, *"a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute."* In ***Khawaja Ahmad Hassan v. Government of Punjab (2005 SCMR 186)*** the scope of subsidiary legislation and the test for its legality was explained as follows:

> *"The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature, must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provision of said enactment. The rules framed under a statute, if are inconsistent with the provisions of the statute and defeat the intention of Legislature expressed in the main statute, same shall be invalid. The Rule-making authority cannot clothe itself with power which is not given to it under the statute and thus the rules made under a statute, neither enlarge the scope of the Act nor can go beyond the Act and must not be in conflict with the provisions of statute or repugnant to any other law in force."*

Uncertified

26. In ***Independent Newspapers Corporation (Pvt.) Ltd. vs. Federation of Pakistan*** ***(PLD 2017 Lahore 289)*** a Division Bench of Lahore High Court, while relying on ***Khawaja Ahmad Hassan***, explained that, *"the rule making body cannot frame rules which are in conflict with or in derogation of the substantive provisions of the statute under which the rules are framed and in case of any inconsistency with the parent statute the excessive rule will be considered illegal because it has gone beyond its delegated authority. It must be kept in mind that when the legislature confers powers on a regulatory authority to frame rules it is expected that the rules will advance the purpose of the legislature and not run contrary to it."* Justice Shahid Karim in his opinion noted that courts can review subordinate legislation if *"satisfied that in making it, the delegatee acted out with the legislative powers conferred upon it."* He cited Lord Diplock's opinion in ***F. Hoffmann La Roche and Co vs. Secretary of State for Trade and Industry*** ***[1975] AC 295*** as follows:

> *"In constitutional law a clear distinction can be drawn between an act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted out with the legislative powers conferred upon him by the previous Act of parliament under which the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)."*

Uncertified

27. In ***Sunbiz Private Limited (7 News TV Pakistan) v. Federation of Pakistan (2018 YLR 1785)***, Justice Miangul Hassan Aurangzeb, while relying on the aforementioned precedents summarized the law on the scope of delegated legislation as follows:

> *"Rules cannot be made to supplant the provisions of the enabling statute but to supplement it. The delegate is not authorized to make a provision beyond the policy of the statute. The delegate cannot override the statute either by exceeding the authority or by making provisions inconsistent with the statute… A general power to make rules or regulations for carrying out or giving effect to the statute is strictly ancillary in nature and cannot enable the authority on whom the power is conferred to extend the scope of general operation of the statute. Therefore, the rule making authority cannot widen the purposes of the statute, or to add new and different means to carrying them out, or to depart from or vary its terms."*

28. In ***Muhammad Amin Muhammad Bashir Vs. Government of Pakistan (2015 SCMR 630)*** the Supreme Court reiterated that the power to enact subsidiary legislation can only be exercised in pursuit of the purpose and object of the statute and not to defeat it and the executive while exercising delegated power cannot overrule a substantive provision of law. It was held that principles of delegated legislation, *"entitle the delegate to carry out the mandate of the legislature, either by framing rules, or regulations, which translate and apply the substantive principles of law set out in the parent legislation or by recourse to detailed administrative directions and instructions for the implementation of the law. They are intended to enforce the law, not override it. They can fill in details but not vary the underlying statutory principles. In case of conflict they must*

Uncertified

yield to the legislative will. They are below and not above the law. The minutiae can be filled in but the basic law can neither be added to nor subtracted from."

29. The executive's obligation to structure its discretion and exercise it in a just, fair and reasonable manner was laid out most cogently by the Supreme Court in ***Aman Ullah Khan vs. The Federal Government of Pakistan (PLD 1990 SC 1092)***, while citing with approval Kenneth Culp Davis's ***Administrative Law***. In ***Abid Hasan v. PIAC (2005 SCMR 25)*** it was observed that, *"in his treatise 'Discretionary Powers' which is Legal Study of Official Discretion D.J. Galligan has acknowledged that the general principles that discretionary decisions should be made according to rational reasons means: (a) that there be findings of primary facts based on good evidence, and (b) that decisions about the facts be made for reasons which serve purposes of the statute in an intelligible and reasonable manner. According to the celebrated author, the actions which do not meet these threshold requirements are arbitrary, and may be considered a misuse of power."*

30. In ***Muhammad Amin Muhammad Bashir*** it was held that, *"the exercise of any discretionary power must be rational and have a nexus with the objective of the underlying legislation. Arbitrariness is the antithesis of the rule of law. The legislature, when it confers a wide-ranging power, must be deemed to have assumed that the power will be, firstly, exercised in good faith, secondly, for the advancement of the objects of the legislation, and, thirdly in a reasonable manner. Section 24A of the General*

Uncertified

Clauses Act, 1897, reiterates the principle that statutory power is to be exercised "reasonably, fairly, justly and for the advancement of the purposes of the enactment" and further clarifies that an executive authority must give reasons for its decision. Any action by an executive authority which is violative of these principles is liable to be struck down. No other view is permissible."

31. In ***Irfan Naseer Baig and another vs Province of Punjab (2011 PLC (C.S.) 1537)***, Justice Syed Mansoor Ali Shah while writing for the Lahore High Court explained how the failure to exercise discretion or fetter discretion vested by law was tantamount to maladministration and a basis for exercise of judicial review. He cited the following text from H.W.R. Wade and C.F. Forsyth's ***"Administrative Law"***: *"An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case; each one must be considered on its own merits and decided as the public interest requires at the time."*

32. The dicta in ***Irfan Naseer Baig*** were relied on by Justice Umar Ata Bandial speaking for Lahore High Court in ***Imran Arif Ranjha v. Punjab Public Service Commission (2012 PLC (C.S) 609)*** to reiterate the principle against abdication of discretionary authority and explain that the essence of the law as explained in ***Irfan Naseer Baig*** was *"that all types of discretion vesting in a public authority must be duly*

Uncertified

surveyed in every eligible case before taking a decision. Such an exercise must precede every decision including both the grant or the refusal of a discretionary benefit by a public authority to a candidate/applicant."

33. The next question that must be dealt with is whether matters pertaining to "national security" are justiciable. The Ordinance itself doesn't impose the requirement on an applicant to seek "security clearance" to be eligible for the grant of a license. It is rule 9 of the Rules that creates such obligation, the legality of which is in question before this court. It is therefore pertinent to address the justiciability of matters where national security is raised as a defense by the state before turning to the text of the Ordinance and the legality of rule 9 of the Rules.

34. In ***Muhammad Zubair v. National Command Authority (2018 PLC (C.S.) 519)*** this court dealt with the meaning of "security clearance" as used in section 9 of the National Command Authority Act, 2010 ***("NCA Act")***, which endowed the National Command Authority (NCA) with the power to regulate all matters relating to the terms and conditions of employees, including their security clearance. Justice Mohsin Akhtar Kayani noted that, *"any material which comes in the way of promotion of the petitioners, if collected by the intelligence agencies against the petitioner has to be confronted through some internal mechanism if the same is not confidential and if the same is confidential and it affects the working of such kind of strategic organization they have to follow a procedure to disengage the services of such officials…"* But that NCA *"cannot*

Uncertified

exercise its power in an unbridled manner without disclosing the reasons and factors under the garb of the term 'security clearance'."

35. In a different context, national security was raised as a defense in a civil dispute regarding entitlement to possession of land before Sindh High Court in ***Shamimah Sayeed v. Base Commander PAF (PLD 2022 Sindh 186)***. Pakistan Air Force as the defendant had argued that the land was required for "national security" purposes. Sindh High Court held that, *"[u]ndoubtedly, defense and security interest of a country is the foremost priority, particularly considering the geostrategic location of our country, but at the same time the ownership rights, which are guaranteed as fundamental rights in the Constitution cannot be sacrificed merely on a vague plea of National Security."*

36. More recently the Supreme Court held in ***Pakistan Peoples Party Parliamentarians v. Federation of Pakistan (PLD 2022 Supreme Court 574)*** that questions related to national security are justiciable when raised in the context of the legality of an executive or legislative action. The court was considering the ruling of Deputy Speaker National Assembly in relation to a vote of no confidence and dissolution of the National Assembly and held that where a prima facie violation of the Constitution is *"justified and defended on the touchstone of national security"*, the court was mandated to assess and evaluate *"the bona fide of the Government's defense of national security"*, and that the government was obliged to substantiate

Uncertified

to the satisfaction of the court, through production of evidence, that the defense of national security was legitimate.

37. The Supreme Court dealt with the question of challenge to a legal provision in ***Muhammad Hanif Abbasi v. Jahangir Khan Tareen*** ***(2018 PLD SC 114)*** while citing ***Sindh High Court Bar Association v. Federation of Pakistan*** ***(PLD 2009 Supreme Court 879)*** as follows:

> *"We are conscious of the principle that there is no estoppel against law and that the point of law can be allowed to be raised at any stage of the proceeding and no valid structure can be built upon a foundation of the law which is void ab initio. No rights and liabilities can be created on the basis of such law. Even accepting the argument of the respondent's counsel that the vires of law as held in the Sindh High Court Bar Association's case (supra) can be challenged in collateral proceedings, yet it cannot be accepted that a person can be allowed to challenge a law which stands repealed and no longer exists on the statute book."*

38. Having discussed the applicable principles of law applicable to the scope of free speech, the manner it is to be protected and facilitated under the law and the Constitution, the principles that regulate the exercise of delegated legislation, the absence of a prohibition to bringing a challenge against a legal provision, exercise of delegated legislation in excess of the power vested by statute as a ground for challenge against subsidiary legislation, the manner of exercise of discretionary authority, the abdication of discretionary authority as a ground for judicial review, and matters related to national security being justiciable, let us summarize the findings of this court in the context of the facts of the present case:

Uncertified

(i) As explained in paras 7 and 8 above, the Ordinance has endowed PEMRA with the exclusive authority to issue licenses under section 19 of the Ordinance and imposed an obligation under section 22 of the Ordinance to render a decision in relation to an application of a license within 100 days of receipt of such application. Under provisions of the Ordinance, it is for PEMRA and PEMRA alone to consider the eligibility of an applicant within the criteria prescribed by and/or under the Ordinance or the disqualification of such applicant for purposes of section 25 of the Ordinance. Such exercise of public authority cannot be outsourced to the Federal Government or the ISI, the IB or any other intelligence agency or instrumentality of the Federal Government.

(ii) The failure of PEMRA to apply, with an independent mind, the criteria for grant of license and/or consideration of whether or not disqualifications prescribed by or under the Ordinance are applicable to an applicant amounts to non-feasance. In the event that PEMRA makes the grant of a license conditional upon grant of approval by the Federal Government or an intelligence agency, whether in the name of security clearance or otherwise, such actions is illegal for being in breach of the principle against abdication of statutory authority. PEMRA does not have the authority to fetter its discretion in

Uncertified

applying the criteria for grant of licenses prescribed by or under the Ordinance and render the exercise of its statutory authority contingent upon grant of prior approval from the Federal Government or an intelligence agency.

(iii) Section 25 of the Ordinance prescribes the prohibitions on the basis of which the grant of a license is to be refused by PEMRA. Section 25 does not require an applicant to be granted security clearance by the Federal Government or intelligence and/or security agencies to qualify for the grant of a license. It prohibits the grant of a license to a foreign entity or an entity owned or controlled by a foreign entity, by virtue of its management or funding. There is nothing prohibiting PEMRA from seeking specific information from the Federal Government and its instrumentalities, including intelligence agencies, within the meaning of section 33A of the Ordinance, as to whether or not an applicant is owned, controlled or funded by a foreign government or organization. But such information must be sought such that a decision on an application is rendered by PEMRA within the period of 100 days prescribed by section 22 of the Ordinance through application of an independent mind by PEMRA, while having received such information from an outside agency.

Uncertified

(iv) The Federal Government can only issue policy directions to PEMRA within the meaning of section 5 of the Ordinance and not otherwise usurp the statutory and regulatory authority vested in PEMRA to issue licenses and regulate licensees, under the garb of issuance of security clearance or withdrawal of security clearance or otherwise. The intent and purpose of the Ordinance is to create a statutory authority for regulation of the media that is independent of and two steps removed from the Federal Government in exercise of its regulatory functions. Such legislative intent, as manifested through the provisions of the Ordinance, cannot be defeated through exercise of the power to enact subsidiary legislation.

(v) The grant of a license to operate a media platform does not fall within the domain of national security or constitute a function to be discharged or overseen by the security establishment that forms part of the Federal Government. Where the legislature in its wisdom concludes that the functions being performed by a statutory authority are such that touch upon matters of national security and defense, and the security clearance of personnel involved in discharge of such functions is essential, it prescribes accordingly in the relevant legislation as in the case of NCA and the NCA Act. The Ordinance does not contemplate any role for intelligence or security

Uncertified

agencies in the grant or revocation of licenses and carving out such role through exercise of delegated legislative powers is a fraud on the statute and inimical to the right of freedom of speech and information guaranteed by the Constitution.

(vi) The right to freedom of speech as guaranteed by Article 19 of the Constitution is not unconditional. The Constitution itself carves out categories of speech that are illegal and unprotected. Provisions of the Ordinance and the rules, regulations and code of conduct prescribed under the Ordinance vest sufficient power in PEMRA to take regulatory action against a licensee that engages in broadcast of illegal or prohibited speech. Such regulatory authority is to be exercised by PEMRA in a just, fair and reasonable manner as an independent regulator and not on the prodding of the Federal Government or intelligence or security agencies. Had the legislature found that such regulatory function is to be performed by the Federal Government (and/or its instrumentalities), there would be no need to create PEMRA as an independent media regulatory authority.

(vii) The criteria for evaluation of license application prescribed by rule 7 of the Rules is to be applied by PEMRA and not the Federal Government. It is for PEMRA to evaluate the credibility, track record and other attributes of an applicant. Rule 9(5) of the

Uncertified

Rules, to the extent that it renders the grant of a license "subject to clearance from the Ministry of Interior" is *ultra vires* the Ordinance. Neither PEMRA nor the Federal Government has been authorized by the legislature under provisions of the Ordinance, whether through issuance of a policy directive or through exercise of the power to enact rules and regulations, to further delegate or outsource PEMRA's obligation to evaluate applications for licenses or place fetters on PEMRA's exclusive right to evaluate applications for grant of licenses or render grant of a license contingent upon issuance of security clearance.

(viii) To the extent that PEMRA solicits information from the Federal Government or divisions of the Federal Government or its instrumentalities, including, *inter alia*, intelligence agencies, or other regulatory authorities such as the Securities and Exchange Commission of Pakistan, for purposes of evaluating an application, PEMRA is obliged to apply its independent mind, act in a just, fair and reasonable manner as required by section 24A of the General Clauses Act and record reasons for its decisions. To the extent that information received from any source outside PEMRA, including from the Federal Government, intelligence agencies or SECP etc. leads PEMRA to believe that an applicant stands disqualified from grant of license, it must confront

Uncertified

> the applicant with such information and afford the applicant an opportunity to defend its credentials. The refusal to grant a license by the state impinges on the civil rights of a citizen and the process must not undermine the guarantee of Article 10A of the Constitution.

39. In the instant case, PEMRA has failed to discharge its statutory authority in accordance with section 19, 22 and 25 of the Ordinance and section 24A of the General Clauses Act. The question of grant of license was left to the Interior Division, which further left it to the grant of security clearance by the ISI. The ISI refused the grant of security clearance and the Interior Division, without seeking reasons for such refusal communicated the refusal to PEMRA, which in turn communicated the refusal to the petitioner. During the pendency of the petition, however, the court was informed that the security clearance has been granted with the proviso that it may be recalled at any time. The issuance of the security clearance was as opaque and whimsical as its refusal. This court however need not engage with the manner of exercise of authority by the Interior Division and the ISI as it has already been held that neither the Federal Government nor intelligence and security agencies have any role in the evaluation of applications filed for grant of licenses under PEMRA Ordinance or the grant or cancellation of such licenses.

40. The learned Assistant Attorney General and the counsel for PEMRA relied on a judgment of the Sindh High Court in ***Labbaik (Pvt.) Ltd. v. Federation of Pakistan*** ***(2016 CLC***

Uncertified

575 Sindh) for the proposition that rule 9(5) of the Rules is *intra vires* the Ordinance, and the seeking and grant of security clearance is in accordance with the practice in vogue, which is unobjectionable. With much respect to the Sindh High Court, this Court is unable to agree with the opinion rendered in ***Labbaik***. It is correct that the right to freedom of business, trade and profession guaranteed by Article 18 is subject to law, but there exists no law that requires grant of a media or broadcast license subject to issuance of security clearance by security or intelligence agencies. The prohibition in section 25 of the Ordinance bars issuance of a license to an entity owned or controlled by a foreign government or organization. And as has been discussed above, PEMRA can seek relevant information for purposes of determining eligibility or lack thereof of an applicant pursuant to section 33A of the Ordinance. While acknowledging the practice of seeking security clearance from the Interior Division, the Sindh High Court was probably not assisted in considering whether such practice was in accordance with the intent and purpose of the Ordinance as reflected from its text and whether subordinate legislation could be enacted such that it undermined the exclusive right vested by the legislature in PEMRA to grant and revoke licenses.

41. For the aforementioned reasons, this petition is **allowed**. Rule 9(5) of the Rules, to the extent that it requires PEMRA to seek security clearance for an applicant prior to grant of license is *ultra vires* Sections 19, 22 and 25 of the Ordinance. PEMRA will decide the application of the petitioner, independently and in a reasoned manner, within a period 15

Uncertified

days. The Federal Government will take appropriate steps to amend provisions of Rules, PEMRA Eligibility Criteria Regulations, 2019, and any other rules and regulations framed under the Ordinance to ensure that they do not impinge upon the exclusive power and obligation of PEMRA to evaluate the eligibility of applicants to be granted licenses under the Ordinance as well as the exclusive authority to take a decision for grant or revocation of licenses.

42. The office will send a copy of this judgment to Secretary Law Division and Secretary Cabinet Division for compliance.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **02.05.2023.**

JUDGE

Approved for reporting.

A. Rahman Abbasi.

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