Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 3483 OF 2022

Professor Dr. Muhammad Naeem Khan
Vs
Federation of Pakistan through Secretary, Ministry of Kashmir Affairs and Gilgit-Baltistan, etc.

PETITIONER BY:	Raja M. Aleem Khan Abbasi and Raja Adeeb Ahmed Abbasi, Advocates.
RESPONDENTS BY:	Mr. Aqeel Akhtar Raja, Assistant Attorney General. Mr. Fahmeen Aslam, S.O, Ministry of Kashmir Affairs and Gilgit-Baltistan. Mr. Waseem Ullah Jan, Registrar University of Baltistan, Skardu.
DATE OF HEARING:	26.01.2023.

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BABAR SATTAR, J.- The petitioner is aggrieved by the rejection by President, in his capacity as Chancellor of the University of Baltistan, Skardu ***("University")***, of the panel of candidates sent to the President for appointment to the office of Vice-Chancellor of the University.

2. The learned counsel for the petitioner stated that the petitioner has impugned the legality of a proviso of Section 11(2) of the University of Baltistan Order, 2016 **("Statute")**, for being ultra vires Article 48 of the Constitution as the said Article requires the President to act on the advice of the Prime Minister. But the impugned proviso endows the President with discretion as Chancellor of the University to decline the appointment of any

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persons recommended by a summary approved by the Prime Minister on the recommendation of Search Committee constituted under the Statute. The learned counsel for the petitioner submitted, in terms of factual background, that the Search Committee was constituted under Section 11(2) of the Statute and shortlisted candidates for the position of Vice Chancellor. The shortlisted candidates were then scrutinized by the Senate. In the 5th meeting of the Senate on 14.02.2022, the Senate recommended three candidates, with the petitioner at merit No.1, for appointment to the President of Pakistan in his capacity as Chancellor of the University. He submitted that the summary was routed to the President through the Ministry of Kashmir Affairs and Gilgit-Baltistan after being approved by the Prime Minister. The President returned the summary to the Prime Minister on 20.06.2022 in view of Section 11(3) of the Statute and sought a fresh panel for his consideration. He submitted that the summary was resent to the President after being approved by the Prime Minister, but the President did not appoint the petitioner in accordance with the summary. He contended that under Article 48(1) of the Constitution, the President is bound to act on the advice of the Prime Minister and given that the Statute is a sub-constitutional legislation the provisions of Article 48 would be read into the Statute and the proviso to Section 11(3), which empowers the President in his capacity as Chancellor to decline to appoint anyone from the panel recommended to him by the Prime Minister, is *ultra vires* Article 48. He submitted that under Schedule V-B, enacted pursuant to Rule 15-A (1) of the Rules of Business, 1973, at Serial No.48 it is

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provided that the cases where the President's approval is required under any statutory provision would be treated as cases requiring orders of the President on the advice of the Prime Minister. He submitted that the question of whether the Chancellor was bound to act on the advice of the Chief Minister in view of Article 105 of the Constitution was settled by the august Supreme Court in ***Rana Aamer Raza Ashfaq vs. Dr. Minhaj Ahmad Khan*** **(2012 SCMR 6)**. He submitted that Article 105 places the same burden on the Governor to abide by the advice of the Chief Minister as Article 48 places on the President. He submitted that the question of the Chancellor being bound by the advice of the Chief Minister has been decided by the learned Lahore High Court in ***Dr. Shahid Mehboob Rana vs. Province of Punjab through Secretary and 2 others*** **(2010 PLC (C.S) 769)** and ***Tahir Riaz Chaudhry vs. Chancellor, University of the Punjab, Lahore*** **(PLD 2013 Lahore 476)** and by the learned Balochistan High Court in ***Dr. Ilyas and another vs. Government of Balochistan through Chief Secretary*** **(PLD 2022 Balochistan 58)** holding that the Chancellor is bound by the advice of the Chief Minister. He also relied on ***The Chancellor, Mirpur University of Science and Technology/President Azad Government of the State of Jammu and Kashmir vs. Dr. Igrar Ahmed Khan*** **(2021 PLC (C.S) Note 3)** where the learned Supreme Court of Azad Jammu and Kashmir held that the President was bound by the advice of the Prime Minister while appointing Vice-Chancellor of Mirpur University of Science and Technology. He further submitted that it was well-settled proposition that the Statute was sub-

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constitutional legislation and had to comply with the requirements of the Constitution to be considered valid law. He relied on ***The State vs. Zia-Ur-Rehman*** **(PLD 1973 SC 49) and** ***Sardar Muhammad Ayub vs. Secretary, S & GAD*** **(2000 YLR 2868)** for such purpose. He further submitted that the Chancellor was not vested with absolute powers and his discretion was not unfettered. Any discretion duly vested had to be exercised through application of mind and on the basis of merit and the President was obliged to record reasons for his decisions. He submitted that in the instant case, the petitioner was at serial No.1 of the shortlist on the basis of merit and no reasons had been recorded by the President for refusing to abide by the advice of the Prime Minister to appoint him as Vice-Chancellor. For these propositions he relied on ***Dr. Razia Sultana vs. Professor Dr. Ghazala Yasmeen Nizam*** **(2016 SCMR 992),** ***Professor Dr. Ghazala Yasmeen vs.Chancellor Shaheed Banazeer Bhutto Women University, Kyber Pakhtunkhwa*** **(2016 PLC (C.S) 686),** ***Dr. Igrar Ahmad Khan vs. Government of the Punjab through Secretary Agricultural Department, Lahore and others*** **(2020 PLC (C.S) 1087)** and ***Dr. Igrar Ahmad Khan vs. Dr. Muhammad Ashraf*** **(2021 SCMR 1509)**.

3. The learned Assistant Attorney General submitted that under Section 8(1) of the Statute, the President had been nominated as Chancellor and the President held such office as persona designata. He submitted that as the President exercised authority under the Statute as Chancellor and not as President, he was not bound to act in accordance with Article 48(1) of the

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Constitution, but in accordance with the provisions of the Statute. And proviso to Section 11(3) very clearly vested authority in the President to decline to appoint any of the individuals nominated to him as part of a panel for consideration for the appointment of Vice-Chancellor. He submitted that the august Supreme Court had settled the law in this regard in ***University of the Punjab vs. Ch. Sardar Ali*** **(1992 SCMR 1093)**, ***Federation of Pakistan vs. Muhammad Tariq Pirzada*** **(1999 SCMR 2189)** and ***Dr. Zahid Javed vs. Dr. Tahir Riaz Ch.*** **(PLD 2016 SC 637)**. He submitted that in ***Dr. Zahid Javed*** a five-member bench by a majority of four to one held that the law laid down by the august Supreme Court previously in ***Rana Aamer Raza Ashfaq*** had not taken into account the judgment of the Supreme Court in ***Ch. Sardar Ali*** and was therefore not good law. He submitted that after ***Dr. Zahid Javed*** it is now settled that where the President or Governor occupy the office of the Chancellor as persona designata they are not automatically bound by the advice of the Prime Minister or Chief Minister, respectively. The requirements of Article 48(1) could not be read into the provisions of the Statute, the provisions of which would need to be interpreted independently. In the instant case, through the proviso of Section 11(3) the legislature had vested in the President the authority to return a panel proposed to him and seek a fresh panel, which the President had done and his action therefore suffered from no infirmity.

4. This Court agrees with the contention of the learned Assistant Attorney General that the manner in which the

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President or the Governor is to exercise the powers of a Chancellor under statutes establishing Universities has been settled by the august Supreme Court in ***Dr. Zahid Javed***. The question of the manner in which power is to be exercised by Chancellor came before the august Supreme Court in ***Ch. Sardar Ali*** wherein it was held that the rules regulating the terms and conditions of service of employees of the University of Punjab were not of a statutory nature merely because they were subject to exercise of authority by the Governor, who by virtue of Section 11(8) of the Act was obliged to act in a manner consistent with Article 105 of the Constitution. And in finding so the august Supreme Court cited with approval the law laid down by the Madhya Perdesh High Court in ***Dr. S. C. Bharat vs. Hari Venik Patskar (AIR 1962 MP 180)***, wherein it was held that a Governor while acting as Chancellor under a statute that established a university exercised authority as persona designata and not as Governor.

5. The question of exercise of power by the President in his capacity as the authority reviewing orders of the Ombudsman pursuant to the Establishment of the Office of *Wafaqi Mohatasib* (Ombudsman) Order, 1983, came before the Supreme Court in ***Federation of Pakistan vs. Muhammad Tariq Pirzada*** **(1999 SCMR 2189)** wherein it was held that, *"the adjudicatory/quasi-judicial powers vesting in the President under Article 32 of the Order are to be exercised by him in his individual judgment by recording reasons in writing and not on the advice of the Prime Minister/Cabinet"*. The august Supreme Court further observed the following:

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> *6. Needless to emphasize that the functions performed by the Wafaqi Mohtasib are quasi-judicial. The concept of a representation envisaged by Article 32 of the Order is that where the Mohtasib has failed to record just and proper findings/recommendations, the President should undo the wrong done to the complainant for the advancement of the purposes of the Order. The powers vesting in the President under Article 32 ibid have to be exercised in conformity with section 24-A of the General Clauses Act, 1897 as amended by General Clauses (Amendment) Act, 1997 (Act XI of 1997)…"*

6. The question of exercise of authority by the Governor in relation to Baha-ud-Din Zakariya University came before the august Supreme Court in ***Rana Aamer Raza Ashfaq***, where the august Supreme Court held that the Governor while acting as Chancellor under Section 11(1) of the Baha-ud-Din Zakariya University Act, 1975, was bound to act on the advice tendered by the Chief Minister in a manner provided in Section 11(8) of the Act read with Article 105 of the Constitution.

7. The question of the manner in which a Governor in his capacity as Chancellor is to exercise his authority under Section 11-A of the University of Punjab Act, 1973 **("*Act*")**, then came before the august Supreme Court in ***Dr. Zahid Javed***. By a majority of four to one, it was held that, "*the principles enunciated in the judgments rendered by this Court in the cases of University of Punjab v. Sardar Ali (1992 SCMR 1093) and Federation of Pakistan v. Muhammad Tariq Pirzada (1999 SCMR 2189), are in consonance with the spirit of the provisions of the Act and the conflicting view in the case of Rana Aamer Raza Ashfaq v. Dr. Minhaj Ahmad Khan (2012 SCMR 6) is not good law. Section 11-A or the other provisions of the Statute of 1975*

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under which Chancellor exercises revisional or appellate powers, are independent and do not make it obligatory on him to seek and/or act on the advice of the Chief Minister in terms of Section 11(8) of the Act". The august Supreme Court held that, *"the Chancellor, who is Persona Designata under the Act, is conferred power but in a different capacity which cannot be termed identical to that of the office of the Governor"*. It reiterated the finding of the august Supreme Court in ***Muhammad Tariq Pirzada*** to the extent that it was concluded therein, "*that powers exercised by the President as appellate authority are quasi-judicial in nature and that Article 48 of the Constitution does not debar the President from exercising appellate powers conferred on him under the aforesaid order independently*". The controversy before the august Supreme Court was whether while exercising provisional powers under Section 11-A of the Act, the Governor was bound by the advice of the Chief Minister. The question had emerged because in Section 11(8) of the Act it was provided that, *"in the performance of its functions under the Act the Chancellor shall act and be bound in the same manner as the Governor of Province acts and is bound under Article 105 of the Constitution…"*. The apex Court while interpreting Article 11-A of the Act held that, *"the more logical interpretation which comports with the legislative intent is to look at the particular provision of the statute and determine the nature of powers, functions and duties conferred by the statute. If it is in the nature of quasi-judicial power, then the Persona Designata is required to act personally and not on the basis of any advice by any other person*

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or authority". The difference of opinion between the majority and the dissenting judge was that it was the view of the dissenting judge that the power under Section 11-A of the Act was not a quasi-judicial power but was an executive power in relation to which the Governor in his capacity as Chancellor was bound by the advice of the Chief Minister in view of Section 11(8) read together with Section 11-A of the Act. There was agreement between the majority and the minority opinion that the legislature was competent to vest authority in the Governor as persona designata and in exercise of such authority the Governor was not bound by the requirements of Article 105 of the Constitution but only by the requirements under provisions of the Statute. However, in interpreting the provisions of the Statute, the majority held that in exercising authority under Section 11-A, which amounted to exercise of quasi-judicial authority, the Governor was not bound by Section 11(8), which provided that the Governor as Chancellor was to act in a manner consistent with Article 105 of the Constitution i.e. on the advice of the Chief Minister. The minority view was that the authority to be exercised under Section 11-A was not quasi-judicial authority but ordinary executive authority and in exercise of such authority the Governor as Chancellor was bound by the Chief Minister's advice in view of Section 11(8) of the Act.

8. The question of the manner in which the President exercises authority under a law where he has been appointed as persona designata came before this Court in ***Mushtaq Ahmad***

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Sukhera vs. President of Pakistan through Secretary and others **(PLD 2020 Islamabad 1)** in which following was held:

> *The Majlis-e-Shoora (Parliament) is empowered to confer powers, duties and functions on the President, either as President or in a different capacity. Likewise, the duties, powers and functions conferred through a statute can either be administrative e.g. making an appointment or adjudicatory or quasi-judicial in nature such as deciding representation under Article 32 of the Order of 1983 or review, revision or appeal. When the power, duty or function has been conferred under a statute on the President as President and it is not in the nature of adjudicatory or quasi-judicial power then it is mandatory to act on the advice of the Prime Minister. On the other hand, when the power or function conferred under the statute on the President is not qua the President but in a different capacity such as Chancellor of a University, as was the case in the aforementioned judgments, then such power or function is to be exercised independently and not on the advice of the Prime Minister. In such an eventuality the President is vested with powers not as President but rather as persona designata.*

9. The concept of persona designata was enumerated by Justice Saqib Nisar in his minority opinion in ***Dr. Zahid Javed*** as follows:

> *"…the persona designata doctrine, is that non-judicial functions can be conferred on judges in their personal capacity. The Latin phrase means that a person is considered as an individual rather than as a member of a class. Originally the idea was that a judge, in his personal capacity, could be appointed to an office involving the performance of administrative or executive functions including functions which were quasi-judicial in their nature".*

10. The persona designata doctrine has its origin in common law. The phrase persona designata was first used in ***Bros vs. York, Newcastle and Berwick R.Y. CO.*** **(1849)**

18L.J.Q.B.1999). As explained by Justice Saqib Nisar in ***Dr. Zahid Javed***, a question arose in relation to exercise of certain powers by a judge as to whether such power was delegated to the judge as a member of the Court and consequently the remedy of review was available against it or whether such power was vested in the judge in his personal capacity and not as delegate of the Court, in which case he would be treated as a persona designata and the remedy available against exercise of power by the judge as a delegate of the Court would not be available. The doctrine was endorsed by the august Supreme Court in ***Ch. Sardar Ali***. While interpreting the scheme of the Act, the august Supreme Court relied on the judgment rendered by the learned High Court of Madhya Pradesh in ***Dr. S. C. Barat vs. Hari Vinayak Pataskar (AIR 1962 Madhya Pradesh 180),*** wherein it was held that, *"the powers and duties that the Chancellor exercises or performs under the Act are not any powers or duties conferred on the Governor qua Governor or of a capacity which he occupies by virtue of his office as Governor. They are the powers and duties of a public capacity held by the personage who is also the Governor. The Chancellor's powers under the Jabalpur University Act are thus not the powers and duties of the office of the Governor and consequently the protection provided by Article 361(1) cannot be invoked by the Chancellor in respect of the exercise and performance of the powers and duties of his office as Chancellor under the Jabalpur University Act."* The question before the august Supreme Court was whether terms and conditions for appointment of teachers acquired a statutory character in view of Section 11(8) of the

Act, given that such appointments were being made by the Governor. The question was answered in the negative. It was held that the Governor exercised authority under the Act as persona designata i.e. as Chancellor exercising authority under the Act and not as Governor exercising authority under the Constitution.

11. As explained above, the concept of persona designata has been adopted and reiterated by the august Supreme Court. The question of whether the legislature is competent to vest duties, functions and powers in a Constitutional functionary such as President or Governor in his capacity as persona designata, such that in exercise of such powers, duties and functions, the President or the Governor is not bound by the requirement of the Section 48(1) and Section 105(1) of the Act, respectively, stands settled. The test laid down by the august Supreme Court in ***Dr. Zahid Javed*** provides that there are two instances in which the President or Governor would not be bound by the advice of the Prime Minister or the Chief Minister, as the case may be. One, where powers, duties and functions are vested by the legislature in an office by promulgation of a statute, which statute further provides that such powers, duties and functions are to be discharged by the President or the Governor as an incidental matter. In other words, if the statutory intent is that the powers, duties and functions are of an office independent of the office of the President or the Governor, and the President or the Governor has been designated as a person who will exercise such powers, functions and duties, the President or Governor exercises such powers as persona designata and is not bound by the provisions

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of the Constitution. Two, even where a statute vests power in the President or the Governor as persona designata, and further provides that as a general matter such power is to be exercised on the advice of the Prime Minister or the Chief Minister, the President or the Governor would not be bound by such advice in discharge of any particular power or function that is quasi-judicial in nature.

12. The ratio of ***Dr. Zahid Javed***, therefore, settles the debate as to whether the legislature is competent to create an office by law and confer on the President the power to discharge the functions of such office while not being bound to act in accordance with Article 48(1) of the Constitution. The legislature has been found competent to create such legislative scheme. And where such scheme is created, the President while acting as persona designata is not bound to discharge the functions of the office, such as the office of Chancellor of the University, on the advice of the Prime Minister, unless the Statute itself provides that the President as Chancellor is so bound. In the present case, the Statute explicitly provides that the President may turn down the panel proposed to him for appointment of a person to the office of the Vice-Chancellor. The situation is thus diametrically opposite to that which was before the august Supreme Court in ***Dr. Zahid Javed*** or even in ***Rana Aamer Raza Ashfaq*** where the Statute itself provided that the powers of the Chancellor are to be exercised in a manner as provided under Article 105(1) of the Constitution. In such cases, the question before the Court was one of the statutory interpretation and how Section 11-A of the Act was to be read together with Section 11(8) of the Act. In

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the present case, there is no such question of statutory interpretation. The Statute clearly vests in the President the power to seek a fresh panel of candidates if he so chooses, and consequently the proviso to Section 11(3) is not ultra vires the Constitution.

13. The second contention of the learned counsel for the petitioner, however, carries weight. To the extent that the President has passed an order rejecting the summary for appointment of a Vice Chancellor and has sought a fresh panel of individuals to be considered for purposes of appointment to the office of Vice-Chancellor of the University, the President was exercising his authority as persona designate. While doing so he was under an obligation to furnish reasons in accordance with the requirements of Section 24-A of the General Clauses Act, 1897, as held by the august Supreme Court in ***Muhammad Tariq Pirzada,*** the relevant portion for which has been reproduced above.

14. This Court therefore finds that the impugned decision of the President in his capacity as Chancellor, which is devoid of any reasoning, falls foul of Section 24-A of the General Clauses Act, 1897. The summary proposed by the University through Ministry of Kashmir Affairs and Gilgit-Balistan will be deemed pending before the President. While the President is within his right to seek a fresh panel of candidates, if he is dissatisfied with the quality of candidates proposed to him for appointment as Vice-Chancellor, he ought to exercise such power pursuant to the proviso to Section 11(3) of the Act through a reasoned order in

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accordance with requirements of Section 24-A of the General Clauses Act, 1897.

15. The petition is ***allowed*** in the above terms.

(BABAR SATTAR)
JUDGE

Announced in open Court on **28.02.2023**.

JUDGE

Approved for reporting.

Shakeel Afzal/-

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