

## **ORDER SHEET.**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

### **Writ Petition No. 2758/2023**

Bushra Imran Khan

***Versus***

Federation of Pakistan through Secretary Ministry of Interior and  
Secretary Ministry of Defence & others

<b>S. No. of order/ proceedings</b>	<b>Date of order/ Proceedings</b>	<b>Order with signature of Judge and that of parties or counsel where necessary.</b>
(12)	29.05.2024	<p>Sardar Shahbaz Khosa, Ms. Suzain Jehan Khan and Mr. Abdullah Malik, Advocates for the petitioner.</p> <p>Ms. Shamsa Jabeen Kayani, Advocate for the petitioner in Writ Petition No.1460 of 2023.</p> <p>Mr. Ahmed Junaid, State Counsel.</p> <p>Barrister Munawar Iqbal Duggal, Additional Attorney General, Raja Muhammad Jawad Arslan and Mr. Aqeel Akhtar Raja, Assistant Attorney General.</p> <p>Mr. Afzal Khan, Mr. Faisal Bin Khurshid and Mr. Taimur Khan, Advocates for PTA.</p> <p>Mr. Faisal Siddiqi, ASC, for PBC.</p> <p>Barrister Zunaira Fayyaz, Advocate, on behalf of Mr. Aitzaz Ahsan, ASC/Amicus.</p> <p>Barrister Ehsan Qazi, Advocate alongwith Sardar Alam Shafqat and Mr. Ali Raza Kumboh, Law Officers, PEMRA.</p> <p>Mr. Ehsan Malik, Advocate for APNS.</p> <p>Mr. Asad Ladha, Advocate for CMPAK.</p> <p>Mr. Muhammad Sohaib Ali Ahmed, Mr. Sahibzada Uzair Hashim and Mr. Ali Ahmed Shah, Advocates for Multinet Wateen Telecom.</p> <p>Mr. Mohammad Irshad, Advocate, alongwith Mr. Rashid Ayub Khan, Senior Manager (Regulatory), Telenor.</p> <p>Mr. Shahid Rafiq Dogar, Advocate for Cyber Net.</p> <p>Mr. Ali Shahryar, Advocate alongwith Mr. Muhammad Arbab, Assistant (Litigation), National Assembly Secretariat, Islamabad.</p> <p>Mr. Shehzad Elahi, Advocate for JAZZ.</p> <p>Mr. Tariq Mehmood, Joint Director General, Mr. Hassan Mushtaq Sukhera, Director (Litigation) and Mr. Amjad Iqbal, Deputy Director (Litigation), Intelligence Bureau.</p> <p>Mr. Waqar uddin Syed, Additional Director (Cyber Crime), Mr. Sarfraz Khatana, Additional Director (Law), Mr. Ayaz Khan, Additional Director (Cyber Crime), Mr. Muhammad Imran Haider, Additional Director and Mr. Muhammad Waqas Rasool, Deputy</p>

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Director (Law), FIA.  
Lt. Jamshed Gull, Law Officer, Ministry of  
Defence.  
Mr. Tahir Kazim, Law Officer, IGP's office.  
Mr. Irtazaa Afzaal, Group Director (Legal), and  
Mr. Obaid Ullah Yousaf, Manager (Legal),  
Ufone/PTCL/PTML

The Director General, Federal Investigation Agency (FIA), has filed a compliance report stating that the fine imposed by order dated 29.04.2024 has been deposited. He has also filed a response in relation to the contempt notice stating that the recusal application in question was filed due to misunderstanding re questions of law and has tendered an unconditional apology, which is being accepted.

2. The Director General, Intelligence Bureau (IB), has filed a report stating that he was out of the country and the application that was filed was not authorized by him. The learned Additional Attorney General states that the fine was to be deposited yesterday but couldn't be deposited as the file was in the Court and the office therefore did not receive the fine. He stated that it will be deposited today. In view of the above, the Court is not minded to initiate contempt proceedings against Director General, IB.

3. The learned counsel for Pakistan Telecommunication Authority (PTA) states that the fine will be deposited today. He submitted that the report re filing of recusal applications solicited by this Court could not be filed yesterday due to public holiday and will be filed today. Let him do so. The Court will consider the report and hear arguments in relation to it on the next date of hearing.

4. The learned Additional Attorney General was asked to delineate the legal framework under which surveillance is being undertaken in Pakistan. He acknowledged that the reports filed by the Federal Government and its

Divisions and Ministries under the authority of Federal Secretaries have represented before this Court that no entity or agency of the country has been authorized to undertake surveillance or undertake legal interception of telephone calls or telecom data. He, however, sought time to seek further instructions from the Federal Government and its relevant Divisions/Ministries and the Prime Minister's office in this regard. The learned Additional Attorney General has read provisions of the Telegraph Act, 1885 ("**Telegraph Act**"). Section 5 of the Telegraph Act provides that the State can order interception of a telegraph on occurrence of a public emergency or in the interest of public safety. The learned Additional Attorney General submitted that no such declaration has been issued by the Federal Government authorizing surveillance of citizens but will once again seek instructions from the Federal Government in such regard. He has further read out Sections 23, 24 and 25 of the Telegraph Act, which provide that unauthorized interception or interference with a telegraph or an attempt to learn the content of a telegraph constitutes an offence punishable with upto three years of imprisonment in addition to fine.

5. The learned Additional Attorney General has also read Section 54(1) of the Pakistan Telecommunication (Re-Organization) Act, 1996 ("**Telecommunication Act**"), as well as Section 57(2)(ah) of the Telecommunication Act. Section 54(1) of the Telecommunication Act empowers the Federal Government to authorize any person to intercept calls and messages and trace calls through the telecommunication system in the interest of national security or in the apprehension of any offence. He states that no rules in this regard have been framed in exercise of rule-making power under Section 57 of the Telecommunication Act. When reminded by the Court that the Federal Government has already filed a report stating that no entity or agency has been authorized to intercept

calls and messages and trace calls for purposes of surveillance, the learned Additional Attorney General sought time to solicit further instructions from the Federal Government.

6. The learned Additional Attorney General then read through the Investigation for Fair Trial Act, 2013 ("**Fair Trial Act**"), which provides a detailed procedure for purposes of surveillance, in which the Directorate Generals of Intelligence of Inter-Services Intelligence (ISI), Military Intelligence (MI), Air and Naval Intelligence, Director General of IB and police authorities are under a statutory obligation to notify an appropriate officer not below the rank of BPS-20 for making applications for purposes of intercepting material as defined under Section 3(g) of the Fair Trial Act. Sections 5, 6, 7, 8, 9, 10 and 11 of the Fair Trial Act then prescribe the process and mechanism for seeking permission for surveillance and for grant of such permission by the relevant Minister and ultimately by the Court. Once an application is approved by the relevant Minister, such application is to be filed before a Judge of the High Court for seeking a warrant for surveillance. The authorized officer is to present the grounds for the application along with relevant material to the Judge-in-Chambers to convince the Judge of the need for issuance of such warrant. The warrant once issued is then to be executed through the designated agency or body, after which service providers are to provide assistance for surveillance within the scope as specified in the warrant. Section 17(2) bars service providers from extending any technical facilities for interception to any person or organization other than the designated agencies or body within the terms of a duly issued warrant. Section 27 of the Fair Trial Act provides for the review committee comprising the Ministers for Defence, Interior and Law, who are to meet on a six monthly basis and review the manner in which surveillance is being carried out and whether it is serving the legitimate state purpose for which it is being

undertaken. Sections 34 and 35 of the Fair Trial Act make misuse of intercepted material or unauthorized surveillance or interception criminal offences punishable with jail terms of upto five years as well as with fine.

7. When asked whether the provisions of the Fair Trial Act are being given effect and whether any surveillance requests, approved by relevant Ministers, soliciting warrants from any Judge of any High Court across Pakistan have been made, the learned Additional Attorney General sought further time to file a proper report in this regard. When asked the review committee in terms of Section 27 of the Fair Trial Act comprising the three Ministers mentioned therein is in existence, he once again sought time to furnish a report in this regard. He did submit in response to the Court's question that no request for a surveillance warrant was sought from Islamabad High Court during his Term as the Federal Government's most senior law officer deputed at this Court.

8. The learned Additional Attorney General then read Section 19 of the Prevention of Electronic Crimes Act, 2016 ("**PECA**"), which states that unauthorized interception through any electronic system is an offence and attracts a jail term of upto two years as well as fine. When asked whether the cases of unauthorized interception that are the subject-matter in the petitions pending before this Court have been registered as criminal cases. The answer was in the negative. The learned Additional Attorney General stated that the complainants have not assisted the relevant investigation agencies. When asked whether the registration of a criminal case was contingent on the complainant appearing before police or investigation authorities even where it was in the knowledge of the state that an offence had been committed, the learned Additional Attorney General answered in the negative.

9. The Court brought to the attention of the learned Additional Attorney General press reports from The Nation (March 15, 2015 and June 04, 2015), Dawn, Tribune (June 04, 2015), and The News (March 22, 2023), asserting that the ISI and IB had filed reports with the Supreme Court in May 2015 (in a suo moto matter related to the surveillance of Justice Sajjad Ali Shah when he was Chief Justice of Pakistan in 1996), stating that they had tapped telephones of thousands of citizens of Pakistan. When asked whether such phone tapping was undertaken in compliance with the provisions and requirements of the Fair Trial Act, which was in the field in 2015, the learned Additional Attorney General sought time to file a report.

10. It appears from the reports filed by the Federal Government, PTA and intelligence agencies and arguments of the learned counsel that no authorization has been granted by the Federal Government under Section 5 of the Telegraph Act and/or Section 54 of the Telecommunication Act to authorize any individual, entity or agency to intercept calls, messages and to surveil citizens of Pakistan. Doing so without authorization is an offence punishable with fine and a jail term under the Telegraph Act, the Telecommunication Act, the Fair Trial Act and PECA. Further, the Fair Trial Act provides a detailed mechanism through which surveillance can be undertaken. The provisions of the Fair Trial Act provide for due process and supervision alongwith checks and balances in the form of intra-executive scrutiny (to be undertaken by the relevant Minister, who authorizes the surveillance and subsequently by a review committee comprising Ministers for Law, Defence and Interior). The Fair Trial Act provides for grant of requests for surveillance by a Judge of the High Court. No phone tapping or other surveillance can be undertaken except pursuant to a warrant issued for such purpose by a Judge of the High Court.

11. In this view of the matter, it appears *prima facie* that no official of the executive/federal government, intelligence agency or police is authorized to undertake surveillance of the citizens of Pakistan. To the extent that any employee of the government or investigation or intelligence agency is undertaking surveillance and/or telecom companies and service providers are affording their facilities to facilitate surveillance, all such individuals are liable for offences under provisions of the Telegraph Act, the Telecommunication Act, the Fair Trial Act and PECA. Any such unauthorized surveillance would also be in breach of fundamental rights of citizens guaranteed by Articles 9, 10A, 14 and 19 of the Constitution read with Article 4 and would cause irreparable harm to the liberty, dignity and privacy of the citizens being surveilled. Till the next date of hearing the intelligence agencies, including, *inter alia*, the ISI and IB, and police authorities will not surveil any citizens, except in accordance with requirements of the Fair Trial Act and warrants duly issued by a Judge of the High Court, and neither PTA nor the telecom companies shall authorize the use of their services or equipment for purposes of any surveillance or interception of phone calls or data.

12. The Federal Government will file appropriate reports for purposes of Section 5 of the Telegraph Act, Section 54 of the Telecommunication Act, and provisions of the Fair Trial Act (explaining the manner in which provisions of the Fair Trial Act have been given effect) providing details of the requests that have been made under provisions of the Fair Trial Act to the relevant ministers and the Courts for issuance of warrants since the law entered into force in the year 2013. The Federal Government will also file a report stating whether any phone tapping has taken place since the entry into force the Fair Trial Act, especially in the context of the press reports stating that ISI and IB acknowledged that they undertook phone tapping of thousands of citizens of Pakistan in 2015. The Ministry of

Defence, the Ministry of Interior and the Ministry of Law and Justice will file appropriate reports in such regard stating whether or not any phone tapping has taken place in Pakistan since the enactment and entering into force of the Fair Trial Act and the manner in which they have discharged obligations of the review committee for purposes of Section 27 of the Fair Trial Act.

13. The Directorate General ISI, the three Service Intelligence Agencies, IB and the Inspector General Police ICT, who are defined as "applicant" under Section 3(a) of the Fair Trial Act, will file individual reports stating whether they have discharged their statutory obligation to appoint an authorized officer in terms of Section 4 of the Fair Trial Act and have complied with the requirements of the said Act in seeking approval for surveillance. The reports by ISI and the three Services Intelligence Agencies may be filed may be filed through the office of the Prime Minister or the Ministry of Defence, in accordance with the law and the Rules of Business, 1973.

14. PTA shall file a report stating whether any SOPs or instructions have been issued to telecom operators to facilitate Lawful Interference (LI) and/or share telecom data with anyone in breach of provisions of the Fair Trial Act. If so, the report will accompany the SOPs or instructions issued alongwith with an explanation re the legal authority under which they have been issued.

15. I have heard the learned counsel for Pakistan Broadcasters Association (PBA), Mr. Faisal Siddiqi, ASC. On the next hearing, the Court will hear the learned counsel for APNS, the learned counsel for PEMRA, the learned counsels for the telecom companies, and the learned Additional Attorney General, in that order, after ensuring compliance with this regard.

16. Let the matter be fixed for 25.06.2024. Let the office transmit a copy of this order to the Principal Secretary to the Prime Minister, Secretaries of Defence, Interior and Law Division, Chairman PTA, Director General ISI, Director General MI, Director General Air Intelligence, Director General Naval Intelligence, Director General IB and Inspector General of Police ICT for compliance. The learned Additional Attorney General shall also communicate the order to the relevant Divisions and/or officials of the Federal Government to ensure that compliance reports are filed by 14.06.2024 for perusal of the Court prior to the hearing.

**(BABAR SATTAR)**  
**JUDGE**