

Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No. 1925 of 2021

Mosharraf Ali Zaidi and others

Vs.

President of Pakistan, through the Secretary Presidential Secretariat,
etc.

Petitioners by : Mr Faisal Siddiqi, ASC.

Respondents by : Mr Khalid Javed Khan, Attorney General for
Pakistan.
Mr Aamir Rehman, Additional Attorney General.
Mr Javed Farooq, Assistant Attorney General.
Mr Mansoor Tariq Advocate, for respondent no.
5/ Higher Education Commission.
Mr Sikandar Naeem Qazi Advocate, for
respondent no. 6.
Agha Ghulam Haider, Deputy Director (Legal)
M/o Federal Education.
Mr Shahid Hamid Sr. ASC, Amicus Curiae.

Date of Hearing : 18.01.2022

ATHAR MINALLAH, C.J.-

The controversy brought before us through the petition in
hand involves questions of paramount public importance, having

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profound consequences for public interest and the fundamental rights of the people at large. The judicial review sought through the petition is regarding the legislation and its interpretation in the context of safeguarding the autonomy and independence of one of the most important national regulatory authorities i.e. the Higher Education Commission of Pakistan [hereinafter referred to as "HEC"].

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2. The constitutional jurisdiction of the Court, vested under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 [hereinafter referred to as the "Constitution"], has been invoked by the petitioners who assert that they are aggrieved because the manner in which the law has been interpreted and the pursuing actions taken by the executive authorities has grossly undermined the autonomy and independence of the HEC. They assert that the legislature could not have intended to make a law having the effect of compromising public interest and violating the fundamental rights of the public at large, guaranteed under the Constitution. They have challenged notifications, dated 26.03.2021 and 05.04.2021, whereby Mr Tariq Javed Banuri [hereinafter referred to as the "Defunct Chairperson"] was declared as having ceased to be holding the office of the Chairperson of the HEC. All the fifteen petitioners have impressive credentials and their professional contributions in their respective professions are not disputed. They assert that the background that had led to and the manner in which the Defunct Chairperson was removed from the office of the Chairperson has grave implications for the autonomy of the HEC. It is their case that the illegal interference of the executive authorities

and misinterpretation of the law is not in conformity with the Constitution and the law.

3. The Defunct Chairperson was appointed as Chairperson of the HEC under section 5 of Higher Education Commission Ordinance, 2002 [hereinafter referred to as the "HEC Ordinance"] for a period of four years, in accordance with the manner and mode prescribed under section 6(5) vide notification, dated 29.05.2018. The latter assumed the charge of the office of the Chairperson vide notification, dated 30.05.2018. The prescribed term of four years under the statute was to continue till 29.05.2022.

4. The documents placed on record on behalf of the Federal Government shows that the process that had ultimately led to the issuance of the impugned notifications had started pursuant to the Prime Minister's Directive, dated 28.01.2021. The Minister for Federal Education and Professional Training was directed to hold a meeting with the relevant stakeholders, including Professor Dr. Atta ur Rehman, Chairman, Prime Minister's Task Force on Science & Technology, [hereinafter referred to as the "Chairman PM's Task Force"] and others to discuss administrative, financial and performance issues, relating to the Universities. It was further directed that the recommendations be submitted in the form of a report. Pursuant to the mentioned Directive, a meeting was held in the Ministry of Federal Education and Professional Training, Government of Pakistan [hereinafter referred to as the "Ministry of Education"]. It appears

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from a plain reading of the minutes of the meeting that the participants felt that there was a need for the HEC to play its role in the changing scenario of Covid-19 and to formulate a plan regarding distance learning and use of technology in order to ensure continuity in learning and mitigating learning losses. It also appears that amendments were proposed to be made in the HEC Ordinance. However, the nature of the proposed amendments have not been described. A report titled "Report on the Administrative, Financial and Performance Issues of Universities" was subsequently prepared and submitted to the Prime Minister's office vide letter, dated 15.04.2021. The proposed amendments were endorsed by the Ministry of Law and Justice vide letter, dated 24.03.2021. The matter was thereafter placed before the *Cabinet Committee for disposal of legislative cases*. The latter, after considering the proposed amendments in its meeting held on 24.03.2021, approved that they be placed before the Federal Cabinet. They were approved by the Federal Cabinet thereafter. Rather than initiating the ordinary legislative process contemplated under the Constitution, the President, on the advice of the Prime Minister was pleased to promulgate the Higher Education Commission (Amendment) Ordinance, 2021 [hereinafter referred to as the "First Amendment Ordinance"] in exercise of powers conferred under Article 89. It was published in the gazette of Pakistan on 26.03.2021. On the same date, the Federal Government, vide notification dated 26.03.2021, declared that the incumbent Chairperson had ceased to hold his office. However, the President, in exercise of powers conferred under Article 89 of the Constitution, promulgated the Higher Education Commission (Second

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Amendment) Ordinance, 2021 [hereinafter referred to as the "Second Amendment Ordinance"] whereby the First Amendment Ordinance was amended. This was promptly followed by issuance of another notification by the Federal Government, dated 05.04.2021, wherein it was reiterated that the Defunct Chairperson had ceased to hold his office. It is noted that the Second Amendment Ordinance was notified in the official gazette on 08.04.2021. The First Amendment Ordinance and Second Amendment Ordinance shall collectively be referred to as the "Amending Ordinances". The Amending Ordinances were placed before the National Assembly of the Majlis-e-Shoora (Parliament) as required under Article 89 (2)(a) of the Constitution. Subsequently, the Majlis-e- Shoora (Parliament) promulgated the Higher Education Commission (Amendment) Act 2021, which was notified in the official gazette on 01-12-2021. Simultaneously, the Higher Education Commission (Second Amendment) Act 2021 was also promulgated and notified in the official gazette on 01.12.2021. The two legislations shall be collectively referred to as the "HEC Amendment Acts".

5. Perusal of the record shows that the Court cannot turn a blind eye regarding a crucial fact which is definitely relevant in order to adjudicate upon the questions raised before us. The role of the Chairman PM's Task Force was significant in the entire process. It has become obvious from the record that he appears to have been affected by the policies of the HEC and the resistance is affirmed from the correspondence. The factor of conflict of interest should have been taken into consideration by the policy making executive authorities.

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The HEC had formulated a policy regarding audit and scrutiny relating to performance evaluation of those institutions which had received public funds. Amongst the institutions that had received major funding included those of which the Chairman PM's Task Force was a patron e.g. the International Centre for Chemical and Biological Sciences. The record placed before us shows that substantial funding from the exchequer, almost Rs.40 billion, was received by the entities wherein the Chairman, PM's Task Force had an interest. It also appears from the record that the latter and the Defunct Chairperson were at loggerheads over the stated policy. The performance evaluation and audit by the HEC of the institutions of which the Chairman, PM's Task Force was a patron was being resisted. The record refers to correspondence received by the HEC from the office of the designated "Controlling Authority" under the HEC Ordinance suggesting that the institutions be exempted from scrutiny and evaluation audit. It appears that, rather than offering the institutions to be evaluated and audited by the exclusive regulatory authority, the HEC, the Chairman, PM's Task Force attempted to defend and justify the performance of the institutions in which he had an interest through publishing articles in the daily newspapers authored by him. The record manifests his pivotal role in the deliberations and proposals, which had ultimately led to the issuance of the impugned notifications and removal of the Defunct Chairperson. The question of conflict of interest, thus, is crucial for the adjudication of the petition.

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6. Mr. Faisal Siddiqi, learned ASC has appeared on behalf of the petitioners. Besides arguing at length before us he has also submitted his written arguments. Likewise, Mr Khalid Javed Khan, the learned Attorney General for Pakistan has also been heard at great length and written arguments submitted by him have also been placed on record. We also had the privilege of being assisted by Mr. Shahid Hamid, senior ASC as an amicus. His written submissions have also been made part of the record. We, therefore, need not to reproduce their arguments as they would be answered herein.

Opinion of the Court:

7. Initially when the petitions were filed, the controversy stemmed from the Amending Ordinances. Besides challenging their vires, their interpretation in the context of the Impugned notifications had also been agitated. However, while the petition was pending, the Majlis-e-Shoora (Parliament) passed the Amending Acts. The petition was duly amended and the parties were heard at great length. The question of vires of the Amending Ordinances had lost its efficacy after promulgation of the HEC Amending Acts. The questions that have arisen out of the arguments advanced by the learned Attorney General and learned counsels for the parties are; whether the Amending Ordinances or the HEC Amending Acts, as the case may be, are in the nature that attract the doctrine of 'colorable legislation'; whether the amendments operate prospectively or they are to be construed as having retrospective effect; were the amendments intended to operate

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and apply in such manner so as to have the effect of removal of the Defunct Chairperson; were the amendments person specific.

The above questions essentially are regarding interpretation of the provisions of the HEC Ordinance and, therefore, it would be beneficial to examine them in more detail. The most relevant provision is section 6(5).

Section 6(5) before insertion of the amendments:

8. Prior to the promulgation of the Amendment Ordinances or the Amendment Acts, as the case may be, section 6(5) was as follows;

"6. Composition and Constitution of the Commission.

(1)

(2)

(3)

(4)

(5) The Chairperson and the members shall hold the office for a period of four years and shall in no case be eligible for reappointment for more than one similar term.

(6). The Chairperson and the members may not be removed from office before the expiry of

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their term save on the proven charges of corruption, inefficiency, permanent disability or failure to attend to consecutive meetings without intimation in advance."

Sub section 5 of section 6 after the Amendment Ordinances:

9. It is noted that the Amendment Ordinances had explicitly declared that in section 6, for sub section (5), the following shall be substituted and shall always be deemed to have been so substituted:-

"(5) The Chairperson shall hold office for a period of two years and members shall hold office for a period of four years. In no case the Chairperson and members shall be eligible for re-appointment for more than one similar term."

"(5A) Notwithstanding anything in any order, notification, contract, agreement or any instrument containing the condition and terms of the service, a Chairperson or a member, who, on or after commencement of this Ordinance completes the term or tenure as provided in sub-section (5) as amended shall on such commencement

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forthwith cease to be Chairperson or member, as the case may be."

Explanation:

Sub section (5), as amended, shall have operation despite any vested right or right as a past and closed transaction in any appointment or terms thereof acquired or purported to have been acquired prior to the Higher Education Commission (Amendment) Ordinance, 2021 coming into force.

Sub section 5 after promulgation of the HEC Amendment Acts:

10. Section 6(5) after promulgation of the Amendment Acts is as follows;

Section 6:

"(5) The Chairperson shall hold office for a period of two years and members shall hold office for a period of four years. In no case the Chairperson and members shall be eligible for re-appointment for more than one similar term."; and

"(5A) Notwithstanding anything in any order, notification, contract, agreement or any instrument containing the duration and terms of the service, a Chairperson

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or a member, who, on or after commencement of the Higher Education (Amendment) Act, 2021 completes the term or tenure as provided in sub-section (5) as amended shall on such commencement forthwith cease to be the Chairperson or member, as the case may be."

Explanation.- Sub section (5), as amended, shall have operation despite any vested right or right as a past and closed transaction in any appointment or terms thereof acquired or purported to have been acquired prior to coming into force of the Higher Education Commission (Amendment) Act, 2021".

11. The learned Attorney General has laid great stress on the judgment of the august Supreme Court rendered in the case titled "Let. General (Retd.) Jamshaid Gulzar and another v. Federation of Pakistan and others" [2014 SCMR 1504] to advance the argument that the amendments made through the Amendment Acts are intra vires because of the similarities between the facts and circumstances of both the cases. He has further contended that the amendments made in the HEC Ordinance were not person specific. Moreover, he has contended

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that even if it is construed as a 'person specific legislation' it would still not be invalid and in this regard reliance has been placed on the jurisprudence of the apex Court enunciated in the case titled "Brig. (Retd.) F.B. Ali and another v. The State" [PLD 1975 SC 506].

12. On the other hand, the learned counsel for the petitioners has argued that the august Supreme Court in the case titled "Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice, Islamabad" [PLD 2012 SC 870] has explicitly held that 'person specific laws' could not be promulgated because such exercise instead of promoting the administration of justice cause injustice in the society amongst the citizens.

13. We have carefully gone through the judgments cited at the Bar. We are of the opinion that in both the judgments the august Supreme Court has not held validity of a 'person specific legislation' as an absolute rule. It is noted that in the case of Brig. (Retd.) FB Ali" supra, it has been held that though a law, which may apply to only one person or a class of persons, could be valid but it has to be premised on the condition that sufficient basis or reasons exist for such legislation. In "Baz Muhammad Federation of Pakistan through Ministry of Law and Islamabad" [PLD 2012 SC 870] the apex Court affirmed that it was one of the recognized principles of jurisprudence that

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person specific laws could not be promulgated. It is, therefore, a settled principle that promulgation of 'person specific law' would be valid and in conformity with the Constitution if sufficient basis or reasons can be shown to exist for it. A 'person specific law' would thus be outside the competence of the Majlis-e-Shbora (Parliament) if sufficient basis or reasons do not exist or justify its promulgation. Such a promulgation would not be valid, rather, depending on the circumstances, it may attract the doctrine of 'colourable legislation' and thus be declared as ultra vires the Constitution.

14. The doctrine of 'colorable legislation' and its principles have been elaborately explained by the august Supreme Court in the case titled "Baz Muhammad Kakar and others v. Federation of Pakistan through Ministry of Law and Justice and others" [PLD 2012 SC 923] and later reaffirmed in the judgment rendered in the case of "Lt. General (Retd.) Jamshaid Gulzar and another v. Federation of Pakistan and others" [2014 SCMR 1504]. It has been enunciated that motives could not be attributed to the legislature if it was competent to pass a particular law. The legislature can only make laws that are within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The august Supreme Court has elaborated the doctrine of 'colourable legislation' to the effect that although, apparently, a legislature

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In passing a statute has purported to act within the limits of its powers, yet in substance and in reality it had transgressed its powers, the transgression being veiled by what appears, on proper examination, to be a mere presence or disguise. Moreover, it has been held that where a challenge is made on the ground of 'colourable legislation' then what has to be proved to the satisfaction of the Court is that though the legislation was ostensibly within the legislative competence of the legislature but in substance and in reality it covers a field which is outside its legislative competence. The doctrine of 'colourable legislation' rests on the question of competency of a particular legislature to enact a particular law. It would also be beneficial to refer to the law enunciated in the case titled "Province of Sindh through Chief Secretary and others v. MQM through Deputy Convener and others" [PLD 2014 SC 531] wherein the august Supreme Court has observed and held that even if an opinion is formed that the legislation is colourable then it would be preferable to save the law by reading it down. It has eloquently explained that when "reading down" a statute, two principles have to be kept in view; first, that the object of 'reading down' was primarily to save the law and in doing so the paramount question that ought to be taken into consideration is whether in the event of reading down, the statute would remain functional; second, would the legislature have enacted the law, if the mischief had been brought to its notice which was being agitated before the court. The legislature undoubtedly is competent to give effect to a law

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or an amendment retrospectively.

15. Before we examine the impugned amendments and notifications in the light of the above stated principles, it would be beneficial to briefly survey the scheme of the HEC Ordinance before having been amended. It is a self-contained, comprehensive statute which was promulgated with the object to establish the HEC for improving and promoting of higher education, its research and development. The expression 'Higher Education' has been defined in section 2(g) as meaning education at bachelors and higher level degree courses including post graduate certificates, diplomas and research and development activities. Section 3 provides that the Prime Minister shall be the Controlling Authority of the HEC and who may 'supervise' its affairs. The scope of such 'supervision' is obviously circumscribed by the powers and functions expressly mentioned in the HEC Ordinance. Section 4 empowers the Controlling Authority i.e. the Prime Minister to appoint the Chairperson of HEC. The composition and constitution of the HEC has been described under section 6 and the Chairperson is one of its members while ten members are appointed by the Controlling Authority. Before the amendment of the HEC Ordinance the Chairperson and members, once appointed, had a fixed statutory term of four years to hold their respective offices. Grounds for their removal before expiry of the four year term have been described under section 6(6) i.e. proven charges

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of corruption, inefficiency, permanent disability or failure to attend two consecutive meetings without intimation in advance. The powers and functions of the Commission have been described under section 10. The reading of the HEC Ordinance as a whole unambiguously shows that the legislature has intended to ensure the autonomy and independence of the HEC by fixing the term for holding the offices of the Chairperson or the members, as the case may be. The security of tenure of the Chairperson and members of HEC is definitely of pivotal importance in the context of guaranteeing the independence of the HEC. The Controlling Authority i.e. the Prime Minister is empowered to appoint the Chairperson and ten members of HEC subject to taking into consideration the qualifications and attributes explicitly described by the legislature. However, once appointed, they can only be removed on the basis of one of the grounds explicitly and unambiguously stated in section 6(6). The Controlling Authority, however, is not empowered to interfere in matters that are within the exclusive domain of the Commission, nor pass any directions in relation thereto. The supervisory power is restricted to the grounds described in section 6(6) of the HEC Ordinance.

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It is obvious from the above discussion that the HEC Ordinance is a special and self-contained statute which was promulgated to establish the HEC as an independent statutory entity to regulate higher education and all matters relating

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thereto. The legislature had explicitly intended to ensure the independence of the HEC by providing security of tenure to the appointed Chairperson and its members. We have carefully gone through the record placed before us but we could not persuade ourselves that the amended provisions were intended to remove only one person i.e. the Defunct Chairperson. Though the material brought on record definitely indicates an interest of the Chairman PM's Task Force but the material placed before us does not disclose any basis whatsoever that sufficient basis or reasons existed to justify person specific legislation. Though it has been indicated in the written comments filed on behalf of the Federation that there were reservations regarding the appointment of the Defunct Chairperson but accepting such a contention is likely to have the effect of rendering the legislation as colorable.

17. There is also another crucial factor i.e. the competence of the President to promulgate an Ordinance under Article 89 of the Constitution sans the jurisdictional pre conditions. The President can only exercise the jurisdictional power vested under Article 89 if the latter is satisfied 'that circumstances exist to take immediate action'. There is nothing to show nor has been argued before us that the President was satisfied that circumstances existed to take immediate action to remove the Defunct Chairperson. If the intent was to remove the Defunct Chairperson by taking

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immediate action then such person specific legislation without sufficient basis or reasons and that too in absence of fulfillment of the jurisdictional pre conditions would definitely be ultra vires the Constitution. The statement of objects and purposes also did not indicate in any manner that the amendments would have the effect of removing the Defunct Chairperson and consequently curtail or undermine the security of tenure. The august Supreme Court, in the case titled "Baz Muhammad Kakar and others v. Federation of Pakistan through Ministry of Law and Justice and others" [PLD 2012 SC 923], while exercising judicial review regarding the vires of a promulgated law had taken into consideration as a crucial factor the haste in passing the statute and that too without referring the bill to a committee pursuant to rule 122 of the Rules of Procedure of the National Assembly. The proceedings that had led to the passing of the HEC Amendment Acts were not different.

18. It is noted that the First Amendment Ordinance was promulgated and notified in the official gazette on 26-03-2021 and the impugned notification declaring that the Defunct Chairperson had ceased to hold office was issued the same day. However, it was withdrawn and a fresh purported notification, dated 05-04-2021, was issued. The issuing authority appears to have realized that the language of the First Amendment Ordinance did not apply retrospectively and would not affect the security of tenure of the Defunct Chairperson. However, the

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Second Amendment Ordinance was notified in the official gazette on 08-04-2021. As a corollary, if the notification, dated 05-04-2021, was issued in anticipation of the promulgation of the Second Amendment Ordinance then to the extent of declaring that the Defunct Chairperson had ceased to hold the office was without lawful effect and jurisdiction. The expression 'as amended' expressly used in sub section 5A is also of significance. When section 6(5A) is read as a whole along with the Explanation then it raises an ambiguity. Does it refer to completion of the term as specified under the amended provision or as it stood prior thereto? Such ambiguity obviously has to be resolved and the provision interpreted so as to avoid the doctrine of 'colourable legislation'. The legislature could not have intended to pass the HEC Amendment Acts having the effect of removal of the Defunct Chairperson because it would have rendered it a 'person specific legislation' without sufficient basis or reasons. In order to avoid striking down the amendments on account of being ultra vires the Constitution and on the touchstone of 'colourable legislation', we prefer to read down the amendments inserted in the HEC Ordinance through the HEC Amendment Acts as having prospective effect and thus without affecting or in any manner prejudicing the secured tenure of the Defunct Chairperson as was prescribed prior thereto i.e. four years, which will expire on 29-05-2022. The emphasis of the learned Judge General regarding the case of "Lt Gen (Rtd.) Jamshed Gulzar", supra is misplaced because in the facts and

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circumstances of the case in hand we have found it to be distinguishable. The judicial review of the statute in that case did not have the characteristics of person specific legislation. Moreover, without prejudice to the foregoing discussion, the competent authority to appoint or remove the Chairperson under the HEC Ordinance is the Controlling Authority i.e. the Prime Minister. Nothing has been placed on record to show that the Defunct Chairperson was removed by the competent authority. We declare that the Impugned notifications were issued without lawful authority and jurisdiction.

19. As already noted, we cannot turn a blind eye to the factor of conflict of interest of the Chairman, PM's Task Force as is evident from the material placed before us. We expect that the Controlling Authority i.e. the worthy Prime Minister will ensure that the HEC undertakes an independent, transparent and fair audit and evaluation of the institutes/centres wherein the Chairman PM's Task Force has an interest and which have received substantial funding from the public exchequer. It is important for the Controlling Authority i.e. the worthy Prime Minister, to demonstrably dispel any perception to the effect that the Impugned notifications may have been issued to avoid implementation of the policy of the HEC to conduct transparent and independent audit and evaluation, particularly in case of the institutes in which the Chairman PM's Task Force had or continues to have a direct or indirect interest. We further expect that the

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Controlling Authority will restrain the Chairman, PM's Task Force from interfering or in any other manner whatsoever dealing with the affairs of the HEC.

20. The above were the reasons for our short order, dated 18.01.2022, and the same is reproduced as follows:

"For reasons to be recorded later the petition in hand is allowed. Consequently, the impugned notifications, dated 26.03.2021 and 05.04.2021, are declared to have been issued without lawful authority and contrary to amended provisions of the Higher Education Commission Ordinance, 2002. Respondent No. 6, Dr. Tariq Javed Banuri, therefore, stands restored as the Chairman of the Higher Education Commission."



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(CHIEF JUSTICE)

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(AMER FAROOQ)
JUDGE

Approved for reporting.

Tanveer Ahmed/*