

**BEFORE THE ELECTION COMMISSION OF
PAKISTAN**

PRESENT:

MR. JUSTICE ® QAZI MUHAMMAD FAROOQ,
CHAIRMAN
MR. JUSTICE NASIM SIKANDAR, MEMBER
MR. JUSTICE AHMED KHAN LASHARI, MEMBER

**In Re: REFERENCES UNDER ARTICLE 63(2) OF THE
CONSTITUTION, RECEIVED FROM SPEAKER
NATIONAL ASSEMBLY OF PAKISTAN, ISLAMABAD
REGARDING DISQUALIFICATION OF MR. IMRAN
KHAN, MNA.**

REFERENCE NO. 1 OF 2007
(F.No.17(1)/2007-Law)

Dr. Sher Afgan Khan Niazi Versus Mr. Imran Khan, MNA

.....

For Petitioner: Dr. Sher Afgan Khan Niazi (in person).

For the Respondent: Mr. Hamid Khan, Advocate
Mr. Ahmed Awais, Advocate

REFERENCE NO. 2 OF 2007
(F.No.17(2)/2007-Law)

Dr. Farooq Sattar & 9 Others. Versus Mr. Imran Khan, MNA

.....

For the Petitioner Barrister Habib-ur-Rehman, Advocate
Dr. Muhammad Ali Saif, Barrister-at-Law
Dr. Farooq Sattar, MNA
Mr. Shamim Siddiqui, MNA
Rana Hyder Abbas Rizvi, MNA
Mr. Iqbal M. Khan, MNA
Mr. Abid Ali Umang, MNA
Mr. Israr-ul-Ibad, MNA
Dr. Abdul Karim Khanzada, MNA
Syed Safwan Ullah, MNA

For the Respondent Mr. Hamid Khan, Advocate
Mr. Ahmed Awais, Advocate

Dates of hearing: 16 & 27.7.2007; 1, 9 & 29.8.2007
and 5.9.2007

.....

ORDER

MR. JUSTICE ® QAZI MUHAMMAD FAROOQ, CEC:- We have before us two disqualification – related References under Article 63 (2) of the Constitution of the Islamic Republic of Pakistan against Mr. Imran Khan, MNA, Chairman Pakistan Tehrik-e-Insaf (respondent herein), who was elected as a member of the National Assembly of Pakistan from NA-71 Mianwali-1 in the General Elections held on October 10, 2002. Both the References are identical in form and substance and as such are being disposed of by this common judgement.

2. The References were received from the Speaker, National Assembly of Pakistan on 21-6-2007. The question of disqualification of the respondent formulated therein is the out-come of two separate petitions filed by Dr. Sher Afgan Khan Niazi, Minister for Parliamentary Affairs and Dr. Muhammad Farooq Sattar, MNA and nine other MNAs belonging to Muttahida Qaumi Movement.

3. Put shortly, the allegations made by Dr. Sher Afgan Khan Niazi in his petition are that the respondent in his nomination paper had declared on oath that he was qualified under Article 62 of the Constitution to be a member of the Parliament and was not disqualified under Article 63 whereas he was disqualified being not qualified to contest the election within the meanings of clauses (d) (e) and (f) of Article 62 of the Constitution read with paragraphs (d) (e) and (f) of sub-section (1) of Section 99 of the Representation of the Peoples Act, 1976. Lack of qualification was on account of the fact

that he was having a love-child from one Ana-Luisa White (Sita White). The concealed fact stood confirmed by a judgement of paternity rendered by a Superior Court of the State of California for the county of Los Angeles in favour of the said Sita White wherein it was held that the respondent was the father of the minor child named Tyrian Jade born on June 15, 1992. The respondent had not challenged that judgement and finally in the year 2004 accepted Tyrian Jade as his daughter and he and his wife Jamima Khan had become her guardian.

4. Dr. Muhammad Farooq Sattar and others made similar allegations in their petition and by way of elaboration of the violated provisions of Article 62 of the Constitution asserted that respondent was not of a good character; he had violated Islamic injunctions; he was not sagacious, righteous, non profligate, honest and Ameen and had committed a major sin of adultery with Sita White instead of abstaining from major sins. The respondent stood disqualified from being a member of the National Assembly as he was not qualified to be a member of the Parliament from the very inception of his candidature.

5. The References also contain a gist of the allegations made in the petitions which served as a springboard for formulation of the question referred for determination. The same are worded thus:-

“Mr. Imran Khan, MNA has a daughter from Sita White, without being legally wedded to her and this fact was proved by the judgement dated 13th August, 1997 of the Superior Court of the State of

California, for the County of Los Angeles and thus was disqualified from being elected or chosen as member of the Majlis-e-Shoora (Parliament) under the provisions of Representation of People Act, 1976, read with Article 63(1) (s) of the Constitution. As a result, a question has arisen about the disqualification of Mr. Imran Khan from being a member of the National Assembly under article 63 (2) of the Constitution”

6. The question of disqualification of the respondent referred by the Speaker of the National Assembly reads as under:-

“I therefore, refer the question to the Chief Election Commissioner as required by Article 63(2) of the Constitution read with Article 63 (1) (s) and Section 99 (1), (d), (e) and (f) of the Representation of the People Act, 1976 and Article 62 (d), (e) of the Constitution”.

7. The Respondent submitted detailed written statement wherein he controverted the allegations levelled by the petitioners and raised several preliminary objections and legal pleas in defence. He asserted with vehemence that the Reference was a part of malicious campaign on the part of the Government to harass, scandalize and defame him and a retaliation for the stance taken by him against the Muttahida Qaumi Movement for committing carnage in Karachi on 12th May, 2007. He also contended that the Reference was *mala fide* in fact as well as in law and the Speaker of the National Assembly by sending it in indecent haste had exposed his partisanship and malice towards him. He also described the Reference as discriminatory on the ground that the Speaker was

sitting over the Reference against the Prime Minister, Shaukat Aziz. The main preliminary objection was to the effect that the Reference was not maintainable under the Constitution and the law inasmuch as the allegation pertained to the period long before the General Election held in the year 2002 and the constitutional requirement for holding a member of the Parliament disqualified from being a member presupposes that the disqualification was incurred post election and was not based on any pre-election qualification. He not only denied the allegations with regard to Sita White, acceptance of Tyrian Jade as his daughter and agreeing to become her guardian but also assailed the *ex parte* judgment of the foreign Court pressed into service by the petitioners on the ground that it was neither admissible in evidence before any Court or Tribunal in Pakistan nor executable against him.

8. The following issues were framed in the light of the contentions of the parties:-

- (1) Whether the Reference is not maintainable under the Constitution and the Law being entirely based on qualifications for membership of the Parliament as envisaged under clauses (d) (e) and (f) of Article 62 of the Constitution read with sub-section (1) paragraphs (d) (e) and (f) of Section 99 of the Representation of the People Act, 1976?
- (2) Whether the Reference is *mala fide*?
- (3) Whether the Reference is discriminatory?
- (4) Whether the Reference is hit by the principle of *laches*?
- (5) What is the legal status and evidentiary value of the *ex parte* Judgement, dated the 13th August,

1997 rendered by the Los Angeles Superior Court against the respondent on which the Reference has been essentially founded?

- (6) Whether the respondent has become disqualified from being a member of the National Assembly on the ground of qualifications for membership of the Parliament as contemplated under clauses (d) (e) and (f) of Article 62 of the Constitution read with sub-section (1) paragraphs (d) (e) and (f) of Section 99 of the Representation of the People Act, 1976?
- (7) To what relief, if any, is the petitioner entitled?

9. At the fag end of the proceedings in regard to framing of the issues an order was passed to the effect that issue No.1 shall be treated as a preliminary issue. None of the parties took exception to the order and the References were adjourned for arguments on the preliminary issue and on the dates fixed for the purpose the learned counsel for the parties were heard at length.

10. Mr. Hamid Khan, learned counsel for the respondent, contended that the References were incompetent and not maintainable being exclusively based on pre-election qualifications instead of any post election disqualification incurred by the respondent. He further contended that qualifications are considered at various pre-poll stages including scrutiny of nomination papers and post-election stage of election petitions but thereafter become irrelevant and a sitting member of Parliament can be disqualified only on the basis of disqualifications contained in the Constitution and the law. He next contended that the expression “from being a member of Majlis-e-Shoora (Parliament)” used in Article 63(1) of the Constitution and the

expression “from being a member of an Assembly” used in Section 99(1A) of the Representation of the Peoples Act, 1976 and the expression “from being a member of Majlis-e-Shoora (Parliament) or a Provincial Assembly” used in Article 8D(2) of the Conduct of General Elections Order, 2002, under which the General elections 2002 were held and which has an overriding effect, did not find mention in clause (1) of Article 62 of the Constitution. The omission clearly suggested that provisions of Article 62 and the corresponding provisions in the mentioned laws apply to a person prior to his election as a member of the Parliament or a Provincial Assembly and Article 63 comes into operation after a person has been elected or chosen as a member. He also contended that the petitioners having singularly failed to challenge the qualifications of the respondent at any pre-election stage were estopped by conduct to challenge the same through present References. He further contended that lack of a qualification was not a disqualification and Article 63 (2) of the Constitution is restricted to a situation where a member of the Parliament has incurred disqualification after his election as member of the Parliament. He lastly contended that the constitutional provision invoked in the Reference being penal in consequence must be construed strictly. In support of the contentions he relied on the cases reported as *Mian Muhammad Shahbaz Sharif vs Ch. Muhammad Altaf Hussain and two others* (PLD 1995 Lahore 541), *Kanwar Intizar Muhammad Khan vs Federation of Pakistan* (1995 MLD, Lahore 1903), *Naqeebullah Khan vs Malik Imran Khan and 6 others* (PLD 2006 Peshawar 21), *Muhammad Tariq Chaudhry vs Syed Masroor Ahsan and 3 other* (PLD 1991 Lahore 200), *Election Commission, India vs Venkata Rao* (AIR 1953 SC 210), *Lt Col. Farzand Ali and others vs*

Province of West Pakistan (PLD 1970 SC 98) and *Ayatullah Dr. Imran Liaqat Hussain vs Election Commission of Pakistan* (PLD 2005 SC 52).

11. Petitioner Dr. Sher Afgan Khan Niazi referred to the preamble as well as Article 8G of the Conduct of General Elections Order, 2002 to contend that at the time of last General Elections all the election laws were in force, therefore, it can not be said that only the said Order was operative with an overriding effect. He also referred to Section 12(2) (a) of the Representation of People Act, 1976 and the nomination paper filed by the respondent wherein he had given a declaration on oath that he fulfilled the qualifications specified in Article 62 and was not subject to any disqualifications specified in Article 63 or any other law for the time being in force. He further contended that the qualifications contained in Article 62 are to be read into disqualifications specified in Article 63 by virtue of Article 63(1)(s), therefore, the provisions of Article 62(1) (d) (e) and (f) have been rightly invoked against the respondent. It was lastly contended that Articles 62 and 63 of the Constitution are to be read together as a sitting member of Parliament is required to keep his qualifications intact.

12. Barrister Habibur Rehman, learned counsel for the petitioners Dr. Farooq Sattar and others, referred extensively to the case-law cited by the learned counsel for the respondent to demonstrate that the view-point of the latter was not tenable. He contended that the Constitution was operative and functional during the General Elections, 2002 by virtue of the provisions of Article 8G of the Conduct of General Elections Order, 2002 and Article 2 of the Provisional Constitution Order No.1 of 1999. He further contended, drawing support from the case reported as *Lt. Col. Farzand Ali vs Province of West Pakistan* (PLD 1970 SC 98), that the matter related to title to office and

the respondent being disqualified for want of qualifications was not entitled to sit in the National Assembly. He next contended that qualifications and disqualifications were interchangeable, as held in *Muhammad Yousaf vs M. Irshad Sipra* (1988 CLC 2475), and in any case distinction between Article 62 and Article 63 was immaterial as the dispute did not relate to the election of the respondent but to his title to retain membership of the National Assembly. He also contended that the plea of *estoppel* taken by the learned counsel for the respondent was not available at all as there can be no *estoppel* against a statutory provision. He also contended in the light of the observations made in *Mirza Tahir Beg vs Syed Kausar Ali Shah* (PLD 1976 SC 504) that Article 63 refers to both pre-election and post-election disqualifications.

13. Before advertng to the preliminary issue, it will be pertinent to reproduce hereunder the precise qualifications for membership of Parliament which form the bedrock of the plea of disqualification of the respondent.

Article 62 of the Constitution

- “(d) he is of good character and is not commonly known as one who violates Islamic Injunctions;
- (e) he has adequate knowledge of Islamic teachings and practices obligatory duties prescribed by Islam as well as abstains from major sins;
- (f) he is sagacious, righteous and non-profligate and honest and amen”

Section 99 (1) of the Representation of the People Act, 1976

- “(d) he is of good character and is not commonly known as one who violates Islamic Injunctions;

- (d) he has adequate knowledge of Islamic teachings and practices obligatory duties prescribed by Islam as well as abstains from major sins;
- (e) he is sagacious, righteous and non-profligate and honest and ameen;"

14. There is no need to highlight the disqualifications contained in Article 63 of the Constitution as the References are entirely based on the above mentioned identical qualifications for membership and the only provision with regard to disqualification alluded to therein is clause (s) of sub-article (1) of Article 63 which reads as under

- “(s) he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force.”

15. Reverting to the preliminary issue it may be observed at the outset that qualifications and disqualifications for membership of Parliament or a Provincial Assembly are considered conjunctively as well as disjunctively at certain stages of the pre-election and post-election phases. The rationale behind this variable mode of consideration is furnished by the conceptual distinction between qualifications and disqualifications. Needless to mention that it is by now well settled that qualifications and disqualifications for membership of Parliament or a Provincial Assembly are two separate concepts having distinct connotations.

16. The pre-election phase commences with the filing of nomination papers by the person seeking membership of an Assembly and scrutiny of the nomination papers by the Returning

Officer in the light of the qualifications for membership as well as disqualifications contained in the Constitution and the law. The next stage is hearing and disposal of appeals by the Appellate Tribunal against rejection or acceptance of nomination papers. At that stage also both qualifications and disqualifications are considered. The orders passed by the Appellate Tribunals are final as per sub-section (5) of Section 14 of the Representation of the People Act, 1976 but it is a matter of common knowledge that the aggrieved candidates by and large resort to constitutional remedies and the controversies are finally set at rest by the High Court or the Supreme Court. The first phase of pre-election electoral process thus comes to an end and the first stage of the post-election phase starts with filing of election petitions by the defeated candidates for resolution of election disputes by the Election Tribunals. It is within the powers of an Election Tribunal to determine whether on the nomination day the returned candidate was not qualified for or was disqualified from being elected as a member. An appeal lies to the Supreme Court against the decision of an Election Tribunal. The mode of consideration of qualifications and disqualifications remains uniform till that stage but thereafter the qualifications are excluded from consideration and disqualification of a sitting member of the Parliament or a Provincial Assembly from being a member is determined only in the light of the disqualifications contained in the Constitution and the law. This metamorphosis is traceable to the parameters of Articles 62 and 63 of the Constitution and the words

used in the opening paragraphs thereof. The opening paragraph of Article 62 of the Constitution reads as under:-

“Qualifications for membership of Majlis-e-Shoora (Parliament):

A person shall not be qualified to be elected or chosen as a member of Mjlis-e-Shoora (Parliament) unless.....”

The opening paragraph of Article 63 reads as follows:-

“Disqualifications for membership of Majlis-e-Shoora (Parliament):

(1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament) if”

17. The words “from being a member of the Majlis-e-Shoora (Parliament)” used in the opening paragraph of Article 63 are conspicuously missing from the opening paragraph of Article 62. This omission, coupled with the distinct expressions “Qualifications” and “Disqualifications” employed in the said Articles, leaves no room for doubt that a member of Parliament or a Provincial Assembly can be disqualified only on the basis of any of the grounds mentioned in Article 63 of the Constitution and the prop of Article 62 is not available for the purpose. The contention that qualifications and disqualifications are considered together even at the stage of ouster of a member of Parliament is thus not tenable. The expressions qualifications and disqualifications are also not interchangeable. Similarly there is no force in the contention that the provisions of Article 62 are to be read into Article 63 on the strength of clause (s) of Article 63(1) of the Constitution because the said provision only gives

constitutional cover to the disqualifications contained in other laws for the time being in force and has no nexus with the qualifications contained in the Constitution and the law. In any case, the provisions of Article 62 cannot be read into Article 63 at the present stage in view of the intention of the legislature made manifest by the aforementioned omission and the well known general rule of literal interpretation. The contention of the learned counsel for the petitioners with regard to title to office has also not impressed us as it is germane to a writ of *quo warranto* and travels beyond the purview and framework of Article 63 of the Constitution under which the question of disqualification of the respondent is to be determined. The case of Mirza Tahir Beg, cited by the learned counsel for the petitioners, is distinguishable as it deals with disqualifications whereas the central point of the preliminary issue in hand is whether qualifications contained in Article 62 of the Constitution and Section 99 of the Representation of the People Act, 1976 can play any role in the removal of a sitting member of the Parliament.

18. The respondent is a sitting member of the National Assembly and his disqualification in both the References has been sought exclusively on the basis of qualifications as contemplated under clauses (d) (e) and (f) of Article 62 of the Constitution as well as clauses (d) (e) and (f) of Section 99(1) of the Representation of the People Act, 1976, which were waived and abandoned at all the preliminary stages of the pre-election phase and later on an election petition was also not filed. The References are altogether silent about the disqualifications for membership of Parliament contained in

Article 63 of the Constitution and Section 99 of the Representation of the People Act, 1976. In the petitions culminating in these References it has not been alleged even in passing that the respondent has incurred any disqualification subsequent to his election as a member of the National Assembly. We are not persuaded to agree with the view canvassed by the learned counsel for the petitioners that distinction between qualifications and disqualifications is immaterial in the proceedings aimed at unseating a member of Parliament. As mentioned earlier a sitting member of Parliament or a Provincial Assembly can be unseated only on any of the grounds listed under Article 63 of the Constitution. The References against the respondent are certainly not maintainable being entirely based on the qualifications for membership of Parliament envisaged by the Constitution and the law. The preliminary issue is, therefore, decided in favour of the respondent and resultantly both the References are dismissed.

(Justice ® Qazi Muhammad Farooq)
Chief Election Commissioner

(Justice Nasim Sikandar)
Member, Election Commission

(Justice Ahmed Khan Lashari)
Member, Election Commission

Islamabad, the
5th September, 2007