P L D 2014 Supreme Court 305

Present: Iftikhar Muhammad Chaudhry, C.J., Jawwad S. Khawaja and Amir Hani Muslim, JJ

HUMAN RIGHTS CASE NO.29388-K OF 2013: In the matter of

Human Rights Case No.29388-K of 2013, decided on 10th December, 2013.

(Application by Muhabat Shah for recovery of Yaseen Shah, missing persons.)

(a) Actions (in Aid of Civil Power) Regulation, 2011---

----Regln. 9---Constitution of Pakistan, Arts. 9, 10 & 184(3)---United Nations General Assembly Declaration on the Protection of All Persons from Enforced Disappearances, 1992, Art. 1---International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), 2006, Art.5---Human rights case---Exercise of jurisdiction by the Supreme Court under Art. 184(3) of the Constitution in regard to persons confined at internment centers who were allegedly taken away by Army authorities---Enforced disappearance of persons---Crime against humanity---Scope---Illegal detention of persons---Letter issued by superintendent of concerned internment center prima facie showed that 35 persons were taken away from the internment center by Army authorities, therefore such persons were in the custody of Army---Army authorities had no authority to retain custody of such persons---Missing persons in question were confined in internment center under Actions (in Aid of Civil Power) Regulation, 2011, which was applicable to Provincially Administered Tribal Areas---Under the said Regulation an internee/detainee came under the control of civil administration, but the regulation was silent as to how Army authorities were authorized to remove internees without seeking permission of competent authority---Except Actions (in Aid of Civil Power) Regulation, 2011, applicable to Provincially and Federally Administered Tribal Areas, there was no law or authority available to any of the agencies including Inter-Services Intelligence (ISI), Military Intelligence (MI), Intelligence Bureau (IB), Frontier Constabulary (FC), Rangers or police to detain persons in question unauthorizedly---No law enforcing agency could forcibly detain a person without showing his whereabouts to his relatives for a long period, as had happened in the present case---Article 10 of the Constitution provided direct protection to people from enforced disappearance---Enforced disappearance of persons was considered to be a crime against humanity all over the world in view of Art. 1 of United Nations General Assembly Declaration on the Protection of All Persons from Enforced Disappearances, 1992, and Art. 5 of International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), 2006---Supreme Court declared that missing persons in question had been removed by Army authorities from internment centers in Provincially Administered Tribal Area, and whereabouts of such persons would only be known to Army authorities; that Army had no authority to detain missing persons in question illegally, and that there must be some legislation in the country to control unauthorized detention of persons--- Supreme Court directed

that Chief Executive of Federal Government and concerned Provincial Chief Executive and Governor should ensure recovery of missing persons within seven days, and persons responsible for their disappearance should be dealt with strictly in accordance with law; that the Federal Government through the Chief Executive must ensure that in future no enforced disappearances took place--- Human rights case was disposed of accordingly.

(b) Constitution of Pakistan---

----Arts. 4, 10, 10A & 184(3)---Territorial jurisdiction of Supreme Court in cases relating to enforced disappearance of persons---Scope---Such cases would involve enforcement of fundamental rights---Notwithstanding whether the enforced disappearance of any person was in an area where jurisdiction of Supreme Court existed, enforcement of Arts.4, 10 & 10A of the Constitution could not be denied to anyone, therefore the Supreme Court was empowered to assume jurisdiction in (any) such area.

Al-Jehad Trust v. Federation of Pakistan 1999 SCMR 1379 ref.

(c) Constitution of Pakistan---

----Art. 10---International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), 2006, Preamble---Enforced disappearance of persons---Crime against humanity---Although Pakistan had not ratified ICCPED, 2006, but the Supreme Court could apply the said Convention in order to achieve the ends of justice---Enforced disappearance of persons was a crime against humanity and clearly violative of Art. 10 of the Constitution, which provided direct protection from such disappearances.

Forced Disappearance' case dated 1st June, 2007 ref.

Applicant (In person).

On Court's Notice:

Muneer A. Malik, Attorney General for Pakistan, Tariq Mehmood Khokhar, Addl. AGP, Khawaja Muhammad Asif, Defence Minister (Not present)., Maj. Gen. (Retd.) Arif Nazir, Acting Secretary Defence and Ataullah, Superintendent Internment Centre, Malakand.

Dates of hearing: 9th and 10th December, 2013.

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, C.J.---This case was initiated under Article 184(3) of the Constitution of Islamic Republic of Pakistan on an application sent by one Mohabbat Shah resident of village Ghala, Tehsil Katlang, District Mardan addressed to one of us (Jawwad S. Khawaja, J.) stating therein that his brother namely

Yaseen Shah has been missing since 2010 in the joint action against the terrorists by Police and Army. It was further stated that the concerned authorities submitted a list before the Peshawar High Court, Peshawar wherein it was admitted that he (Yaseen Shah) is in an internment center at Malakand. However, his family members were not allowed to have a meeting with him nor were his whereabouts known to the family members. It was prayed that he may be released from illegal confinement. The said application was forwarded to one of us (Chief Justice of Pakistan) upon which following order was passed:--

"Put up in court on 2-8-2013. Notice to Attorney General be issued."

2. Matter was fixed before the Court when on 19-8-2013 learned Additional Attorney General, on instructions stated that Yaseen Shah was not detained in internment centre Malakand. However, efforts were being made to locate him in any other internment centre. However, on 26-9-2013 he informed the Court that according to some information, it was revealed that perhaps Yaseen Shah was an internee confined in some internment centre but location of the centre was yet to be ascertained.

3. On 24-10-2013, the Court directed the Additional Attorney General to produce the missing persons first of all before this Court and thereafter, if he was required to be kept in internment centre, then subject to the rules/regulations, he should be dealt with. Despite clear directions, Yaseen Shah was not produced before the Court. But a letter issued by Superintendent Judicial Lock Up Malakand addressed to the Additional Registrar, Peshawar High Court, Peshawar which was placed on record by the Additional Attorney General, contents whereof are reproduced hereinbelow:--

(1) While Taking Charge of Internment Center Malakand on 19-9-2011, 66 Nos. of undeclared Internees including Yaseen Shah son of Qabil Shah r/o Katlang were handed over by the Army authorities without any Internment orders, the list of which was submitted to the Worthy Inspector General of Prisons Khyber Pakhtunkhwa Peshawar vide No.1954 dated 29-11-2011.

(2) Later on, 31 were declared as Internees by the Interning authority and Internment orders of these Internees were handed over to the undersigned and the rest of 35 Nos. of other detenues who have not been declared as Internees by the Interning authorities including Yaseen Shah son of Qabil Shah r/o Katlang Distt: Mardan were shifted out of Internment Center Malakand by the Army authorities.

(3) The list of 31 Internees who are now confined in Internment Center Malakand has already been submitted to Worthy Inspector General of Prisons Khyber Pakhtunkhwa Peshawar vide this office No.1140 dated 5-7-2012 (Photo Copy attached).

(4) The said detenu namely Yaseen Shah son of Qabil Shah is not confined in Internment Center Malakand and his whereabouts is best known to Army authorities.

The Superintendent, Judicial Lock up Malakand also furnished a list of undeclared internees who were taken away by the Army Authorities, which is reproduced hereinbelow:--

Sr. No.	Name with parentage	Declared/ Undeclared internees	Remarks
1	Shah Hussain son of Umar Khitab	Undeclared	The charge of internment centre Malakand was taken on 4-2-2012 by the Army authority through Naib Subidar Amanullah Beg since then the whereabout of these undeclared Detenues are not known to Jail authorities.
2.	Sultan Zeb son of Aurangzeb	Undeclared	
3.	Ijaz son of Miraj Muhammad	Undeclared	
4.	Qamar Zeb son of Awal Khair	Undeclared	
5.	Abdar Ali son of Yar Muhammad	Undeclared	
6.	Nawab Ali son of Abdul Matin	Undeclared	
7.	Khalid-ur-Rehman son of Jamil-ur-Rehman	Undeclared	
8.	Yousaf son of Akhtar Munir	Undeclared	
9.	Hashim son of Ghulam Rasool	Undeclared	
10.	Muhammad Sabir son of Pir Said	Undeclared	
11.	Abdu Bakar son of Liaq-ur-Rehman	Undeclared	
12.	Hamid Ayoub son of Muhammad Ayoub	Undeclared	
13.	Habib Ullah son of Hazrat Muhammad	Undeclared	
14.	Amjid Hussain son of Saeed Gul	Undeclared	
15.	Akhtar Ali son of Naik Muhammad	Undeclared	
16.	Abdul Wadood son of Abdul Qayoom	Undeclared	
17.	Zakir Ullah son of Majid Ullah	Undeclared	

18.	Naeem-ur-Rehman son of Sher Zada	Undeclared	
19.	Muhammad Ilyas son of Muhammad Sadiq	Undeclared	
20.	Abdul Salam son of Arshed Ali	Undeclared	
21.	Numan son of Abdul Waris	Undeclared	
22.	Sardar Ali son of Rozi Mand	Undeclared	
23.	Rahmat Ullah son of Naser Ullah	Undeclared	
24.	Zakir Khan son of Akhtar Gul	Undeclared	
25.	Faisal Khan son of Tahir Khan	Undeclared	
26.	Alam Khan son of Rahmat Khan	Undeclared	
27.	Nadar Khan son of Said Rahman	Undeclared	
28.	Kalim Khan son of Hazrat Hussain	Undeclared	
29.	Haroon Rasheed son of Fazal Ghafoor	Undeclared	
30.	Rasheed Ahmad son of Shad Muhammad	Undeclared	
31.	Yaseen Shah son of Qabil Shah	Undeclared	
32.	Sartaj Hussain son of Khan Sherin	Undeclared	
33.	Muhammad Khan son of Yousaf Khan	Undeclared	
34.	Sajjad Khan son of Bkhti Rawan	Undeclared	
35.	Zafar Khan son of Faqir Khan	Undeclared	

4. From the above, it is evident that 34+1=35 missing persons, named hereinabove, are in custody of the Army. Therefore, the Army authorities are bound, under the law, to produce them before the Court of Law. They have no authority to retain their custody as such.

5. The matter was taken up on various dates and mostly on every date of hearing the learned Additional Attorney General assured the Court that Yaseen Shah will be produced before the Court. However, despite repeated directions of the Court, Yaseen

Shah was never produced. It is pertinent to note that the applicant Muhabat Shah appeared before this Court on every hearing but to no avail as he never received any information about his brother. Thus, the Ministry of Defence was involved to ensure that Articles 9 and 10 of the Constitution are enforced. In the meanwhile Kh. Muhammad Asif took over the charge as Defence Minister and appeared before the Court. It was informed by the Ministry of Defence that Yaseen Shah could not be traced. Moreover, two individuals mentioned at Serial Nos.22 and 27 of the list reproduced above, had died during internment and their dead bodies were handed over to their relatives.

6. On the next day i.e. 6-12-2013, the Defence Minister in consultation with the learned Attorney General furnished a summary regarding 35 missing persons, which reads as under:--

(1) Persons living freely and can be produced (7 in numbers)

(2) Internees (2 in numbers)

(3) Died due to natural causes (2 in numbers)

(4) Proceeded abroad (1 in number)

(5) Those regarding whom there is unsubstantiated information (5 in numbers)

(6) Reported to be in South and North Waziristan (5 in numbers)

(7) Reported to be in Kunar, Afghanistan (8 in numbers)

(8) Not-known (7 in numbers)

As far as Yaseen Shah, brother of the applicant is concerned, he was statedly shown in the category of the persons "not known". However, it was directed that 7 persons who are living freely and the two persons/interns mentioned at Sr. No.2 reproduced above and 5 persons with unsubstantiated information for which it has been claimed that information can be gathered in a day or two, be produced in Camera before one of us (Mr. Justice Amir Hani Muslim) on 7-12-2013 at 10-00 am. It was further directed that the persons mentioned in the remaining categories be produced on 9-12-2013.

7. As per directions only 7 missing persons were produced before one of us (Mr. Justice Amir Hani Muslim) in Chambers on 7th December, 2013. The Honourable Judge, on having observed the relevant formalities, got them identified through their relatives as well as with the help of Mr. Ataullah, Superintendent Internment Centre Malakand who appeared and stated that he identified them as per the record maintained in the Internment Centre. Their complete credentials etc. were sealed in an envelope at the request of the Acting Secretary Defence who stated that this was for the sake of their safety.

8. It may be noted that Acting Secretary Defence has no direct knowledge about these affairs as being posted in the Defence Ministry he seeks instructions from the concerned quarters which is Armed Forces or any other authority which is supposed to report to the Defence Secretariat; meaning thereby that he had also knowledge about responsible officers/officials as well. Be that as it may, the order dated 6th of December, 2013 was not complied with in letter and spirit for one reason or the other which justifications are not acceptable to us as we have noticed that on the basis of the record, the factum of removing 35 persons from Malakand Internment Centre by the Army has been established as this fact has been mentioned in the letter dated 7-12-2012 filed in Court and the name of Yaseen Shah son of Kabal Shah, on whose behalf his brother Mohabbat Shah is running from pillar to post in pursuit of justice. The learned Attorney General has stated on 24-8-2013 that Yaseen Shah is an undeclared internee, and he sought time to seek further instructions in this behalf from the concerned authorities. On this, directions were made to the learned Attorney General to produce him before the Court with further observation that thereafter if he is required to be kept in internment centre then subject to the rules/regulations he should be dealt with. It is a fact that despite mentioning his name to be one of the persons who were taken away by the Army personnel as per letter received from Mr. Ataullah, he has not been produced.

9. It is important to note that the Court exercised judicial restraint. However, one should not be under a wrong impression that coercive order cannot be passed. Developments in this case dated 5-12-2013 highlighted the importance of the issue when during the hearing a phone call was received by the Defence Minister from the Prime Minister of Pakistan and with the permission of the Court, he attended the call. He appeared again along with the learned Attorney General and sought adjournment till the next date of hearing i.e. on 6-12-2013 at 10-30 a.m. for giving good news. The involvement of the Prime Minister of the country in the instant matter is not an ordinary development as he is the Chief Executive. The Prime Minister is the head of the Executive Government and enjoys authority through the Cabinet in terms of Article 90 of the Constitution. The Constitution presupposes that he is fully acquainted in respect of the issues relating to the human rights particularly in respect of the serious issue of the missing persons from all over Pakistan including Balochistan and Khyber Pakhtunkhwa etc. The Court was confident that the involvement of the highest Executive Authority would be a step forward to resolve the issue not only relating to the case under discussion but also to identical matters reference to which has been made hereinbefore. It may also be observed that even earlier on 3rd December, 2013 the learned Attorney General who was appearing along with Khawaja Muhammad Asif, worthy Defence Minister requested for a "little time" because the Ministry of the Defence shall definitely show progress and the request so made was entertained hoping that the issue of the missing persons would be resolved.

10. Besides, a list of undeclared internees was filed in Court on 26-11-2013 by the Superintendent Malakand Jail wherein in the Column of Remarks it was categorically mentioned that "the charge of internment centre Malakand was taken on 4-2-2012 by the Army authorities through Naib Subedar Amanullah Baig since then the whereabouts of these undeclared detenues is not known to the Jail Authorities." It is interesting to note that at initial stage of the hearing of this case, on behalf of the

Defence Ministry there was complete denial regarding the names of undeclared internees including Yaseen Shah noted hereinbefore but when the case proceeded gradually and the learned Additional Attorney General made a statement seeking time for further instructions till then no admission was made but subsequently, it was admitted by informing that out of this list one internee has left for Saudi Arabia and is living over there, whereas two had passed away in the Internment Centre of Lakki Marwat. This admission itself was sufficient to prima facie, conclude that the Army authorities were fully aware about the removal of these 35 persons from Malakand Internment Center through Naib-Sobedar Amanullah Baig. We are confident that if the matter is further probed into strictly in accordance with law both by the Federal and the Provincial Government the names of some of the other Army officers shall also be surfaced who had removed them from the Internment Centre.

11. Five out of the 35 missing persons were stated to be with unsubstantiated information and it was stated on 6-12-2013 before the Court that this information will be gathered in one or two days but the same has not been done so far. Similarly, the Defence authorities persuaded the Court to believe that out of 35 persons, 8 persons had gone to Kunnar Province of Afghanistan whereas information regarding 7 persons (mentioned as 'Not Known') is not believable in view of the material evidence referred to hereinbefore and admissions made by the Defence authorities from time to time. It is hard for us to believe this statement because we are of the view that the persons who have been confined in the Internment Centre under Actions (in Aid of Civil Power) Regulation, 2011 (a regulation to provide for actions in aid of civil power in the Provincially Administered Tribal Areas-PATA) promulgated on 27-6-2011 shall be applicable in Provincially Administered Areas and an internee supposedly comes under the control of Civil Administration. The regulation is silent as to how the Army authorities are authorized to remove the internees without seeking permission of the competent authority sending a Sobedar or some other officer without even disclosing the reasons for which they are being removed from the Internment Centre. We do not say that there should not be any procedure for undertaking such exercise unless something in substance is placed before the Court. We also would not in agreement with the contention that they were not illegally removed from the Internment Centre by the Army authorities. Prima facie, the conclusion definitely can be drawn that all these 35 persons were undeclared internees and they remained in the Internment Centre and were removed from there by the Army authorities as indicated in the letter of Superintendent Internment Centre, Malakand. Except producing 7 persons before one of us (Mr. Justice Amir Hani Muslim) in Chambers on 7-12-2013 no explanation has been offered for other internees. When we inquired from the Secretary Defence who appeared along with the learned Attorney General for Pakistan to satisfy the Court about the authority of the Army personnel for removing such persons forcibly from the Internment Centre, he replied that as the Army has been given powers under Article 245 of the Constitution, therefore, in order to control the Internal and external aggressions such powers can be exercised. However, the learned Attorney-General conceded that Article 245 of the Constitution is not applicable in such circumstances but the Army is exercising its powers under Actions (in Aid of Civil Power) Regulation, 2011 (A regulation to provide for actions in aid of civil power in the Provincially Administered Tribal Areas) as well as Actions (in Aid of Civil Power) Regulation, 2011 (A regulation to provide for actions in aid of civil power in the

Federally Administered Tribal Areas) both promulgated on 27-6-2011. We agreed with the learned Attorney General but would not comment as far as the vires of these two laws are concerned because there are two petitions already pending for adjudication, therefore, we reserve our comments in this behalf.

12. It is also to be noted that this is not only one case where the Courts under the constitutional obligations directed the concerned authorities to produce disappeared persons. According to the record which has been made available there are about 721 cases pending in this Court and the Provincial High Courts breakup of which is reproduced as under:--

Sr. No.	Name of Court	No. of Cases
1.	Supreme Court of Pakistan	44 on Judicial side
2.	Supreme Court of Pakistan H.R. Cell	345
3.	Peshawar High Court	137
4.	Islamabad High Court	1
5.	Lahore High Court	11
6.	Sindh High Court	165
7.	Balochistan	18

When we inquired the learned Attorney General if there are any legal instructions empowering the Army authorities/Law Enforcing Agencies to detain such persons he stated that the office of the Attorney General has recommended the Federal Government for promulgating such law but so far no progress has been made in this behalf although he submitted that he, on the instructions of the competent authority, has sent draft recommendations for such legislation.

13. Today, at the commencement of the hearing of this case, the learned Attorney General has made a statement of behalf of the Defence Minister that a bill to legislate the law to cover the issue of unauthorized/ forced disappearances shall be put up in the current session of the National Assembly. In view of the statement on behalf of the Defence Minister, one can conveniently infer that except FATA/PATA Regulation in respect of the issues relating to the Khyber Pakhtunkhwa there is no law or the authority available to any of the Agencies including ISI/MI/IB/ FC/Rangers or the Police to detain a person unauthorizedly. However, as far as the Police is concerned, it exercises its jurisdiction by registering an F.I.R. to involve such like people. Otherwise, no Law Enforcing Agency can forcibly detain a person without showing his whereabouts to his relatives for a long period as is evident from the details of the cases which are pending before the Courts noted hereinbefore.

14. The learned Attorney General has also raised an objection with regard to the jurisdiction of this Court but frankly conceded that the Malakand Internment Centre falls within the Provincially Administered Tribal Areas where jurisdiction of the High Court and the Supreme Court under the Supreme Court and High Court (Extension of Jurisdiction to certain Tribal Areas) Act, 1973 stands extended. We have pointed out to him that even if there is a case relating to the disappearance of a person in the areas other than the Provincially Administered Areas the question before this Court is in

respect of enforcement of fundamental rights. In this behalf reference of Article 10 of the Constitution may not be out of place of mention which reads as follows:--

"10. Safeguards as to arrest and detention.---(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the nearest Magistrate, and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding three months unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of three months, unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.

Explanation I.---In this Article, "the appropriate Review Board" means,

(i) in the case of a person detained under a Federal Law, a Board appointed by the Chief Justice of Pakistan and consisting of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court: and

(ii) in the case of a person detained under a Provincial Law, a Board appointed by the Chief Justice of the High Court concerned and consisting of a Chairman and two other persons, each of whom is or has been a Judge of a High Court.

Explanation II.---The opinion of a Review Board shall be expressed in terms of the views of the majority of its members.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, within fifteen days from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:

provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.

(6) The authority making the order shall furnish to the appropriate Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents, is produced.

(7) Within a period of twenty-four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:

Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity.

(8) The appropriate Review Board shall determine the place of detention of the person detained and fix a reasonable subsistence allowance for his family.

(9) Nothing in this Article shall apply to any person who for the time being is an enemy alien."

The above provisions while read with Articles 4 and Article 10A of the Constitution, will definitely make it clear that notwithstanding whether the enforced disappearance of any persons is in the area where the jurisdiction of this Court, enforcement of the fundamental rights noted hereinabove cannot be denied to anyone. Therefore, the Supreme Court, being guardian of the fundamental rights of the citizens, is empowered to assume its jurisdiction. In this behalf we will also rely upon another judgment reported Al-Jehad Trust v. Federation of Pakistan (1999 SCMR 1379) wherein a direct question of applicability for jurisdiction for enforcement of fundamental rights in respect of the citizens of northern areas was resolved by this Court which reads as follows:--

10. Adverting to Ch. Muhammad Frooq's second contention that this Court has no jurisdiction to entertain the above Constitution Petitions, it may be observed that the grievance of the petitioners is that the Federation is not discharging its Constitutional duty by denying the Fundamental Rights, to the people of Northern Areas. In our view, since the Federal Government is situated within the territory over which this Court admittedly has jurisdiction, the above Constitution Petitions are maintainable. It cannot be deemed that the question as to whether the people of Northern Areas have the right to invoke Fundamental Rights under the Constitution, is a question of public importance relating to the enforcement of Fundamental Rights contained in Chapter 1

of Part II of the Constitution and hence this Court has competently entertained the above Constitution Petitions under Article 184(3) of the Constitution.

12. it is an admitted position that the people of Northern Areas have the citizenship of Pakistan, inasmuch as they have been issued Pakistani Identity Cards and Passports. They have reserved seats in Pakistani educational institutions and the Federal Government etc. It has also been admitted that the Federation exercises de jure administration in the Northern Areas. In the alternative, it has been pleaded by the Federation that the doctrine of de facto administration applies and the Pakistan has been exercising a continuous effective occupation of the Northern Areas for the past fifty years with the intention to act as sovereign. It has also been pleaded that the international community generally and the United Nations Organisation in particular, recognises the above position. It may also be pointed out that most of the Pakistani statutes have been made applicable by the Government of Pakistan to the Northern Areas through various notifications issued from time to time commencing from 1947 to 1999, the Pakistan Citizenship Act, 1951 (Adaptation) Order, 1981 was made applicable to Northern Areas on 20-6-1979 and 30-9-1981 vide notification by the Deputy Secretary, Kashmir Affairs/Northern Areas.

13. In the above background, it is not understandable on what basis the people of Northern Areas can be denied the fundamental rights guaranteed under the Constitution ..

14. Since most of the Pakistani statutes have been made applicable to Northern Areas including Citizenship Act as stated above, we are of the view, that the people of Northern Areas are citizens of Pakistan, for all intents and purposes. The above distinction between the two categories of the above fundamental, rights of the Constitution is not material. They, as the citizens of Pakistan, like any other citizen have the right to invoke any of the above Fundamental Rights, but they are also liable to pay taxes and other levies competently imposed"

15. Thus, objection raised by the learned Attorney General is not entertainable. Now turning towards another important aspect of the case namely that despite directions commencing from 5th August 2013 onward during course whereof Worthy Defence Minister was involved and the Prime Minister/Chief Executive also came into contact through Defence Minister, no solution has been put forth to resolve the controversy of producing the missing persons who at present number 26 as per the list produced by the Defence Ministry. In the face of these apparently Kafkaesque workings of the concerned authorities, there seems to be no remedy for those who are running from pillar to post in the pursuit of justice.

16. As the Federal Government through Prime Minister/Cabinet working through Chief Executive in terms of Article 90 is very much in the picture, it is their duty to ensure the production of these persons and also to ensure that all those officers who are responsible for their removal and have failed to account for this so far should be dealt with in accordance with law. The acting Defence Secretary, though he apparently did his best, could not achieve the object for which the jurisdiction of this Court was

invoked. Perhaps for the reasons we have already noted, the non-cooperative stance in respect of the persons whose whereabouts we have no knowledge, as we asked to show the names of the persons who are responsible, The Secretary Defence could not give a satisfactory answer regarding the whereabouts of the missing persons, saying that there are so many persons in several units and that efforts to recover these persons from their addresses will take time as the stance of the Defence Minister is that they were not in their custody, which subsequently has been proved incorrect as it has been discussed hereinabove. Not only in the instant case but in all the other cases relating to missing persons the intervention of the Federal and Provincial Governments is imperative. In our own law under the P.P.C. as well as the customary international law codified in the United Nations General Assembly Declaration on Enforced Disappearance 1992 and the Convention against Enforced Disappearance 2006, details whereof have been reproduced hereinbelow, enforced disappearance has been considered to be a crime against humanity all over the world. Article 1 of the 1992 UN Declaration on Enforced Disappearance states that:--

"1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the UN and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life."

Article 5 of the 2006 Convention states as under:--

"The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."

17. It may not be out of context to note that in somewhat identical circumstances the Supreme Court of Nepal in the Forced Disappearances' case dated 1st June, 2007 applied the principles enshrined in the Convention against Enforced Disappearance, 2006 despite the fact that Nepal had not ratified the same. Relevant portion of the said judgment is reproduced hereinbelow:--

"There is no problem in implementing the principles laid down in the Disappearance Convention for the sake of respecting and promoting the life, dignity and freedom of Nepal's citizens. Therefore, our legal system can also include these principles as it is beneficial for us. It is not objectionable in both our law and practice; rather it should be seen as essential."

It is pertinent to note that Pakistan has also not ratified this Convention. The Supreme Court of Nepal applied the principles of the 2006 Convention in light of the right to life guaranteed in the Interim Constitution of Nepal, 2007. Our Constitution at Article 9 lays down the right to life which has received an expansive interpretation from this Court. Moreover, Article 10 provides direct protection from enforced. disappearances. Thus the crime against humanity of enforced disappearances is clearly violative of the Constitution of Pakistan. Therefore, this Court can also apply the principles enshrined in the 2006 Convention in order to achieve the ends of justice. Likewise there are cases from international tribunals such as the UN Human Rights Committee, the Inter-American Court of Human Rights and the European Court of Human Rights as well as other national courts, most notably the Constitutional Courts of Peru and Colombia, where the Courts were forced to issue directions to the concerned authorities for effecting recovery of the missing persons and also dealing with those persons who are responsible for their enforced disappearance.

18. We may point out at this juncture at the cost of repetition that restraint was being exercised in view of longstanding practice and knowing the consequences because such action by the Court is likely to affect not only the persons who are directly or indirectly involved. The Executive Government should also be held responsible because it is their duty to ensure that fundamental rights of the citizens are protected. If any such activity is going on, it must be stopped. If this is not done, the Court may also ascertain the intention of the Executive, that why it is not discouraging such practices which amount to serious crimes against humanity. Thus, for the foregoing reasons, we declare that:--

(1) Army authorities in PATA have removed 35 persons from Malakand Internment Centre, out of which only 7 persons have been produced. As far as rest of them are concerned, their whereabouts would only be known to the army authorities. They had no authority to detain them illegally. The Chief Executive of the Federal Government, Chief Executive and the Governor of the Province of Khyber Pakhtunkhwa are directed to immediately proceed with this case and ensure recovery of these persons within seven days and submit report to Registrar for our perusal. The persons who are responsible for the same, should be dealt with strictly in accordance with law.

(2) Presently there is no law for unauthorizedly detaining undeclared internees except the Provincial Law which is applicable in Khyber Pakhtunkhwa. As far as rest of the country is concerned, there must be some legislation to control such like activities and the Federation through Chief Executive must ensure that in future no enforced disappearances take place,

Petition stand disposed of with the above observations.

MWA/H-23/SC Order accordingly.

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