

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

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
(10)	14.03.2024	<p>Sardar Latif Khan Khosa, Mr. Muhammad Shoaib Shaheen and Ms. Suzain Jehan Khan, Advocates for the petitioner. Mr. Ahmed Junaid, State Counsel. Barrister Munawar Iqbal Duggal, Additional Attorney General, Mr. Shakeel Ahmad Shahzad, Deputy Attorney General, and Mr. Aqeel Akhtar Raja, Assistant Attorney General. Mr. Irfan Qadir, ASC, alongwith Major General (R) Hafeezur Rehman, Chairman, Mr. Muhammad Khurram Siddiqui, Director General (L&R), Mr. Muhammad Naeem Ashraf, Director (Litigation), Ch. Adil Javed, Assistant Director (Litigation), and Syeda Itrat Batool, Law Officer, PTA. Mr. Faisal Siddiqi, ASC, for PBC. Mr. Aitzaz Ahsan, ASC/Amicus, alongwith Barrister Zunaira Fayyaz, Advocate. Barrister Ehsan Qazi, Advocate alongwith Mr. Muhammad Saleem, Chairman, and Mr. Tahir Farooq Tarar, Head Legal, PEMRA. Pir Muhammad Masood Chishti, Advocate for PBC. Mr. Ehsan Malik, Advocate for APNS. Mr. Asad Ladha, Advocate for CMPAK. Mr. Sahibzada Uzair Hashim and Mr. Ali Ahmed Shah, Advocates for Multinet Wateen Telecom. Mr. Faisal Bin Khurshid, Advocate. Mr. Mohammad Irshad, Advocate for Telenor. Mr. Mozam Ali Malik, Assistant (Litigation), National Assembly Secretariat, Islamabad. Mr. Shehzad Elahi form JAZZ. Mr. Ayaz Khan, Additional Director (Cyber Crime), Mr. Sarfraz Khatana, Additional Director (Law), and Mr. Muhammad Waqas Rasool, Deputy Director (Law), FIA. Lt. Jamshed Gull, Law Officer, Ministry of Defence. Mr. Tahir Kazim, Law Officer, IGP's office and Mr. Tanveer Ahmed, Sub-Inspector, Police Station Kohsar, Islamabad.</p>

The learned counsel for Pakistan Telecommunication Authority (PTA), Mr. Irfan Qadir, ASC, submitted that Chairman PTA is present in Court and the affidavits sought from Chairman PTA and Members of PTA pursuant to various order passed in Writ Petition No.1805 of 2023 are ready and will be filed in the Court today. He submitted that while no formal objection or allegation of bias was being made, in view of my understanding of telecom laws, he had inquired and had found out on further inquiry that I had represented PTA in various cases in the past. He therefore invited me to consider whether recusal may be in the interest of justice. He further submitted that the provisions of various statutes, including Section 54 of the Pakistan Telecommunication (Re-Organization) Act, 1996, authorize the Federal Government to permit lawful interference (LI) on grounds of National Security as well as to prevent offences from being committed. Consequently, PTA required all licensees to comply with the requirements of LI while installing and operating telecom systems. He submitted that as the Federal Government had not instructed PTA with regard to undertaking LI, the framework for LI currently lay idle and was not being used by PTA. He submitted that Writ Petition No.1805 of 2023 had become infructuous and the Court need not adjudicate its subject-matter.

2. The Chairman PTA was asked to assist the Court as to whether any instructions were being issued to licensees with regard to LI and whether any agency had been authorized or designated to use telecom systems for purposes of LI or to record audios or surveil citizens using telecom systems. He answered in the negative. He submitted that there was a legal requirement to

ensure that licensees were LI compliant as a matter of international practice. However, PTA had neither facilitated any agency or entity to undertake LI nor allowed any such agency or entity to use the LI infrastructure to surveil citizens. He submitted that the issue of illegal surveillance and the means of illegally acquiring data by bugging and cloning cell phones was a universal phenomenon that all countries were struggling to deal with. He submitted that Israel had created something called Pegasus Software, which was widely being used for surveillance. He was again asked to confirm that PTA was neither aware of any agency or entity using the LI framework made available by telecom licensees to get access to private information and data of telecom consumers nor had facilitated and/or allowed any agency or entity to do so. He again answered in the negative.

3. The learned counsel for JAZZ, Mr. Shehzad Elahi, ASC, submitted a report in the Court and further stated that all telecom licensees were required to make infrastructure available to PTA to enable any authorized or designated agency to have access to voice and data travelling through telecom systems. Creation and provision of such infrastructure was a license requirement for all telecom licensees and the manner in which the LI infrastructure for access was created was such that even that telecom licensees were unaware of its use and had no ability to monitor as to whether PTA or any authorized or designated agency was using such LI infrastructure to monitor calls or data. He sought further time to provide more technical details as to how such infrastructure was made available to PTA. When asked as to the manner and the legal framework under which telecom operators make private information of consumers available to law enforcement agencies, even where

such demands are legitimately initiated to fight crime and/or terror etc. He sought further time to file an additional report in such regard.

4. The learned counsels for the other telecom operators also sought time to file their reports.

5. The learned counsel for Pakistan Electronic Media Regulatory Authority (PEMRA), Barrister Ehsan Ali Qazi, Advocate, assisted by Chairman PEMRA appeared and submitted that in view of the judgments of the Supreme Court, PEMRA was unable to take penal action against broadcast of private information, including such information that has been acquired illegally such as leaked voice calls, etc. He submitted that PEMRA could pass a prohibition order but do nothing else. When asked as to whether any prohibition orders were passed recently where certain illegally acquired private information such as a leaked voice call was being repeatedly broadcasted, his answer was in the negative.

6. The learned counsel for Pakistan Broadcasters Association (PBA), Mr. Fasial Siddiqi, ASC, submitted that the subject-matter had not become infructuous as it entailed the question of privacy of citizens and the manner in which it continued to be breached. And PBA welcomed the adjudication of such issue by the Court. He formulated six-questions that need to be addressed by the Court, which need not be documented in the present order as Mr. Siddiqi is continuing his arguments and will recommence the same on the next date of hearing. He pointed out that while the Court was hearing two petitions that were clubbed together, the parties in Writ Petition No.1805 of 2023 were not impleaded as parties in the present petition, including PBA, and this was creating some

confusion as to the petition in relation to which PBA was required to file a report and comments.

7. The learned counsel for Pakistan Bar Council (PBC) had to leave during the hearing and his representative submitted that he will make his arguments on the next date of hearing.

8. The instant petition has not become infructuous. The petition has been brought by a citizen, whose private phone conversation with her attorney was leaked on social media and then was broadcast on main stream media and also reported in print media. The foundational question therefore remains the right of privacy and dignity of the petitioner and other citizens and the scope of authority of the State to surveil citizens, together with the obligations of the State to protect the privacy and dignity of citizens against illegal surveillance. As a grievance has been brought before the Court by the petitioner, the proceedings in the case are not *suo moto*. In order to adjudicate the subject-matter for the Court, the Court has impleaded parties as respondents in order to ensure that all the necessary and proper parties are before the Court and are able to assist the Court before a judgment is rendered. As the Federal Government has unfortunately not been forthcoming with candid and thorough assistance, the Court has erred on the side of caution while impleading necessary and proper parties to be able to render an informed decision. In order to ensure that nothing gets lost in translation in this important constitutional matter, the Court has asked heads of key statutory organizations and security agencies such as PTA, PEMRA, Intelligence Bureau (IB) and Federal Investigation Agency (FIA) to appear and assist the Court.

9. Likewise, as the subject-matter requires determination of the extent to which certain information can be allowed to be disseminated on the media, the Court has impleaded Pakistan Federal Union of Journalists (PFUJ), PBA and All Pakistan Newspaper Society (APNS) as parties to assist the Court as to the Code of Conduct that applies to the media. Similarly, as the subject-matter involves the question of attorney-client privilege, the Court has also impleaded PBC as a proper party.

10. As the present petition is being heard alongwith Writ Petition No.1805 of 2023, inadvertently some of these necessary and proper parties have not been impleaded in both petitions. It is therefore clarified that other than the parties that have already been impleaded PBC, BPA, APNS, PFUJ and all telecom operators are being impleaded by this Court as respondents in the instant petition. The petitioner will file an amended memo of parties reflecting the same.

11. It is further clarified that under the Code of Conduct applicable to judges, the knowledge of a legal subject by virtue of the judge having practiced in such area as a lawyer is not a disqualification. This Court has explained to the learned counsel for PTA, Mr. Irfan Qadir, ASC, that during my career as a lawyer I worked in the area of telecom laws and represented both PTA as well as telecom operators in various matters. Such representation of clients, which included the regulator as well as the licensees, has neither made me privy to any confidential information that creates any bias in relation to the subject-matter before the Court in the present petitions nor has resulted in any personal friendships with any officials involved in the present case that would create cause for recusal. Judges of constitutional courts swear an oath to do

justice to all manner of people in accordance with law without considerations of fear and are obliged to discharge such obligation to the best of their abilities. Failure to do so would amount to dereliction of duty. Merely because surveillance whether undertaken by state agencies or private entities is a sensitive matter involving questions of state security does not mean that the underlying constitutional questions involving fundamental rights are not justiciable. In such view of the matter, the question of recusal therefore does not arise.

12. Let PTA, telecom licensees and all others respondents file their reports to the extent that such reports have not been filed as yet. Let the telecom operators also have their technical teams make a presentation to the court on the next date to explain how the LI infrastructure has been made available to PTA and how other consumer information is shared with PTA or law enforcement or security agencies. Further, let PBA, APNS and PFUJ constitute a committee and co-opt the Association of Electronic Media Editors and News Directors (AEMEND) within such committee to put together suggestions that would enable the media to undertake voluntary self-regulation in order to comply with the Code of Conduct prescribed by PEMRA. The Court would request Mr. Faisal Siddiqi, ASC, to facilitate such effort and furnish a report put together by such committee within a period of four weeks. Let Chairman PEMRA also file a report explaining what system can be put in place to prohibit broadcast of private and illegally acquired information and what can be done to prevent rebroadcast of such information if its gets broadcast at all.

13. Let the matter be fixed for 29.04.2024. The hearing will commence with the arguments of the learned counsel for PBA, Mr. Faisal Siddiqi, ASC.

**(BABAR SATTAR)
JUDGE**