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**Justice Faez Isa: fighting the fog**

The short order of the Supreme Court of Pakistan – of April 26, 2021 – rendered by a majority of six with four honourable judges dissenting, in the review petitions filed by Justice Faez Isa, Mrs Sarina Isa, the Pakistan Bar Council, the Supreme Court Bar Association and the various high court bar associations across the country has been hailed as a triumph by the overwhelming majority of the serious-minded in the legal profession.

It has been bemoaned by those close to the government as a victory of sentiment over substance (see Raoof Hasan’s article on these pages on April 30), and has been spun viciously on social media as the grant of immunity by a set of brother judges to one of their own. It is said that the constitutional authority of the Supreme Judicial Council headed by the honourable chief justice of Pakistan has been constrained. This is a sombre moment. One must begin with the prosaic facts.

A residential property was purchased by Mrs Isa in London in 2004. Two further properties were purchased by Mrs Isa and her adult children in 2013. The total purchase value of the properties came to about 750,000 pounds. At the relevant times, funds were transferred through official banking channels from a foreign currency account in Mrs Isa’s name in Karachi to a foreign currency account in her name in London. Given the currency exchange rates at the relevant times, this amount translates into one hundred and four million rupees. Justice Isa, prior to his elevation as chief justice of the Balochistan High Court in 2009, was a partner in one the most successful law firms in the country. He, however, has maintained throughout that the properties are owned independently by his wife and adult children.

Mrs Sarina Isa owns ancestral, irrigated agricultural land totaling 173 acres in Sindh as well as a substantial holding of land in Dera Murad Jamali, District Naseerabad, Balochistan. This land forms part of a larger family holding that was cultivated and controlled by her father till his passing away last year. Mrs Isa’s aggregate tax exempt agricultural income between 2004 and 2013 at the average rate of about Rs40,000 per acre per year, accumulated exempt income prior to 2004, along with tax paid rent from her commercial properties, salary income from her job at the Karachi American School and proceeds of sale of properties owned in Karachi is more than sufficient to account for the 104 million rupees needed for the acquisition of the 750,000 pounds that were transmitted by her to her account in London.

In order to maintain a charge against Mrs Isa, and to implicate Justice Isa, the Federal Board of Revenue (FBR) has chosen to take the position that no income at all accrued to Mrs Isa from her considerable holdings of agricultural land. This would be an astonishing position but for the malice that has prompted it. A report filed by the FBR (the ‘FBR Report’) with the Supreme Judicial Council as directed by the majority order of the Honourable Supreme Court of Pakistan – dated 19 June 19, 2020 – that has now been set aside in review, had justified ignoring the tax-exempt agricultural income claimed by Mrs Isa on the ground that she had not declared this income in her income tax returns for her other taxable income.

Whether or not Mrs Isa was required to declare her tax-exempt agricultural income in her income tax returns is a matter that has been the subject of some debate. Mrs Isa’s tax adviser Mr Rehan Naqvi, generally accepted as the leading tax expert of his era, had advised her against such declaration. Be that as it may, non-declaration of tax-exempt agricultural income had no tax payment consequences and the fact of non-declaration does not result in the extinguishment of the income.

The FBR Report, declared non est by the order of April 26, had also refused to accept the 750,000 pounds transmitted by Mrs Isa as the source for the purchase of the London properties on the ground that the bank officer making the transfers had described the purpose of the transfers to be ‘support for the children’ and not ‘purchase of properties.’ This is at best laughable. There was no bar at the time on the transmission of funds overseas for any purpose. Declaration of a purpose by the bank was an administrative measure that was executed in broad terms.

The London properties are in the names of Mrs Isa and her two children. Mrs Isa’s children, while studying or in employment overseas, were not tax residents for much of the period since 2003 and were not required to file returns in Pakistan. Mrs Isa filed returns when she had taxable income in Pakistan. Mrs Isa’s position has been that she was not required to declare her foreign assets prior to 2018. It was only after the insertion, through the Finance Act 2018, of section 116A in the Income Tax Ordinance, 2001 that resident taxpayers were required to file a foreign income and assets statement. Mrs Isa complied with the law and filed foreign wealth statements for the year 2018 and for the year 2019.

It would appear that during the latter half of the year 2018 the government decided to target Justice Isa and look for something to pin against him. It is clear that no general probe of the superior judiciary was initiated. Justice Isa was the solitary target. He had already delivered his judgment about the apparent facilitation of the Tehreek-e-Labbaik dharna in 2017. The lack of any mention of the London properties by Mrs Isa, prior to her filings for the tax year 2018, caught the eye of the sleuths engaged for this purpose. In normal circumstances, a notice under the tax law could have been issued to Mrs Isa asking her to explain her acquisition of property in London. In normal circumstances, the explanation based on the bank transfers and the claim of agricultural income commensurate to the agricultural land owned would have been accepted and the matter closed.

In this case, no notice at all was issued to Mrs Isa by the relevant tax officer. The president of Pakistan, on advice of the prime minister, proceeded with the filing of a presidential reference before the Supreme Judicial Council for the removal of Justice Isa as judge of the Supreme Court of Pakistan. This act of the president was unanimously declared mala fide by ten judges of the Honourable Supreme Court on June 19, 2020. The presidential reference was quashed and the shoddy legal work that had led to it was deprecated. Seven of the ten judges, however, replaced the presidential reference with a judicial direction to the FBR to conduct an ad-hoc inquiry into Mrs Isa’s acquisition of foreign properties and to place a report before the Supreme Judicial Council for further action, if necessary.

This direction, in effect, granted a rebirth to the botched presidential reference. The coterie responsible for the first round of malice against Justice Isa and his family got to work again in producing the FBR Report. Non-compliant officers within the FBR were removed. It was this direction that was challenged in review and has now been set aside. Consequently, the FBR Report that was directed to be compiled by the order of the seven judges stands quashed.

Has the majority order in review of April 26 created immunity for Mrs Isa, and by extension Justice Isa, against the due process of the law? Have the powers of the Supreme Judicial Council been curtailed? Clearly not. Only the ad-hoc inquiry against Mrs Isa, outside the processes prescribed by tax law, and the consequences of this inquiry, have been quashed. A probe by the tax officer duly authorized under the terms of the Income Tax Ordinance, 2001 is still possible. The concerned officer can issue a notice and receive a reply. As regards the Supreme Judicial Council, all that the majority order of April 26 has said is that the quashed FBR Report, having lost its legal existence, may not form the basis of any proceeding.

The fact that a dissent was recorded on April 26 by four honourable judges whose legal acumen and concern for the dignity of the judicial branch is beyond dispute must remind society at large of what resides at the heart of the judicial process. The act of interpreting the law, in particular the constitution, can yield disparate outcomes, each equally sincere, as text and perceived purpose are moulded by judicial minds into coherent outcomes. These outcomes remain human achievements built on a lifetime of reflection from different vantage points.

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