



BAR HUMAN RIGHTS
COMMITTEE OF
ENGLAND AND WALES

The Shariat Court of Azad Jammu and Kashmir

Re. Naheem Hussain and Rehan Zaman

**AMICUS BRIEF ON BEHALF OF THE HUMAN RIGHTS COMMITTEE
OF THE BAR OF ENGLAND AND WALES**

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INTRODUCTION

1. This brief is respectfully addressed to the Shariat Court of Azad Jammu & Kashmir (hereinafter 'AJK') by the Human Rights Committee of the Bar of England and Wales (hereinafter 'BHRC').
2. The BHRC is the international human rights arm of the Bar of England and Wales. Established in 1991, it is an independent committee of the General Council of the Bar of England & Wales. The BHRC is primarily concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial. The remit of the BHRC extends to all countries of the world, apart from its own jurisdiction of England & Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer, critic and advisor, with internationally accepted rule of law principles at the heart of its agenda.
3. The BHRC's objectives include upholding the rule of law and internationally recognised human rights norms and standards, and supporting practicing lawyers, judges and human rights activists. To achieve its objectives, the BHRC conducts trial observations, capacity building training, fact-finding investigations, monitors human rights abuses, provides legal resources and conducts strategic litigation.
4. In carrying out this work, the BHRC has secured a reputation for legal expertise in the protection of human rights, and notably the right to a fair trial. The BHRC's reports and written submissions provide valuable tools to legal practitioners around the world and are read widely by policy makers within national and international bodies, thereby assisting in the development of the law.
5. The Shariat Court of AJK is due to hear the bail appeal in respect of Naheem Hussain and Rehan Zaman. The background to the case is contained within the documents before the Court and the bail application filed on behalf of Naheem and Rehan.

SUBMISSIONS

Code of Criminal Procedure (Amendment) Bill 2011

6. A new bail law was passed in AJK on 4 June 2011. President Asif Ali Zardari signed the Code of Criminal Procedure (Amendment) Act 2011 granting statutory bail both to under trial prisoners and convicts whose trials and appeals have not been disposed of within a prescribed time limit. The new provisions amend the Criminal Procedure Code 1898 and state that anyone facing capital charges and held on remand for more than 2 years should be granted bail. Section 3 (iii) of the Act states:

Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail -

7. Section 3 (iii) (b) goes on to state

Who, being accused of an offence punishable by death, has been detained for a continuous period exceeding two years and in case of a woman exceeding one year and whose trial for such offence has not concluded.

8. The only exception immediately follows:

Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person, who in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

9. The above provisions are now in force. Naheem and Rehan were arrested in 2004. They have both therefore been on remand for 7 years. This is an unacceptable period of pre-trial detention. The delay in their trial being heard has been due to numerous reasons. However none of these are the fault of Naheem or Rehan. It is submitted that they should now be given the protection afforded by the Code of Criminal Procedure (Amendment) Act 2011 and be granted bail accordingly.

Evidence extracted under torture

10. Naheem and Rehan were arrested on 22nd June 2004. Naheem's father Fazal Hussain and Rehan's father Muhammad Zaman were also arrested. The men were taken to Dadyal Police Station. It is alleged by Naheem and Rehan that on their arrival they were handcuffed, beaten, punched and kicked in separate cells.
11. On the second day, Rehan was hung upside down from a hook and then kicked and punched repeatedly in a technique known as 'inverse strappado'. Over the next two weeks, Rehan states that he was subjected to having cigarettes put out on his wrists and having a fingernail pulled out. Rehan alleges that he was also subjected to torture involving the relevant police officials tying ropes around his upper thighs and pulling them to force his legs open. Rehan still has the scars from the ropes that were used. His evidence is that whenever he lost consciousness, the police would throw water on him so that he would regain consciousness; they would then continue to torture him.
12. Naheem states that he was tied to a chair with his legs together and had a piece of wood tied across both thighs. This was then tied around each leg and attached to another bit of wood which would be turned like a garrotte to increase the pressure on Naheem's legs. The police continued to tighten the rope, driving the wood deeper into Naheem's legs. This treatment constitutes torture.
13. On 28 June 2004, Naheem and Rehan were taken to a graveyard and told by the police to confess that they had thrown the murder weapons away in that area. Naheem and Rehan both refused to make this admission until they were told that more members of their family would be brought into the police station and tortured. Naheem was told that his wife and mother would be tortured, whilst the police told Rehan that they would torture his 80 year old grandmother. It is the evidence of Naheem and Rehan that guns had been pre-planted in the graveyard and that they were forced to point them out as the murder weapons. The Court will be aware that the subsequent ballistics testing proved that these guns could not have been used in the offences, therefore adding weight to the submission that their subsequent confessions were forced.
14. After 11 days in the police station Muhammad Zaman was released without charge. By 6 July 2004, the police had threatened to hang Naheem from a tree and remove his fingernails unless

Fazal paid a large sum of money and confessed. Fazal subsequently wrote the Police Chief a cheque for over £10,000 and signed a 'confession' stating that he had instigated the murders. Documentary evidence of the cheque paid to the police official will be made available for the Shariat Court. Naheem was also forced to sign a document that was written in Urdu and which he was unable to understand.

15. It is therefore submitted that the confessions relied upon by the prosecution are factually inaccurate and have been extracted under torture and are therefore wholly unreliable as evidence. The use of the confessions arising from torture as evidence before the Court is also contrary to international law. The BHRC respectfully reminds the Shariat Court of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Convention Against Torture'), adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46). The Convention Against Torture entered into force on 26 June 1987. Pakistan signed this treaty on 17th April 2008 and ratified it on 3rd June 2010. Article 15 of the Convention Against Torture states that

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

16. The Committee against Torture, in its consideration of Article 15 of the Convention Against Torture, unequivocally prohibits the use of evidence obtained by torture under any circumstance except as against the person committing the act of torture him or herself. In *P.E. v France* (CAT 193/01) the UN Committee against Torture stated that the provisions of Article 15 derive from 'the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of the procedure for which it is competent have been made as a result of torture'. Once the State party has ascertained that a statement has been obtained by torture, such a statement cannot be used against anyone but the torturer himself. Such is the absolute nature of the prohibition of torture.
17. The BHRC respectfully reminds the Court that international jurisprudence recognises that evidence obtained under torture is unreliable. It is submitted that the Court should disregard any evidence extracted under torture when considering this bail appeal and during any subsequent trial.

Period on remand

18. Naheem and Rehan have been held on remand without a trial commencing since their arrest on 22nd June 2004. Despite the numerous and varied reasons for the delay in this case, it was accepted by the Learned Judge at the previous bail application that these delays are not in any way the fault of the accused. The BHRC considers that the level of delay in bringing this case to trial is manifestly unfair. Furthermore, it is submitted that a period of 7 years in pre-trial detention by far exceeds and is a clear breach of Pakistan's obligations under international law.
19. The Universal Declaration of Human Rights 1948 (hereinafter 'the Declaration') asserts that 'everyone has the right to life, liberty and security of person'.¹ This is considered to be one of the most important and inalienable human rights upon which others are based. Article 9 of the Declaration states that 'no one shall be subjected to arbitrary arrest, detention or exile'.²
20. The Declaration specifies fundamental rights held by criminally accused persons, that is, the right to a fair and public hearing by an independent and impartial tribunal,³ and the right to be presumed innocent until proven guilty.⁴ The robust protection of the rights of the accused in the Declaration illustrates their importance to the bedrock of democracy and the rule of law.
21. There is clear case law before the UN Human Rights Committee on what constitutes an unacceptable delay under Article 9(3) of the International Covenant on Civil and Political Rights (hereinafter 'the ICCPR'). In *Koné v Senegal* (386/89) the Human Rights Committee held that where a prisoner was detained awaiting trial for four years and four months this cannot be deemed compatible with Article 9, paragraph 3. The delay in the case of Naheem and Rehan is undoubtedly in violation of the ICCPR and renders Pakistan not only in breach of its international obligations under the treaty it ratified, but also under the clear international human rights norms on this issue.
22. The ICCPR was signed by Pakistan on 17 April 2008 and ratified on 23 June 2010. Pakistan by ratifying the ICCPR undertook to comply with its provisions. The ICCPR affirms the right

¹ Universal Declaration of Human Rights 1949, Article 3

² Ibid, Article 9

³ Ibid, Article 10

⁴ Ibid, Article 11 (1)

to liberty and declares that ‘no one shall be subjected to arbitrary arrest or detention’.⁵ Anyone arrested or detained on criminal charges is entitled to trial ‘within a reasonable time or to release’.⁶ According to the same Article, the default position or preferred option should be to release to the community (subject to guarantees to appear in Court) rather than detention awaiting trial.

23. In light of Pakistan’s obligations under international law, Naheem and Rehan should be released into the community immediately. Imposing conditions and guarantees as part of their bail is within the discretion of the Court.
24. Article 9(4) ICCPR speaks specifically to people detained and affirms their right to have their case heard before a Court in order to determine ‘without delay... the lawfulness of his detention and order his release if the detention is not lawful’.⁷ It is considered that, by virtue of the fact that the pre-detention period has now been over 7 years, this detention can no longer be seen to be lawful. The ICCPR also guarantees the right to a fair and public trial,⁸ presumption of innocence until proven guilty,⁹ and the right to be tried ‘without undue delay’.¹⁰ The BHRC reiterates that the delay in this case has clearly been considerable.
25. In addition to these binding international conventions, customary international law is expressed in various United Nations General Assembly Resolutions which reflect state practice and the general consensus in the international community. For instance, in The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988,¹¹ in which the General Assembly states that ‘arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law...’ and that ‘[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority’.¹²
26. The Resolution further declares that the authorities that arrest, detain, or investigate accused persons, ‘shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority’.¹³

⁵ ICCPR, Article 9 (1)

⁶ Ibid., Article 9 (3)

⁷ Ibid., Article 9(4)

⁸ Ibid., Article 14(1)

⁹ Ibid., Article 14(2)

¹⁰ Ibid., Article 14(3)(c)

¹¹ The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988

¹² Ibid, Principle 11

¹³ Ibid, Principle 9

The need for judicial impartiality

27. The Judge who heard the previous bail application will be the trial judge and he has clearly formed a strong view of this case before any trial has taken place. In the judgment given when rejecting the initial bail application, the Judge concluded that Naheem and Rehan had carried out the murders and therefore they were ‘dangerous, desperate and hardened criminals’.
28. Furthermore in the Learned Judge’s reasons for refusing bail, he stated that the accused shot indiscriminately and that in his view the double murder was committed by the accused with prior planning and not by accident. These remarks clearly demonstrate that the Judge has already concluded the outcome of this trial before hearing any oral evidence. Naheem and Rehan are being presumed to be guilty before any trial has taken place. The BHRC considers that it is imperative that Naheem and Rehan receive a fair trial before a judge who has not pre-determined their guilt prior to a trial commencing.

SUMMARY

29. The Court is respectfully urged to grant the bail applications without any further delay in this case which has already involved an exceptional length of pre-trial detention. There is strong evidence to suggest that both of the accused are innocent and that the evidence upon which bail was previously refused included evidence extracted under torture. The BHRC urges the Shariat Court to grant bail for Naheem and Rehan forthwith in accordance with Pakistan’s bail law and relevant international standards as set out above.

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Respectfully submitted,

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