



IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR

Re. SAJID HUSSAIN

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

TO BE HEARD ON 11TH JUNE 2013

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INTRODUCTION

1. This brief is respectfully addressed to the Supreme Court of Azad Jammu & Kashmir (hereinafter ‘Supreme Court’) by the Bar Human Rights Committee 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. 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.

SUBMISSIONS

3. The Supreme Court is due to hear the bail appeal of Sajid Hussain, a British national who was arrested on suspicion of murder in Dadyal on 1st June 2010. Mr. Hussain is currently facing trial for murder before the Additional District Court of Dadyal. The background to the case is contained within the documents before the Court and the bail application filed on behalf of Sajid Hussain.

Code of Criminal Procedure (Amendment) Act 2011

4. A new bail law was passed in Azad Jammu & Kashmir on 4 June 2011. The President of Pakistan signed the Code of Criminal Procedure (Amendment) Act 2011 granting statutory bail to both under-trial prisoners and prisoners 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 -

5. 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.

6. 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.

7. The above provisions are now in force. Given Mr. Hussain was arrested on 1 June 2010, he has been on remand for 3 years. This is an unacceptable period of pre-trial detention. The delay in his trial being heard has been due to numerous reasons. However none of these are the fault of the accused. It is submitted that he should now be given the protection afforded by the Code of Criminal Procedure (Amendment) Act 2011 and be granted bail accordingly.

Period on remand

8. Mr. Hussain has been held on remand without a trial commencing since his arrest on 1st June 2010. 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 3 years in pre-trial detention by far

exceeds what is reasonable, and is a clear breach of Pakistan's obligations under international law.

9. 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
10. 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.
11. Article 9 of the International Covenant on Civil and Political Rights (hereinafter 'the ICCPR') asserts the right 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', and there is a general presumption that the accused be released into the community (subject to guarantees to appear in Court) rather than detained awaiting trial.⁶ 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.
12. There is clear case law before the UN Human Rights Committee on what constitutes an unacceptable delay under Article 9(3) of the ICCPR. In *Koné v Senegal* (386/89) the UN Human Rights Committee held that where a prisoner was detained awaiting trial for four years this could not be deemed compatible with Article 9, paragraph 3.

¹ Universal Declaration of Human Rights 1949, Article 3

² Ibid, Article 9

³ Ibid, Article 10

⁴ Ibid, Article 11 (1)

⁵ ICCPR, Article 9 (1)

⁶ Ibid, Article 9 (3)

13. Supplementary to 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. In the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988,⁷ 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’.⁸ The Resolution declares that authorities responsible for arrest, detention, or the investigation of 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’.⁹
14. Furthermore, the Supreme Court is asked to consider that in many countries, including the United Kingdom, there are strict statutory ‘Custody Time Limits’ beyond which defendants have to be released on bail. In addition, at common law, otherwise justifiable detention may become arbitrary due to the passage of time. The 2011 amendments to the Criminal Procedure Code brought domestic law into line with these international norms.
15. We submit that the delay in the case of Sajid Hussain is plainly in violation of the international obligations set out in the ICCPR, a treaty ratified by Pakistan, and also a clear violation of international human rights norms on this issue.
16. In light of Pakistan’s obligations under international law, it is submitted that Mr. Hussain should be released into the community immediately. It is within the discretion of the Court to impose conditions and guarantees as part of his bail.

⁷ 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

⁸ Ibid, Principle 11

⁹ Ibid, Principle 9

17. The ICCPR also guarantees the right to a fair and public trial,¹⁰ the presumption of innocence until proven guilty,¹¹ and the right to be tried ‘without undue delay’.¹² The BHRC reiterates that the delay in this case has been considerable and also may affect the fairness of any trial.

‘Hardened, desperate or dangerous criminal’

18. The law governing bail in Azad Jammu and Kashmir (detailed in paragraph 6 of these submissions) provides for an exception to the requirement that prisoners be granted bail after two years. The exception applies to prisoners who are ‘hardened, desperate, and dangerous criminals’. Successive courts have indicated that this exception should be interpreted narrowly.
19. Mr. Hussain’s detention reached 2 years in June 2012 and his legal counsel duly made an application for bail. His application was subsequently rejected by both the District Court and the Shariat Court.
20. Among the reasons given by the District Court for the rejection of Mr. Hussain’s application for bail was the perceived risk that Mr. Hussain would abscond once bail was granted. This was based on the fact that Mr. Hussain had allegedly requested the return of his and his wife’s passports, which had been in police custody, and taken from him while he was allegedly being subjected to torture. It is respectfully suggested that the Court can impose appropriate bail conditions to alleviate any concerns it may have. The presumption is to release Mr. Hussain into the community, subject to such reasonable conditions as are necessary, rather than detention awaiting trial.
21. The District Court also stated in its judgment of 18 October 2012 that Mr. Hussain had committed murder. The District Court’s decision repeatedly made reference to Mr. Hussain’s guilt despite the fact that Mr. Hussain has not been convicted of any crime, and has not yet

¹⁰ Ibid, Article 14(1)

¹¹ Ibid, Article 14(2)

¹² Ibid, Article 14(3)(c)

had the opportunity to present his defence. In the Court's judgment the Learned Judge determined

'The petitioner/accused murdered two people during the day, then proceeded to dump the bodies in the victim's car and then proceeded to park the car about 800 feet from the place of occurrence in the jungle'

He further stated

'..according to our opinion although the period of detention of accused/petitioner is more than two years and the trial of the case has not been concluded yet, notwithstanding prima facie after committing the murder of two persons, disposing of their dead bodies and....'

22. The judgment of the Shariat Court dated 15th February 2013 upheld the decision of the District Court. The Shariat Court acknowledged that there was provision in the bail law allowing for bail to be refused to those who had been convicted of the most serious offences. However the Court went on to rule that the accused was a 'hardened' criminal on the allegations relating to the present case. The Shariat Court stressed in its judgment that the brutal act of the accused was immoral and strictly prohibited by law.
23. Whilst it is accepted that a bail court is entitled to act on the basis that the charges against an accused may be made out, it is submitted that the judgments of the District Court and the Shariat Court go too far in asserting the guilt of the accused. It is respectfully submitted that there is an appearance that the Court has pre-determined Mr. Hussain's guilt despite the fact that evidence in the case has yet to be heard.
24. The BHRC notes that domestic and international law requires that Mr. Hussain receives a fair trial, and that he should not be denied bail on the basis that he is considered a 'hardened' criminal due to the alleged facts of this case. Mr. Hussain has never been convicted of a crime and no criminal case has ever been brought against him. He should be granted bail forthwith with appropriate bail conditions which the Supreme Court deems necessary to prevent flight, and further offending.

25. The Shariat Court has previously indicated that although the bail law provided an exception under which bail could be refused, this was to apply only to offenders previously convicted and sentenced to death or life imprisonment, and those convicted of serious offences such as rape or abduction for ransom, or those involved in ‘such other terrorist activities so as their liberty could be a threat to society’ (Naheem Hussain v State, Shariat Court of AJK, 14/11/2011). Mr. Hussain has never before been charged or convicted of any other serious offence. He clearly does not fit into the category of a ‘hardened, desperate or dangerous criminal’ and nor is he someone who has ever been ‘accused of an act of terrorism punishable with death or imprisonment for life’ as outlined in the 2011 bail law.

Allegations of torture while on remand; request for a Convention Against Torture investigation

26. Mr. Hussain asserts that following his arrest on 1st June 2010, he was subjected to a regime of severe and sustained torture at Dadyal police station. He states that it was for this reason that he made admissions to the offences charged when he was taken to Court on Saturday 5 June.
27. Mr Hussain has not been allowed an independent medical assessment despite this being requested by the British High Commission. The BHRC respectfully reminds the Supreme Court of the obligations arising under 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. It is submitted that there should be an independent investigation into the allegations of torture made by Mr. Hussain.
28. Representatives of the international human rights organisation Reprieve have visited Mr. Hussain on a number of occasions and continue to monitor his detention. Reprieve is currently writing to the Government of AJK and the Federal Government of Pakistan to raise the issue of Mr. Hussain's alleged torture and to request a Convention Against Torture compliant investigation. The BHRC does not pre-judge the issue of whether Mr. Hussain has been subjected to torture, but echoes the call from Reprieve. Wherever there is a credible allegation

of torture, the State is under an obligation under the Convention Against Torture to institute an independent and effective investigation.

SUMMARY

29. The Court is respectfully urged to grant the bail application without any further delay in this case which has already involved an exceptional length of pre-trial detention. The BHRC urges the Supreme Court to grant bail to Mr. Hussain forthwith in accordance with Pakistan's bail law and relevant international standards as set out above.

Respectfully submitted,

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