

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition 454/2020.
Date of institution 10.03.2020.
Date of decision 23.06.2022.

Bilal Aziz s/o Mohammad Ibrahim Aziz, r/o Village Pattan Sher Khan, Kair, Pallandari, presently Ward No.24 Mohallah Upper Gojra Tehsil & District Muzaffarabad Azad Kashmir.

Petitioner

VERSUS

1. Azad Govt. of the State of Jammu & Kashmir, through Secretary Higher Education, having his office at Civil Secretariat Muzaffarabad;
2. Secretary Higher Education Azad Jammu & Kashmir having his office at new Secretariat Muzaffarabad;
3. Director Public Instructions Colleges Azad Jammu & Kashmir, having his office at old Secretariat Muzaffarabad;
4. Azad Jammu & Kashmir Public Service Commission through its Chairman, having his office at Narul Stadium Muzaffarabad;
5. Chairman Azad Jammu & Kashmir Public Service Commission, through Secretary Public Service Commission, having his office at Narul Stadium Muzaffarabad.

Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Saqib Javed, Advocate for the Petitioner.
Syed Atif Mushtaq Gillani, Legal Advisor for HED.
Miss Aliya Abdul Rehman, Advocate for the PSC.

JUDGMENT:

The supra titled writ petition has been addressed under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974, whereby, the petitioner has sought direction against the respondents to appoint him as **Lecturer Islamiyat B-17** against the withheld posts.

I. BRIEF BACKGROUND:-

2. Respondent, Public Service Commission through advertisement No.02/2019 advertised 15 posts of Lecturer Islamiyat B-17 (Male) out of which one post falls against the quota of district Sudhnuti and the petitioner applied against the quota of district Sudhnuti, thereafter, the petitioner after qualifying the written test was called for interview and after selection process, one Hafiz Mohammad Aftab Khan from district Sudhnuti was appointed as Lecturer Islamiyat (B-17) and according to the information of petitioner, he has also passed the interview and immediately falls next below the successful candidate and despite availability of the posts, the appointment of petitioner could not be made. As per stance of the petitioner, he applied for the copy of merit list/result and other relevant documents but the same have not been supplied to him. It has been stated that the number of posts

of Lecturer Islamiyat (B-17) have been lying vacant for several years and the respondents kept the same hidden for political reasons. As per knowledge of petitioner, Mr. Ejaz Ahmed Khan, Lecturer Islamiyat and Mr. Mohammad Shabir Khan, Assistant Professor Islamiyat, have already attained their age of superannuation on 31.12.2018 and 29.04.2019 respectively while one Mr. Abdul Saboor, Assistant Professor has been posted as Principal in Devi Galli. Similarly, several other posts are still being held by the ad-hoc appointees and the said posts could not have even been filled in on permanent basis, hence, through the supra petition, the petitioner has sought direction to appoint him against any vacant post of Lecturer Islamiyat as per his meritorious position.

II. ENSUING PROCEEDINGS:-

3. After admission of the writ petition, respondents Nos. 1 to 3, filed written statement, whereby, the contents raised in the petition were refuted in toto and it has been stated that the petitioner has failed to obtain the meritorious position and no post at the time of requisition was withheld by the department and lastly they prayed for dismissal of the writ petition alongwith application for interim relief.

4. The learned counsel for the parties argued the case according to their respective pleadings.

5. As per claim of the petitioner, the respondents had mala-fidely withheld the posts of Lecturer Islamiyat and the same were not sent to the Azad Jammu & Kashmir Public Service Commission (PSC) for requisition and if the withheld posts had timely been sent to the AJ&K Public Service Commission, the petitioner would have easily been appointed. Now, I have to see whether the posts were available or were mala-fidely withheld by the department before requisitioning the same to the AJ&K Public Service Commission. The petitioner in support of his version produced the copies of notifications dated 28.07.2017, 22.03.2019, 31.12.2018, 09.09.2020 and 20.01.2021. According to the notification dated 28th of July 2017, one Yousaf Hameed was appointed as Lecturer Islamiyat (B-17) in Govt. Post Graduate College Pallandari and as per notification dated 22nd of March 2019, the said Yousaf Hameed was further appointed on ad-hoc basis in the same College for a period of 6 months or till appointment of a suitable candidate by the AJ&K Public Service Commission. A notification dated 31.12.2018, also reveals that one Mr. Ejaz Ahmed Khan, Lecturer Islamiyat Govt. Post Graduate

College Rawalakot was retired w.e.f 28.02.2019. A glance perusal of the notification dated 09.09.2020, also reflects that one Yousaf Hameed who had earlier been appointed as Lecturer Islamiyat twice since 2017, was once again appointed in the same College i.e. Govt. Post Graduate College Pallandari, for six months or till permanent induction of a suitable candidate by the Public Service Commission. Annexure F/8 produced by the petitioner in his support also manifests that in different districts i.e. Muzaffarabad, Neelum and Jhelum Valley, the posts of Lecturer Islamiyat are shown to have been filled in on contract basis.

6. It also appears from the record that the posts of Lecturer Islamiyat were advertised in the year 2019 and last date for submission of the applications was fixed as 04th of April 2019. The written examination against the supra posts was conducted on 12.07.2019 and the petitioner was called for interview on 12.09.2019 and when he was not appointed, he filed the instant writ petition on 10.03.2020, which in my opinion is well within time. As per supra mentioned notifications, the post occupied by one Yousaf Hameed was available since 2017, and the same was mala-fidely withheld by the department while continuing the ad-

hoc service as well as making fresh ad-hoc appointment of the supra candidate i.e. Yousaf Hameed. Had the aforesaid post been sent to the AJ&K Public Service Commission for requisition, then the petitioner herein, who was placed at serial No.1 of the waiting merit list would have easily been appointed as Lecturer Islamiyat but due to mala-fide on part of the department, the petitioner could not be appointed and was compelled to knock the door of this Court by seeking direction against the respondents for issuance of his appointment order as per his meritorious position.

7. The validity of the waiting merit list is **180 days** from the date of selection of the candidate and as per numerous pronouncements of the Hon'ble Apex Court of Azad Jammu & Kashmir and Pakistan, the candidate placed in the waiting list must be appointed within 180 days. The petitioner has filed the instant petition within time and in my considered view, he has amply proved his case by producing relevant notifications pertaining to the ad-hoc appointments of employees against the withheld posts of Lecturer Islamiyat of District Sudhnuti. The term "waiting list" has been defined in **Black's Law Dictionary, Eleventh Edition** at page No.1894 in a manner articulated hereunder:-

Waiting list:- A roster of people who have requested something that is not currently available but either will be or might be in the future.”

In the case of Gujrat State Dy. Executive Engineers' Association Vs. The State of Gujrat and others reported as **[1994 Supp. 2 SCC 591]** it was held that a waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate.

8. Even otherwise, as per supra notifications, two other additional posts became vacant due to appointment of one Abdul Saboor as well as due to retirement of Mr. Ejaz Ahmed Khan and as per Rule 9 of the **Azad Jammu & Kashmir Public Service Commission Procedure Rules 1994,** the additional posts should have also been requisitioned to the Commission before the date of test/examination or interview and as per supra rule, the candidates, who had already applied in response to the original advertisement, may not be required to apply again. So, if the requisition of the additional posts had timely been sent to the Commission then not only the petitioner but the candidate falling at serial Nos. 2 and 3 of the waiting list would have been appointed. So, as per my estimation, to the extent of

one post occupied by one Yousaf Hameed, the petitioner has proved his case, therefore, being placed at serial No.1 of the waiting merit list, he is entitled to be appointed as Lecturer Islamiyat (B-17).

9. Be that as it may, three general principles on the basis of which judicial review against any administrative action is undertaken are illegality, irrationality and procedural impropriety. Powers conferred under Article 44 of the Azad Jammu & Kashmir Interim Constitution 1974, are meant for to prevent arbitrariness, enforcement of fundamental rights and to exercise powers in the larger public interest keeping in view the scheme of Constitution, celebrated principle of law is a beacon of light indicating the roadmap quo performance of official acts/ work i.e. when an act is required to be done in a particular manner, same should be done in that manner only, any deviation in procedure provided in the relevant statute amounts to incurable illegality justifying judicial review by superior Courts. At this juncture, I would like to refer the landmark judgment of the Hon'ble Apex Court of Pakistan in a case titled "Government of West Pakistan and another Vs. Begum Agha Abdul Karim Shorish Kashmiri" reported as **[PLD 1969 SC 14]** wherein, it was held that an action which

is mala-fide or colorable is not regarded as an action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner.

III. CONCEPT OF JUDICIAL REVIEW:-

Judicial review is a process under which executive, legislative and administrative actions are subject to review by the judiciary. In Azad Jammu & Kashmir, it takes breath from Article 4 clause (1) and clause (2) of the Azad Jammu & Kashmir Interim Constitution, 1974, the conjunctive reading of the said two clauses makes it crystal clear that any law, custom or usage, if abridges or takes away the fundamental rights guaranteed by the Constitution to the subjects of the State or any law is made in contravention of fundamental rights, the same shall be declared void. Judicial review is one of the checks and balances under the doctrine of separation of powers/trichotomy of powers i.e. ***trias politica*** (propounded by Montesquieu), wherein, the Judiciary supervises the other two organs i.e. Legislature and Executive, when the latter perform their authority ultra-vires the Constitution and law.

a. ORIGIN OF JUDICIAL REVIEW:-

In the year 1803, the U.S Supreme Court in the case of William Marbury Vs. James Madison, Secretary of State of the United States [5 U.S 137] established the principle of judicial review in the United States by declaring the act of Congress unconstitutional (Congress is America's parliament comprising of "Senate" or the upper house and "House of Representatives" or the lower house) meaning that American Courts have the power to strike down laws and statutes that they find to violate the Constitution of the United States. The said verdict was authored by their Chief Justice (as then he was) John Marshall.

b. MARSHALL'S FOUR CORE POINTS IN MARBURY Vs. MADISON (SUPRA):-

1. The Constitution established a Government of limited powers;
2. The Constitution is the supreme law of the land- it is superior to legislative enactments- otherwise, the Constitution would be useless/futile;
3. The Court cannot close its eyes to an unconstitutional act. Marshall stated: "It is emphatically, the province and duty of the judicial department to say what the law is";
4. Judges take an oath to uphold the Constitution. It would be immoral for them to give effect to an unconstitutional act.

10. In the hierarchy of institutions, the Azad Jammu & Kashmir Public Service Commission is somewhat at higher pedestal as it directly derives its force from **Article 48 of the**

Azad Jammu & Kashmir Interim Constitution, 1974, and under the auspices of the Constitution, the Azad Jammu & Kashmir Public Service Commission Act, 1986, and rules made thereunder are providing a complete roadmap and mechanism quo its purposes and functions. Under Section 7 of the supra Act, functions of the Commission have been elucidated as infra:-

- (a) to conduct test and examinations for recruitment to the civil services of Azad Jammu & Kashmir and such posts in connection with the affairs of the Government as may be prescribed by rules made under Section 11;
- (b) to advice the President on matters relating to qualifications for, and method of recruitment to, the services and posts referred to in clause (a); and;
- (c) any other matter, which the President may refer to the Commission.”

While in juxtaposition as per part IV, Rule 23 (1) of AJ&K Civil Servants (Appointment and Conditions of Service) Rules, 1977, the appointing authority is under legal obligation to forward a requisition to selection authority immediately after decision is taken to fill in the post. Rule 23 (1) supra referred speaks as under:-

“23 (1). When a post is required to be filled, the appointing authority shall forward a requisition to the selection authority immediately after decision is taken to fill the post.”

Similarly, as per Rule 3 sub rule (1) of Azad Jammu & Kashmir Public Service Commission rules 1994, it is mandatory requirement for concerned departments to send requisition of all available slots, above quoted rule speaks as infra:-

“3. (1). When a post, which is to be filled on the basis of competitive examination falls vacant, the Department concerned shall send a requisition on the prescribed form duly signed by the Administrative Secretary of the Department to the Commission by 1st day of September and for posts other than those to be filled on the basis of competitive examination by 1st day of December every year. It shall be accompanied by a copy of departmental rules relevant to the post to which recruitment is to be made. Exceptional cases may, however, be sent any time during the calendar year to the Commission.”

IV. CONCLUSION:-

11. There is no concept of sending piecemeal requisition to the AJ&K Public Service Commission. All available vacant posts (in similar discipline) are simultaneously liable to be forwarded in a joint manner through one requisition to the selection authority i.e. Public Service Commission for the purpose of holding and carrying out selection process. Withholding posts and sending piecemeal requisition is colorable exercise of powers, act of mala-fide and arbitrariness which is directly in opposition

with the constitutionally fundamental guaranteed rights, particularly right No.1 (security of person) and 15 (Equality of State Subjects) besides it mocks the concept of better government and principle of policy enshrined in the Azad Jammu & Kashmir Interim Constitution, 1974.

a. RIGHT NUMBER 1, SECURITY OF PERSON:-

“No person shall be deprived of life or liberty save in accordance with law”.

All the fundamental rights guaranteed by the Constitution are meant for the life and liberty of the persons or State Subjects, as the case may be, and this right stands over all the rights. It, infact, includes in itself all that is guaranteed by the Constitution or by the law. The word “Life” used in fundamental right No.1 of the Azad Jammu & Kashmir Interim Constitution, 1974, covers all facets and it cannot be restricted to vegetative or animal life or mere existence, life includes all amenities and facilities which a person, born in a free country, is entitled to enjoy with dignity. Guidance in this regard can be sought from the following case law i.e.

- (i) Shela Zia & others Vs. WAPDA [PLD 1994 SC 693]
- (ii) General Secretary, Salt Miners Union Vs. Director Mineral Development [1994 SCMR 2061]
- (iii) Unni Krishnan Vs. State of AP [AIR 1993 SCW 863].

12. Be that as it may, the petitioner has successfully made out his case for interference, this Court is burdened with heavy duty to enforce the constitutionally fundamental rights of the aggrieved people who knock the door of Court, vigilantly keeping in mind the standard operating procedures (SOPs') which are sine qua non for invoking extraordinary jurisdiction of High Court. ***[Fiat Justitia Ruat Caelum]*** let the justice be done though heavens fall. High Court is zealous to rescue the aggrieved one from such like situation and redress his/her grievance.

13. Before parting with the judgment, I would like to direct the AJK Govt. to do needful that all concerned departments at the eve of sending requisition of posts of Gazetted cadres to Public Service Commission in view of Rule 23 (1) of AJ&K (Appointment and Conditions of Service) Rules 1977, ensure to send all the available slots/posts in a same discipline through single requisition and head of the relevant department shall verify in the requisition that no other posts in the same discipline has been withheld as well.

14. No one can suffer for inaction, lapses or loopholes of the authorities. If all the available/withheld

posts would have been forwarded, the petitioner legitimately could expect for redressal of his grievance.

b. EPITOME OF THE INSTANT LIS.

The writ petition in hand is accepted and the respondents are directed to appoint the petitioner against the post of Lecturer Islamiyat (B-17) as per merit determined by the Azad Jammu & Kashmir Public Service Commission within a span of two months. The compliance report shall also be submitted before the Registrar of this Court.

Muzaffarabad.

23.06.2022 (Saleem)

JUDGE

Note:- Judgement is written and duly signed. The office is directed to announce the judgment in presence of the parties or their counsel accordingly

JUDGE

(APPROVED FOR REPORTING)

JUDGE