

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ Petition No. 530/2012;
Date of Institution. 10.03.2012;
Date of Decision. 29.11.2012.

Talha Sarfraz son of Muhammad Sarfraz, resident of Gojra, Tehsil and District Muzaffarabad, candidate for admission in Medical College Muzaffarabad against reserved seat for overseas.

..... Petitioner

VERSUS

1. Azad Government of the State of Jammu & Kashmir through its Chief Secretary, New Secretariat Muzaffarabad;
2. Medical College situated at Muzaffarabad through its Principal;
3. Executive Board, Medical College Muzaffarabad old Secretariat through its Chairman;
4. Admission Committee for Admissions of the Candidates in first year MBBS for Academic Session 2011-12 through its Chairman/Secretary Health Azad Jammu & Kashmir Muzaffarabad;
5. Scrutiny Committee for admissions through its Chairman, Dr. Sajid Shah;
6. Health Department Azad Jammu & Kashmir through Secretariat Health Azad Jammu & Kashmir Muzaffarabad;
7. Executive Director, Medical College Muzaffarabad;
8. Farhana Tahir D/O Tahir Ali R/O D.K. 734/A, Dhoke Kashmirian Satellite Town, Rawalpindi;
9. Waqas Akhtar S/O Mohamamd Akhtar Khan, R/O House No. 1112, Street No.7 Baharia Town Phase-II, Extension Rawalpindi;
10. Saleha Azhar D/O Azhar Hussain, resident of House No. 43-A, Sector D-1, Mirpur Azad Kashmir;
11. Basit Mukhtar S/O Mukhtar Ahmed, C/O Ch. Traders Bank Road Muzaffarabad, Azad Kashmir;
12. Jawaz Zahoor S/O Kh. Zahoor Ahmed C/O Munir General Store, Near Mosque Kattah Wali, Sethi Bagh Muzaffarabad, Azad Kashmir;

13. Sharjeel Mushtaq S/O Sardar Mohammad Mushtaq Khan, R/O House No. 228, Street No. 29, I-9 Islamabad;
14. Zohaib Ilyas S/O Ilyas Hussain Shah, R/O village Kakutta P/O Seher Kakutta, Tehsil Hajeera, District Poonch, Azad Kashmir;
15. Sina Tariq D/O Tariq Mehmood, R/O House No. 438 ZB Sector 4-B, Khayaban Sir Syed Rawalpindi;
16. Qaria Saira Irshad D/O Mohammad Irshad Khan R/O village and P/O Thorar, District Poonch, Azad Kashmir;
17. Seher Maqbool Kiani D/O Maqbool Hussain Kiani C/O Ehsan Khalid Kiani Secretary Works Civil Secretariat Chatter Muzaffarabad, Azad Kashmir.

..... Respondents

WRIT PETITION

Before: **Justice Ghulam Mustafa Mughal, C.J**
 Justice Munir Ahmed Chaudhary, J
 Justice M. Tabassum Aftab Alvi, J

PRESENT:

Mr. Sadaqat Hussain Raja, Advocate for the petitioner.

Sardar M.R.khan, AAG for official respondents.

Kh. Attahullah Chak, Advocate for respondent No.11.

Mr. Khalid Yousaf Chaudhary, Advocate for respondents No.8 to 10 and 16.

Nemo for the remaining respondents.

ORDER:

(Justice Ghulam Mustafa Mughal, C.J.)

The captioned petition is directed under section 44 of the Azad Jammu & Kashmir Interim Constitution Act, 1974, whereby admission of private respondents, herein in Medical College Muzaffarabad and Mirpur against the seats reserved for Overseas Kashmiris has been challenged for having been made without lawful authority.

Facts of the case are that petitioner and private respondents applied for admission in M.B.B.S Course in Azad Jammu & Kashmir Medical College Muzaffarabad and Mohtarma Benazir Bhutto Shaheed Medical College, Mirpur against the seats

reserved for the Overseas Kashmiris. Private respondents, herein, have been granted admission by the admission committee whereas petitioner has been refused the same on the ground that he could not obtain merit position against the quota of Overseas Kashmiris. The petitioner has challenged the admission of the private respondents on the ground that criteria formulated by the official respondents in the meetings dated 29.12.2011 and 20.02.2012 is violative of PM&DC Regulations, 2010. It is alleged by him that through arbitrary and colourable exercise of powers respondents have infringed the fundamental right of education enshrined in Section 4(8) of the Interim Constitution Act, 1974 and have also violated the PM&DC Regulations known as “Conditions for Admission in MBBS and BDS Courses and Conditions for House Job Regulations, 2010. It is further alleged that petitioner was sole eligible candidate against the quota of Overseas Kashmiris in view of Rule 9 sub-rule (2) & (3) of the PM&DC Regulations but the official respondents have accommodated the candidates who were their kith and kins on the ground of favouritism and nepotism. It is further stated that respondents have even violated their own criteria framed in meetings dated 29.12.2011 and 20.02.2012. It is further stated that under Item No.9 of the minutes of meeting dated 20.02.2012 it was resolved that criteria adopted for nomination against the reserved seats by the medical colleges in Pakistan shall be consulted and adopted but in violation of the rules, private respondents who were not fulfilling the required conditions have been admitted against the Overseas seats. It is pleaded that respondent No.11 has been granted admission on the basis of

political consideration by violating the conditions of PM&DC Regulations because his father is Government servant and is not in possession of the documents which were required for the purpose of admission against the Overseas seats. It is prayed that by declaring the act of respondents capricious, mala fide and violative of guidelines approved in the meeting on 20.02.2012, admissions of private respondents may be declared to have been made without lawful authority.

Petition has been contested by the respondents by filing separate written statement. The respondents have negated the facts pleaded by the petitioner on common grounds. It is prayed that the petition may be dismissed on the ground that after acceptance of the terms and conditions of advertisement, policy laid down by the respondents from time to time and criteria adopted by the executive committee in its meeting dated 20.02.2012, petitioner has submitted his application for nomination against the seats reserved for Overseas Kashmiris and after being unsuccessful in obtaining admission, he cannot challenge the procedure adopted for admission by the admission committee on account of acquiescence and estoppel. It is further stated by the respondents that petitioner has not attained merit position, hence, has rightly been denied admission. Respondents have submitted that rules of PM&DC have been followed and merit has been determined strictly in accordance with the said rules and the criteria formulated by the official respondents. It is also stated on behalf of respondent No.11 that petitioner's parents have died while they were serving in Saudi Arabia and after their death

petitioner shifted to Pakistan and received his education from Azad Jammu & Kashmir. He did his F.Sc from Mirpur Board hence, is not entitled to be considered for admission against the disputed quota. On behalf of respondent No.11, it is pleaded that though his father is in the service of Azad Jammu & Kashmir Government, however, he was allowed private practice under rules and he has been practicing out side the country after obtaining ex-Pakistan leave on the basis of a valid resident visa. He was registered as Overseas Kashmiri with the Overseas Pakistanis Foundation, therefore, was entitled to be admitted against the seats reserved for Overseas Kashmiris in view of his merit position. In the written statement filed on behalf of respondents No.8,9,12,14 and 16 same grounds of defence have been raised, therefore, need not to be reiterated.

Mr. Sadaqat Hussain Raja, the learned counsel for the petitioner vehemently argued that first advertisement for the purpose of admission was issued in daily "Jang" on 27.12.2011 in which the last date for submission of the applications was fixed as 5th January 2012 and without any genuine reason, a corrigendum was issued vide annexure PA/1 in which date was extended from 5th January 2012 to 10th January 2012. He submitted that the time was further extended till 16th January 2012 and once again extension was allowed up to 27.01.2012. The learned counsel referring to the advertisement and their dates strenuously argued that extension has been granted by the respondents with mala fide intention in order to accommodate the private respondents especially respondent No.11 who has submitted his application

before expiry of the last extended date and prior to that he was not in possession of the documents which were to be furnished along with the application in view of the criteria adopted by the respondents in the meeting dated 20.02.2012. The learned counsel vehemently argued that for granting admission to private respondents the official respondents changed their policy from time to time and have given undue benefit to the respondents on the basis of political consideration, nepotism and favouritism. The learned counsel contended that respondents were not competent to frame policy/criteria in violation of PM&DC Regulations and in case of contradiction, said Regulations shall prevail and the criteria framed by the official respondents being ultra vires to the Statutory Rules/Regulations, is liable to be ignored. He argued that it was enjoined upon the respondents to make admission strictly in accordance with Rule 9 of PM&DC Regulations, 2010 which provides that candidates must have studied from abroad from a foreign education system. He submitted that private respondents are not fulfilling these conditions, so they were not even entitled to be considered for admission against the Overseas Kashmiris seats. The learned counsel submitted that admission of Basit Mukhtar, respondent was totally illegal, because the same has been made in violation of the statutory rules on the basis of so-called policy framed by the respondents. It is further submitted that neither father of Basit Mukhtar was an Overseas Kashmiri, nor he is in possession of foreign education. The learned counsel contended that petitioner was the only candidate who was in possession of Residential Certificate from abroad. It is further contended that

parents of the petitioner were died but he remained residing in Saudi Arabia and resident certificate issued to him was valid at the time of admission, therefore, he was entitled to admission against one of the seats falling in the quota of Overseas Kashmiris. It is stated that change in the merit list has been effected in order to deprive the petitioner from his lawful right of admission and education.

Kh. Attaullah Chak, the learned counsel appearing for respondent No.11 has controverted the arguments advanced on behalf of petitioner. The learned counsel contended that 2 Medical Colleges have been established for the first time in Azad Jammu & Kashmir and it was decided to start the classes forthwith, hence, the statutory rules could not be framed for regulating the admission and no prospectus was issued by the admission committee as is done in the Punjab and other Provinces of Pakistan. The learned counsel contended that though PM&DC Act, Rules and Regulations framed thereunder have been adapted in Azad Jammu & Kashmir, but notwithstanding the adaptation of Act and Rules, the Govt. is competent to frame policy or guidelines for the purpose of admission and the criteria adopted by the executive committee/Government is neither contrary to the PM&DC Regulations nor can be declared as such. He argued that after accepting the conditions of the advertisement, criteria approved in the meeting dated 20.02.2012 and after being unsuccessful in obtaining admission, petitioner is estopped from challenging the process of selection on the basis of principles of acquiescence and estoppel. The learned counsel contended that even otherwise

procedural irregularities committed by the respondents are ignorable, because it was first experience and the classes were to be started within the time framed fixed by the PM&DC. He argued that annual exam of the first year has been scheduled, therefore, acceptance of writ will not serve any purpose, because the petitioner cannot be admitted in the previous session and ouster of the private respondents will be shocking. In support of his submission, the learned counsel placed reliance on a judgment of the apex Court rendered in Civil Review No.6/97 titled “Aisha Hameed Qadri vs. Azad Govt. & others” decided on 13.11.1997. The learned counsel maintained that in the cited case, apex Court of Azad Jammu & Kashmir mould the relief according to the circumstance which happened after the admission and institution of the petition and declined to disturb the students who were studying in the relevant institution although their merit position stood changed after availability of the additional seats. The learned counsel prayed that Overseas Pakistanis Foundation which has issued the certificate in favour of Basit Mukhtar on the basis of which he has been declared entitled to admission has not been impleaded in the line of respondents, therefore, no effective direction can be issued and petition is liable to be dismissed on this sole ground without attending its merits. He argued that writ jurisdiction being discretionary can be refused even otherwise in the circumstances of this case because respondents are likely to be placed in an ugly position.

Mr. Khalid Yousaf Chaudhary, the learned counsel for respondents No.8 to 10 and 16 has filed written arguments wherein

it is submitted that stand of the petitioner is self-contradictory and inconsistent. He applied against the seats reserved for Overseas Kashmiris and was considered by the official respondents. He did not obtain merit position, therefore he was refused admission. The learned counsel pleaded that respondents No.8 to 10 and 16 were fulfilling the prescribed qualification, therefore, their admission cannot be recalled on the move of the petitioner who has not obtained merit position.

We have heard the learned counsel for the parties and gone through the record of the case with our utmost care.

It may be stated that captioned petition was filed in this Court on 10.03.2012. After necessary proceedings vide judgment and order dated 06.06.2012 the same was dismissed on the ground that petitioner is not aggrieved. Petitioner felt aggrieved from the judgment and filed an appeal before the apex Court of Azad Jammu & Kashmir. The apex Court vide judgment dated 07.11.2012 by setting-aside the judgment of this Court dated 06.06.2012 has remanded the case for decision on merit.

In order to resolve the controversy, it is necessary to refer the PM&DC approved Regulations for admissions in M.B.B.S/BDS courses. The admissions in the Medical Colleges of Pakistan have been regulated through the regulations called "The Conditions for Admission in MBBS and BDS Courses and House Job Regulations, 2010". For proper decision of the controversy Rules 4 and 9 of the said Rules are reproduced as under:

4. **Minimum Academic Requirements for admission in the MBBS/BDS Course:**

(1) For local Pakistani Students.

.....

(2) For Overseas Students.

- i). The candidate who has passed an examination equivalent to Intermediate level of Pakistan from a foreign education system with three science subjects out of which Biology and Chemistry are essential subjects with 60% marks in each as certified by IBCC, is eligible to appear in the entry test of MBBS/BDS. On open merit seats no admission shall be given except through the provincial entry test.....
- ii). On foreign seats only and not on open merit seats, in lieu of the entry test of the admission authority, the candidates is required to have passed SAT II examination score with minimum 550 marks in each of the three science subjects of which two have to be Biology and Chemistry.
- iii).

9. Admission on Overseas (foreign) self finance seats and eligibility criteria for foreign students and Pakistani students who have done premedical studies from abroad (1) No admission shall be given in MBBS/BDS course on the Overseas (foreign), self finance seats or any other such Government or private scheme, without any entry test or the requisite SAT II score of 550 marks.

- (2) Only 10% of seats in a private college shall be allowed to be foreign seats. The foreign/overseas self finance seats shall be filled only by persons who meet the Council criteria for admission on foreign seats.
- (3) **The following categories of students shall be eligible for admission on the Overseas (foreign) self finance seats if they fulfill the following conditions:**
 1. **Pakistani national student having passed an examination equivalent to Intermediate level of Pakistan after study abroad from a foreign education system with three science subjects out of which Biology and Chemistry are essential subjects with 60% marks in each certified by IBCC, is eligible to appear in the entry test for admission in MBBS/BDS, subject wise equivalence by**

IBCC shall be acceptable irrespective of study group mentioned by IBCC if any.

In lieu of the entry test of the admission authority, the candidates is required to have passed SAT II examination score with minimum 550 marks in each of the three science subjects of which to have to be Biology and Chemistry.

2. **Foreigners and Pakistanis having dual nationality shall be eligible for admission on foreign/overseas seats irrespective of the place of their premedical study, Pakistan or abroad. They shall either have to appear in the entry test or present the admitting authority/University with the requisite SAT scores and entry test marks.** The candidate is required to have passed intermediate from a Pakistan board or an examination equivalent to intermediate level of Pakistan after study abroad from a foreign education system.....
3. **Pakistani students studied abroad for premedical but appearing in the Pakistani boards from abroad are also eligible. They shall either the Pakistani boards from abroad are also eligible. They shall either have to appear in the entry test or present the admitting authority/University with the requisite SAT scores and entry test marks. The candidate is required to have passed intermediate from a Pakistan board or an examination equivalent to intermediate level of Pakistan after study abroad from a foreign education system.....**

The executive committee constituted for the purpose of supervision, scrutiny and admission held a meeting in the office of Chief Secretary, AJ&K, Muzaffarabad on 20.02.2012. After examining the progress regarding the establishment of the Medical Colleges, the following additional criteria for admission against the seats reserved for Overseas Kashmiris was approved:-

9. **Reserve Seats:**

- a. **Admission against the reserve seats for Occupied Kashmiri students.** The nomination against these seats will be awaited till 29th

February 2012. Failing to get nomination by the due date these seats will be converted into open merit.

- b. Nomination against overseas seats: For the nomination against the overseas students, the criteria of nomination against such reserve seats for other medical colleges in Pakistan to be consulted as guideline and following documents will be mandatory:
- 1) Overseas Pakistani card.
 - 2) A bank draft of US\$4000.
 - 3) The copy of the Passport of parents with resident visa/work permit/proof of second nationality.
 - 4) Proof of tangible fund remittance by the parents from abroad.
 - 5) Proof of AJK nationality (State Subject Certificate)

For proper appreciation of the matter the criteria approved and laid down for admission against the seats reserved for Overseas Pakistanis by the University of Health Science, Lahore is also reproduced as under:-

“Foreign Students Seats:

- a) -----
- b) **Foreign Students Seats Under Self-Finance Scheme (FSF):**
- a. The eligibility criteria for admission of foreign students and students of Pakistani origin under Self-Finance Scheme shall be as follows:
 - i. The applicant must hold a **permanent** foreign nationality at the time of admission (dual nationality for Pakistani origin applicants).
 - ii. The applicant must have passed HSSC/12th grade or equivalent examination (either from Pakistan or abroad).
 - iii. The applicant must have scored a minimum of **60% marks** in HSSC/12th grade or equivalent examination with

Chemistry and Biology as compulsory subjects and third science subject could be Physics or Mathematics.

- iv. The applicant has either appeared in the Entrance Test of the Punjab *OR* passed SAT-II examination with a minimum score of 550 marks in each subject i.e., Biology, Chemistry and Physics/Mathematics.
- v.
- vi.

We have considered the PM&DC Rules, guidelines laid down by UHSL and criteria adopted by the Executive Committee constituted by the Government in its meeting dated 20.02.2012 in juxtaposition. In view of the observations recorded by the apex Court in the remand order, first question which needs resolution is as to whether in presence of PM&DC Regulations, the executive committee or Government was competent to frame its own policy and criteria for admission and, as to whether the criteria/policy framed by the executive Committee is in line with the statutory rules? Admittedly, the PM&DC Ordinance, 1962 and all the rules and regulations framed thereunder from time to time have been adapted in Azad Jammu & Kashmir, that is why in the meeting dated 29.12.2011 it was resolved that for the purpose of admission in the Colleges the criteria and policy laid down by the PM&DC shall be adhered to. It hardly need any deliberation that PM&DC has been established under the aforesaid Ordinance as an autonomous body. The objective and scope of the various provisions and its supervisory role has been examined by the apex Court of “Pakistan in a case titled Pakistan Medical & Dental Council vs. Ziauddin Medical University and others” [PLD 2007

SC 323]. The Hon'able Supreme Court of Pakistan after examining various provisions, at Page 335 of the report concluded in respect of the objective and responsibilities of the Council, as under:-

“A careful study of various provisions of the Ordinance referred to in the preceding paragraphs show that the objective of the ordinance are as follows:-

- (i) Maintenance of uniform standard of Medical & Dental Education (at the Graduate and Postgraduate level).
- (ii) Recommendations for recognition, de-recognition of medical qualifications registration of doctors with recognized medical qualifications within the country or outside the country.
- (iii) Registration of doctors possessing recognized medical qualification from within country or from foreign countries.
- (iv) Making arrangements with foreign countries for according reciprocal recognition to the medical qualifications.”

In view of above the Council has sole authority to provide qualification as well as other conditions for the purpose of medical education etc. The same view was taken earlier in a case titled “Nadir Khan and others vs. Principal Khyber Medical College Peshawar and other” reported as 1995 SCMR 421. At page 428 of the report, it was observed that “**the regulations framed by PM&DC shall apply to all the medical colleges of Pakistan irrespective of the fact whether prospectus issued by these colleges contained a similar provision or not.**” No doubt, the Government can establish medical colleges and reserve seats for different categories because it is the prerogative of the

Government. The Government is also competent to adopt policies which are essential for day to day business within constitutional frame work. However, where a case of arbitrary exercise of power by the Government or a public functionary is made out or violation of statutory rules is proved or any policy or executive or administrative order has been issued without any statutory backing, or any contravention is noticed in the policy or order and statutory rules, then the Court is duty bound to declare such policy and administrative order to the extent of such inconsistency. against the statute and without lawful authority. Identical view was taken in the following cases:-

1. AIR 1984 SC 1543;
2. AIR 2009 SC 2322 and;
3. 2012 SCMR 1841;

In the first case referred to hereinabove, it was observed as under:

“The Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them.”

In the second case, their lordships concluded as under:-

“The Courts are neither equipped nor have the academic or technical background to substitute themselves in place of statutory professional technical bodies and take decisions in academic matters involving standards and quality of technical education. If the Courts start entertaining petitions from individual institutions or students to permit courses of their choice, either for their convenience or to alleviate hardship or to provide better

opportunities, or because they think that one course is equal to another, without realizing the repercussions on the field of technical education in general, it will lead to chaos in education and deterioration in standards of education.....The role of statutory expert bodies on education and role of courts educational policy or an issue involving academic matter, the courts keep their hands off. If any provision of law or principle of law has to be interpreted, applied or enforced, with reference to or connected with education, the courts will step in.”

In the 3rd case apex Court of India at page 1855 of the report, it was observed as under:-

“Thus, the process of evaluation, the process of ranking and selection of candidates for admission with reference to their performance, the process of achieving the objective of selecting candidates who will be better equipped to suit the specialized courses, are all technical matters in academic field and courts will not interfere in such processes. Courts will interfere only if they find all or any of the following: (i) Violation of any enactment, statutory Rules and Regulations; (ii) mala fides or ulterior motives to assist or enable private gain to someone or cause prejudice to anyone; or where the procedure adopted is arbitrary and capricious. An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation. When an action or procedure seeks to achieve a specific objective in furtherance of education in a bona fide manner, by adopting a process which is uniform and nondiscriminatory, it cannot be described as arbitrary or capricious or mala fide.”

(Underlining is our)

As we have held that PM&DC is only statutory body vested with the authority to frame policy, criteria for admission for Medical Colleges, therefore, the executive committee was not

competent to make its own policy or provide additional qualification in presence of PM&DC Regulations, therefore, the conditions listed under item No.9 (2) of the meeting of executive committee dated 20.02.2012 being contrary to the PM&DC Regulations and criteria adopted by the UHS and for having been issued without any statutory backing, are declared ultra vires of the PM&DC Regulations/Rules.

Before considering the legality and propriety of admission of the private respondents, we may observe that under PM&DC Regulations reproduced hereinabove, for admission against the category under the heading of “overseas students” the only condition is that a student should have passed an examination equivalent to Intermediate level of Pakistan from a foreign education system with 3 science subjects including Biology and Chemistry. These students may compete on open merit seats by participating and qualifying entry test conducted by the concerned university. However, for admission on foreign seats result of SAT II examinations with prescribed standard is acceptable in lieu of entry test. Rule 4(2) does not visualize that such a candidate or his parent must be in possession of dual nationality. The other category listed in rule 9(3)(1) is of those Pakistani national students who have received their Intermediate level education of Pakistan after studying abroad from a foreign education system in the subjects already stated above. These candidates are also not required that they must be in possession of dual nationality. The only condition is that they are Pakistani national and have passed their examination after studying abroad from a foreign education

system. The third category is recognized by Rule 9(3)(2). In this category, in our view, foreigners who are not Pakistani by origin but have obtained nationality of Pakistan and those Pakistani who hold dual nationality are eligible for admission on foreign/overseas seats irrespective the place of their premedical study, Pakistan or abroad. For admission of this category, the proof of dual nationality is sine-quo-non. No matter they have studied abroad or received their education from Pakistan. At this juncture we will refer to Notifications dated 10.01.2012 and 13.01.2012. In these notifications the seats have been reserved for Overseas Kashmiris whereas in the PM&DC Regulations reproduced hereinabove, a different terminology has been used. Under clause 4 of the said regulations, eligibility and conditions for admission have been mentioned under the heading of “For local Pakistani students” “For overseas students” and foreigners and Pakistanis having dual nationality. In the Notifications issued by the Government of Azad Jammu & Kashmir on 10.01.2012 and 13.01.2012 the word “Overseas Kashmiris” has been used which has created a confusion for everybody. The seats cannot be given to the Overseas Kashmiris rather reservation should have been made for the children of Overseas Kashmiris. This omission, in our view, does not preclude the Court from interpreting the Notification in its true perspective for advancement of interest of justice and for ascertaining the true intention of the Government. We are clear in our mind that intention of the Government was to reserve the seats for the children of the Overseas Kashmiris. Even otherwise, the Courts are not only competent to interpret the language of an Act

in order to give effect to the manifest intention of the legislature but are also duty bound to supply the omission with a view that the object of an enactment be achieved rather defeated. Therefore, we are of the view that while reserving seats for Overseas Kashmiris intention of the Government was to reserve the seats for Overseas Kashmiris' children. We have summoned the record from both the Medical Colleges and considered the applications with our utmost care. Father of Jawad Zahoor Ahmed, placed at serial No.1 of the merit list is in possession of resident certificate of UAE. Sharjeel Mushtaq is in possession of resident certificate issued by the KSA. The father of Zohaib Ilyas, Basit Mukhtar, Farhana Tahir, Waqas Akhtar, Saleha Azhar, Qaria Saira and Seher Maqbool are in possession of resident certificates/immigration cards issued by KSA, Ireland, USA, UAE, Spain and Oman whereas Rafia Butt is green card holder, who has not been impleaded as party in the writ petition, rightly so because she was in possession of dual nationality and was placed ahead to the petitioner in the merit list. The claim of the petitioner is that he is entitled to the admission against the reserved seats for Overseas Kashmiris' children under Rule 9(3)(2) of PM&DC Regulations. The respondents have also not denied that admission have not been granted on the basis of this rule, rather it is an admitted position that admissions against the Overseas Kashmiris students have been made under Rule 9(3)(2) of the aforesaid rule. Thus, it is crystal clear that all the students who have been admitted against the Overseas Kashmiris' children seats, except Rafia Butt, who is not before us, are not in possession of dual nationality. The resident work permits issued in

favour of the parents of the private respondents herein, are not substitute of dual nationality because the same are issued for a limited period and purpose and remain valid up to certain time. In a case titled “Fozia Hussain Abbasi vs. The Nomination Board and 4 others” [1995 CLC 1761], the apex Court of Azad Jammu & Kashmir has drawn a distinguish between “State Subjects”, “Domicile” and “nationality” while relying upon a book namely “Private International Law” by Cheshire. At page 1779 of the report from page 168 of the said book opinion of learned author on the term “nationality” has been reproduced as under:-

Nationality represents a man’s political status by virtue of which he owes allegiance to some particular country; domicile indicates his civil status and it provides the law by which his personal rights and obligations are determined. Nationality depends, apart from naturalization, on the place of birth or on parentage; domicile, as we have seen, is constituted by residence in a particular country with the intention of residing there permanently. It follows that a man may be a national of one country but domiciled in another.”

Similarly in Umar Ahmad Ghumman’s case [PLD 2002 Lahore 521] Mr. Justice Tassaduq Hussain Jilani, as his lordship then was, has considered the scope of the term “nationality” in para 10 of the report and observed as under:-

“10. Nationality in common parlance means membership of a particular nation. In International Law it refers to the attributes of a person natural or artificial person belonging to a State with certain rights and obligations which the law may prescribe. Citizenship, on the other hand, is a term of Municipal Law which denotes the relationship between a natural person/an individual and the State conferring the civil and political rights to individuals corresponding with duties. In S.T Corporation of India V. Commercial Tax

Officer etc. (AIR 1963 Supreme Court 1815), at page 1819, these two terms have been defined as under:--

“Nationality has reference to the jural relationship which may arise for consideration under international law. On the other hand ‘citizenship’ has reference to the jural relationship under municipal law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, whereas citizenship is intimately connected with civil rights under municipal law. Hence all citizens are nationals of a particular State but all nationals may not be citizens of the State. In other words citizens are those persons who have full political rights as distinguished from nationals who may not enjoy full political rights and are still domiciled in that country.”

The concept of citizenship is as old as the Greek City States. Down the ages nations and countries have enacted laws regarding acquisition and loss of citizenship and also with regard to dual nationality. These rules and enactments primarily fall in the domain of Municipal Law and not International Law. Till recent times, these matters have not been of much concern in International Law. Consequently, there are only a few rules of customary International Law which specifically deal with just a few issues of nationality. Some of these issues are enforced naturalization, cession of territory and instances of diplomatic protection to nationals of a country. The Municipal Laws of various countries demonstrate a various approach so far legislation on dual nationality is concerned. Countries have enacted laws to encourage some form of dual nationality while there are countries where laws stipulate loss of nationality in case of citizen acquires foreign citizenship. Professor N. BAR – YAACOV, in an introduction to his book “Dual Nationality”, at page 3, lists some of the instance when dual nationality may occur. Those are as under:-

“The following cases of acquisition of dual nationality are possible by the combined operation of laws of two States: dual nationality is acquire at birth by children born in a State which has adopted the principle of jus soli, by virtue of which nationality is acquired by the fact of birth within the territory of the State, of parents who are nationals of

another State which applies the principle of jus sanguinis, under which nationality is acquired by descent, irrespective of place of birth. Dual nationality also arises when an individual who acquires a new nationality by naturalization does not thereby lose the nationality of his home State. Marriage causes dual nationality when one of the spouses acquires the nationality of the other spouse while also retaining the earlier nationality. Transfer of sovereignty may bring about the acquisition of dual nationality by residents of the transferred territory who obtain the nationality of their new sovereign while retaining the nationality of the State within whose territorial jurisdiction they were prior to the transfer.”

In view of above, we are clear in our mind that the resident work visa/permit issued in favour of private respondents is not substitute of dual nationality. Even in the admission policy issued by the Government of Azad Jammu & Kashmir for candidates seeking admission against the category of Overseas Kashmiris’ children, are required to send their applications along with passport, visa and equivalence certificate, therefore, the condition of producing passport/dual nationality was sine-quo-non for admission against the seats in question, which condition cannot be relaxed. The learned Islamabad High Court in writ petition No.211/2011 titled “Usman Nasir vs. Pakistan through the Secretary Ministry of Economic Affairs & Statistics, Economic Affairs Division etc.” decided on 13.04.2011, dealt with an identical controversy. The seat in the cited case was claimed on the basis of dual nationality though reserved under a different scheme. For admission on that seat requirement was that the applicant must had dual nationality. The applicant, therein, was not in possession

of dual nationality, hence, his request for direction for admission was rejected and it was observed as under:-

“The condition No.1 (i) clearly manifests that the applicant and his parents should hold a permanent foreign nationality (dual nationality for Pakistan origin applicants). The said rule further reveals that if the students are from friendly countries, evidence of parents’ nationality is not required. According to the petitioner the parents’ nationality evidence was not required in his case. I have given due consideration to this aspect and have reached on the conclusion that it does not mean that the parents of students should not have foreign nationality and in case of any doubt, they are at liberty to check the same. It is not the case of the petitioner that his parents are foreign national. Rather, in para No.1 of this petition, the petitioner has in unequivocal terms asserts as under:

“That he was born in that country on 25th June 1991 and holds dual nationality of Pakistan & USA by virtue of his parents being Pakistani nationals”

Neither the petitioner has alleged that his parents had foreign nationality nor any document to this extent has been annexed with the petition. Rather, at the time of arguments, it has been stated that mother of the petitioner had applied for U.S nationality and during the process she had expired and his father and resident visa of USA. In such circumstances, the petitioner cannot be deemed to have been fulfilled the condition precedent i.e. permanent foreign nationality of parents. Moreover, according to condition No.2, the application was to be sent through government/embassies for forwarding the same to respondents, but it was not done so. Therefore, the petitioner has not fulfilled the required criteria for admission and he has rightly been denied admission. There is no question of discrimination as being agitated by the petitioner.”

A similar view has been taken in a case titled “Huma Rafiq Khan vs. Secretary of Finance and Economic Affairs,

Government of Islamic Republic of Pakistan” [1988 MLD 2562].

Relevant observation is as under:-

“It is an admitted position that the parents of the petitioner are not foreign national but Pakistani national and, therefore, the above-quoted condition No.1 is not fulfilled. However, it has been contended by the learned counsel for the petitioner that in one of the cases this condition was relaxed inasmuch as one of the parents was not foreign national. In our view we cannot direct the respondent to relax the above condition as it is a matter of discretion. In the absence of any guiding statutory rule we are not in a position to comment upon question, on what consideration the relaxation in the above case was accorded. However, it will suffice to observe that the petitioner may approach the respondent for relaxation if she considers herself eligible even now after the expiry of above academic year 1985-86. With the above observation the petition is dismissed but there will be no order as to costs”.

The contention of Mr. Sadaqat Hussain Raja, the learned counsel for the petitioner that the time for submission of the applications has been extended with mala fide intention, has been judged in light of the record. We found no substance in it. The authority competent to fix the time is equally vested with the powers to enlarge the same in order to provide a reasonable opportunity to aspiring candidates. We are of the opinion that after declaring criteria adopted by the executive committee ultra vires of the rules, this argument even otherwise, becomes irrelevant.

The contention of Kh. Attaullah Chak, Advocate that petitioner is estopped on the principles of acquiescence and estoppel, is devoid of any substance. We are of the view that it is not proved by the respondents that petitioner was fully aware about the additional qualification on the basis of which respondents have

been granted admission. The rule of acquiescence and estoppel is attracted against a person who has knowledge about an illegality and did not challenge the same within reasonable time. Otherwise the principles of the acquiescence and estoppel hardly come in the way of a bona-fide contestant who is in possession of a legal claim. Our this view is supported by the dictum of the apex Court laid down in a case titled “Umar Hayyat vs. Azad Govt. of The State of Jammu and Kashmir through Chief Secretary and 3 others” reported as [1999 PLC (C.S.) 93] wherein the concept of acquiescence and estoppel was examined by the apex Court at length and after thrashing out the earlier case law, at page 103 of the report, it was observed as under:-

“It is difficult to summarise in a few words all the shades of the meaning of the acquiescence as defined and interpreted in the judgments and the celebrated works mentioned above, but it can be safely stated that there can be no acquiescence unless two ingredients are present. Firstly, there should be express or implied, abandonment of a right or failure to enforce it. The second ingredient is that the act by which acquiescence is inferred should be inconsistent with the right. In the present case, both these factors are absent. So far as inconsistency is concerned, it needs to be emphasized that the appellant’s contention never was that the Public Service Commission had no authority to hold test and interview for the disputed posts. His contention was that test should be restricted to refugees settled in Pakistan. His appearance in the failure to get it cancelled, was not an inconsistent conduct because being a refugee himself he was entitled to appear in the test.”

The contention of Kh. Attahullah Chak, Advocate that Overseas Pakistani Foundation is necessary party, is also devoid of any force. The Overseas Pakistani Foundation has been registered

under the Company Laws and is working for the betterment of its members. This Corporation is not vested with the authority to issue guidelines or make rules for the purpose of admission against Overseas Kashmiris seats, therefore, it cannot be held that without impleading or in the absence of Overseas Pakistani Foundation, petitioner is not entitled to any relief.

The contention of Kh. Attahullah Chak, the learned Advocate that in view of the judgment of the apex Court relied upon by him, the petitioner cannot be admitted in the previous session, therefore, ouster of the private respondents will not serve purpose, is devoid of any force. The Court has to give the judgment regardless of administrative consequences. Where admission is granted in violation of the policy and statutory rules, the same cannot be saved and no benefit can be extended to the students who have illegally been admitted on the ground that relevant academic session has expired. In a case titled “Rahat Saeed Bokhary vs. Aisha Hameed Qadri & another” [PLJ 1997 SC (AJK) 69] an identical proposition was raised before the apex Court in a nomination matter. It was argued that as the session has been closed and the respondent therein cannot be admitted in the institution, hence, the acceptance of writ will not serve any purpose, the contention was repelled and admission was recalled after a period of 2 years. The apex Court concluded as under:-

“9. Apart from that it is evident from the authorities referred to above that relief to an aggrieved candidate for admission to an educational institution cannot be refused merely because the academic session for which he or she was candidate has expired. If the grievance of an aggrieved candidate who was illegally

refused admission was found genuine, the direction was issued to the concerned authority to nominate or admit him in the academic session for which he was a candidate despite the delay, if possible, or if the session had already expired, direction was issued to admit him in the current session. However, in some cases, the candidates who had already been given admission were not disturbed. Therefore, the contention of the learned counsel for the appellant that the respondent could not be admitted to Medical College because the Academic Session 1994-95 for which she was a candidate had already expired and the appellant has been promoted to second year of M.B.B.S class is not tenable.”

As we have held that work visa/permit of the parents or the candidates himself, on the basis of which private respondents have been granted admission, is not a substitute of dual nationality, therefore, our conclusion is that except Rafia Butt, who is green Card Holder, the admissions of all the other candidates made against the overseas seats are illegal and are hereby declared to have been made without lawful authority and of no legal consequences.

So far as the case of the petitioner is concerned, he has also based his claim on resident permit, which has already been declared not equivalent to dual nationality, therefore, he is also not entitled to any relief.

The petition stands disposed of in the manner indicated above.

Muzaffarabad,
29th Nov 2012.(M.N) **CHIEF JUSTICE JUDGE JUDGE**