

IN THE SUPREME COURT OF PAKISTAN  
(APPELLATE JURISDICTION)

**PRESENT:**

MR. JUSTICE NASIR-UL-MULK, HCJ  
MR. JUSTICE AMIR HANI MUSLIM  
MR. JUSTICE IJAZ AHMED CHAUDHRY

**CIVIL PETITION NO. 2124 OF 2013 &**  
**C.M.A. NOS. 1079 & 4821 OF 2014**

(On appeal against the order dated 10.10.2013  
passed by Islamabad High Court, Islamabad in ICA  
No. 1005/2013)

Ghulam Rasool

... Petitioner

**VERSUS**

Government of Pakistan through Secretary Establishment Division,  
Islamabad and others

... Respondents

For the Petitioner: Mr. Abdul Rahim Bhatti, ASC

For the Respondent (3): Mr. Khurram Mumtaz Hashmi, ASC

For Federation: Mr. Salman Aslam Butt, Attorney General  
Mr. Muhammad Waqar Rana, Addl. Attorney  
General

Date of Hearing: 30.10.2014

**JUDGMENT**

**CIVIL PETITION NO. 2124 OF 2013**

**IJAZ AHMED CHAUDHRY, J.-** Petitioner and others,  
who are serving employees of Inter Services Intelligence (ISI) and  
belong to surveillance cadre, being aggrieved of their promotion  
policy to next scale had filed a Constitution Petition before the  
learned Islamabad High Court. At the time of hearing of the petition,  
the respondent No. 3 raised a preliminary objection with regard to  
the maintainability of the writ petition, upon which the learned  
Single Judge in Chamber after hearing the parties dismissed the  
Writ Petition by observing that the petitioners are civil servants and  
the High Court has no jurisdiction to entertain the said petition and  
that the proper forum for the matters in relation to terms and

conditions of the civil servants is Federal Service Tribunal. The Intra Court Appeal filed by the petitioners also met the same fate. Hence this petition.

2. We have heard learned counsel for the parties and have perused the impugned judgments.

3. Admittedly the petitioner is enjoying the status of civil servant in terms of Section 2(b) of the Civil Servants Act, 1973. His appointment letter has also been issued under the said Act and the proper forum for redressal of his grievance was Federal Service Tribunal. The Tribunal is functional and the petitioner, if so advised, can approach the said forum for redressal of his grievance. In these circumstances, the impugned judgments are unexceptionable. The petition is dismissed and leave refused.

**ISSUE OF FILLING UP CERTAIN CONSTITUTIONAL POSTS  
(C.M.A. NOs. 1079 & 4821 OF 2014)**

4. During the hearing of Civil Petition No. 2124/2013 this Court had taken note of the fact that specific posts under the Constitution and under various statutes are pending and still have not been filled up. A concise statement in this behalf bearing CMA No. 1079/2014 has been filed by the Federal Government wherein steps have been outlined for the appointment of various constitutional posts and the problems the Government is facing in such appointments. Learned Attorney General for Pakistan has submitted that as there was no specific prayer made in the said concise statement, another CMA bearing No. 4821/2014 has been filed. He submitted that the Federal Government is facing difficulties in appointments to such offices in view of the direction given by this Court in paras 26 & 27 of the judgment reported as Khawaja Muhammad Asif Vs. Federation of Pakistan (2013 SCMR 1205); that

in the said judgment a procedure has been prescribed for appointments to certain offices in statutory bodies, autonomous bodies, semi-autonomous bodies, regulatory bodies etc to be processed through a Commission; that some of these offices are created by statutes providing their own procedure for appointment and, therefore, some anomalies would arise in case the appointments are made in accordance with the directions given in Khawaja Asif supra judgment and the business of the Federal Government is suffering. He further added that since assumption of office by the Prime Minister and the Federal Cabinet, the Federal Government has sincerely tried to fully comply with the above said judgment regarding the proposed Commission and initially certain Public Sector Organizations were included in the schedule of posts under the purview of the Commission but despite the sincere endeavours there are administrative issues that are creating hurdles. In this regard a list has also been filed whereby it has been brought to the notice of this Court that so far only for the following Public Sector Organizations, appointments can be made:-

- i) Pakistan Telecommunication Authority
  - a) Member Technical
  - b) Member Finance
- ii) Pakistan Television Corporation
- iii) Pakistan Steel Mills Limited

According to the list, there are 22 statutory bodies and 33 Public Sector Companies established under Companies Ordinance, 1984, whose heads are yet to be appointed by the Commission.

5. Learned Attorney General further added that while making the directions, the provisions of Article 90 of the

Constitution where the power of appointment has been vested in the Federal Government has not been taken into consideration by this Court; that the contents of para 26 & 27 of the Khawaja Asif supra judgment were in the form of certain recommendations and suggestions which could not have assumed the status of law. In this regard he relied on Shahid Orakzai and another Vs. Pakistan (PLD 2011 SC 365). He further added that various Acts / Ordinances lay down the criteria for high-level appointments and empower the Federal Government to make such appointments, which the Federal Government is bound to follow; that such provisions also inherently envisage the ability of the Federal Government to adopt any suitable manner, method and policy of vetting, assessing and selecting suitable candidates for such appointments according to the peculiar needs and complexities of specific appointments; that when the law provides for a thing to be done in a particular way, it should have been done in that way and in no other way; that none of the Acts / Ordinances envisage any forum or body like the Commission; that an essential function of the Government has been given to the Commission which is against the law; that the Members of the Commission are not accountable to anybody and that since the Commission has no legal status, its Members are not subject to judicial review by the Court, therefore, there is no procedure available to check the possible abuse of power by the Commission. On the other hand, he added that the Federal Government or the Prime Minister, as the case may be, are accountable to the Parliament under the Constitution and also to the People of Pakistan and their actions are subject to judicial review. He lastly prayed that the directions contained in Khawaja Asif supra judgment at paras 26 to 30 may be revisited or clarified.

6. We have heard learned Attorney General for Pakistan at some length.

7. During the last care-taker Government, a large number of appointments were made without following any merit or procedure that were against the Constitutional mandate of a care-taker Government. Khawaja Muhammad Asif, a Parliamentarian, had filed a petition before this Court under Article 184(3) of the Constitution against the said appointments and this Court had *inter alia* made following directions:-

*"26. Be that as it may, in order to ensure the enforcement of the fundamental right enshrined in Article 9 of the Constitution and considering it to be a question of public importance, a Commission headed by and comprising two other competent and independent members having impeccable integrity, may be the Federal Ombudsman or Chairman NAB or a Member of Civil Society having exceptional ability and integrity, is required to be constituted by the Federal Government through open merit based process having fixed tenure of four years to ensure appointments in statutory bodies, autonomous bodies, semi-autonomous bodies, regulatory authorities to ensure appointment of all the government controlled corporations, autonomous and semi-autonomous bodies, etc. The Commission should be mandated to ensure that all public appointments are made solely on merits. The Commission should discharge mainly the following functions:-*

- (i) Regulate public appointments processes within his remit;*
- (ii) implement a Code of Practice that sets out the principles and core processes for fair and transparent merit-based selections;*
- (iii) chair the selection panels for appointing heads of public/statutory bodies and chairs and members of their boards, where necessary;*
- (iv) appoint Public Appointments Assessors to chair the selection panels for appointing heads of public/statutory bodies and chairs and members of their boards, where appropriate;*
- (v) report publicly on a public/statutory body's compliance with the Code of Practice, including examples of poor and good performance, and best practice;*
- (vi) investigate complaints about unfair appointment process;*

- (vii) *Monitor compliance with the Code of Practice;*
- (viii) *Ensure regular audit of appointments processes within his remit;*
- (ix) *Issue an annual report giving detailed information about appointments processes, complaints handled, and highlights of the main issues which have arisen during the previous year. The annual report for the previous calendar year should be laid before the Parliament by 31st March;*
- (x) *Take any other measures deemed necessary for ensuring that processes for public sector appointments that fall in his remit are conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are fully guarded against.*

27. *The Code of Practice should provide foundations for transparent merit-based public appointments. All public appointments must be governed by the overriding principle of selection based on merit, out of individuals who through abilities, experience and qualities have a proven record that they best match the need of the public body in question. No public appointment must take place without first being recommended by the Commission. The appointments procedures should be subjected to the principle of proportionality, that is, what is appropriate for the nature of the post and the size and weight of its responsibilities. Those, selected must be committed to the principles and values of public service and perform their duties with highest level of integrity. The information provided about the potential appointees must be made public. The Commission may from time to time conduct an inquiry into the policies and procedures followed by an appointing authority in relation to any appointment. He may also issue a statement or publish a report commenting publicly on any breach or anticipated breach of the Code. The appointment of the successful candidate must be publicized.*

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30(e) *The appointments in autonomous/semi-autonomous bodies, corporations, regulatory authorities, etc., made before the appointment of Caretaker Government shall also be subjected to review by the elected Government by adopting the prescribed procedure to ensure that right persons are appointed on the right job, in view of the observations made in above paras (Paras.Nos.25 and 26)"*

8. We have noted that while making such directions, the provisions of Article 90 of the Constitution were overlooked by this Court. Article 90 reads as under:-

*"90. (1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the Chief Executive of the Federation.*

*(2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers."*

9. The appointment of a Commission and the power to make recommendations for such appointments is not in accordance with Article 90 of the Constitution where the power of appointment has been vested in the Federal Government. It appears that in the light of the observations made in paras 26 & 27 of the *Khawaja Asif supra* judgment the legal authority has been vested in a Commission and its recommendations are being made binding upon the Prime Minister. It is by now a well settled law that the responsibility of deciding suitability of an appointment, posting or transfer fell primarily on the executive branch of the State. It is also a settled law that the Courts should ordinarily refrain from interfering in policy making domain of the Executive. In Executive District Officer (Revenue), District Khushab Vs. Ijaz Hussain (2012 PLC(CS) 917) this Court has held that framing of recruitment policy and rules thereunder fell in the executive domain; that the Constitution of Pakistan is based on the principle of trichotomy of powers where legislature is vested with the functions of law making, the executive with its enforcement and judiciary of interpreting the law and that Courts could neither assume the role of policy maker nor that of a law maker. The contents of the said paras were in the form of certain recommendations, which could not have assumed the status of law. In Shahid Orakzai and another Vs. Pakistan (PLD 2011 SC 365) the importance of consulting the Hon'ble Chief

Justice of Pakistan has been stated in the matter of appointment of Chairman of the National Accountability Bureau and it was expected that such recommendation had to be given effect for all future appointments. Subsequently in Ch. Nisar Ali Khan Vs. Federation of Pakistan etc (PLD 2013 SC 568) this Court had clarified that in the absence of the Hon'ble Chief Justice of Pakistan from the appointment process of Chairman NAB, the observations in Shahid Orakzai supra case were not to be treated as binding and that *"a suggestion or recommendation made by the Court in a judgment though entitled to due respect, deference and consideration, does not travel beyond a suggestion or a recommendation and it does not by itself assume the status of law. By its nature and form a suggestion or a recommendation is simply what it is, nothing more and nothing less."* In Syed Mahmood Akhtar Naqvi and others Vs. Federation of Pakistan etc (PLD 2013 SC 195), this Court has held that *"whenever there are statutory provisions or rules or regulations which govern the matter of appointments, the same must be followed"*. Keeping in view the above discussion, it can be said that the matter of appointment of heads of statutory bodies, autonomous / semi-autonomous bodies, corporations, regulatory authorities etcetera are governed under specific statutory provisions which cannot be overlooked or substituted by some other mechanism. We have noted that various Acts / Ordinances lay down a specific criteria / qualifications for high-level appointments and empower the Federal Government to make such appointments. Some of them are (i) Federal Public Service Commission of Pakistan Ordinance, 1977, (ii) Competition Act, 2010, (iii) Pakistan Electronic Media Regulatory Authority Ordinance, 2002, (iv) Oil and Gas Regulatory Authority Ordinance, 2002, (v) NEPRA Act, 1997, (vi) Securities &



Exchange Commission Act, 1997, (vii) Pakistan Telecommunication (Re-organization) Act, 1996, and (viii) Companies Ordinance, 1984. The above referred Acts / Ordinances provide a complete procedure of appointments, which the Federal Government is bound to comply with as mandated under Article 5 of the Constitution. The Federal Government has been expressly empowered by the Legislature to make high-level appointments in accordance with the criteria specified in the concerned Acts / Ordinances. In case of companies incorporated in the public sector under the Companies Ordinance, 1984, the appointment and removal of Directors is comprehensively dealt with under the said Ordinance and the memorandums, rules / regulations framed there under. However, it is also made clear that the Court's deference to the Executive Authority lasts for only as long as the Executive makes a manifest and demonstrable effort to comply with and remain within the legal limits which circumscribe its power. Even where appointments are to be made in exercise of discretionary powers, such powers are to be employed in a reasonable manner. Even otherwise, the policy adopted by the Federal Government in making appointments is open to judicial review on the touchstone of the Constitution and the laws made there under i.e. in case of any illegality in the ordinary process of appointment, this Court as well as the High Courts have sufficient powers under Articles 184 & 199 of the Constitution to exercise judicial review. There are similar Commissions in other countries including the United Kingdom, Canada and India. However, all those commissions were made pursuant to specific laws / statutes enacted for that purpose. In Australia, the Australian Public Service Commission was established pursuant to the Public Service Act, 1999. Similarly in Canada, the Federal Accountability Act, 2006,

was enacted by the Parliament for *inter alia* putting in place measures respecting administrative transparency, oversight and accountability. However, no public appointments commission has yet been created. No statutory Commission has been created in Pakistan for examining suitability of persons for appointment to high public offices. The Government may consider the establishment of such a Commission through legislation in order to ensure transparency which would also enable the executive authority to make an informed decision while making appointments.

10. In view of the afore-referred circumstances, we clarify that it is the exclusive preserve of the Federal Government to appoint heads of statutory bodies, autonomous bodies, semi-autonomous bodies, regulatory bodies etc as also to make appointments on merits under the Acts / Ordinances wherein certain criteria has been laid down for such purpose. CMA Nos. 1079 & 4821 of 2014 are allowed in terms noted above.

11. Now that there are no impediments in the process of appointments to the offices in the statutory bodies and to public sector companies referred to in paragraph 4 above, they shall be filled up without loss of time by the end of December, 2014. A preliminary report of the progress made towards the appointment shall be submitted by the learned Attorney General for Pakistan for our perusal in chambers by the 10<sup>th</sup> of December, 2014.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the  
Announced on 14.11.2014.

Approved For Reporting  
Khurram