IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MUNIB AKHTAR

Civil Appeal No.1481 of 2015
(On appeal from the judgment dated 4.5.2015 passed by the FST, Ibd. in Appeal No.1704(R)(C.S)/2013)

Muhammad Saleem

...Appellant (s)

vs

Federal Public Service Commission and others **Respondent (s)**

For the Appellant Qazi Jawad Ehsanullah, ASC.

For the Respondents : Mr. Sohail Mehmood, DAG.
Mr. Haroon ur Rasheed, Dy. Dir.(FPSC)
Mrs. Misbah Gulnar Sharif, ASC.
Raja Abdul Ghafoor, AOR.
Mr. Zahid Nawaz Cheema, ASC.
Syed Ali Zafar, ASC.
Mr. Waqar A. Shaikh, ASC.
Mr. Tariq Aziz, AOR.
Hafiz Tariq Nasim, ASC.
Mr. Aftab Alam Rana, ASC.
Syed Rafaqat Hussain Shah, ASC.
Malik Muhammad Qayyum, Sr. ASC.
Mr. Shoaib Shaheen, ASC.
Mr. Khalid Anwar Afridi, ASC.

Date of hearing: 27.11.2018

JUDGMENT

Munib Akhtar, J.- The appellant assails the order of the learned Federal Service Tribunal dated 04.05.2015. The matter relates to the Occupational Group called the Military Lands and Cantonments Group (herein after referred to as the "ML&C

Group"), and the absorption therein (in terms of the Office Memorandum whereby the Group was constituted) of the contesting private respondents. These respondents were in the Income Tax Group (now called the Inland Revenue Service) and the Audit and Accounts Group (now called the Pakistan Audit and Accounts Service). They were absorbed in BS 18, in terms of paragraphs 5 and 8 (relating, respectively, to horizontal movement and lateral entry) of the aforementioned Office Memorandum. The appellant, on the other hand, was inducted directly in the ML&C Group itself in BS 17. His grievance is that the aforesaid absorption of the contesting respondents is contrary to the Civil Servants Act 1973 ("1973 Act") and the rules framed thereunder, and adverse to the rights and expectations of the members of the ML&C Group (i.e., officers like himself) to suitable promotion within the Group.

2. The appellant (and certain other officers similarly placed) had initially filed a writ petition in the Islamabad High Court, which was dismissed both by a learned Single Judge and (on appeal in ICA) by a learned Division Bench. The appellant filed a leave petition in this Court, which was disposed of by order dated 24.10.2013. It was held, setting aside the orders made in the High Court, that "the writ petition filed by the petitioners is treated to be a service appeal and is remitted to the learned Service Tribunal for decision in accordance with law". It was in such circumstances that the matter was decided by means of the impugned order. That order dismissed the appeal (while making some observations regarding seniority). The appellant again approached this Court, and leave was granted vide order dated 04.12.2015 to consider whether, as claimed by the appellant, the impugned order was contrary to the law laid down by this Court in *In re: Criminal Original Petition No. 89 of 2011* 2013 SCMR 1752 and *National Assembly Secretariat v. Manzoor Ahmed and others* 2015 SCMR 253.

3. Learned counsel for the appellant submitted that the contesting private respondents were transferred to the ML&C Group by order dated 14.06.2006 “on deputation basis... for a period of 03 years or till such time officers of ML&C Group become available from FPSC/Establishment Division, whichever is earlier, in their own pay scales...” (to quote from the said order). At that time, all of the transferred officers were in BS 17. They continued serving in the ML&C Group and in the meanwhile were promoted to BS 18 in their own Groups (i.e., the Income Tax Group and the Audit and Accounts Group). By order/notification dated 11.06.2010 they were permanently absorbed (as one batch) in the ML&C Group in BS 18. After giving the history of the litigation as set out above, learned counsel submitted that there was no concept of the permanent absorption of an officer transferred on deputation, and there was nothing in either the 1973 Act or the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 (“APT Rules”) that could apply to the circumstances of the present case. Learned counsel submitted that the contesting respondents were absorbed ostensibly in terms of paragraphs 5 and 8 of the Office Memorandum dated 11.05.1975 whereby the ML&C Group was constituted (herein after the “ML&C Group OM”). It was submitted that while Office Memorandums, as issued from time to time (compiled for convenience in various editions of the ESTACODE) were, and had the authority of, law they could not be contrary to either the 1973 Act or the rules framed in terms thereof. They were subordinate to the latter. In case of any conflict or inconsistency, they necessarily had to yield to the Act and the rules. That, it was submitted, was precisely the situation here. Paragraphs 5 and 8 were contrary to, and inconsistent with, the Act and the rules and hence the absorption of the contesting respondents was patently unlawful. Certain judgments of this Court, including those mentioned in the leave granting order, were relied upon. It was prayed that the appeal be allowed.

4. Learned counsel for one of the private respondents (No. 14) submitted that the appeal before the learned Tribunal was barred

by limitation and that the appellant had not challenged the notification under which the contesting respondents were absorbed. In any case, the petition itself (sent by this Court to the learned Tribunal to be dealt with as an appeal) had been filed after more than 30 days of the issuance of the notification, which was the period stipulated for filing appeals in the Service Tribunal. It was submitted that the ground of limitation had never been waived by the respondents. Turning to the merits of the case, learned counsel submitted that the ML&C Group OM set out the terms and conditions of service of civil servants in the Group. The Group was effectively disbanded in 2000 but was restored in 2007. Learned counsel submitted that on 25.10.2007 a presentation was given to the Prime Minister in relation to the Group. A series of decisions were taken, including the revival of the Group. Learned counsel focused on the following decision:

> "Permanent absorption of already serving CSS qualified deputationists who are willing and are considered fit by the ML&C Department. This may be done through a selection committee consisting of representatives of Defence, Establishment Divisions and DG, ML&C."

Learned counsel submitted that pursuant to this decision a meeting of the selection committee was held on 12.10.2010 where the entire matter was carefully considered in depth. The minutes of the meeting were referred to, and in particular reliance was placed on paras 3 and 4 thereof. These provided as follows:

> "3. DG. ML&C gave a brief presentation to the participants highlighting the need and purpose of permanent absorption of the officers of other groups already serving in the Deptt:. He revealed that against a sanctioned strength of 77 officers in ML&C Deptt:, only 38 were currently available out of which 02 officers were serving out of cadre on deputation to various other departments. The shortage of officers had occurred mainly due to stoppage of fresh induction in the Deptt: for over a decade and retirements of a large number of serving officers during the period. DG informed the meeting that the most critical shortage of officers was being faced in junior and middle managerial positions as against sanctioned strength of 22 officers in BS-17, only 03 were available while against sanctioned strength of 26 in BS-18, only 9 officers were available. This shortage was seriously affecting the departmental functioning since junior and middle ranking officers were required to man the slots at execution level of the Department and their absence was telling heavily upon service delivery and enforcement. While the

> shortage at intake level i.e. BS-17 might be made good in a few years time by induction of officers through CSS, there was no method to fill up the wide gap of shortfall in BS-18 which can be filled through promotion only that may take far more time. The only solution to this problem lay in absorption of already serving deputationists who had obtained sufficient experience and exposure of the departmental working.
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> 4. DG, ML&C informed the Committee that the approval of Prime Minister contained in the minutes of the Briefing of 2007 circulated by PM Secretariat vide No.96/GS/Estab/2006 Dated: 02.11.2007 laid down that already serving CSS qualified officers who were willing and considered fit by the ML&C Deptt: should be absorbed. Accordingly, willingness of serving deputationists was duly obtained and an internal mechanism was devised to select best officers by forming a Departmental Selection Board comprising the DG, ML&C, Addl: DG, Regional Directors and the DDG(HQ). The aforesaid Board thoroughly scrutinized the work and conduct of deputationists and recommended six officers of Income Tax Group and two officers of Pakistan Audit & Accounts Service for absorption in ML&C Group. The work and conduct of the Deputationists was further scrutinized and discussed in the Regional Directors and Senior Officers Conference held in the Deptt: on 8-9 December, 2009 and the following 12 officers were finally considered fit for absorption:- [there then followed a Table which need not be reproduced]"

Learned counsel submitted that it was on the foregoing basis that the absorption of the contesting respondents was recommended. This led finally to the issuance of the order/notification dated 11.06.2010, already referred to above. Learned counsel emphasized that the matter had throughout been dealt with in accordance with law and, in particular, the ML&C Group OM. Learned counsel placed strong reliance on a judgment of this Court reported as *Fida Hussain Shah and others v. Government of Sindh and others* 2017 SCMR 798 ("*Fida Hussain Shah* case").

5. Learned counsel for some of the other contesting respondents (Nos. 7, 8, 9, 12, 13 and 15) adopted the submissions made and emphasized that there was no illegality in the absorption, whether as claimed or otherwise. Certain decisions of this Court were relied upon. Learned counsel submitted that *In re: Criminal Original Petition No. 89 of 2011* 2013 SCMR 1752 (relied upon for the appellant) had no application to the facts and circumstances of the case at hand. Learned counsel for respondent Nos. 6, 10 and 11 also submitted that the entire matter had been

dealt with in accordance with law. Reliance was placed in particular on the *Fida Hussain Shah* case. Learned counsel for respondent Nos. 16 to 18 reiterated that the Office Memorandums had the force of law. Reference was made to various paragraphs of the ML&C Group OM and to certain rules in the APT Rules. Learned counsel for the respondent No. 4 adopted the submissions already made, and also referred to some decisions of this Court. Finally, the learned AAG submitted that the appeal was barred by limitation and also adopted the submissions made earlier.

6. We have heard learned counsel as above, and considered the record and case law relied upon. This appeal involves some interesting points with regard to the relationship of the Office Memorandums by which Occupational Groups have been created with the 1973 Act and the rules framed in terms thereof, and the arrangement of the foregoing within the framework of Article 240 of the Constitution, which is the bedrock on which rests the entire structure of the services, both of the Federation and the Provinces.

7. The administrative changes that were brought about shortly after the coming into force of the present Constitution (the commencing day of which was 14.08.1973) resulted in the abolition of the services into which, up to that time, the service of the Federation (or Centre) was classified, and their replacement with what were called “new occupational groups”. The first such Group to be constituted was the Audit and Accounts Group (now renamed, as noted above, as the Pakistan Audit and Accounts Service), which was created by an Office Memorandum dated 23.01.1974. Thereafter, other Occupational Groups were successively constituted, with the ML&C Group coming into existence as a result of the ML&C Group OM on 11.05.1975. It appears that at present there are 16 Occupational Groups into which the service of the Federation is divided, including the two All-Pakistan Services (as per the 2015 edition of the ESTACODE). Although the creation of the Occupational Groups was supposedly a break with the past there was, as will become apparent,

nonetheless a certain underlying continuity. The roots of the structural arrangement of the service of the Federation, and in particular its division or classification into various services or groups (howsoever called), lie deep in the past. In our view, it is not possible to understand the present arrangement without taking into account the trajectory along which previous constitutional arrangements have travelled. This is so because Article 240 is not a *tabula rasa* that sprang into existence for the first time in the constitutional journey of this country. It is linked intimately with that which has gone before. In order therefore to properly understand, on the constitutional and legal plane, the issues that arise in the present appeal we must undertake, even if only briefly, a tour of previous constitutional arrangements.

8. The journey must begin exactly 100 years ago, in 1919. At that time, India was constitutionally governed by the Government of India Act, 1915 ("1915 Act"), an Act of the Imperial Parliament. The eponymously named Act of 1919 ("1919 Act") made several important changes to the 1915 Act (the legislation being consolidated in 1924). The 1919 Act is of course well known (if not to all and sundry, then at least to constitutional lawyers, history buffs and students of a certain age) for introducing the system of "dyarchy" into the governance of India. Our interest however, lies elsewhere: in Part VII-A (comprising of ss. 96B to 96E) that was added by the 1919 Act. Section 96B, as presently relevant, provided as follows in its subsections (2) and (4):

> "(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local Governments, or authorise the Indian Legislature or local Legislatures to make laws regulating the public services:...
>
> (4) For the removal of doubts it is hereby declared that all rules or other provisions in operation at the time of the passing of this Act, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that

> behalf, and are confirmed, but any such rules or provisions may be revoked, varied or added to by rules or laws made under this section."

The foregoing provisions placed the classification of services in India, their recruitment, the conditions of service and allied matters on the constitutional plane. (We may note in passing that the Indian Civil Service had already been separately provided for in Part VIII of the 1915 Act.) This section was the genesis of all that followed, and in that sense can be regarded as the constitutional progenitor of Article 240. It will be seen from subsection (2) that the power conferred on the Secretary of State in Council was all encompassing. Not even the Governor-General in Council, and certainly not the Indian legislatures constituted under the Government of India Acts, had any competence with regard to what might be compendiously called the terms and conditions of the civil service, until and unless the Secretary of State in Council delegated the power to the former or authorized the latter to exercise such legislative competence. Subsection (4) provided constitutional cover for all rules etc hitherto made. In exercise of the power conferred by s. 96B the Secretary of State in Council framed the Civil Servants (Classification, Control and Appeal) Rules, 1930. It appears that no legislative competence was conferred on any Indian legislature. The aforesaid rules classified the civil services of India into the various categories as therein specified.

9. The next stage was reached in the Government of India Act, 1935 ("1935 Act"), which continued up to Independence and of course served as the first constitution for each of the Dominions of Pakistan and India. It will be convenient to set out its relevant provisions, along with those contained in the 1956 Constitution, the 1962 Constitution and the Interim Constitution of 1972 in tabular form. The table is set out in the Annex to this judgment, to which reference may be made.

10. It will be seen that the 1935 Act made two significant changes. Firstly, it empowered the Governor-General to make the rules as regards the terms and conditions of service. Secondly, it empowered the Indian legislatures created by the 1935 Act also to have legislative competence in this regard. The rule making power of the Governor General was subject to any law so made. However, it is important to keep in mind that the said power of the Governor General was a direct, and independent, grant on the constitutional plane, i.e., it was not dependent on any Act of the Indian legislature. Furthermore, the power conferred on the Governor General was mandatory, as evidenced by use of the word "shall": he had to make the relevant rules (or, what amounted to the same thing, allow existing rules to continue). The law making competence of the Indian legislature was only enabling ("may"). In the event, it appears that no law was made by any Indian legislature in this regard.

11. When the provisions of the 1956 Constitution, the 1962 Constitution and the Interim Constitution are compared with the 1935 Act, it will be seen that the same pattern was followed. The rule making power of the President, which was cast in mandatory terms, was a direct and independent grant on the constitutional plane. It was subject to any law made by the relevant legislature, but the competence of the latter was only enabling. Again, it appears that no such law was enacted. Thus, the entire matter continued to be dealt with, as it had from 1930 onwards under s. 96B of the 1915 and 1919 Acts, by rules made by what may be regarded as the Executive branch. The Legislative branch, though empowered since 1935, remained (or perhaps was kept) quiescent throughout.

12. This brings us to the present Constitution, and Articles 240 and 241, which as presently relevant provide as follows:

> "**240**. **Appointments to service of Pakistan and conditions of service**. Subject to the Constitution, the appointments to and the conditions of service of

> persons in the service of Pakistan shall be determined—
>
> (a) in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of Majlis-e-Shoora (Parliament);...
>
> **241**. **Existing rules, etc., to continue**. Until the appropriate Legislature makes a law under Article 240, all rules and orders in force immediately before the commencing day shall, so far as consistent with the provisions of the Constitution, continue in force and may be amended from time to time by the Federal Government...."

It will be seen that compared with what had gone before Article 240 has been cast in a crucially different form. The rule making power, as conferred on the Executive branch (i.e., the President) as a direct and independent grant on the constitutional plane, has been done away with altogether. Now the power to make appointments and settle the terms and conditions of persons in the service of the Federation has been conferred solely and exclusively on the Legislative branch, which must ("shall") act in this regard. Furthermore, although all rules and orders made under previous constitutional dispensations (as were not inconsistent with the Constitution) were continued in terms of Article 241, that situation was to remain in place only till such time that a law was not made under Article 240. And, while the Federal Government could amend such rules and orders, it could not make new ones. The Executive branch was bereft of power in this regard.

13. Whatever may have been the scope of Article 241, it had a very short run indeed. For, the very next day after the commencing day of the Constitution, the Civil Servants Ordinance, 1973 ("Ordinance") was promulgated on 15.08.1973. Thus, a law in terms of Article 240 was put in place in the shortest possible time. (The Ordinance was replaced about a month later by the 1973 Act.) Section 25 of the Ordinance (replicated in the 1973 Act) provided as follows:

> "**25. Rules**.- (1) The President or any person authorized by the President in this behalf, may make such rules as appear to him to be necessary or expedient for carrying out the purposes of this Ordinance.
>
> (2) Any rules, orders or instructions in respect of any terms and conditions of service of civil servants duly made or issued by an authority competent to make them and in force immediately before the commencement of this Ordinance shall, in so far as such rules, orders or instructions are not inconsistent with the provisions of this Ordinance, be deemed to be rules made under this Ordinance."

Subsection (1) empowered the President or any person authorized by him (i.e., the Executive branch) to make rules for carrying out the purposes of the Ordinance (latterly the 1973 Act). However, it is important to keep in mind that this was not the independent and direct constitutional grant of old; it was merely a delegation of power conferred by the legislature as permitted by Article 240 ("by or under"). Subsection (2) continued such rules, orders or directions made under previous dispensations as were not inconsistent with the Ordinance (since they would otherwise have fallen by the way by reason of Article 241). Interestingly, regardless of their previous provenance even as orders or instructions, they were all deemed to be "rules" under the Ordinance.

14. The comparative and historical exercise just carried out highlights both the continuity that Articles 240 and 241 have with the past and the changes brought about by them. This sets the stage for considering the Occupational Groups and the Office Memorandums whereby they were constituted. Although the classification of the service of the Federation (or Centre or India) into different types of "services" was abolished, the Occupational Groups that almost immediately replaced them were, structurally and functionally, not an altogether new and different species. The earlier classification, which was perhaps much more rigid and stratified, was loosened but the overall shape maintained a continuity. The Ordinance and the 1973 Act spoke in large measure in generalities, providing for much of the detailed structure of the terms and conditions to be determined as

"prescribed", i.e., as established in the exercise of the rule making power under s. 25. Many rules (including in particular the APT Rules) were (and continue to be) framed under and with specific reference to s. 25. However, at the same time, the service continued to be divided into different categories, now called the Occupational Groups. These were created by Office Memorandums issued by the Establishment Division essentially over the period 1974 to 1976 (although it seems that the Railways (Commercial & Transportation) Group was created as recently as 12.10.2012). All the Office Memorandums provide in relation to each Group (as does paragraph 2 of the ML&C Group OM) that the Group "will function within the following broad framework of rules and procedure". Now, it was common ground before us that these Office Memorandums had the force of law. The question however is: what is the legal source of the power whereby, or in terms whereof, these Office Memorandums have been issued? This question is of central importance to deciding this appeal since it will be recalled that one basic objection taken by the appellant to the ML&C Group OM is that it is (in relevant part) inconsistent with the 1973 Act and the rules framed thereunder and must therefore yield to, and before, the latter.

15. Keeping the foregoing analysis in mind it is our view that the legal source for the issuance of the Office Memorandums can only be the 1973 Act itself. Thus, the legal power whereby the Office Memorandums have been issued is nothing other than an aspect (and exercise) of the rule making power conferred in terms of s. 25(1). The reason is that, as shown above, the present Constitution has removed entirely the earlier direct and independent grant of rule making power on the Executive branch. On the constitutional plane there is now only one repository of the power in relation to the appointment and the terms and conditions of service of civil servants, and that is the legislature. It would therefore be incorrect to posit that, notwithstanding this important and in many ways fundamental change from the past, the Executive branch nonetheless somehow continues to have (perhaps on some residual

basis) a direct and independent power in this regard. That cannot be so. Even a bare glance at the Office Memorandums shows that they are concerned with the terms and conditions of service of the civil servants who fall within the relevant Group. It will also be recalled that in terms of s. 25(2) not only rules but also the orders and instructions carrying over from previous dispensations were deemed to be "rules" under the statute. Even though the Office Memorandums do not formally make reference to s. 25 it surely cannot be otherwise with regard to terms and conditions settled under them after the commencement of the present Constitution. In our view therefore, in law the Office Memorandums whereby the Occupational Groups are established emanate from, and are an exercise of, the rule making power conferred on the "President or any person authorized by the President in this behalf".

16. If, as we have just concluded, the legal source from which the Office Memorandums emanate is the rule making power, it necessarily follows that they are co-equal with other rules framed in terms thereof, such as the APT Rules. In other words, they cannot be considered subordinate to such rules. It follows from this that the Office Memorandums cannot, in case of any inconsistency, be regarded as yielding to the rules otherwise made under s. 25 (i.e., more formally with specific reference thereto). Since in the legal hierarchy they are of equal standing, the Office Memorandums and rules such as the APT Rules must be read together in a harmonized and consistent manner, to the maximum extent possible. It is only if there is an irreconcilable difference that the question of which will prevail would arise. And that question would have to be addressed by resort to well established rules of interpretation, including (but not limited to) those such as relating to earlier versus later in time, or general versus specific etc. Which particular rule(s) of interpretation would actually apply (and how) would depend on the actual provisions under consideration and the context in which they operate. However, with respect, the submission made by learned counsel for the appellant, that rules such as the APT Rules are (as it were) of a higher legal order or

standing and will therefore always and automatically prevail over the Office Memorandums cannot be accepted. They are aspects of the same delegated power conferred by the 1973 Act on the Executive branch. It may be reiterated that it is the Legislative branch alone which has been conferred an independent and direct grant on the constitutional plane. Of course, the Office Memorandums cannot be inconsistent with the 1973 Act itself nor (*ipso facto*) the Constitution. But any such objection to them operates on a plane higher than their position vis-à-vis rules such as the APT Rules.

17. The matter can also be approached from another angle. Section 5 of the 1973 Act provides as follows:

> "**5. Appointments**.- Appointments to an All-Pakistan Service or to a civil service of the Federation or to a civil post in connection with the affairs of the Federation, including any civil post connected with defence, shall be made in the prescribed manner by the President or by a person authorized by the President in that behalf."

It will be seen that s. 5 deals with three situations: (i) an All-Pakistan Service; (ii) a civil service of the Federation; and (iii) a civil post in connection with the affairs of the Federation (including any civil post connected with defence). In respect of each, appointments are to be made by the President in the "prescribed manner", i.e., in exercise of the rule making power. Now, s. 5 of the Ordinance was in the same terms as reproduced above. On the day on which the Ordinance was promulgated (on 15.08.1973) the civil services into which the service of the Federation was then classified were in existence, and hence the reference to "a civil service of the Federation" in s. 5. As noted above those services were abolished shortly thereafter. The "new occupational groups" that then came into existence were meant specifically to replace those services. (Reference may be made to the opening paragraph of the Office Memorandum dated 23.01.1974 whereby the Audit and Accounts Group was created.) When considered in this context, in our view, in the end the words "a civil service of the

Federation" as used in s. 5 meant (and continue to mean) the Occupational Groups that replaced the services that had been in place till that time. We hold accordingly. The APT Rules, on the other hand, deal only with appointments to "posts", i.e., the third situation catered for in s. 5. Thus, even when examined in the context of s. 5, the legal instruments (i.e., the Office Memorandums) whereby the Occupational Groups have been created are an exercise of the rule making power delegated to the President, both specifically in terms of the section itself and also, of course, s. 25. It is also to be noted that, as specifically provided in each Office Memorandum, the relevant Occupational Group comprises of the posts as identified therein (which cataloging is invariably rounded off by the formula "and such posts as may be included in the Group from time to time"). These are the posts that fall to the lot of the civil servants who are members of that Group. Thus, in fact the Office Memorandums and the APT Rules act in tandem. They operate in their own, though interlocking, spheres. The latter lay down the rules of how appointments are to be made to posts, whereas the former lay down the "broad framework of rules and procedure" whereby the Groups that are to hold posts (in the main, and generally speaking, though not always exclusively) are constituted and function. This serves only to reinforce the point already made, that the legal source of the power to issue the Office Memorandums that constitute the Occupational Groups lies squarely in the rule making power conferred and delegated on the Executive branch by the 1973 Act.

18. In our view therefore the ML&C Group OM cannot be said to be inconsistent with either the 1973 Act or the APT Rules. The submissions made by learned counsel for the appellant to contrary effect cannot, with respect, be accepted.

19. As noted above, the contesting respondents first came to the ML&C Group by way of deputation in 2006. The description of a "deputationist", as given in the ESTACODE, has been accepted by this Court, and reference may be made to *Islamic Republic of*

Pakistan v. Israrul Haq and others PLD 1981 SC 531 and *Muhammad Arshad Sultan and another v. Prime Minister of Pakistan and others* PLD 1996 SC 771. These decisions were reaffirmed in *In re: Criminal Original Petition No. 89 of 2011* 2013 SCMR 1752 (herein after referred to as the "*Contempt Petition* case"). It was there held as follows (in a portion of the judgment titled "Deputation"; emphasis in original; pp. 1844-45):

> "127. The issue of *'deputation'* has created lot of unrest amongst the Civil Servants. From the arguments of the learned counsel and the material produced before us, we are of the considered view that the term *"deputation"* has not been provided under any civil service law and this term has been borrowed from Esta Code 2009 Edition Chapter-III at page 385. Part-II at Page 426 of the Esta Code which deals with the issue of deputation and serial No.29, which defines *"deputation",* is reproduced herein below [Now see ESTACODE 2015 ed., pg. 415, Chapter 3, Sl. No. 8]:-
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> > *"Hither-to the term 'deputation' has not been formally defined. However, according to the practice in vogue a Government servant begins to be regarded as a "deputationist" when he is appointed or transferred, through the process of selection, to a post in a department or service altogether different from the one to which he permanently belongs, he continues to be placed in this category so long as he holds the new post in an officiating or a temporary capacity but ceases to be regarded as such either on confirmation in the new post or on reversion to his substantive post."*
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> 128. In the case of Muhammad Arshad Sultan and another vs. Prime Minister of Pakistan, Islamabad and others (PLD 1996 SC 771) at page 777, this Court has defined *"deputation"* in the following terms:-
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> > *"Deputationist' to be a Government servant who is appointed or transferred through the process of selection to a post in a department or service altogether different from the one to which he permanently belongs. Such a Government servant continues to enjoy this status so long as he holds the new post in an officiating or a temporary capacity but ceases to be regarded as such either on confirmation in the new post or on reversion to his substantive post. The departmental interpretation referred to by the said Tribunal as having the effect of statutory rule has still being retained, as is evident from the ESTACODE (1983 Edition) in Chapter III, Part II at page 217. This Court has also accepted the aforesaid definition of the term 'deputation' in Islamic Republic of Pakistan v. Israrul Haq and others PLD 1981 SC 531.*"

In our view, there is nothing in the record that would indicate that the contesting respondents were not deputationists within the meaning of the foregoing when they were transferred to the ML&C Group by order dated 14.06.2006. Learned counsel for

the appellant referred to the foregoing paras of the *Contempt Petition* case, and relied also on paras 129, 134 and 137. Learned counsel for the respondents submitted that those paras had no application to the facts and circumstances of the case at hand. We agree. It is quite clear that the observations sought to be relied upon were in relation to non civil servants being accommodated on extraneous and unlawful grounds in posts and cadres of the service of the Province. That is nothing like the situation at hand, and no such claim was made before us. In our view, the contesting respondents arrived (if we may put it so) in the ML&C Group posts in accordance with law.

20. This brings us to the nub of the matter, i.e., the absorption of the contesting respondents in the ML&C Group as members thereof in BS 18. As noted above, in this regard reliance was placed on paragraphs 5 and 8 of the ML&C Group OM. These provide as follows:

> "5. *Grades 18 and above.*- Posts will be filled by promotion or direct recruitment in accordance with the procedure laid down in the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 and other instructions issued from time to time or by horizontal movement of suitably qualified and experienced officers from other Groups."
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> "8. *Lateral entry.*- In order to meet shortages of officers in the Military Lands and Cantonments Group or to meet specific requirements, appointments may be made to posts in the Group in any Grade by transfer from other Groups, or by recruitment through lateral entry of persons engaged in a profession or in the service of a corporation or private organization, who possess such professional qualifications and experience as may be prescribed from time to time."

21. The first point to note is that paragraph 5 is specific to BS 18 and above whereas paragraph 8 is more general, applying to posts in any grade. Insofar as paragraph 5 is concerned, it allows for the filling of posts in two ways: (i) by promotion or direct recruitment as per the APT Rules, supplemented by other instructions as issued from time to time; or (ii) by "horizontal movement", of suitably qualified and experienced officers from other Occupational Groups. Paragraph 8 allows for "lateral entry"

to meet either of two contingencies: (i) shortages of officers; or (ii) "specific requirements". In respect of either contingency, appointments can be made in two ways: (i) by transfer from other Occupational Groups; or (ii) by recruitment through lateral entry of persons in what might be called the private sector, i.e., someone who is not a civil servant.

22. Having considered the foregoing provisions, in our view they call for a harmonized and conjoint reading and application. Thus, insofar as BS 18 and above posts are concerned, paragraphs 5 and 8 do not provide separate and independent ways of joining the ML&C Group. The horizontal movement from other Occupational Groups permissible under the first paragraph must also comply with requirements of the second paragraph. In other words, it must be shown that either one of the two contingencies set out in the latter is applicable before there can be any horizontal movement under the former. Secondly, these provisions, of horizontal movement and lateral entry, must be construed strictly and narrowly. Thus, e.g., the "specific requirements" contingency, if invoked, must be clearly spelt out and narrowly tailored. Furthermore, the onus would lie on the Government and/or the 'incoming' civil servants to show that the conditions for the applicability of paragraphs 5 and 8 have been met.

23. The manner in which the contesting respondents were absorbed in the ML&C Group has been set out above. Here, the most important part of the record is the meeting of the selection committee held on 12.10.2010. The relevant portions from the minutes have been reproduced in para 4 above. We have carefully considered the same. In our view, what is stated therein is compliant with the requirements of paragraphs 5 and 8 of the ML&C Group OM. There was clearly a shortage of officers at the BS 18 level. There is a proper application of mind to the problem. The specific manner in which the respondents came to be chosen is also set out in considerable detail and the record appears to indicate that they were thoroughly vetted before the decision was

taken to recommend them for absorption. In our view therefore, the actions culminating in the order/notification dated 11.06.2010 were taken in accordance with law. The absorption of the contesting respondents must therefore be regarded as proper and lawful, and within the scope of, and in consonance with, paragraphs 5 and 8 of the ML&C Group OM. We hold accordingly. (Before proceeding further, we may make one point. The question whether the concepts of 'horizontal movement' or 'lateral entry', as set out in the Office Memorandums, are in any manner *ultra vires* Articles 240 to 242 of the Constitution must be regarded as open for consideration in some future case. This is so because it was not, as such, canvassed before us nor has it been treated in the case law to which we were referred in the context, and analysis, as herein above set out.)

24. The various cases relied upon by learned counsel for the parties (those which appear to have some relevance for the issues at hand) may now be considered. We have already seen the *Contempt Petition* case. The other decision relied upon at the leave granting stage is *National Assembly Secretariat v. Manzoor Ahmed and others* 2015 SCMR 253. In this case the respondent (who was in the erstwhile Ministry of Education) claimed absorption in the National Assembly Secretariat, where he had been working on deputation. This effort ultimately failed, and the respondent filed a writ petition in the Islamabad High Court, where he succeeded. The National Assembly Secretariat appealed to this Court, which was allowed. It was held that the High Court had no jurisdiction in the matter on account of Article 212. More importantly for present purposes, it was observed as follows (in a passage relied upon by learned counsel for the appellant; pg. 257):

> "The learned High Court has failed to notice that the transfer under section 10 of the Civil Servants Act is itself of a temporary nature and neither confers a right on the transferee to get himself absorbed nor the borrowing department, in law, could be compelled to retain the services of such an employee on permanent basis by absorption. There is no concept of absorption of a Civil Servant in another department either in the Civil Servant Act or the Rules framed thereunder. Section 10 of

> the Civil Servant Act empowers the Competent Authority to order an employee from one post to another, which is never permanent in nature."

Section 10 of the 1973 Act deals with postings and transfers (as per its marginal note) and provides, inter alia, that every civil servant is liable to serve anywhere within or outside Pakistan in any equivalent or higher post under the Federal Government, a Provincial Government, etc. In the passage relied upon, the Court was addressing a specific submission made for the respondent, which was to the following effect (*ibid*): "The respondent No.1, under the Ordinance was obliged to join the newly created Ministry of Education and Trainings, instead he claimed that since he was serving in the National Assembly Secretariat on appointment by transfer, therefore, he stood absorbed as permanent employee in the said Secretariat". The foregoing passage must therefore be understood in this context and, obviously, when so considered it is unexceptionable. Indeed, the said passage was preceded by the following observations (*ibid*):

> "Mere transfer of respondent No.1 from Devolution Cell of the Cabinet Division to the National Assembly Secretariat, could not be construed that his services were transferred and absorbed in the National Assembly Secretariat. Such transfer was temporary in nature and the respondent No.1 will continue his lien with the parent department, created by the Federal Government by the Schedule I of the Rules of Business."

It is in our view clear that the passage quoted by learned counsel cannot be read as applying to the facts and circumstances of the case at hand, which are far removed from those in the cited case. As seen above, the issues raised here crucially involve, inter alia, consideration of the Office Memorandums by which the Occupational Groups into which the service of the Federation is classified. The cited case does not provide any assistance to the appellant.

25. Learned counsel for the appellant also relied upon *Ali Azhar Khan Baloch v. Province of Sindh and others* 2015 SCMR 456. This was a judgment on a review petition filed against the judgment in

the *Contempt Petition* case. Learned counsel relied on paras 119-120 (pp. 507-8) of the judgment (a portion titled "Absorption"). The Court was there considering the Sind Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, framed under the Sind Civil Servants Act, 1973. The question was whether there was a power to absorb any person from within or outside the Province in the service thereof under Rules 9(1) and/or 9-A of the aforesaid Rules. There was also an issue as regards the power of the competent authority to allow absorption in relaxation of the Rules. In our view the relevant provisions and the issues involved were different from those at hand. The passages relied upon do not therefore, with respect, advance the case sought to be made for the appellant.

26. Learned counsel for the respondents relied strongly on *Fida Hussain Shah and others v. Government of Sindh and others* 2017 SCMR 798. This judgment disposed of three contempt petitions, which arose in relation to the *Contempt Petition* case and the judgment considered in the last preceding para. The petitioners challenged, on the basis of the aforesaid judgments, "the re-allocation/change of Occupational Groups of the Respondents ... from Foreign Service and Income Tax Group, respectively, to the Police Service of Pakistan (PSP)" (pp. 800-1). The challenge failed and the petitions were dismissed.

27. Insofar as the plea of limitation is concerned that objection was raised also before the learned Tribunal, where it was repelled. We are satisfied that the learned Tribunal dealt with the point properly, and reach the same conclusion. The objection taken by learned counsel for the respondents cannot, with respect, be accepted.

28. Before concluding we may clarify that in this judgment we have been concerned only with those Office Memorandums by which the various Occupational Groups have been created. The nature of office memoranda, orders, instructions or directions of any other sort, and their position and relationship vis-à-vis the

1973 Act, the rules framed in terms thereof and, indeed, with the Office Memorandums here considered, all in the context of the above analysis are matters that are left open for consideration in some future case.

29. In view of the foregoing discussion, this appeal fails and is hereby dismissed. There will be no order as to costs.

Judge

Judge

Announced in open Court today December 16, 2019.

JUDGE

Approved for reporting

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)
C.A. 1481/2015

ANNEX

Government of India Act, 1935	**1956 Constitution**	**1962 Constitution**	**Interim Constitution**
241.-(1) Except as expressly provided by this Act, appointments to the civil services of, and civil posts under, the Crown in India, shall, after the commencement of Part III of this Act, be made- (a) in the case of services of the Federation, and posts in connection with the affairs of the Federation, by the Governor-General or such person as he may direct;... (2) Except as expressly provided by this Act, the	**182**. (1) Except as expressly provided by the Constitution or an Act of the appropriate legislature, appointments to service, the civil services of, and civil post in the service of, Pakistan shall be made - (a) in the case of services of the Federation and posts in connection with the affairs of the Federation, by the President or such person as he may direct; ... (2) Except as expressly provided by the	**174**. Subject to this Constitution, the appointment of persons to, and the terms and conditions of service of persons in, the service of Pakistan may be regulated by law. **178**. (1) Subject to this Constitution and law - (a) appointments to an All-Pakistan Service or to a civil service of the Centre, or to a civil post in connection with the affairs of the Centre, shall be made by the President or a person authorized by	**217**. Subject to this Constitution, the appointment of persons to, and the terms and conditions of service of persons in, the service of Pakistan may be regulated by law. **221**. (1) Subject to this Constitution and law - (a) appointments to an All-Pakistan Service or to a civil service of the Federation, or to a civil post in connection with the affairs of the Federation, shall be made by the President or a

conditions of service of persons serving His Majesty in a civil capacity in India shall, subject to the provisions of this section, be such as may be prescribed- (a) in the case of persons serving in connection with the affairs of the Federation, by rules made by the Governor-General or by some person or persons authorised by the Governor-General to make rules for the purpose; ... ... (4) Notwithstanding anything in this section, but subject to any other provision of this Act, Acts of the appropriate Legislature in India may regulate the conditions of service of persons serving His Majesty in a civil	Constitution, or an Act of the appropriate legislature, the conditions of service of persons serving in a civil capacity shall, subject to the provision of this Article, be such as may be prescribed - (a) in the case of persons serving in connection with the affairs of the Federation, by rules made by the President, or by some person authorized by the President to make rules for the purpose; ...	the President in that behalf; ... (2) Subject to this Constitution and law, the terms and conditions of service of persons serving in a civil capacity in the service of Pakistan (other than persons whose terms and conditions of service are specified in this Constitution) shall be as prescribed- (a) in the case of a person who is a member of an All-Pakistan Service or who is serving in connection with the affairs of the Centre—by rules made by the President or by a person authorized by the President in that behalf; ...	person authorized by the President in that behalf; ... (2) Subject to this Constitution and law, the terms and conditions of service of persons serving in a civil capacity in the service of Pakistan (other than persons whose terms and conditions of service are specified in this Constitution) shall be as prescribed- (a) in the case of a person who is a member of an All-Pakistan Service or who is serving in connection with the affairs of the Federation, by rules made by the President or by a person authorized by the President in that behalf; ...

capacity in India, and any rules made under this section shall have effect subject to the provisions of any such Act:...			

Note: The text of the Government of India Act, 1935 is given as originally enacted. Certain amendments (essentially to reflect the consequences of Partition) were made to these provisions up to the time of the promulgation of the 1956 Constitution. However, those changes are not relevant for present purposes.