

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 490 OF 2021

Tabish Badar

Vs

Pakistan through Secretary Ministry of Interior & others.

PETITIONER BY: Sardar Jahanzeb Khan, Advocate.

RESPONDENTS BY: M/s Ahmer Bilal Soofi, Mr. Usman Jillani,
Mr. Majid Bashir, Ms. Fatima Midrar and
Raja Sajid, Advocates

Mr. Muhammad Usman Warraich, AAG
and Mian Nasim Saqlain, AAG.

DATE OF DECISION: 17.03.2023.

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BABAR SATTAR, J.- The petitioner is aggrieved by the placement of his name in the Exit Control List ("**ECL**") pursuant to a memorandum issued by the Ministry of Interior dated 11.07.2019.

2. Learned counsel for the petitioner stated that the petitioner proceeded to study abroad on a scholarship, a condition for which was that he must return to Pakistan and serve for a period of two years, which he did not do as a consequence of which he was removed from service. He stated that the petitioner has already suffered penal consequences for breach of the provisions for the grant of scholarship and his placement on the ECL is not justified by law. He stated that the Air Weapons Complex ("**AWC**") has already clarified that he was not serving in a sensitive position. He stated that the

petitioner filed a representation before the Secretary Ministry of Interior seeking the removal of his name from ECL dated 30.08.2020. But despite such representation, his name has not been removed from the ECL.

3. The learned counsel for respondents No.2 and 3 submitted that a framework under the National Command Authority Act, 2010 ("**NCA Act**") pursuant to which employees are required to undertake security clearance falls within the domain of NCA to ensure that none of the employees possess any sensitive security related information that they share with any party in breach of confidentiality requirements. He stated that pursuant to National Command Authority Security Rules, 2011 ("**NCA Security Rules**"), there is authority vested in DG, SPD to recommend an employee to be placed on ECL, where there is abscondence or fear of abscondence. He further stated under the Personnel Reliability Programme Rules, 2016 ("**NCA PRP Rules**"), at the time of retirement under Rule 15(3) there is a need to procure a NOC from the intelligence division of NCA. And further pursuant to an undertaking signed by all employees there is an obligation not to divulge any sensitive information procured during service. He stated that it is for the purposes of forming an opinion as to whether an employee who is leaving the organization possesses any sensitive information or is likely to divulge such sensitive information that an exit interview is conducted. And the petitioner's name has been placed on the ECL to require him to return Pakistan and participate in such exit interview. He stated that there is a special committee constituted under the NCA framework, which convenes

meetings and it was during the meeting convened on 09.03.2019 that it was decided that those employees who had proceeded abroad for educational purposes shall be requested to be placed on the ECL under the authority of DG, NCA in the event that they do not appear for debriefing before DG, Security.

4. In rebuttal, the learned counsel for the petitioner submitted that on 16.02.2016, the petitioner was removed from the service by AWC itself. He further stated that his supervisor within AWC had also certified in response to an internal letter dated 06.04.2016 (with regard to the petitioner's clearance) that the petitioner had not been working on any sensitive project within AWC and his name was not recommended to be placed on ECL. Consequently, the subsequent placement of his name on ECL in the year 2019 was neither backed by law nor a bona fide measure to require him to engage in a debriefing process as such policy decision was reached almost four years after he quit being in the employment of AWC. .

5. The learned counsel for respondents No.2 and 3 was given a further opportunity to assist the Court as to how the petitioner fell within the definition of an employee for purposes of the NCA Act in the year 2019 when he had already been removed from service in the year 2016. Respondents No.2 and 3 were also directed to place before the Court NCA Security Rules and NCA PRP, Rules pursuant to which respondents No.2 and 3 assumed the authority to direct that the petitioner's name be placed on ECL.

6. By order dated 13.03.2023, the matter was next fixed for hearing on 17.03.2023. On such date the learned counsel for respondents No.2 and 3 submitted that they did not seek to place any reliance on the NCA Security Rules and NCA PRP Rules, under the instruction of respondents No.2 and 3, as such rules framed under the provisions of the NCA Act were non-statutory and their circulation was for the limited purpose of internal NCA use.

7. The facts as have emerged from the material placed before the Court are that the petitioner was employed by AWC on 06.11.2008 and was working as a Manager when he was granted leave for purpose of studies from 01.10.2013 to 30.09.2015. He sought to extend his study leave, which permission was not granted. By letter dated 25.10.2015 he was directed to report back to duty. The petitioner then sought to resign from his position and continue his education, but he was advised that he could not resign without reporting back to duty by letter dated 16.12.2015. The petitioner was then issued a show cause notice dated 12.12.2015 and was subsequently removed from service under Rule 5(b)(3) of NCA Employees Efficiency and Discipline Rules, 2010 (**"NCA Discipline Rules"**) as a penalty, with effect from 01.10.2015. While seeking his clearance, Commander Hameed-Ur-Rehman, the relevant departmental officer incharge of the petitioner, issued an Office Memorandum stating that, *"Manager Tabish Badar was not working on any sensitive project, therefore, his name is not recommended to put in ECL."* Notwithstanding such determination that the petitioner was not holding the sensitive

position or working with a sensitive project, his name was placed on ECL on the recommendation of respondents No.2 and 3 and he was advised of such fact by letter dated 19.12.2019. The petitioner sought to have his name removed by filing an application with respondents No.2 and 3. He was advised by letter dated 26.11.2020 that while his completed clearance certificate had been received by the Human Resource Department AWC, in view of the policy being followed by respondents No.2 and 3, the petitioner had to return to Pakistan for a period of two years and also participate in a debriefing session to be entitled to have his name removed from ECL.

8. Respondent No.1 issued the impugned memorandum dated 11.07.2019 stating that the petitioner's name had been placed on ECL pursuant to Section 2 of the Exit from Pakistan (Control) Ordinance, 1981 (**"Exit Control Ordinance"**) on the basis, inter alia, that (i) he had absented himself from duty with effect from 01.10.2015 after the expiry of his study leave, (ii) pursuant to clause 6 of the deed of agreement 01.10.2013 signed by him while proceeding for study leave he was required to serve AWC for a period of two years after completion of studies, and (iii) he had not completed the codal formalities for purposes of issuance of clearance certificate and had been exposed to sensitive information. The impugned memorandum was issued by Section Officer ECL, Ministry of Interior. The petitioner filed a representation before the Secretary of the Ministry of Interior seeking the removal of his name from ECL on 30.08.2020, but no decision with regard to the same was rendered by respondent No.1.

9. What emerges from the above is that the petitioner was removed from service for not returning from his study leave upon its expiry on 30.09.2015, which was a condition under the deed of an agreement signed between the petitioner and respondent No.3. Respondent No.3 could insist that the petitioner return to Pakistan to serve respondent No.3 under the employment agreement between the petitioner and respondent No.3. Respondent No.3, however, chose not to follow such course and instead initiated disciplinary proceedings against the petitioner under the NCA Discipline Rules and terminated the petitioner from the service of respondent No.3 with effect from 01.10.2015 during the clearance process. The official within AWC overseeing the work of the petitioner certified that the petitioner was neither working on a sensitive project nor was exposed to sensitive information. Notwithstanding such recommendation that the name of the petitioner was not to be recommended for placement on ECL, his name was placed on ECL in the year 2019 on the recommendation of respondents No.2 and 3.

10. The first question that arises is whether the petitioner could be treated as an employee of NCA at the time when his name was placed on ECL in the year 2019. The term employee has been defined under Section 2(c) of the NCA Act as follows:-

"employee" means any official, employee etc., whether in the service of the Authority or the Strategic Organizations, serving or retired and includes those on deputation or secondment within Pakistan or abroad, and those studying abroad;

11. It is evident from the aforementioned definition that a former employee who has been dismissed from service does not fall within the definition of an employee under the aforementioned definition. The petitioner is neither a serving nor a retired officer of any organization that falls within the domain of NCA. He was dismissed from service as a penalty in exercise of authority by respondents No.2 and 3 under the NCA Discipline Rules with effect from 01.10.2015, and consequently the petitioner ceased to be an employee as of such date. The petitioner was no longer an employee of AWC or NCA when respondents No.2 and 3 determined that the petitioner ought to be required to appear for an exit interview and security briefing, failing which his name should be placed on the ECL. The provisions of the NCA Act do not vest any authority in respondents No.2 and 3 to do so. The powers and functions of NCA are detailed in Section 7 of the NCA Act, which vests powers in NCA to take measures regarding employees in respect of their movement and to place restrictions and limitations on such employees necessary in the interest of confidentiality of their functions, etc. Such powers do not include the power to regulate the rights and liberty of a person who has been dismissed from service or removed from service many years after such dismissal and for the rest of his life. Further, the schedule to the NCA Act issued under Section 12(2) of the Act mentions the statutes in relation to which jurisdiction has been vested proceedings can be initiated by NCA in relation to its employees. The said schedule does not list the Exit Control Ordinance as a statute in relation to which NCA has

been vested with authority. In other words, the NCA has no statutory authority for purpose of the Exit Control Ordinance.

12. In the report filed by respondents No.2 and 3 it has been contended that there was an agreement executed between the petitioner and respondents No.2 and 3 pursuant to which it was agreed that the employee's name may be forwarded for placement on ECL in case of failure of the employee to return to Pakistan and assume duties after completion of the study period. Such contractual arrangement vests no statutory authority in NCA. And any recommendation made by NCA to place any individual on ECL would need to be considered and processed by the Federal Government under provisions of the Exit Control Ordinance.

13. The law in relation to the Exit Control Ordinance vests in the Federal Government to power to prohibit exit from Pakistan under Section 2, which states the following:-

2. Power to prohibit exit from Pakistan.— (1) The Federal Government may, by order, prohibit any person or class of persons from proceeding from Pakistan to a destination outside Pakistan, notwithstanding the fact that such person is in possession of valid travel documents.

(2) Before making an order under sub-section (1), the Federal Government shall not be necessary to afford an opportunity of showing cause to the person against the order.

(3) If, while making an order under sub-section (1) it appear to the Federal Government that it will not be in the public interest to specify the ground on which the order is proposed to be made, it shall not be necessary for the Federal Government to specify such grounds.

14. While sub-section (2) and (3) of section 2 authorize the Federal Government to pass an order to place someone on the ECL without affording such a person an opportunity to be heard, such statutory provisions have been read down and it is now settled that in view of Section 24-A of the General Clauses Act, 1897, read together with Article 10-A of the Constitution that it is mandatory for the Federal Government to issue notice and grant a hearing to a person whose right and liberty to travel guaranteed by Articles 9 read together with Articles 4, 15 and 25 of the Constitution. A person whose fundamental rights are to be fettered must be given an opportunity to be heard and the order placing his name on ECL must record reasons, which are then justiciable. It is further clarified that the power vested in the Federal Government under the Exit Control Ordinance is the power to prohibit a person from proceeding within Pakistan to a destination outside Pakistan and not to prevent a citizen already outside Pakistan from re-entering the country. The scope and competence of the statutory authority to prevent a citizen from returning to Pakistan was considered by the august Supreme Court in the *PML(N) case*¹ wherein it was clarified that a public authority is only vested with such power as granted to it by the statute. The statute in present case unambiguously only grants power to the Federal Government to prevent a citizen from proceeding abroad. In the instant matter, it was within the contemplation of the respondents that the petitioner was already abroad when a recommendation to have his name

¹ *Pakistan Muslim League (N) Vs. Federation of Pakistan and others (PLD 2007 Supreme Court 642)*

placed on ECL was made and consequently the placement of his name on the ECL would have the effect of preventing him from travelling to Pakistan as opposed to proceeding abroad. In these circumstances the placement of the petitioner's name on ECL served no purpose but to prevent his re-entry into Pakistan, which could not have been done in exercise of authority under Section 2 of the Exit Control Ordinance.

15. The impugned order is also not sustainable in view of the fact that power under the Exit Control Ordinance is to be exercised by the Federal Government as defined by the august Supreme Court in **Mustafa Impex and others vs. The Government of Pakistan and others** (PLD 2016 SC 808).

Such power could be exercised by the Federal Cabinet and not by the Secretary, Ministry of Interior. In the instant case, the respondents were provided multiple opportunities to place on record a decision of the Cabinet approving the placement of the petitioner's name on ECL. While it was submitted that the representation of the petitioner seeking the removal of his name from ECL was pending before a Committee of the Cabinet, the initial placement of the petitioner's name on ECL is not backed by a Cabinet decision. On this basis alone the impugned memorandum dated 11.07.2019 placing the petitioner's name on ECL is devoid of legal authority for being *coram non judice*.

16. In terms of the reasoning in the impugned memorandum dated 11.07.2019, even in the event that it was approved by the Federal Cabinet, it is not sustainable and is liable to judicially reviewed on grounds of illegality and irrationality. The grounds for prohibiting a person from proceeding from Pakistan to a

destination outside are provided under Rule 2 of the Exit Control Rules and include under Rule 2(1)(c), "*acts of terrorism or its conspiracy, heinous crimes and threatening national security.*" Merely because the petitioner extended his study leave and was removed from service for his refusal to return to Pakistan as opposed to continuing his education upon expiry of his study leave does not constitute a threat to national security. The relevant supervising officer of the petitioner certified that the petitioner was neither serving in a sensitive project nor was exposed to sensitive information. The respondents were given an opportunity to satisfy the Court as to how the petitioner's conduct, even if he could be deemed to be an employee of NCA, was a threat to national security. There was no material brought before the court. The only argument made by the respondents was that the petitioner did not participate in an exit interview and debriefing session, and thus it was recommended that his name be placed on ECL. The refusal or inability of an employee or former employee of NCA to participate in an exit interview is not a ground for placement of his name on the ECL under the Exit Control Rules or the Exit Control Ordinance. Placing a citizen's name on the ECL encumbers his/her right to liberty and his right to freedom of movement guaranteed by Articles 9 and 15 of the Constitution read together with Article 4 and 25 of the Constitution and such fetter on fundamental rights of the citizen cannot be slapped lightly to by the Federal Government or a statutory body controlled by it for the purposes of enforcing an employment related procedural requirement to participate in an exit interview. It is now settled law that even criminal charges

and pendency of a criminal trial against a citizen is no basis to place his name on the ECL, as clarified by this Court in *Dr. Joseph Wilson*² wherein the following was held:

"Even the pendency of criminal proceedings, including proceedings before an Accountability Court (without an order or a request from the Court for the curtailment of an accused's freedom to travel abroad) is not considered a sufficient ground to place a citizen's name on E.C.L."

17. It must also be observed that this Court in *Waqas Rafi Awan*³ while speaking of the rules framed under the NCA Act has held the following:

"We, therefore, declare that the petitioners are regulated and governed under non statutory rules and thus not amenable to the jurisdiction of this Court under Article 199 of the Constitution. The constitutional petitions are consequently not maintainable and accordingly dismissed."

Therefore, the rules framed under the NCA Act are non-statutory and an employee of the authority cannot seek the enforcement of such rules under Article 199 of the Constitution.

18. The right to travel and the right to liberty are guaranteed by Articles 9 and 15 of the Constitution as has been explained above. And such constitutional rights cannot be controlled by non-statutory rules framed under the NCA Act. Under Section 9 of the NCA Act, NCA has been vested with the authority to regulate the service of his employees and make provisions for their security and related matters under the garb of such authority, NCA cannot frame non-statutory rules or policies that subject the enjoyment of fundamental rights to compliance with

² *Dr. Joseph Wilson versus Federation of Pakistan* (2017 P Cr. L J 1569)

³ *Waqas Rafi Awan versus National Engineering and Scientific Commission, Islamabad* (2021 P L C (C.S.) 1309)

the procedures and policies for NCA's internal use that do not have the status of law and the breach of which cannot be adjudicated by constitutional courts (that constitute the mechanism for enforcement of fundamental rights in our constitutional scheme). For the purpose of placing a restriction on the right of a citizen to travel, authority has been vested in the Federal Government under the Exit Control Ordinance. The authority to place someone on the ECL must therefore be exercised in accordance with the provisions of the Exit Control Ordinance read together with Exit Control Rules and the jurisprudence produced in relation to such statutory instruments. It must be emphasized that the effect of non-statutory rules is that such rules are deemed to be for the internal regulation of an entity and do not have the status of law that a High Court can take cognizance of under Article 199 of the Constitution. Under such non-statutory rules what statutory authority cannot do is claim and seek to exercise power that interferes with the statutory or constitutional rights of a person. In view of Section 20A of the General Clauses Act, to be granted the status of law a legal instrument must be published and available to the citizens so that they can organize their lives in view of the requirements of such law.⁴ But where a statutory organization is allowed to frame rules and regulations for internal consideration and such rules and regulations are not

⁴ It is settled law that a notification ought to be published in the official gazette before it can be enforced as law. See for example Province of East Pakistan Versus Hasan Askary (PLD 1971 SC 82), Muhammad Ishaq Versus Chief Administrator of Auqaf, Punjab (PLD 1977 SC 639), Deputy Controller of Customs (Valuation) and others Versus Messrs Abdul Shakoor Ismail Kaloodi (2006 PTD 2142), Government of the Punjab, Food Department through Secretary Food and another Versus United Sugar Mills Ltd. (2008 SCMR1148), Chief Administrator Auqaf Versus Mst. Amna Bibi (2008 SCMR 1717) and Government of Sindh through Secretary Agriculture and Livestock Department Versus Khan Ginners (Private) Limited (PLD 2011 SC 347).

afforded the status of law and are not required to be published in official gazette, the provisions of such non-statutory rules cannot be implied to interfere with or undermine the fundamental rights of persons whether or not they are subject to such rules and regulations. The state cannot seek to have certain rules and regulations declared non-statutory to shield them from judicial scrutiny and then use such non-statutory instruments to determine the extent to which fundamental rights are to be afforded to citizens subject to such legal instrument. The state cannot be allowed to have its cake and eat it too, when it comes to the relationship between citizens and the state.

19. In view of the above, it is declared that the impugned memorandum dated 11.07.2019 is *coram non judice* for not having been issued under the authority of the Federal Cabinet. It is also liable to be *set-aside* for being illegal and irrational and not supported by provisions of the Exit Control Ordinance read together with Exit Control Rules. It is further declared that the Federal Government is not vested with authority under the Exit Control Ordinance to place the name of a citizen on the ECL with full knowledge that such citizen is abroad and the effect of placement of his name on the ECL would be to prohibit his re-entry in Pakistan. It is further clarified that the NCA under the NCA Act is vested with no authority to direct that the name of any employee or former employee be placed on the ECL. Any recommendation for such purpose must be considered by the Federal Government within the scope of provisions of Exit Control Ordinance and Exit Control Rules. And an order to such

effect must be passed by the Federal Cabinet through an independent application of mind in view of material placed before the Federal Cabinet on the basis of grounds mentioned in Rule 2 of the Exit Control Rules. And such order must record reasons for the exercise of such power after affording a citizen an opportunity to be heard, given that the effect of such order is to fetter the right of a citizen to liberty and freedom to travel guaranteed by Articles 9 and 15 of the Constitution.

20. In view of the above, the instant petition is **allowed** and consequently the impugned memorandum dated 11.07.2019 is **set-aside**. Respondent No.1 is directed to remove the petitioner's name from the ECL forthwith and communicate to the Federal Investigation Agency ("**FIA**") as well as the Directorate General Immigration and Passport that the petitioner's name has been so removed and file a compliance report before this Court within a period of seven days.

(BABAR SATTAR)
JUDGE

Announced in open Court on **31.03.2023**.

JUDGE

Approved for reporting.

Shakeel Afzal/-