

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO.26/2014

SHAHZADO LANGAH,

APPELLANT
PETITIONER

VERSUS

FEDERATION OF PAKISTAN, ETC.

RESPONDENT
DEFENDANT

Appeal/revision against the decree or order (as the case may be) of _____

SERIAL NO. OF ORDER OF PROCEEDINGS	DATE OR ORDER OF PROCEEDINGS	Order with signatures of judge, and that of parties or counsel, where necessary.
1 st	2	3

10.01.2014 Mr. G.M Chaudhry, Advocate for Petitioner.

Petitioner invoked the Constitutional
Jurisdiction of this Court by way of filing instant
Writ Petition with the following prayer:-

*"In view of the above, it is respectfully
prayed that appropriate writs may graciously be
issued to the following effect:-*

- a) That requiring the Respondent No.5 to show
under what authority of law he is holding he
office of the Secretary Law, Justice and Human
Rights Division.*
- b) That appointment of the Respondent No.5 as
Secretary Law, Justice and Human Rights
Division vide Impugned Notification
No.17/13/2013-E-1, dated 21.10.2013 (Annex-
B) issued by the Respondent No.2 be declared
as illegal, in violation of rules/instructions, etc.,
and void ab initio and be set aside declaring the
resultant post of the Secretary Law, Justice and
Human Rights as vacant and directing for filling
up the said post in the prescribed manner
following due process of law, rules and merit as
well as transparency.*
- c) That it be further directed that the Respondent
No.5 shall have to refund all sums received in
terms of salary/remuneration, allowances and
other perks and privileges forthwith.*
- d) That the Respondent No.2, 3 and 4 had misused
their discretion and power to cause financial
loss to public exchequer and to provide undue*

gain to the Respondent No.5 in terms of section 9 of the National Accountability Ordinance, 1999 (Ordinance No.XVIII of 1999) liable to necessary legal action against them under the said Ordinance as the Respondent No.2, 3 and 4 had not performed their duties in accordance with law, rules and instructions, etc., while recommending appointment of the Respondent No.5 as required by law to do and misused their authority and discretion in violation of law, rules, merit and transparency.

- e) That a thorough inquiry may be ordered for mala fide conduct of the Respondent No.2,3 and 4 as well as other officers working under the administrative control of the Respondent No.2 who had participated in different stages of recruitment process for the post Secretary Law, Justice and Human Rights Division by an impartial law-enforcement agency and necessary disciplinary action may be ordered under the Government Servants (Efficiency and Discipline) Rules, 1973 as well as under the provisions of the National Accountability Ordinance, 1999 (Ordinance No.XVIII of 1999) for their acts of commission, omission, malfeasance, nonfeasance or misfeasance in addition to other wrongs on the part of the Respondents and such other officers for breach of public trust, misuse of their authority and discretion and favouritism due to which financial losses to the public exchequer occurred in the form of salary/remuneration of illegally appointed Respondent No.5 as well as misuse of power.
- f) That the Respondent No.5 be restrained from performance of official functions as Secretary Law, Justice and Human Rights Division.
- g) That the Respondent No.1 to 4 may be restrained from taking any adverse action against the Petitioner during the pendency of the instant Writ Petition before this Honourable Court.

Any other favourable relief may also graciously be granted to the Petitioner as may be deemed just and proper in the facts and circumstances of the case. ”

2. And presented the facts as under:-

That the Petitioner is a conscientious citizen of Pakistan and is therefore duty-bound to bring all illegalities committed by public functionaries before this Honourable Court for their judicial scrutiny under the Constitution, law, rules and regulations, etc. so that there should be no miscarriage of justice and due process of law in making appointments for public offices under the administrative control of the Federal Government or in the public bodies or organizations through a fair, transparent and open process on the basis of merit, qualifications and eligibility under the law through a competitive process as a result of open advertisements in the national press along with other eligible persons or aspiring candidates. That Respondent No.2 is responsible to advise the Respondent No.1 in all matters regarding human resources, recruitment, promotion and other terms and conditions of service of the Civil Service of Pakistan under the Civil Servants Act, 1973 (*Act No.LXX of 1973*) and Rules, Regulations, Instructions etc. made there under from time to time. That Respondent No.2 has advertised the post of Secretary, Law, Justice and Human Rights Division as per advertisement which contains different inconsistencies and defects and it is not possible to make recommendation of a competent and duly qualified person for the post of Secretary Law, Justice and Human Rights Division in a

transparent, competitive and merit basis in the light of observations made by the Apex Court in cases reported as 1996 SCMR 1349, PLD 2012 SC 132. That the Supreme Court of Pakistan has evolved the principles for exercise of discretion which are grossly violated while making appointments of the Respondent Nos.1 to 3 whereas Respondent No.4 has failed to perform his official duties in accordance with law and the Constitution as while making appointments, the authorities ignored the merit as well as Provincial/Regional quotas as provided in Serial No.13-A (Page-6) of Chapter 2 of the ESTACODE, 2007 which cannot be violated in any case. That Respondent No.2 in its advertisement has mentioned the educational qualification as "Bar-at-Law/LL.M" whereas "Bar-at-Law" is not a recognized academic qualification but only a title which is conferred to a member of one of the Inns of the Bar amongst four Inns in the city of London, United Kingdom and is conferred after graduation in the field of law i.e. after LL.B, therefore, an LL.B qualified person cannot be equated with LL.M qualified. The HEC is the concerned authority for determination of equality of educational qualifications but there is nothing available on the website of HEC to consider Bar-at-Law at par with LL.M, therefore, Respondent No.2 was bound to consult HEC before advertising

such vague and non-determined educational qualification. That the experience mentioned in paragraph (c) is absolutely irrelevant as the Secretary Law, Justice and Human Rights Division should necessarily be a high professional in the field of law due to his role in some constitutional matters and a person having only "administrative and management" experience cannot be considered to be a suitable person perhaps this is the reason that previously only lawyers of professional standing or sitting/retired Judges of the High Court/Supreme Court were appointed against the post of Secretary Law, Justice and Human Rights. That Respondent No.2 has created an ambiguity as well as confusion while making the said advertisement to make appointment of a favorite instead of merit, open competition and with transparency which are basic requirements of good governance while misusing the discretionary powers. That according to Finance Division's Office Memorandum No.F.3(7)-R.4/98, dated 18.08.1998, the salary and perquisite package MP-I is meant for professionals from the private sector proposed to be appointed on a contract against the position of Chief Executive in the public sector and not any functionary like the Federal Law Secretary which is a BPS-22 position. That in the instant case the composition of Selection Board for hiring of

Professionals in Management Position Scales i.e MP-I, II & III as provided under Establishment Division's Office Memorandum No.1(77)/2002-E-6, dated 11.04.2005 have been ignored. Moreover, guidelines provided for Appointment on Contract Basis, under Sr. No.133, Chapter 2 of ESTACODE, 7th Edition, page 206-208 for appointments in BPS-20 and above have also been violated, as the appointment of the Respondent No.5 is illegal, *coram non judice* and *void ab initio*. Similarly, the appointment on contract basis cannot be made for more than 02 years whereas appointment of Respondent No.3 has been made for a period of 03 years in violation of above instructions. That there should be at least a panel of 03 candidates for each post/vacancy recommended by the Selection Board as provided in the light of Sl. No.140 of the Chapter 2 of ESTACODE, 7th Edition, page 213-215 (Annex-I) whereas in the case of selection of Respondent No.5 only two candidates were shortlisted and interviewed which is in violation of rules and instructions, etc. and all that happened due to tailor-made and *mala fide* advertisement. That there is no other alternate, efficacious, adequate and speedy remedy available to Petitioner except to seek the indulgence of this court by invoking extraordinary constitutional jurisdiction of this Court for issuance of appropriate writ.

3. I have heard the Learned Counsel/Petitioner in person and carefully perused the relevant record.

4. The Petitioners have questioned the appointment of Barrister Zafar Ullah Khan as Secretary Law, Justice and Human Rights Division primarily on the ground that the said post had to be filled through promotion and not otherwise, and for that matter, have solely relied on Section 9 of the Civil Servants Act, 1973. However, Petitioners have neither denied the eligibility or qualification of the said Respondent to hold the said post nor has he denied the fact that the impugned appointment has been made by the Competent Authority, i.e. the Prime Minister of Pakistan in a transparent manner through due process.

5. When the Petitioner was confronted with the proposition as to under what law and rules he claimed that the said post was to be filled only through promotion, he could not give any satisfactory answer thereto. In addition to this, he also admitted that no officer of BPS-21 in the Ministry of Law and Justice has assailed the said appointment on the grounds of promotion. It is, therefore, evident that none is wronged by the said appointment as had the said post be meant for promotion, the persons in the line of promotion would have undeniably challenged the same.

6. Before rendering my findings on the issue, it is important to understand the nature of relief under Article 199(1)(b)(ii) of the Constitution, traditionally and more popularly referred to as writ of quo warranto which is reproduced herein below:

"(1) Subject to the Constitution, a High Court may if it is satisfied that no other adequate remedy is provided by law,---

(b) on the application of any person make an order-

(ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office".

As per Halsbury's Law of India—Vol 35

(Constitutional Law-II Lexis Nexis Butterworths

2007-p.145) *"The quo warranto proceeding*

affords a judicial remedy by which any person,

who holds an independent substantive public

office ... is called upon to show by what right he

holds the said office, ... so that his title to it may

be duly determined, and in case the finding is

that the holder of the office has no title, he would

be ousted from that office by judicial order. In

other words, the procedure of quo warranto gives

the judiciary a weapon to control the executive

from making appointments to public office against

law and to protect a citizen from being deprived of

public office to which he has a right. These

proceedings also tend to protect the public from

usurpers of public office, who might be allowed to

continue either with the connivance of the executive or by reason of its apathy". Justice Mansoor Ali Shah in Sardar Muhammad Vs Federation of Pakistan (PLD 2013 LHR 343) stated that "the object of this constitutional remedy is to protect the sanctity of the "public office" by safeguarding against unlawful appointments. The constitutional objective appears to be more institutional. Acting as gatekeepers, the constitutional courts protect the sanctity of a "public office" and, as a result, shield public institutions from usurpers. The constitutional obligation is to ensure that persons selected to man public institutions are appointed in accordance with law without the slightest taint of impropriety. It is also a constitutional platform for the "whistle-blowers" to come forward in public interest and raise their concern about wrongdoing within organizations. The result is that institutions/ organizations are more open and accountable to their employees, shareholders and the greater public in their activities".

However, said that, proceedings of quo warranto are not issued as a matter of course. The Court can and will enquire into the conduct and motive of the Petitioner. However, no precise rules can be laid down for the exercise of discretion by the court in granting or refusing the same and each aspect of the case is to be considered. In the present case, appointment of

Barrister Zafar Ullah Khan as Secretary Law,

Justice and Human Rights Division primarily on the ground that the said post had to be filled through promotion and not otherwise, without claiming or stating superior right of any other person on the ground that such promotion was not warranted under the law has been agitated.

As stated earlier no person from the Ministry has claimed the post either on the basis of promotion or superiority nor have stated to be aggrieved or discriminated against by the said appointment because had the said post be meant for promotion, the persons in the line of promotion would have eventually challenged the same. It is well settled law as per the numerous dictums mandated by the superior courts that the Petitioner must not himself be an aggrieved party but he must at least show his *bonafide* which in this case in lieu of the above the Petitioner has been unable to prove to the Court. Reliance in this regard can be placed on *Al-Jehad Trust v. Federation of Pakistan* PLD 1996 SC 324; *Pakistan Tehrik-e-Inqilab v. Election Commission of Pakistan and 2 others* 1997 MLD 3167; *Arun Kumar v. Union of India and others* AIR 1982 Rajasthan 67; *The Tariq Transport Company v. The Sargodha Bhera Bus Service* PLD 1958 SC 437; *Dr. Kamal Hussain v. M. Siraj ul Islam* PLD 1959 SC 42; *Islamic Republic of Pakistan v. Muhammad Saeed* PLD 1961 SC 192; *Government of Sindh v. Hasina* 1979 SCR 17; *Jan Muhammad and others v. Government of N.-W.F.P.* 1993 CLC 1067; *Pir Sabir Shah v. Federation of Pakistan and*

others PLD 1994 SC 738; Zafar Ali Shah v. Federal

Government of Pakistan 1994 CLC 5; Ali Raza Asad

Abidi v. Justice Muhammad Ilyas 1995 MLD 2022; Dr.

Azim-ur-Rehman Khan Meo v. Government of Sindh

2004 SCMR 1299; M.Liaqat Munir Rao v. Shams-ud-Din

2004 PLC (C.S.) SC 1328; Syed Amjad Ali v. Ch. Amir

Afzal and others 2006 SC (AJ&K) 69; Ghulam Ali Shah

v. Election Commission of Pakistan 2008 CLC 738; Sindh

High Court Bar Association v. Federation of Pakistan

PLD 2009 SC 879; Dr. Azim ur Rehman Khan Meo v.

Government of Sindh and another 2004 SCMR 1299 and

Federation of Pakistan and others v. Mian Muhammad

Nawaz Sharif and others PLD 2009 SC 644 ref.

7. The post of the Secretary Law & Justice is admittedly a civil post in connection with the affairs of Federation within the meanings of Section 2(1) (b) of the Civil Servants Act, 1973. A careful perusal of the law on the subject would show that appointments in the civil service are made in three manners i.e. direct recruitment, promotion & transfer. Under Section 5 of the Civil Servants Act, 1973, which reads as follows:

**SECTION 5 OF THE CIVIL SERVANTS
ACT, 1973**

Appointment- 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.

8. It has been provided in the aforesaid section that appointment to a civil post

has to be made on the prescribed manner by the President or by a person authorized by the President in that behalf. The said prescribed manner has been provided under the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973, the rules made by the Ministries and Divisions concerned as well as the instructions contained under ESTACODE.

9. In case of promotion and transfer, Section 9 & 10 of the Civil Servants Act, 1973 read with Rule No. 7 to 9 of the Civil Servants (Appointment, Promotion & Transfer) Rules, 1973 read with Promotion & Transfer Policy are relevant. It is nowhere mention under the said Sections and Rules that a post of BS-22 cannot be filled by direct recruitment. For the sake of convenience are reproduced herein below

**SECTION 9 & 10 OF THE CIVIL
SERVANTS ACT, 1973**

Section 9. Promotion - (1) A civil servant possessing such minimum qualifications as may be prescribed shall be eligible for promotion to a higher post for the time being reserved under the rules for departmental promotion in the service or cadre to which he belongs:

"Provided that the posts of—

(a) Additional Secretary and Senior Joint Secretary may, in the public interest, be filled by promotion from amongst officers of regularly constituted Occupational Groups and services holding, on regular basis, posts in Basic Pay Scale 20; and

(b) Secretary may, in the public interest, be filled by promotion from amongst officers of regularly constituted Occupational Groups and services holding, on regular basis, posts in Basic Pay Scale 21, in such manner and subject to such conditions as may be prescribed."

(2) A post referred to in sub-section (1) may either be a selection post or a non-selection post to which promotions shall be made as may be prescribed-

(a) in the case of a selection post, on the basis of selection on merit; and

(b) in the case of a non-selection post, on the basis of seniority-cum-fitness.

(3) Promotion to posts in basic pay scales 20 and 21 and equivalent shall be made on the recommendations of a Selection Board which shall be headed by the Chairman, Federal Public Service Commission.

10. Posting and transfer.- Every civil servant shall be liable to serve anywhere within or outside Pakistan, in any equivalent or higher post under the Federal Government, or any Provincial Government, or local authority, or a corporation or body set up or established by any such Government; Provided that nothing contained in this section shall apply to a civil servant recruited specifically to serve in a particular area or region:

Provided further that, where a civil servant is required to serve in a post outside his service or cadre, his terms and conditions of service as to his pay shall not be less favorable than those to which he would have been entitled if he had not been so required to serve

**RULES 7 TO 10 OF THE CIVIL
SERVANTS' (APPOINTMENT,
PROMOTION AND TRANSFER) RULES,
1973**

7. Promotion and transfers to posts in [basic pay scales 2 to 18 and equivalent] shall be made on the recommendation of the appropriate Departmental Promotion Committee and promotions and transfers to posts in [basic pay scales 19 to 21 and equivalent] shall be made on the recommendations of the Central Selection Board:

8. Only such persons as possess the qualification and meet the conditions laid down for the purpose of promotion or transfer to a post shall be considered by the Departmental Promotion Committee or the Central Selection Board, as the case may be.

8-A. No promotion on regular basis shall be made [to posts in basic pay scales 18 to 21 and equivalent] unless the officer concerned has completed such minimum length of service as may be specified from time to time.

8-B.- (1) Where, the appointing authority considers it to be in the public interest to fill a post reserved under the rules for departmental promotion and the most senior civil servant belonging to the cadre or service concerned who is otherwise eligible for promotion does not possess the specified length of service the authority may appoint him to that post on acting charge basis.

(2) So long as a civil servant holds the acting charge appointment, a civil servant junior to him shall not be considered for

regular promotion but may be appointed on acting charge basis to a higher post.

(3) *In the case of a post in [basic pay scales 17 to 22 and equivalent] reserved under the rules to be filled by initial appointment, where the appointing authority is satisfied that no suitable officer [drawing pay in the basic pay scale] in which the post exists is available in that category to fill the post, and it is expedient to fill the post, it may appoint to that post on acting charge basis the most "senior officer otherwise eligible for promotion in the organization, cadre or service, as the case may be, in excess of the promotion quota.*

(4) *Acting charge appointment shall be made against posts which are likely to fall vacant for a period of six months or more. Against vacancies occurring for less than six months, current charge appointment may be made according to the orders issued from time to time.*

(5) *Appointment on acting charge basis shall be made on the recommendations of the Departmental Promotion Committee or the Central Selection Board, as the case may be, save in the case of [post in basic pay scale 22 and equivalent].*

(6) *Acting charge appointment shall not amount to appointment by promotion on regular basis for any purpose including seniority.*

(7) *Acting charge appointment shall not confer any vested right for regular promotion to the post held on acting charge basis.*

9. *Appointments by transfer shall be made from amongst the persons holding appointment on a regular basis in [post in the same basic pay scale or equivalent to or identical with] the post to be filled.*

10. *Initial appointment to the All-Pakistan Services, the Civil Services of the Federation and posts in connection with the affairs those which, under the Federal Public Service Commission (Functions) Rules, 1978, do not fall within the purview of the Commission, shall be made on the basis of tests and examinations to be conducted by the Commission].*

10. For direct recruitment, Section 5 of the Civil Servants Act, 1973 read with Rule Nos. 10 onward are relevant. However, for direct appointment on contract basis, instructions have been provided under ESTACODE which is also a prescribed manner within the meanings of aforesaid Section 5. In the case in the hand, the said appointment has admittedly been made on contract basis for a specific period by adopting a

transparent manner where against no candidate whatsoever has raised any objections thereto.

11. It goes without saying that the post of Secretary Law & Justice is required to be held by a person having professional career and qualification in legal discipline. That is why; the same has time and again been filled by Honourable Judges of High Courts as well as from the respected and esteemed individuals from the legal fraternity. There is no denial of the fact that a number of lawyers have already remained posted against the impugned post as it is the need of the job description and requirement. In case the post is assumingly be allowed to be filled amongst the persons holding the positions of BS-21 irrespective of their qualifications of law, the same would not justify the descriptions and requisites attached with the said post.

12. Moreover, reliance of the Petitioner on Section 9 of the Civil Servants Act, 1973 is totally misconceived as the eligibility criteria given thereunder is only relevant when the post of BS-22 is filled through promotion. The said section is not attracted in the case of direct recruitment. As mentioned hereinabove there is no

prohibition to fill up the said post through direct recruitment on contract basis. Under Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, no one can be prevented to do an act which is not prohibited under any law. Moreover, it is also significant to note that after Judicial Policy, the said post can only be filled through direct recruitment from amongst professional lawyers as has been done in the instant case.

13. As for the Petitioners disputation regarding the prescribed criteria for the impugned post, relating to education, judicial/legal experience or skills of “*administrative and management*” is concerned there is no apparent illegality, unconstitutionality, unreasonableness, prejudice or discrimination in the same warranting interference through exercise of extraordinary jurisdiction of this Court as the same is a policy, strategic and guiding principle of the Ministry not in the domain of the Courts to venture into.

14. In Muhammad Shafique Raja v. Government of Punjab and others 1991 CLC 617, the Lahore High Court observed that “*a writ of quo warranto should be encouraged in order to keep a check on executive authorities. It stated that if a*

petition is filed seeking a writ of quo warranto in connection with a public office, that the writ would (unless withheld at the court's discretion) be issued if the court is satisfied that any one or more of the following elements are, missing, namely that (a) the respondent holds the public office by order or decision of an authority competent to so appoint him; (b) he was appointed in the prescribed manner (and if the appointment is at the discretion of the appointing authority, that discretion was lawfully exercised); and (c) he could have been appointed to the office (e.g., that he had the requisite qualifications and was not otherwise disqualified)". In the instant case, it is evident that the said appointment was made through the Competent Authority in a transparent manner with due regard to the prescribed procedure as well adoption of a competitive process. Further, Respondent No.5, namely Barrister Zafar Ullah Khan, had the requisite qualifications prescribed by the Respondents for the post and was not otherwise disqualified from the appointment hence no illegality, injustice, unlawfulness, discrimination, prejudice or wrong has been committed with his appointment.

15. For the foregoing reasons I find that Petitioner has failed to make out a case for issuance of quo warranto against the Respondent No 5, and is dismissed accordingly.

(SHADKAT AZIZ SIDDIQUI)
JUDGE

Approved for Reporting.

Blue slip addul.

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