

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.355/2016

Federation of Pakistan through Prime Minister and another
Versus
Aftab Ahmad

Date of Hearing:	10.10.2018
Appellants by:	Mr. Muhammad Waqas Malik, Advocate and Mr. Shabbir Abbasi, Assistant Attorney-General
Respondent by:	M/s Shoaib Shaheen and Mirza Waqas Qayyum, Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant intra Court appeal, the appellants, impugn the judgment dated 07.06.2016, passed by the learned Judge-In-Chambers, whereby writ petition No.1394/2016 filed by the respondent, was allowed and the appellants were directed to issue an appointment letter to the respondent for the post of Judicial Member (BPS-20), Appellate Tribunal Inland Revenue, Azad Jammu & Kashmir ("ATIR, AJ&K").

2. The facts essential for the disposal of the instant appeal are that in response to an advertisement published in the newspapers, the respondent participated in the competitive process for appointment as Judicial Member (BS-20) ATIR, AJ&K on contract basis for a period of two years. The respondent is said to have obtained first position in the written test conducted by the National Testing Service ("NTS"); and that after being interviewed by the Departmental Selection Committee ("DSC"), the respondent was found to be qualified and eligible for appointment against the said post. The DSC recommended the respondent for appointment against the said post. Since there was a long period of silence, the respondent filed writ petition No.961/2016 seeking information regarding the fate of the selection process. The Prime Minister of Pakistan, in his capacity as Chairman of the Azad Jammu & Kashmir Council ("AJ&K Council"), ordered that the selection process should be conducted afresh. Aggrieved by the said decision, the respondent filed a writ petition No.1394/2016 before this Court

praying for a direction to the appellants to appoint the respondent as Judicial Member (BS-20) ATIR, AJ&K. Vide judgment dated 07.06.2016, the said writ petition was allowed with the direction to the appellants to appoint the respondent against the said post. The said judgment has been challenged by the appellants in the instant appeal.

3. Learned counsel for the appellants submitted that the recruitment process in question was initiated by appellant No.2 (Secretary, Ministry of Kashmir Affairs and Gilgit-Baltistan) in his capacity as Secretary, AJ&K Council Secretariat; that the order for the initiation of a fresh recruitment process was made by the Prime Minister of Pakistan in his capacity as the Chairman, AJ&K Council; that the decisions taken by the Prime Minister of Pakistan in the said capacity cannot be subjected to judicial review before this Court; that the AJ&K Council is an organ of the Azad State of Jammu and Kashmir and has been established under section 21 of the Azad Jammu and Kashmir Interim Constitution Act, 1974 ("the Constitution of AJ&K"); that the territory of Azad Jammu and Kashmir is not a part of Pakistan in view of Article 1 of the Constitution of the Islamic Republic of Pakistan, 1973; that the respondent is a State subject of the former State of Jammu and Kashmir and his fundamental rights are protected by the Constitution of AJ&K; that the requirement for the submission of a panel of three candidates for the post in question was a decision taken in the interests of a fair competition; that since only two candidates had appeared for the test and interview, there was no illegality in the decision to initiate the recruitment process afresh; that since the respondent had secured only 56, out of 100 marks, the Chairman, AJ&K Council, was justified in deciding that the recruitment process should be conducted afresh; and that this Court did not have the jurisdiction to adjudicate upon the writ petition filed by the respondent. Learned counsel for the appellants prayed for the appeal to be allowed and for the impugned judgment to be set-aside.

4. On the other hand, learned counsel for the respondent submitted that the impugned judgment does not suffer from any legal infirmity; that the DSC had admittedly recommended the respondent's appointment against post of Judicial Member (BS-20) ATIR, AJ&K; that the respondent's test and interview was conducted at Islamabad; that the recommendations for the respondent's appointment against the said post were also made by the DSC at Islamabad; that the advertisement inviting applications for appointment against the said post was published by the NTS at Islamabad; and that since the decision to initiate a fresh recruitment process was made by the Prime Minister of Pakistan, this Court was not bereft of the jurisdiction to adjudicate upon the writ petition filed by the respondent.

5. Learned counsel for the respondent further submitted that no reasons, whatsoever, were advanced for initiating a fresh recruitment process; that it was not even stated by the appellants that the respondent's credentials or qualifications were in any manner wanting; that the post in question had been advertised on two occasions previously; that the post in question pertains to a specialized cadre and requires extensive qualifications and experience; that since the post is reserved for AJ&K State Subjects that is why not more than three candidates had applied, out of which two, including the respondent, were found to be eligible; and that the Prime Minister's impugned decision dated 07.03.2016 is devoid of reasons. Learned counsel for the respondent prayed for the appeal to be dismissed.

6. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

7. Under Rule 3(2) of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973, as adopted by the AJ&K Council vide Azad Jammu & Kashmir Council Adaptation of Laws Act, 1979, the method of appointment of Judicial Member (BS-20) ATIR, AJ&K, under the AJ&K Council Secretariat is 100% by initial appointment. On 02.05.2014, a summary was submitted by the Azad Jammu &

Kashmir Council Secretariat to the Chairman, AJ&K Council (i.e. the Prime Minister of Pakistan) on the appointment of the Judicial Member (BS-20) ATIR, AJ&K. In the said summary, it was proposed to fill the said post for a period of two years on contract basis after short listing the candidates through the NTS. After the short listing of the candidates by the NTS, and interviews being conducted by the Departmental Selection Committee, AJ&K Council, a panel of at least three eligible persons were to be furnished for approval/appointment by the Chairman, AJ&K Council. The proposal made in the said summary was approved by the Prime Minister of Pakistan in his capacity as the Chairman, AJ&K Council.

8. It is not disputed that after going through a competitive process (i.e. test conducted by NTS and interview by the Departmental Selection Committee), the respondent, having 56 out of 100 marks, was one of the two eligible candidates for the post of Judicial Member (BS-20) ATIR, AJ&K. The other candidate had got 43 out of 100 marks. It is also not disputed that the respondent's name was recommended by the DSC for appointment against the said post on contract basis for a period of two years. The respondent's grievance stems from the decision dated 07.03.2016 taken by the Prime Minister of Pakistan, in his capacity as the Chairman of the AJ&K Council, to start a fresh selection process for the appointment against the post of Judicial Member (BS-20) ATIR, AJ&K. On 28.03.2016, the Prime Minister of Pakistan, directed that the selection process be repeated through the NTS.

9. Now, the vital question that needs to be answered is whether this Court, in exercise of its jurisdiction under Article 199 of the Constitution, can issue a writ of *mandamus* to a person who is not performing functions in connection with the affairs of the Federation, a Province, or a local authority.

10. When writ petition No.1394/2016 was filed, the petitioner therein (i.e. the present respondent) was aggrieved by the inaction on the part of the Chairman, AJ&K Council in taking a decision on the recommendations of the DSC to appoint him as Judicial Member (BS-20) ATIR, AJ&K. On the record is a decision made by the Prime

Minister of Pakistan, in his capacity as the Chairman, AJ&K Council, to start a fresh selection process through the NTS for the appointment against the said post. Therefore, in essence, the decision taken by the Prime Minister of Pakistan, in his capacity as the Chairman, AJ&K Council, was called in question in the Constitutional jurisdiction of this Court.

11. The AJ&K Council is not the creature of the Constitution of Pakistan or any Statute enacted by the Federal or Provincial Legislature. The AJ&K Council has been established pursuant to section 21 of the Constitution of AJ&K. For ease of reference, section 21 *ibid* is reproduced in "Schedule-A" hereto.

12. By virtue of section 21(2) of the said Act, the Prime Minister of Pakistan is the Chairman of the AJ&K Council. Other members of the AJ&K Council, include the President of AJ&K; five members to be nominated by the Prime Minister of Pakistan from time to time amongst Federal Ministers and Members of Parliament; the Prime Minister of AJ&K or a person nominated by him and six members to be elected by the Assembly from amongst State Subjects in accordance with the system of proportional representations by means of the Single Transferable Vote. Section 21(7) provides *inter-alia* that the executive authority of the Council shall extend to all matters with respect to which the Council has the power to make laws and shall be exercised, in the name of the Council, by the Chairman who may act either directly or through the Secretariat of the Council. Therefore, the Prime Minister of Pakistan exercises his functions as Chairman, AJ&K Council being a *persona designata* under section 21 *ibid*. The Prime Minister of Pakistan does not sit as the Chairman of the AJ&K Council by virtue of any provision of the Constitution of Pakistan or any statute enacted by the Federal or the Provincial Legislature. To sit as the Chairman of AJ&K Council is also not one of the Prime Minister's duties or responsibilities under the Rules of Business, 1973. It is only by virtue of section 21 of the Constitution of AJ&K that the Prime Minister sits or takes decisions as Chairman, AJ&K Council. It is an admitted position that the decision in question before us was not taken by the Prime Minister in

exercise of his executive authority under the Constitution or any statute enacted by the Federal or the Provincial Legislatures or any form of an inherent authority but in his capacity as Chairman, AJ&K Council.

13. It is an admitted position that AJ&K Council's executive authority does not extend beyond the territories of Azad Jammu & Kashmir. Under section 31(1)(a) of the Constitution of AJ&K, the AJ&K Council has the power to make laws for the territories of the AJ&K. Since the executive authority of the AJ&K Council cannot be beyond the territories over which it can exercise legislative powers, the AJ&K Council, regardless of its composition, cannot be said to be exercising executive power within the territorial limits of the Islamic Republic of Pakistan as per Article 1 of the Constitution of Pakistan.

14. True, the respondent gave his test and was interviewed within the jurisdiction of this Court. The decision to start a fresh selection process for the post in question was also taken within the jurisdiction of this Court. However, since the AJ&K Council is not the creature of the domestic law, it is our view that it is not a person performing functions in connection with the affairs of the Federation, a Province, or a local authority, to whom a writ of *mandamus* can be issued by this Court in exercise of its jurisdiction under Article 199 of the Constitution. A body created by the laws of AJ&K cannot be issued a writ by this Court even if it takes decisions within the territorial jurisdiction of this Court and even if such decisions do not withstand the test of legality on the touchstone of the provisions of the Constitution of the Islamic Republic of Pakistan. In the case at hand, the competitive process for the appointment in question was also not pursuant to any laws of Pakistan but under the AJ&K Council, vide Azad Jammu & Kashmir Council Adaptation of Laws Act, 1979, as explained above.

15. In view of the above, we hold that writ petition No.1394/2016 instituted by the respondent seeking the issuance of a writ of *mandamus* with respect to a decision taken by the Prime Minister of Pakistan, in his capacity as the Chairman, AJ&K Council, was not

maintainable before this Court. Consequently, the instant appeal is allowed and the said writ petition is dismissed with no order as to costs. The respondent is at liberty to agitate his grievance before a Court that can issue directions to the AJ&K Council.

(ATHAR MINALLAH)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018

(JUDGE)

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**

Uploaded By: Zulqarnain Shah

"SCHEDULE-A"

"21. Azad Jammu and Kashmir Council.- (1) There shall be an Azad Jammu and Kashmir Council consisting of

- (a) the Prime Minister of Pakistan;
 - (b) the President;
 - (c) five Members to be nominated by the Prime Minister of Pakistan from time to time amongst Federal Ministers and members of Parliament;
 - (d) the Prime Minister of Azad Jammu and Kashmir or a person nominated by him; and
 - (e) six members to be elected by the Assembly from amongst State Subjects in accordance with the system of proportional representation by means of the single transferable Vote.
- (2) The Prime Minister of Pakistan shall be the Chairman of the Council.
- (3) The President shall be the Vice-Chairman of the Council.

¹[(3-A) The Federal Minister of State for Kashmir Affairs and Northern Affairs shall be an ex-officio member of the Council.]

(4) The qualifications and disqualification for being elected, as, and for being a member of the Council shall, in the case of a member referred to in clause (e) of sub-section(1), be the same as these for being elected as, and for being a member of the Assembly.

²[(4-A) The seat of a member of the Council elected by the Assembly, hereinafter referred to as an elected member, shall become vacant if,-

- (a) he resigns his seat by notice in writing under his hand addressed to the Chairman or, in his absence, to the Secretary of the Council;
- (b) if he is absent, without the leave of the Chairman, from thirty consecutive sittings of the Council;
- (c) he fails to make the oath referred to in sub- section (6) within a period of ninety days after the date of his election, unless the Chairman, for good cause shown, extends the period; or
- (d) he ceases to be qualified for being a member under any provision of this Act or any other law.

(4-B) If any question arises whether a member has, after his election, become disqualified from being a member of the Council, the Chairman shall refer the question to the Chief Election Commissioner and, if the Chief Election Commissioner is of the opinion that the member has become disqualified, the member shall cease to be a member and his seat shall become vacant.

(4-C) An election to fill a vacancy in the office of an elected member shall be held not later than thirty days from the occurrence of the vacancy or, if the election cannot be held within that period because the Assembly is dissolved, within thirty days of the general election to the Assembly.

(4-D) The manner of election of elected members and filling of a casual vacancy in the office of an elected member shall be such as may be prescribed.]

(5) ¹[An elected member] shall hold office for a term of five years from the day he enters upon his Office:

²[Provided that an elected member shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his Office.]

(6) ³[An elected member] shall, before entering upon office, make before the Chairman oath in the form set out in the First Schedule.

(7) ⁴[The executive authority of the Council shall extend to all matters with respect to which the Council has power to make laws and shall be exercised, in the name of the Council, by the Chairman who may act either directly or through the Secretariat of the Council of which a Federal Minister nominated by the Chairman from amongst the members of the Council and not more than three advisors appointed by the Chairman shall be in -charge:

Provided that the Council may direct that, in respect of such matters as it may specify, its authority shall be exercisable by the Vice-Chairman of the Council, subject to such conditions, if any, as the Council may specify.

(8) An advisor may be appointed from amongst the elected members or the members of the Assembly.

(9) An advisor shall, before entering upon office, make before the Chairman oath in the form set out in the First Schedule.

(10) An Advisor who is a member of the Assembly and ¹[the Federal Minister of the State for Kashmir Affairs and Northern Affairs] shall have the right to speak in, and otherwise take part in the proceedings of the Council, but shall not by virtue of this sub- section be entitled to vote.

(11) The Council may make rules for regulating its procedure and the conduct of its business, and shall have power to act notwithstanding any vacancy in the membership thereof, any proceedings of the Council shall not be invalid on the ground that a person who was not entitled to do so sat, voted or otherwise took part in the proceedings.

(12) Orders and other instruments made and executed in the name of the Council shall be authenticated in such manner as may be specified in rules to be made by the

Council and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not any order or instrument made or executed by the Council.

(13) The Chairman may regulate the allocation and transaction of the business of the Council and may, for the convenient transaction of that business, delegate any of its functions to officers and authorities subordinate to it.]

Explanation: In this section, 'Chairman' means Chairman of the Council.

²[(14) The words 'The Prime Minister of Pakistan' wherever occurring in this section shall be deemed to include the person for the time being exercising the powers and performing the functions of the Chief Executive of Pakistan.]”