

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P.No.2904 of 2016
Wahaj Zulfiqar and others
Versus.

Federation of Pakistan through Secretary, Cabinet Division, and
others

Date of Hearings:	24.08.2017 & 23.01.2018
Petitioners by:	Mr. Shoaib Shaheen and Mirza Waqas Qayyum, Muhammad Umair Baloch and Kh. Manzoor Ahmad, Advocates, Mr. Afnan Karim Kundi, learned Additional Attorney-General and Ms. Sitwat Jahangir, learned Assistant Attorney-General,
Respondents by:	Mr. Muhammad Salman Ajaib, Barrister Salman Rashid, Advocates for the respondents No.2 and 3, Mr. Aftabullah Deputy Director (Litigation) Ministry of NHR&C, Mr. Zubair, Director NTP, Mr. Irfanullah, NTP Manager Operations, Mr. Zaheer Iqbal, Section Officer (Lit-II) Cabinet Division, Mr. Zaheer Ahmad, Chief Finance & Admn. Officer T.B. Control Programme.

MIANGUL HASSAN AURANGZEB, J:- Through this common judgment, I propose to decide writ petition Nos.2904/2016, 3074/2016, 3917/2016 and 4343/2017, since they entail common questions of law and fact.

2. The petitioners in the said writ petitions are all contract employees in a project by the name of “National TB Control Programme”. Some of them are aggrieved by the sudden termination of their services. The petitioners also seek a direction to the respondents (i.e. (1) the Federation of Pakistan through the Secretary, Cabinet Division, (2) the Secretary, Ministry of National Health Services, Regulation and Coordination, and (3) National Program Manager, Ministry of National Health Services, Regulation and Coordination) to regularize their services with effect from the date of their initial appointment with all back benefits.

3. Mirza Waqas Qayyum, Advocate learned counsel for the petitioners submitted that the petitioners were appointed on contract basis in the National TB Control Programme against different posts between 2008 and 2015; that the petitioners are in fact employees of the Ministry of National Health Services, Regulation and Coordination; that the petitioners' contractual employment was extended from time to time with no gap in the middle; that the Sub-Committee of the Cabinet on Regularization of Contract/Daily Wages Employees in the Ministries / Divisions / Attached Departments / Autonomous / Organizations, etc. ("the Cabinet Sub-Committee") in its meeting held on 31.05.2012 decided to regularize 36 contract employees of the National TB Control Programme; that on 22.10.2012, an Office Memorandum was issued by the Establishment Division conveying the minutes of the meeting to the Cabinet Sub-Committee in which the said 36 contract employees of the National TB Control Programme were regularized; that some of the petitioners who were serving as contract employees in the National TB Control Programme at that time were not considered for regularization; that the petitioners deserve for their services to be regularized in the same way as the said 36 employees; that the petitioners do not want their cases to be referred to any committee for the consideration of their cases for regularization; that this Court ought to issue directions to the respondents to regularize the petitioners' services; and that upon the regularization of their services, the petitioners would become civil servants.

4. Learned counsel for the petitioners further submitted that vide letters dated 18.07.2016 and 19.07.2016, petitioners No.1 to 11 in writ petition No.2904/2016 were informed that their services would be terminated with effect from 31.07.2016, whereas the services of petitioners No.12 to 16, who had been working on contract basis, had not been regularized; that the petitioners are being exploited at the hands of the respondents; that the petitioners have been meted out discriminatory treatment since 36 contractual employees, who were

similarly placed as the petitioners, had been regularized by the Cabinet Sub-Committee in the year 2012; that neither show cause notices were issued to petitioners No.1 to 11 nor were they afforded an opportunity of hearing before the respondents decided not to extend the contractual employment of some of the petitioners; and that this Court as well as the Hon'ble Supreme Court have in several cases issued directions for the regularization of contractual employees working in organizations owned, controlled or managed by the Federal Government. Learned counsel for the petitioners prayed for the writ petition to be allowed and for the orders dated 18.07.2016 and 19.07.2016 to be set-aside. It was also prayed that the respondents be directed to regularize the petitioners' services from the date of their initial appointments with all back benefits. Learned counsel for the petitioners in the other connected writ petitions adopted the arguments of the learned counsel for the petitioners in W.P.No.2904/2016.

5. On the other hand, Messrs M. Salman Ajaib, Advocate and Barrister Salman Arshad, learned counsel for respondents No. 2 and 3 submitted that respondent No.3 was not managed, controlled or financed by the Federal Government; that the National TB Control Programme was not an attached department or a subordinate office/department of any Ministry; that the National TB Control Programme is not performing functions in connection with the affairs of the Federation, and therefore, not amenable to the constitutional jurisdiction of this Court; that the petitioners' employment with the National TB Control Programme is not governed by any statutory rules or regulations; that the National TB Control Programme is a project which is funded by an international donor agency by the name of "Global Fund"; that the survival of the National TB Control Programme is contingent on funding by the Global Fund; that the contribution of the Federal Government to National TB Control Program is negligible; that the Federal Government has no role in engaging or retaining the petitioners' services; that the petitioners'

employment with the National TB Control Programme is governed by the terms and conditions set out in their employment contracts; that the fixed period for which the petitioners were employed is mentioned in their respective employment contracts; that the petitioners' employment contracts provide that the employer can terminate the employment contracts on one month's notice or one month's salary in lieu of notice; and that the petitioners' relationship with respondent No.3 is that of master and servant.

6. Learned counsel for respondents No.2 and 3 further submitted that 36 employees were regularized pursuant to the decision dated 31.05.2012 of the Cabinet Sub-Committee; that the said employees were employed by the erstwhile Ministry of Health, therefore, the petitioners' case is distinguishable from that of the employees whose services were regularized; that all the petitioners have been employed by the National TB Control Programme, and not by the Ministry of Health; that all the petitioners are project employees, and therefore, are not covered by the regularization policy contained in the office memorandum dated 29.08.2008, issued by the Establishment Division; that in the said regularization policy, it has been clearly set out that those employees "*who are working against tenure posts, project posts or daily wages or those who are being paid from contingent or defence budget are not eligible for regularization*".

7. Furthermore, learned counsel for respondents No.2 and 3 submitted that the contracts of petitioners No.1, 2, 4, 9 and 11, had expired on 31.12.2016, and that the National TB Control Programme had not renewed or extended their contracts; that petitioners No.3, 5, 6, 7, 8 and 10 had been readjusted since 01.07.2016, and they continued to serve as contractual employees; that petitioner No.12 resigned in October 2016; that the contractual employment of petitioners No.13 to 16 had not been disturbed; and that the services of petitioners No.1, 2, 4, 9 and 11 cannot be regularized without first

reinstating them in service. Learned counsel for respondents No.2 and 3 prayed for the writ petition to be dismissed.

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

9. After the enactment of the Constitution (Eighteenth Amendment) Act, 2010, and devolution of the subject of 'health' to the Provinces, the Ministry of Inter Provincial Coordination issued notification dated 14.10.2011, whereunder the National HIV/AIDs Control Programme, National TB Control Programme and the Directorate of Malaria Control were revived with effect from 01.07.2011. Their functions/terms of reference were as follows:-

- a) *"To act as Principal Recipient for all Global Fund supported health initiatives.*
- b) *Preparation of proposals and liaising with international agencies for securing support of such partner agencies.*
- c) *Providing technical and material resources to the provinces for successful implementation of disease control strategies, and disease surveillance"*

10. The Global Fund was established in the year 2002 as an innovative financing institution for the purpose of attracting and managing financial resources globally as well as providing resources to countries to support national and regional programs that prevent, treat and care for people with the diseases of HIV/AIDs, tuberculosis and/or malaria. On 24.02.2016, a framework agreement was entered into between the Islamic Republic of Pakistan and the Global Fund, whereby grants were to be made to the Islamic Republic of Pakistan for implementing and governing programs for the eradication of the said diseases/viruses. The implementation period of the said agreement was from 01.07.2016 to 31.12.2017. Funds to the tune of U.S. \$ 71,681,713/- were to be provided by the Global Fund for the purpose of the prevention and eradication of tuberculosis for the said period. Such agreements had also been entered into in the past between the Islamic Republic of Pakistan and the Global Fund.

11. The admitted position is that all the petitioners were appointed on various dates between 2008 and 2015 in the National TB Control Programme on contract basis. All of them have executed employment contracts. Their employment contracts also show that their contracts will remain in effect for a fixed period subject to the continuation of the grant by the Global Fund. All these contracts contain termination clauses empowering the employer to terminate the contracts on 30 days written notice. In their employment contracts, the petitioners have expressly declared that they will comply with the terms and conditions of their employment contracts. The validity of these employment contracts have been extended from time to time. Their contracts were renewed subject to the availability of grant from the Global Fund and the approval of posts by the donor.

12. On 18.07.2016 and 19.07.2016, petitioners No. 1 to 11 in writ petition No.2904/2016 were informed by their employer that their services would be terminated with effect from 31.07.2016. The petitioner in writ petition No.3074/2016 was also given such a notice. The petitioners in writ petitions No.3917/2016 and 4343/2017 were not given such a notice, but they seek the regularization of their services. The position taken by the respondents was that some of the petitioners were issued termination notices because their positions were not approved by the donor and funds were not available to finance their positions. This caused the said petitioners, along with other contractual employees of the National TB Control Programme, to file the said writ petition. The petitioners seek a restraint against the termination of their employment contracts. They also want their contractual employment to be converted into permanent/regularized appointment.

13. As for the petitioners who have been issued notices for the termination of their employment contracts, this Court in exercise of its jurisdiction under Article 199 of the Constitution, can neither declare the termination notices to be unlawful nor hold that their employment contracts continue to subsist after the termination

notices. It is an admitted position that there are no statutory rules governing the petitioners' relationship with the respondents. Until the filing of these petitions, the petitioners' employment was contractual in nature. This made their relationship with their employer as that of master and servant. The terms of such petitioners' employment contracts empowered their employer to terminate their services by giving one month's notice or one month's salary in lieu of such notice. This being so, if some of the petitioners are aggrieved by the termination of his employment contracts, at best, they can file a suit for damages. It is well settled that a contractual employee cannot file a writ petition seeking his reinstatement in service. Reference in this regard may be made to the following case law:-

- (i) Recently in the case of Chairman NADRA, Islamabad Vs. Muhammad Ali Shah (2017 SCMR 1979), it has been held that a contractual employee of a statutory organization cannot invoke the constitutional jurisdiction of the High Court under Article 199 of the Constitution.
- (ii) The Honourable Supreme Court in the case of Pakistan Telecommunication Company Limited Vs. Iqbal Nasir (PLD 2011 S.C. 132), held as follows:-

"All the employees having entered into contracts of service on the same or similar terms and conditions have no vested right to seek regularization of their employment, which is discretionary with the master. The master is well within his rights to retain or dispense with the services of an employee on the basis of satisfactory or otherwise performance. The contract employees have no right to invoke writ jurisdiction, particularly in the instant case where their services have been terminated on completion of period of contract."

(Emphasis added)

- (iii) In the case of the Federation of Pakistan through Secretary Law Justice and Parliamentary Affairs Vs. Muhammad Azam Chatha (2013 SCMR 120), it has been held as follows:-

"In addition to it, it is a cardinal principle of law that a contract employee instead of pressing for his reinstatement to serve for the leftover period can at best claim damages to the extent of unexpired period of his service."

- (iv) In the case of Trustees of the Port of Karachi Vs. Saqib Samdani (2012 SCMR 64), it has been held as follows:-

“Evidently the above letter reflects that the respondent was in employment on contract basis, hence no vested right was created in his favour for reinstatement in service. It was not the case where the respondent was appointed as a regular employee against any particular quota to give him a valid cause of action. Equally, the impugned judgment is also silent that termination of service of the respondent violated any of his rights, therefore, in our view his reinstatement under the impugned judgment does not appear to have been validly ordered.”
(Emphasis added)

- (v) In the case of Syed M. Yahya Vs. First Credit and Investment Bank Limited (2009 UC 656), it has been held *inter alia* that contractual employment containing specific terms and conditions of service would exclude the application of a general terms and conditions of service applicable to non-contractual employees. Furthermore, it was held that a contractual employee could not invoke writ jurisdiction under Article 199 of the Constitution against his termination from service in accordance with the specific terms and conditions of service contained in the contract.
- (vi) In the case of Muhammad Waqas Gul Vs. Water and Power Development Authority (2015 PLC (C.S.) 144), it has been held as follows:-

“Without going into the question whether the aforesaid clauses will automatically dispense with requirement of rule of natural justice, suffice it to say that non issuance of notice of hearing to the petitioners, will not entitle the petitioners, for revival of their contract of service, rather the remedy of the petitioners, if any, for wrongful termination would be for damages to the extent of unexpired period of their services, before the competent court of law.”

14. It is well settled that where the conditions of service of an employee of a statutory body were governed by statutory rules, any action prejudicial against such an employee in derogation or in violation of statutory rules could be set-aside by the High Court in

exercise of writ jurisdiction. In the case at hand, it is admitted that there are no statutory rules governing the petitioners' relationship with the respondents. Learned counsel for the petitioners could not even point out any non-statutory service rule which had been violated by their employer while terminating the petitioners' employment contracts in pursuance of an express clause in the employment contract.

15. It is a master's prerogative to terminate a servant's contractual appointment if the former does not find the latter's performance to be satisfactory. Such termination can take place in accordance with the terms and conditions of the employment contract. A contractual employee cannot insist for a regular inquiry to be held regarding the employer's satisfaction with the employees' performance. In the case at hand, the notices whereby the employment contracts of some of the petitioners have been terminated do not, in any manner, stigmatize them.

16. The petitioners do not pray for the reference of their cases before any committee constituted by the Federal Government for the consideration of their cases for regularization. The petitioners simply seek a direction to the respondents to regularize their services from the date of their initial appointment. Learned counsel for the petitioners submitted that in the event, the petitioners are regularized, they would in fact become employees of the Ministry of National Health Services, Regulation and Coordination, and attain the status of civil servants.

17. It is an admitted position that the petitioners are not paid their salaries by the Federal Government. The continuation of the petitioners' employment contracts were contingent on funding from the Global Fund. There is nothing in their employment contracts showing that the petitioners were in fact the employees of the Federal Government. The terms and conditions of some of the petitioners employment contracts show that their monthly remuneration is fixed in US Dollars. For instance, petitioner No.12 (Syed Mubashar Ahmad)

in writ petition No.2904/2016 drew a salary of US Dollars 1,500/- per month. If he were to be regularized and given the status of a civil servant, he would be in BPS-18 or above.

18. Some of the petitioners' pay scales cannot be determined because they admittedly draw their salaries in US Dollars. Petitioner No.16 (Khalid Rizwan Malik) draws a salary equivalent to Rs.2,93,933/-, whereas petitioner No.15 (Aamir Habib) draws a salary equivalent to Rs.1,09,849/-. The learned counsel for the petitioners was at a loss when asked about the pay scales in which the services of such petitioners would be regularized. Even if pay scales for most of them is to be determined on the basis of their salaries, it would be certainly more than BPS-16. The petitioners want to become the regular employees of the Ministry of National Health Services, Regulation and Coordination, and therefore, want to become civil servants. Regular appointment in BPS-16 and above can only be made through the Federal Public Service Commission strictly in accordance with the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973. This Court cannot give the requirements of the said Rules a go-bye by directing the respondents to regularize the petitioners' services in the Ministry of National Health Services, Regulation and Coordination. The grant of such a relief would be in contravention of the Civil Servants Act, 1973, and the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973. It is well settled that a thing required by law to be done in a particular manner must be done in that manner or not at all. This Court cannot compel a project (i.e. the National TB Control Programme, which is funded by a foreign donor agency) to appoint the petitioners on permanent basis. The National TB Control Programme is neither an attached department nor a subordinate office, nor an adjunct of the Ministry of National Health Services, Regulation and Coordination. The employees of the National TB Control Programme are, therefore, not the employees of the Ministry of National Health Services, Regulation and Coordination. Since the National TB Control Programme is not

running its affairs with funds solely provided by the Federal Government, it cannot be termed as a person performing function with the affairs of the federation.

19. Learned counsel for the petitioners was also unable to show if there were any permanent posts against which the petitioners were seeking the regularization of their services. Other than one Irfan Ullah, the learned counsel for the petitioners could not name any other person working in the National TB Control Programme whose contract services had been regularized.

20. Learned counsel for the petitioners brought on record office memorandum dated 22.10.2012, issued by the Establishment Division, wherein reference was made to a decision taken by the Cabinet Sub-Committee in its meeting held on 31.05.2012 approving the regularization of 36 contract employees of the National TB Control Programme under the Ministry of Inter Provincial Coordination. It is an admitted position that the petitioners' cases were not placed before the Cabinet Sub-Committee at any material stage. Learned counsel for respondents No.2 and 3 submitted that only one person namely, Irfan Ullah, working with the National TB Control Programme had been regularized pursuant to the decision of the Cabinet Sub-Committee, and that he had been appointed by the Ministry of Health, and after the devolution of the Ministry of Health, he was sent to the Ministry of Inter Provincial Coordination.

21. Irfan Ullah's employment contract dated 23.06.2005, shows that he was appointed as an Accounts Officer (BS-17) in the National TB Control Programme for a period of one year by the Ministry of Health (Government of Pakistan). His employment contract was extended from time to time. Vide notification dated 11.03.2013, issued by the Ministry of Inter Provincial Coordination, Irfan Ullah was regularized pursuant to the decision taken on 31.05.2012, by the Cabinet Sub-Committee on Regularization of contract/daily wages employees. Vide notification dated 29.04.2015, issued by the Ministry of National Health Services, Regulations and Coordination, Irfan Ullah was given

the charge of the post of Administration Manager, Global Fund, National T.B. Control Programme on deputation basis. It is my view that, given these facts, the petitioners' case is different from that of Irfan Ullah. The petitioners in the instant writ petitions were never appointed by the erstwhile Ministry of Health or any other department or adjunct of the Federal Government. Therefore, the petitioners' case is distinguishable from that of Irfan Ullah. Additionally, it could not be explained by the learned counsel for the petitioners as to how an employee in BS-16 and above could be regularized under the regularization policy contained in office memorandum dated 29.08.2008. This Court in the cases of "Ms. Shagufta Hashmat Vs. Federation of Pakistan, through Secretary Cabinet Div. etc." (W.P. No.2117/2016), and "Mst. Saima Malik Vs. Ministry of Capital Administration and Development and another" (W.P.No.4634/2016), has held that the Cabinet Sub-Committee had not been empowered by the Federal Cabinet to regularize employees in BPS-16 and above. Furthermore, in the latter case, it was held that regularization of employees in BPS-16 and above carried out by the Cabinet Sub-Committee was in excess of jurisdiction.

22. The petitioners want permanent employment without going through a competitive process for it. The mere fact that they were given contractual employment after a test or an interview could not make out their case for the conversion of their contractual employment into a permanent employment. It may be mentioned that vide order dated 14.11.2017, passed by the Division Bench of this Court in I.C.A. No.108 of 2017, titled, "Muhammad Qasim and others Vs. Federation of Pakistan through Secretary, Ministry of Overseas Pakistanis & Human Resource Development and another", it was held as follows:-

"7. It is our view that the dimensions and parameters of a competitive process for a permanent appointment and a contractual/ temporary appointment are altogether different. Competition for a contractual/temporary employment is not as aggressive and competitive as competition for a permanent employment. Many vying for permanent employment would not

bother applying for contractual/temporary employment. This is more so when there is no representation in the advertisement inviting applications for contractual/temporary employment that the same would somehow transform into a permanent employment. If a person employed purely on temporary basis is to be given a permanent employment without any competitive process it would amount to stealing a march on hundreds of thousands of able would-be applicants who did not apply for temporary/contractual employment, but would have applied had they known that the contractual employment would, without any further competitive process, turn into permanent employment. The conversion of a person's temporary/contractual employment into permanent employment without any transparent competitive process, would be a clear violation of Articles 3 and 9 of the Constitution. Equal opportunity in public employments is a constitutional mandate. The principle of "each according to his ability to each according to his work" can only be achieved by appointing meritorious candidates in the public sector through strict competition. Such competition for a permanent employment in the public sector cannot be given a go-bye simply because a contractual employee, desirous of his employment being made regular/permanent, was given contractual employment through a competitive process. The equality clause enshrined in the Constitution is followed scrupulously by the public sector. The youth of this Islamic Republic burning the midnight oil to secure permanent employment in the public sector through an open competitive process would be let down and demoralized if the contractual employment of persons like the appellants is converted into permanent employment without a competitive process. Such a relaxation would be a bad precedent to a large number of qualified people aspiring for permanent employment in the public sector."

23. Be that as it may, unlike the earlier regularization policies, under the latest policy the project employees can also be regularized. As mentioned above, the petitioners did not pray for a direction for their cases for regularization to be referred to any committee established under any regularization policy. If the petitioners consider themselves eligible for regularization under the latest regularization policy, they may consider applying under the regularization policy presently in vogue. The criteria for regularization set out in the Office Memorandum dated 11.05.2017 issued by the Establishment Division, Government of Pakistan, is as follows:-

- (i) *All Contract/Contingent Paid/Daily Wage/Project employees who have rendered a minimum of one year of service, in*

continuity, as on 1-1-2017 (hereinafter referred to as eligible employees) may apply for appointment on regular basis in the manner prescribed hereinafter provided that the condition of continuity shall not be applicable in case of person(s) employed on daily wages who have completed at least 365 days service.

- (ii) *For initial appointment to posts in BS-16 and above, the employees shall apply direct to FPSC against relevant/suitable vacancies as and when arising for which they are eligible.*
- (iii) *For initial appointment to posts in BS-1 to BS-15, the eligible employees may apply as per criteria given vide this Division's O.M.No.53/1/2008-SP dated 16-1-2015 and 3-3-2015 shall be adopted.*
- (iv) *The eligible employees shall be awarded extra marks in interview at the rate of one (01) mark for each year of service rendered upto a maximum of five (05) marks, on the recommendations of the respective selection authorities.*
- (v) *The period served as contract/contingent paid/daily wage/project employee, shall be excluded for the purpose of determination of upper age limit in addition to relaxation of upper age limit as per existing rules.*
- (vi) *Qualifications prescribed for a post shall be strictly followed. In case, a person does not possess the prescribed qualifications/ experience for the post he/she is applying for, he/she shall not be considered for the same.*
- (vii) *The employee must be in good mental and bodily health and free from any physical defect likely to interfere with the discharge of his duties unless appointed against disability quota.*
- (viii) *The advantage of para 1(e) is a one-time dispensation for all contract/ contingent paid/ daily wage/ project employees for their eligibility to regular employment.*

24. In view of the above, these petitions are dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2018

(JUDGE)

Qamar Khan*

APPROVED FOR REPORTING