JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A. No.281 of 2015

Azra Jamali & others
VERSUS
Federation of Pakistan, through Secretary, M/o Commerce & another

Date of Hearing:	**03.02.2016**
Appellants by:	M/s Baz Muhammad Kakar & Babar Sohail, learned Advocates,
Respondents by:	Syed Hasnain Ibrahim Kazmi, learned Deputy Attorney-General, Mr. Altaf Asghar, Joint Secretary (Admn) & Mr. Muhammad Faridoon, Section Officer Ministry of Commerce.

MIANGUL HASSAN AURANGZEB, J:- Through the instant Intra Court Appeal, twelve appellants have impugned the judgment dated 29.05.2015, passed by the learned Single Judge in Chambers, whereby the appellants' petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, was dismissed.

2. The appellants, in their writ petition, prayed for the grant of the relief reproduced herein below:-

> *"In view of the foregoing, it is respectfully prayed that the impugned Recall Notices/Orders (Annex-I) may kindly be set aside and be declared to be of no lawful authority and the Respondent Federation be directed to continue the service of the Petitioners in terms of the Policy of 2015 and the Strategic Trade Policy Framework 2012-2015 for a period of at least four years, subject to performance evaluation. The Respondent Federation be directed to carry out performance evaluation of the Petitioners.*
>
> *The Respondent Federation and LUMS be restrained from causing conduct of the test pursuant to the Notice for Applications by 25-04-2015 (Annex-L) for selecting individuals to replace the Petitioners.*
> *Any other order deemed to be just and fair may also kindly be passed."*

3. The appellants pleaded that they are serving as Trade Officers at various overseas diplomatic missions of

Pakistan; that the appellants were so appointed through a transparent competitive process, which included an examination and an interview; that in the said competitive process, candidates from the public and private sector participated in the test carried out by the Lahore University of Management Sciences; that after emerging successful in the test, the appellants were appointed as Trade Officers in terms of the Policy for Selection and Monitoring of Trade Officers approved on 01.02.2005 and supplemented by the Strategic Trade Policy Framework 2002-2015; that the appointment letters issued to the appellants were subject to the said Policy Framework whereunder the tenure of the appellants was to be for an initial period of two years, and at the end of this period, a final extension of two years could be given, subject to performance; that Strategic Trade Policy Framework 2002-2015 provided that the service of the Trade Officers would be subject to annual performance evaluation having both qualitative and quantitative aspects with the possibility of recalling the three lowest performing Trade Officers.

4. That it was further pleaded by the appellants that in the 15th meeting of the Senate Standing Committee on Commerce and Textile Industry held on 29.05.2014, the Federal Government took the position that the Trade Officers appointed under the Policy of 2005 and the Strategic Trade Policy Framework 2002-2015 were entitled to a further tenure of two years upon satisfactory performance evaluation at the end of the first two years of their appointments; that in the past the Trade Officers appointed by the Federal Government have served for a term of four years; that the Hon'ble Federal Minster for Commerce, in the 110th Session of the Senate of Pakistan held on 06.02.2015 confirmed that the service of the Trade Officers was to be continued for a period of four years on the basis of performance evaluation.

5. The appellants also pleaded that after the change of the Government at the Federal level in May 2013, the appellants have been issued arbitrary and discriminatory recall notices; that after their appointments abroad, the appellants moved their families and organized their lives on the basis of the representation made to them that they would serve as Trade Officers for at least four years subject to satisfactory performance evaluation; that the Federal Government issued the recall notices to the appellants after they had served as Trade Officers for two years without carrying out their performance evaluation; that the Federal Government has adopted a policy of pick and choose by extending the tenure of some Trade Officers whilst issuing recall notices to the appellants and thereby transgressing Article 25 of the Constitution; that the recall notices were in violation of the appellants' vested rights and legitimate expectations; that the Federal Government could not change the policy retrospectively and destroyed the appellants' vested rights.

6. The appellants have further pleaded that they are civil servants belonging to various occupational groups and that the post of a Trade Officer is not treated as a civil service/cadre post; that the post of a Trade Officer was made open to candidates not just in the civil service; and that the Public Service Commission had no role to play in the appointment process of the Trade Officers.

7. The appellants were prompted to file a writ petition before this court when the Ministry of Commerce issued a public notice, indicating that on 24.05.2015 the Lahore University of Management Sciences would conduct tests for the appointment to the posts of Trade Officers. The appellants apprehended that the consequence of such tests would be to arbitrarily cut shot their tenure as Trade Officers.

8. The learned Single Judge of this Court, dismissed the appellants' writ petition by holding that since further

extension in the tenure of the appellants as Trade Officers relates to the appellants' terms and conditions of service and the policy of the executive branch, and that both matters are not amenable to the constitutional jurisdiction of this court. Furthermore, it was held that the appellants had been informed at the time of their appointments that the initial period of their tenure was to be two years and that there was no dispute regarding the fact that the appellants had completed the two-year tenure. As regards the subjective assessment regarding the performance of the appellants, it was held that that matter too was within the exclusive domain of the executive and that this court could not substitute the opinion of the executive authorities with its own. The appellants were held to have no vested right to be posted at a particular place.

9. Mr. Baz Muhammad Kakar, learned ASC for the appellants, made his submissions in reiteration of what was pleaded before the learned Single Judge of this Court. The said judgment dated 29.05.2015 was impugned, *inter-alia*, on the ground that in view of the law laid down in the case of Orya Maqbool Abbasi Vs. Federation of Pakistan, reported as 2014 SCMR 817, Secretary Establishment Division Vs. Aftab Ahmad Manika reported as 2015 SCMR 1006, Liaqat Ali Chughtai Vs. Federation of Pakistan reported as PLD 2013 Lahore 413, the High Court had the jurisdiction in the instant case to adjudicate upon the matter. It was further argued that the impugned judgment was *per incuriam* as it was contrary to the law laid down in the said judgments. He contended that the policies and guidelines adopted by the Government were binding and the vested rights created thereby could not be disturbed. The sheet anchor of his submissions was that the appellants could be recalled after serving as Trade Officers for two years unless and until their performance was evaluated and they were found not up to the mark, and that unless such a performance evaluation had

been carried out, the appellants had a vested right to complete a period of four years as Trade Officers.

10. Syed Hasnain Ibrahim Kazmi, learned Deputy Attorney-General, defended the judgment dated 29.05.2015, passed by the learned Single Judge of this Court, by contending that the writ petition filed by the appellants was not maintainable in view of the bar contained in Article 212 of the Constitution as the matter related to the terms and conditions of service of the appellants. However, he submitted that the competent authority had already appointed Trade Officers to replace the appellants. These new Trade Officers were appointed as a consequence of a competitive process and a test conducted by the Lahore University of Management Sciences. On 12.01.2016, after briefly hearing the learned counsel for the parties, this Court passed the following order:-

> *"The main grievance of the appellants in the instant appeal is that they have been issued recall notice without evaluation of their performance as in the terms & conditions of their appointment, it is provided that they have been appointed for two years which may be extended for another term of two years subject to evaluation of their performances. In reply thereto, learned D.A-G has submitted that performance evaluation of the appellants is under process, however, seeks a short adjournment in order to obtain instructions from the concerned respondent.*
> *Adjourned to 21.01.2016."*

11. On 21.01.2016, the learned Deputy Attorney-General submitted a "Performance Evaluation and Monitoring Report" with respect to the twelve appellants. This report was stated to be verified by Mr. Afzal Raza, Assistant Chief (Stat), Ministry of Commerce, Islamabad. According to this report, other than appellant No.6 (Mr. Ameer Mohyuddin, Commercial Counselor at Narobi Kenya) and appellant No.10 (Mr. Zahid Ali Abbasi, Commercial Counselor at The Hague, Netherlands), there had been a decline registered in Pakistan's Exports to the countries where the appellants had been posted as Trade Officers.

This court after going through the said report adjourned the matter to 02.02.2016 for final arguments.

12. During the course of the final arguments, the learned Deputy Attorney-General produced Summary No.SO/Secy/2014, dated 30.05.2014 for the Prime Minister of Pakistan from the Secretary Commerce, Government of Pakistan, and on its basis submitted that the Ministry of Commerce maintains 50 to 53 Trade Offices in 35 countries abroad; that these officers are appointed for promoting and facilitating expansion of Pakistan's visible and invisible trade particularly exports, increasing investment in Pakistan, negotiating favourable market access conditions for Pakistani products and services in the country of posting, and improving the image of Pakistan especially in the business realm; that the selection of Trade Officers has remained a subject of considerable controversy and generated frequent complaints of lack of transparency in their appointment process; that there is a widespread dissatisfaction over the performance of most of the trade officers; that the last batch of 41 Trade Officers was selected in 2013; that in the allocation of stations, there were no criteria to match the qualification and experience of an officer with the specific job requirements in the country of posting; that considerations other than merit allegedly played a vital role in allocation of stations in the developed countries; that a large number of individuals (officers) with little or no relevant qualifications and/or professional experience in the field of trade promotion and commercial diplomacy, had been able to secure their selection as Trade Officers; that the sub-optimal performance of the Trade Officers was, therefore, a natural corollary; that the Sub-Committee of the Cabinet had, *inter alia*, decided the closure of 8 Trade Offices at Athens, Baka, Port Louis, Cairo, Mexico City, OIC Trade Mission Jeddah, Santiago and Tripoli.

13. The Ministry of Commerce, in the said summary, gave the following three options to the Prime Minister of Pakistan:-

> ***(a) "All the officers may be allowed to complete the normal tenure of 4 years (2 years + 2 years extension).***
> ***(b) All these officers may be immediately recalled and the posts may be included in the new selection process.***
> ***(c) All the officers may be recalled on completion of their initial tenure of 2 years."***

14. The Ministry of Commerce, recommended the adoption of the option at Paragraph (c) above, and solicited the approval of the Prime Minister of Pakistan. The Prime Minister considered the said Summary dated 30.05.2014 and approved the following procedure for the appointment of Trade Officers in the future:-

> ***(i) "All posts of Trade Officers likely to fall vacant within a year will be advertised in leading national dailies, clearly specifying eligibility criteria in terms of educational qualifications, experience, age and so forth.***
> ***(ii) All posts of Trade Officers shall be open for public and private sector candidates who are citizens of Pakistan.***
> ***(iii) The existing system of a competitive test conducted by the Lahore University of Management Sciences shall continue; however, the test will be made more rigorous in consultation with the University.***
> ***(iv) The minimum qualifying score in the test will be set at 60 percent.***
> ***(v) Candidates qualifying the test will be called for an interview, which will be conducted by a committee to be constituted by the Prime Minister.***
> ***(vi) Eighty percent weightage will be given to the competitive test and twenty percent weightage to the interview.***
> ***(vii) Successful candidates will be given, in order of their merit, the option to pick the station of their choice from amongst available stations.***
> ***(viii) The tenure for a Trade Officer shall be two years, which would be extendable for a maximum period of one additional year only on the basis of performance review on completion of two years. Ministry of Commerce may specify parameters for performance review before posting of fresh batch of officers."***

15. In addition to the above, the Prime Minister was pleased to approve that the tenures of the Trade Officers presently serving in the foreign countries shall not be

extended upon expiry of their current terms, and that the Ministry of Commerce should communicate this decision to the concerned officers immediately so as to provide them sufficient time to complete formalities and preparations for their departure. This decision was taken on 10.02.2015.

16. The learned Deputy Attorney-General submitted that through the said decision dated 10.02.2015 of the Prime Minister, the Policy for Selection and Monitoring of Trade Officers stood changed and amended. He further submitted that the Rules of Business, 1973, permitted the respondents to depart from an important policy with the approval of the Prime Minister.

17. We have heard the arguments of the learned counsel for the parties and have perused the record with their able assistance.

18. We propose, first, to deal with the contention of the learned Deputy Attorney-General that the writ petition filed by the appellants was barred under Article 212 of the Constitution. Now Article 212(1)(a) of the Constitution empowers the legislature to make a law providing for establishment of tribunals to exercise exclusive jurisdiction in respect of matters relating to terms and conditions of persons who are or have been in the service of Pakistan including disciplinary matters. Under Article 212 (2) of the Constitution, the jurisdiction of this court is barred in respect of any matter to which the jurisdiction of such a Tribunal extends. Section 4 of the Federal Service Tribunal Act, 1973, provides for appeals to the Service Tribunal by a civil servant aggrieved of any order regarding the terms and conditions of his service. Section 4(1)(b) of the Federal Services Tribunal Act, 1973, expressly bars the Service Tribunal from entertaining appeals against the decisions of a departmental authority determining the fitness or otherwise of a person to be appointed or to hold a particular post.

19. The appellants in this case seek an extension of two years to hold the posts of Trade Officers subject to their

satisfactory performance to be determined through an evaluation process. In other words, the appellants want to hold the respondents to the representation contained in their letters of appointment as Trade Officers. Under paragraph 6 of the letters of appointment, it was provided that the tenure of the Trade Officers shall initially be two years, and that at the end of this period, and subject to performance, a final extension of two years may be given. Whether the appellants were fit or otherwise to hold the post of Trade Officers and for this purpose wanted their two-year performance to be evaluated in accordance with paragraph 6 of the letters of appointment was a matter, in our view, over which the Service Tribunal did not have appellate jurisdiction. Such a matter could lawfully be agitated by the appellants before the constitutional jurisdiction of this Court under Article 199 of the Constitution. Hence, we cannot bring ourselves to agree with the finding of the learned Single Bench of this court that the jurisdiction of this court qua the matter agitated by the appellants in their writ petition was barred under Article 212 of the Constitution. As it is, perusal of the impugned judgment reveals that the learned Single Judge had also dismissed the writ petition on merits as indicated in paragraph 8 above.

20. We now proceed to decide the case on merits. The appellants based their case on the contents of Policy for Selection and Monitoring of Trade Officers, dated 01.02.2005 and approved by the Prime Minister on 03.03.2005 ("the 2005 Policy") as supplemented by the Strategic Trade Policy Framework 2002-2015. The appellants also rely on the terms of the appointment letters issued to the appellants which were subject to the said Policy Framework whereunder the tenure of the appellants was to be for an initial period of two years, and at the end of this period, a final extension of two years could be given, subject to performance. Reliance is also placed on the statements made by public functionaries before various *fora* that the two-year tenure of the appellants

as Trade Officers may be extended for another two years based on the evaluation of their performance.

21. Some of the features of the 2005 Policy as supplemented by the Policy Framework were that the test for the selection of the Trade Officers was to be conducted by the Lahore University of Management Sciences and for the rest of the assessment including interview, the Special Selection Board would continue; the officers selected were to be given mandatory language training of the country of their posting in the National Institute of Modern Language, Islamabad, or any other institute approved by the Ministry of Commerce before their departure; on their return, the Ministry of Commerce was to have the first right of refusal to post these officers. For the present purposes, it is pertinent to mention that under the 2005 Policy as supplemented by the Policy Framework, the tenure of the Trade Officers was to be initially for two years with an extension of one year depending on their performance. Extension of more than one year could be considered depending on their performance.

22. These policies referred to hereinabove were changed and amended by virtue of the decision taken by the Prime Minister of Pakistan on 10.02.2015, whereby the tenure of the Trade Officers serving presently in foreign countries was not to be extended upon the expiry of their current term. Additionally, the Ministry of Commerce was required to communicate the said decision to the concerned officers immediately so as to provide them sufficient time to complete formalities and preparations for their departure. In compliance with the said decision, the Ministry of Commerce on 30.03.2015, issued recall/readiness notice to the appellants to join the headquarters on completion of their tenure or selection of their replacement. The appellants were directed to retain the charge till the posting of their replacement.

23. The appellants, as prudent civil servants knew or ought to have known, that the Rules of Business, 1973, made

by the Federal Government in exercise of the powers conferred by Articles 90 and 99 of the Constitution provides in Rule 15(a) of Part C thereof that cases involving important policy or departure from important policy are required to be referred to the Prime Minister for approval. It is explained in the Note to the said Rule 15(a) that departure from policy includes departure from a previous decision of the Cabinet or the Prime Minister. As mentioned above, in the instant case, the Prime Minister through his decision dated 10.02.2015, made a departure from an important policy made with his approval on 03.03.2005 (i.e. Policy for Selection and Monitoring of Trade Officers approved on 01.02.2005 as supplemented by the Strategic Trade Policy Framework 2002-2015). This decision was taken in exercise of the powers vested in Prime Minister of Pakistan (on the recommendations of the Ministry of Commerce), by Rule 15(a) of Part C of the Rules of Business, 1973.

24. In the matter of Federal Government of the Islamic Republic of Pakistan Vs. General (R) Parvez Musharraf, reported as 2014 PCr.LJ 684, it has been explained that Article 90 (1) of the Constitution stipulates that the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers through the Prime Minister but at the same time Article 99 (3) of the Constitution empowers the Federal Government to make rules for the allocation and transaction of its business; that Article 99 (3) of the Constitution clearly provides that the executive authority of the Federation i.e. the Prime Minister and the Federal Ministers, apart from taking direct decisions collectively, shall make rules to allocate and transact the business of the Federal Government; that Rule 3 of the Rules of Business pertains to the allocation of business to the Ministries and the Divisions, while Rule 5 pertains to transacting the business of the Federal Government; that this allocation and transaction of the business of the Federal

Government is in fact a delegation of executive authority of the Federation from the Prime Minister to the Federal Minister; that the Federal Minister through the Secretary of his Division transacts business of the Federation within the sphere circumscribed by the Rules of Business without seeking recourse to the executive authority of the Federation as provided by Article 90(1) of the Constitution; that if an action is taken on the basis of the delegated authority within the sphere of the Rules of Business which specify the business allocated to the Divisions, this leaves no room for seeking further sanction from the Prime Minister.

25. In the case of Tariq Aziz-ud-Din reported as 2010 SCMR 1301, the Hon'ble Supreme Court of Pakistan has emphasized that due weight was required to be given to Rules of Business, 1973, which had a constitutional sanction. And in the case of Amin Jan Vs. Director-General, T&T, reported as PLD 1985 Lahore 81, it has been held that Rules of Business are based on public policy and designed to effectively safeguard State interests. To act in consonance with these Rules is a clear duty cast on all the Divisions and Ministries of the Federal Government.

26. In the case of Sardar Muhammad Vs. Federation of Pakistan, reported as PLD 2013 Lahore 343, it has been held by the Hon'ble Lahore High Court at Paragraph 43 of the report as follows:-

> ***"43. Adherence to the rule of law, in general, and to the Rules of Business, in particular, in conducting its business determines the quality of governance of the government in power. Rules of Business flow out of the Constitution, and are the sinews of a workable government. Besides providing a departmental organogram of a workable democracy, these Rules are a fine weave of democratic principles including: participatory engagement, written and reasoned dialogue, divergence of opinion, open and transparent deliberations, etc. These Rules of Business besides providing a procedural manual for the Federal Government to conduct its business also act as constraints on governmental power."***

27. Now Rule 15(a) of Part C of the Rules of Business, 1973, mandates that the making of an important policy or a

departure from an important policy cannot take place unless and until approval in this regard is obtained from the Prime Minister. Hence, decisions pertaining to the making of an important policy or a departure therefrom stand of a higher pedestal from the ordinary business transacted by the government under the Rules of Business, 1973. It is not the appellants' case that the requisite sanction has not been obtained by the Ministry of Commerce from the Prime Minister of Pakistan in changing or making a departure from the earlier policy. Therefore, it needs to be determined whether this court in its constitutional jurisdiction can interfere in the policy making process or strike down a change in the policy made by the Federal Government.

28. Through the Writ petition and the instant appeal the appellants, in effect, question the departure from an important policy made by the Federal Government under Rule 15(a) of Part C of the Rules of Business, 1973, which are made by the President of Pakistan under Article 99 of the Constitution. In our view it is neither within the domain of the Courts nor the scope of the judicial review under Article 199 of the Constitution to embark upon an enquiry as to whether a new policy is wise or whether the earlier policy was better. The wisdom and viability of policies of the Government are not amenable to judicial review. The Government is entitled to make pragmatic changes in its policies from time to time so long as they are not patently arbitrary, discriminatory or mala fide.

29. Now judicial review of administrative actions is a well-established norm. It is permissible on the ground of illegality or irrationality or procedural impropriety. But it is also well settled that administrative decisions involving policy considerations have been put on a different pedestal. Though they are not totally immune from judicial review, yet certain grounds, which are available in the case of administrative decisions not involving policy considerations, are not open for challenging the policy decisions. By and

large the courts observe restraint in deciding the validity of issues involving policy. Since, Courts do not sit as an appellate authority over the policy considerations, it cannot examine the correctness, suitability and appropriateness of the policies. The executive has the authority to formulate a policy and the courts can interfere with it only if it violates the fundamental rights enshrined in the Constitution or is opposed to the provisions of the Constitution or is opposed to a statutory provision. A court cannot interfere with a policy either on the ground that it is erroneous or that a better and fairer alternative was available. The administrative actions and policies of the government which relate to the enforcement of fundamental rights of the people and are of public importance, must be framed in consonance with the policy of law and mandate of the Constitution. The consistent view taken by the Superior Courts in Pakistan has been that the Courts would not interfere in the policy making domain of the executive unless the policy was in violation of the Constitution, smacked of arbitrariness, favoritism and a total disregard of the mandate of law.

30. In the case of Ghiasuddin Vs. Ghulam Mohyuddin, reported as 2005 SCMR 471, the Hon'ble Supreme Court of Pakistan has explained the meaning and import of the term 'policy' in the following terms:-

> ***The expression "policy", "policy of law" and "public policy" have been described in Corpus Juris. Secundum by Francis, J. Ludes, Volume LXXII as follows:--***
> ***"Policy. The word 'policy' is defined as meaning a settled or definite course or method adopted by a Government, institution, body or individual.***
> ***As applied to a rule of law, 'policy' refers to its probable effect, tendency, or object, considered with respect to the social or political well-being of a State."***
> ***"Policy of the law. The term is difficult to define. It has been considered to refer to the purpose and spirit of the substantive laws of a State, whether such laws be found in the Constitution and statutes or in judicial records. The term has been said to be synonymous with public policy."***
> ***"Public Policy. The term public policy is perhaps the most expansive and widely comprehensive phrase known to the law. It has been said that the doctrine of***

> ***public policy originated in England in the early part of the Fifteenth Century, arid that the principle of public policy owes its existence to the very sources from which the common law is supplied. The phrase is used in several senses; and it may mean the prevalent notions of justice and general fundamental conceptions of right and wrong and it may mean both. It is a vague, indefinite, and nebulous term."***
> ***"It is evident that public policy is a relative term and sometime lacks in precision and oftenly is used indistinctly and there must be pragmatic approach for understanding its real meaning in the light of the circumstances surrounding the particular transaction. When a policy or direction is given for guidance to the officers of a department without any statutory backing, no claim of vested right can be based on such policy or direction." Shafiq Ahmed v. Federation of Pakistan 1997 CLC 697."***

31. The Superior Courts in Pakistan have generally exercised judicial restraint in interfering with the policy-making domain of the executive authority while exercising the power of judicial review of administrative actions. The reluctance of the superior courts in Pakistan to judicially examine administrative decisions involving policy considerations has been time and again emphasized in, inter alia, the following cases:

32. In the case of Farzand Ali Vs. Province of West Pakistan, reported as PLD 1970 SC 98, the Hon'ble Supreme Court of Pakistan has held that in the matter of policy decisions the Government is the best Judge and it is not possible for the Court to sit on judgment over the action of the Government, if from materials disclosed it does not appear that the action taken was merely a colourable exercise of or in abuse of power. It was further held that it must of necessity be left to the Government itself to decide and take policy decisions. It would be pertinent to observe that whenever any policy decision or executive order passed by the executive is assailed before the Courts, the question of the Courts' jurisdiction is determined by the Court itself and, therefore, it is always incumbent upon every such Court to determine its jurisdiction before embarking upon to consider the legality of such decisions/orders. In

determining the question of jurisdiction in such matters, it is always imperative to exercise judicial restraint keeping in view the principle of separation of powers firmly embedded and enshrined in the Constitution of the Islamic Republic of Pakistan. The judiciary has always safeguarded its jurisdiction jealously and has expanded it according to exigencies of time. However, while exercising the jurisdiction falling within the ambit of judicial review of administrative actions, it is equally important to ensure that no encroachment is made on the powers vested in the executive and no interference is made until and unless any such decision/executive order is shown to be violative of any provision of the Constitution or is established to be in derogation of or violation of the statutory law.

33. In the case of Government of Pakistan Vs. Zamir Ahmed Khan, reported as PLD 1975 SC 667, it has been held as follows:-

> ***"... the amendment made on 10th August 1972 in Item No.49 signified a change in policy and the respondent was informed that he was being refused licence because of "the change in policy" and not because of any other reason. On these facts, it is not possible to subscribe to the proposition that a writ of mandamus would lie against Licencing Authority, which would have the effect of defeating the policy, competently made by the Federal Government."***

34. **In the case of Watan Party Vs. Federation of Pakistan, reported as PLD 2006 SC 697, the Hon'ble Supreme Court of Pakistan, the well established principles governing the power of judicial review were reiterated by holding that:**

> ***"In exercise of the power of judicial review, the courts normally will not interfere in pure policy matters (unless the policy itself is shown to be against Constitution and the law) nor impose its own opinion in the matter."***

35. In Re: Suo Moto Case No.10 of 2007, reported as PLD 2008 SC 673, it was held that the Supreme Court, in exercise of its powers under Article 84(3) of the Constitution, was not supposed to interfere in policy decisions of an

administrative nature and to control the administrative affairs of the government but the interference of Supreme Court in the matter relating to the breach and enforcement of fundamental rights of people at large scale was always justified. Courts must not act in departure to the settled principles of judicial norms or in aid of administrative policy of executive authority or as social reformer rather must confine itself within the domain of law and mandate of the Constitution.

36. In the case of Dr. Akhtar Hussain Vs. Federation of Pakistan, reported as 2012 SCMR 455, it has been held by the Hon'ble Supreme Court that once the competent authority in the government has taken a decision backed by law, it would not be in consonance with the well established norms of judicial review to interfere in policy making domain of the executive authority. It was further held that the question whether a particular policy or a particular decision taken in the fulfillment of that policy is fair, is not for the court to determine and it is only concerned with the manner in which those decisions have been taken. Courts should ordinarily refrain from interfering in policy-making domain of executive authority or in the award of contracts unless those acts smack of arbitrariness, favoritism and a total disregard of the mandate of law. Judicial review would be available only if public law element is apparent which would arise only in a case of bribery, corruption, implementation of unlawful policy and the like.

37. In the case of Dossani Travels (Pvt.) Ltd. Vs. Travels Shop (Pvt.) Ltd, reported as 2013 SCMR 1749, the Hon'ble Supreme Court of Pakistan held that it was not the function of the High Court exercising jurisdiction under Article 199 of the Constitution to interfere, in the policy-making domain of the Executive. Furthermore, it was held that the High Court can under Article 199 of the Constitution annul an order or a Policy framed by the Executive, if it is violative of the Constitution, law or is a product of mala fides.

The Hon'ble Supreme Court of Pakistan did not find that the Hajj Policy to be suffering from any of these infirmities.

38. The latest authority on the subject emanating from the Hon'ble Supreme Court of Pakistan is the case of Ghulam Rasool Vs. Government of Pakistan, reported as PLD 2015 SC 6, wherein it has been held as follows:-

> ***"9. ... It is by now a well-settled law that the responsibility of deciding suitability of an appointment, posting or transfer fell primarily on the executive branch of the State. It is also a settled law that the Courts should ordinarily refrain from interfering in policy making domain of the Executive. In Executive District Officer (Revenue), District Khushab v. Ijaz Hussain (2012 PLC (CS) 917) this Court has held that framing of recruitment policy and rules thereunder fell in the executive domain; that the Constitution of Pakistan is based on the principle of trichotomy of powers where legislature is vested with the functions of law making, the executive with its enforcement and judiciary of interpreting the law and that Courts could neither assume the role of policy maker nor that of a law maker. ... Even where appointments are to be made in exercise of discretionary powers, such powers are to be employed in a reasonable manner. Even otherwise, the policy adopted by the Federal Government in making appointments is open to judicial review on the touchstone of the Constitution and the laws made thereunder i.e. in case of an illegality in the ordinary process of appointment, this Court as well as the High Courts have sufficient powers under Articles 184 and 199 of the Constitution to exercise judicial review. ..."*** **(emphasis added).**

39. In the case of Ministry of Inter-Provincial Coordination Vs. Major (R) Ahmad Nadeem Sadal, reported as 2014 CLC 600, the Division Bench of the Hon'ble Islamabad High Court held as follows:-

> ***"31. ... In addition to that, adopting one of the options, given by the ICC, by the Government was entirely a policy matter. It is established principle of law that High Court has only power to interpret the law and has no jurisdiction to take the role of policy maker in the garb of interpretation. In judgment titled as "Aqsa Manzoor v. University' of Health Sciences, Lahore through Vice-Chancellor and 3 others" reported as PLD 2006 Lahore 482, it was held that Policy matters of the Government could not be assailed or challenged in the constitutional jurisdiction unless those were proved to have been framed or formulated against the fundamental and basic provisions of the Constitution."***

40. In the case of Yameen-ud-Din Vs. Lahore Graveyard Committee, reported as 2003 CLC 1718, it has been held by the Hon'ble Lahore High Court that it is the duty of the Court to interpret the law and not to assume the role of a policy maker.

41. In the case of Suhail Shafi Vs. Government of Punjab, reported as 2005 PLC (CS) 1, it was held by the Hon'ble Lahore High Court that the determination of eligibility and criteria for promotion is essentially an administrative matter which fell within executive domain and policy decision making of the Government. Interference by the Court in such matters was held not to be warranted.

42. In the case of Shazia Irshad Bokhari Vs. Government of Punjab, reported as PLD 2005 Lahore 428, it has been held that Courts do not sit in judgment over a policy of the Government, and that Courts do not normally interfere or strike down a policy made by the Government unless it is proved mala fide or made in a colourful exercise of authority.

43. In the case of M/s. AES Pak Gen (Pvt.) Ltd., Vs. Income Tax Appellate Tribunal, reported as 2006 PTD 1, it was held by the Hon'ble Lahore High Court that no policy framework laid down by the Federal or any other Government can, in any manner, take precedence over the express provisions of a statute.

44. In the case of Dildar Ahmad Vs. Province of Punjab, reported as 2010 YLR 101, it has been held by the Hon'ble Lahore High Court that policy making is within the exclusive domain of the executive which in normal course cannot be interfered by the courts unless the same is in conflict either with some provisions of the law of the land or against the provisions of the Constitution.

45. In the case of Safdar Jamil Vs. Vice Chancellor, reported as 2011 CLC 116, it has been held by the Hon'ble Lahore High Court that Courts do not normally interfere or strike down a policy made by the Government, unless it is

proved to be mala fide or make in colorful exercise of authority.

46. In the case of Alzair Travel and Tours (Pvt.) Ltd., Vs. Federation of Pakistan, reported as 2014 CLC 1766, it has been held by the Hon'ble Lahore High Court as follows:-

> *"10. The Hon'ble Supreme Court of Pakistan has specifically held that the High Court is not enjoying the jurisdiction to interfere in the policy matters of the Executive as it is against the principle of trichotomy of powers, the foundational principle of the Constitution of Islamic Republic of Pakistan. However, the High Court in its jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan can annul an "order" or a "Policy" framed by the Executive, if it is violative of the "Constitution", "law" or is "product of mala fides".*

47. In the said case, the Hon'ble Lahore High Court examined the Hajj Policy, 2014, in the Constitutional jurisdiction under Article 199 of the Constitution to see whether it was violative of the Constitution, law or a product of mala fides. The Hon'ble High Court after carrying out the said exercise declared the Hajj Policy-2014, to the extent of grant of quota of 15,000 pilgrims to the Private Hajj Tour Operators as per list of 2013, as without lawful authority and against law.

48. In the case of Bar Association, Depalpur Vs. Chief Secretary, reported as PLD 2014 Lahore 433, it was held that Courts should exercise judicial restraint from forcing the Provincial Government to commit an act which was neither authorized by specific law nor contemplated by a specific executive policy. The Hon'ble High Court also cautioned that Courts should refrain from directing executive action that is devoid of legal cover. Otherwise, a mandatory judicial direction would be tantamount to deciding executive policy. Reliance was placed on the law laid down by the Hon'ble Supreme Court of Pakistan in the case of Dossani Travels (Pvt). Ltd., Vs. Messrs Travels Shop (Pvt.) Ltd., reported as PLD 2014 SC 1, wherein it was held that Courts of law cannot issue

directions in matters falling within the domain of executive policy.

49. In the case of Muhammad Iqbal Vs. Government of Punjab, reported as 2015 PLC (CS) 1503, it was held by the Hon'ble Lahore High Court that it was settled principle of law that ordinarily High Court does not interfere with policy matters in its jurisdiction under Article 199 of the Constitution. However, if a policy is in conflict with any provision of law or is violative of the fundamental right of a citizen, the same may be challenged before this court in its constitutional jurisdiction.

50. In the case of M/s. A. G. Pesticides (Pvt.) Ltd., Vs. Federation of Pakistan, reported as PLD 2004 Karachi 620, it has been held as follows:-

> *"21. ... The Federal Government in terms of section 3 of the Imports and Exports (Control) Act, 1950, frames policy, keeping in view the demand and or national requirement of import of different items. The policies of the Government are framed and modified at times with the change circumstances. These policies are normally framed by the Federal Government after examining its requirement keeping in view the larger interest of public. The policies cannot be framed to benefit individuals nor could such a direction be at all given to the Federal Government to frame its policy in a particular manner, in order to give effect to an assurance which the law does not recognize."*

51. In the case of Shehzad Riaz Vs. Federation of Pakistan, reported as 2006 YLR 229, it was held by the Hon'ble High Court of Sindh that the superior judiciary should always be slow in interfering with the policy decision of the executive, so long as the policy decision is within the domain of jurisdiction of the authority taking the policy decision or making the executive order.

52. In the case of Shakirullah Khan Vs. Khyber Medical University, reported as 2015 YLR 2488, the trial Court had also issued some directions which related to policy matters concerning the Khyber Medical University/defendant. The Hon'ble Peshawar High Court held that such directions by

the trial Courts were not within their domain and be avoided in future.

53. In the case of Ameer Taimoor Vs. Government of Khyber Pakhtunkhwa, reported as 2016 PLC (CS) 106, it has been held by the Hon'ble Peshawar High Court as follows:-

> ***"8. The recruitment policy has always been formulated by the Government as part of the delegated legislation. Making policy is the prerogative of the Government and the Court in exercise of its constitutional jurisdiction cannot make policy for the Government. The Court cannot interfere in the Government policy unless there is infringement of legal rights or found to be ultra vires to the Constitution and injunction of Islam."***

54. In the case of Rahim-ud-Din Vs. Sabahuddin, reported as 2016 MLD 20, it was held by the Hon'ble Peshawar High Court, as follows:-

> ***"7. The new policy framed by the Institute as well as by the Environmental Department of the Provincial Government as part of delegated powers cannot be struck down on the ground that petitioners being students of B.Sc Forestry are also entitled to admissions in the M.Sc Forestry and that the policy/decision of abolishing the self finance admission in the Institute is violative of Article 25-A of the Constitution. It is well settled presumption that those who exercise such powers would have done it in a bona fide manner. Framing of admission policy and rules thereunder fell in the executive domain. The Constitution of Pakistan is based on the principle of trichotomy of powers where legislature is vested with the functions of law making, the executive with its enforcement and judiciary of interpreting the law. The Courts can neither assume the role of policy maker nor that of a law maker."*** **(emphasis added)**

55. It is apposite at this stage to refer to the case-law from the Indian jurisdiction. In the case of State of M.P. Vs. Nandlal Jaiswal, reported as (1986) 4 SCC 566, it has been held by the Hon'ble Supreme Court of India that the Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. A similar view has been taken by the Hon'ble Supreme Court of India in the cases of State of M.P. Vs. Nandlal Jaiswal, reported as (1986) 4 SCC 566;

Cavasjee Cooper Vs. Union of India, reported as (1970) 1 SCC 248; Delhi Science Forum Vs. Union of India, reported as (1996) 2 SCC 405; Peerless General Finance and Investment Co. Limited Vs. Reserve Bank of India, reported as (1992) 2 SCC 343, and; G.B. Mahajan Vs. Jalgaon Municipal Council, (1991) 3 SCC 91.

56. In the case of Shankarsan Dash Vs. Union of India, reported as AIR 1991 SC 1612, it has been held by the Supreme Court of India that a decision taken to depart from the confirmed policy if taken after a consideration by the authorities of the position in regard to the unavailability of the qualified candidates from year to year adversely affecting the desired strength of the reserved candidates in service cannot be condemned on the grounds of arbitrariness and illegal discrimination.

57. In the case of Premium Granites and Another Vs. State of T.N., reported as (1994) 2 SCC 691, the Supreme Court of India, while considering the Court's powers in interfering with a policy decision, observed at page 715 as follows:-

> *"54. It is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether the particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be.."*

58. In the case of State of Rajisthan Vs. Sevanivatra Karmachari Hitkari Samity, reported as (1995) 2 Supreme Court 117, it has been held that a matter of policy decision for an executive must be left to the consideration of the State Government. The wisdom in a public policy of the Government, as such is not justiciable unless such a policy decision is wholly capricious, arbitrary and whimsical, thereby offending the rule of law as enshrined in Article 14 of the Indian Constitution or such a policy decision offends any statutory provisions or the Constitution.

59. In the case of All India Ex-Emergency Commissioned Officers & Short Commissioned Officers Welfare Association Vs. Union of India, reported as (1995) Supp (1) Supreme Court 78, it has been held by the Supreme Court of India that policy matters can be interfered with by Courts only on the grounds of illegality, irrationality and procedural impropriety.

60. In the case of P.T.R. Exports (Madras) (P.) Ltd., Vs. Union of India, reported as (1996) 5 Supreme Court 268, it has been held that the Government or the legislature has the power to evolve a new fiscal policy in the public interest which includes its power to withdraw the old policy. The Court would not bind the government to its previous policy by invoking the doctrine of legitimate expectation of the applicant for a licence unless the change in policy is vitiated by mala fides or abuse of power which the applicant must plead and prove to the satisfaction of the Court.

61. In the case of M.P. Oil Extraction Vs. State of M.P., reported as (1997) 7 SCC 592, the Hon'ble Supreme Court of India held, at page 610 of the judgment, as follows:-

> ***"41. ... Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the stature or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there***

may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

62. In the case of State of Punjab Vs. Ram Lubhaya Bagga (1998) 4 SCC 117, the validity of the change of Government policy regarding reimbursement of medical expenses to its employees came up for consideration before the Hon'ble Supreme Court of India. The State of Punjab had changed this policy whereby reimbursement of medical expenses incurred in a private hospital was only possible if such treatment was not available in any government hospital. In Paragraph 25, the judgment, it was held as follows:-

"25. ... So far as questioning the validity of governmental policy is concerned in our view it is not normally within the domain of any court, to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitutional, statutory or any other provision of law. When Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints."

63. In the case of Bhavesh D. Parish Vs. Union of India, reported as (2000) 5 SCC 471, the Supreme Court of India held that in policy matters the accepted principle is that the Courts should not interfere, and that they are best left to the wisdom of the legislature or the executive.

64. In the case of Narmada Bachao Andolan Vs. Union of India, reported as (2000) 10 SSC 664, the Supreme Court of India held by majority at page 762 as follows:-

> ***"229. It is now well settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the Courts are ill-equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."***

65. In the case of Dilip Kumar Garg Vs. State of U.P., reported as (2009) 4 Supreme Court 753, it was held that the government is the best judge to take policy decisions and that judicial interference is not warranted as the court cannot act as an appellate body over policy decisions.

66. We have examined the change in the policy made with the approval of the Prime Minister of Pakistan in the light of the dicta of the Superior Courts. Remaining within the parameters enunciated by the Superior Courts for judicially reviewing a policy decision made by the executive or action taken thereunder, we do not find the departure from the earlier policy made by the Ministry of Commerce with the approval of the Prime Minister of Pakistan to be *ultra vires* the provisions of the Constitution or Statute. As we do not find such a change in policy to be vitiated by *malafides*, patent arbitrariness or abuse of power, we cannot bind the government to its previous policy by invoking the doctrine of legitimate expectation of the appellants.

67. Hence, there is no occasion to interfere with the decision dated 10-02-2015 taken by the Prime Minister of Pakistan on the recommendation of the Ministry of Commerce contained in its summary dated 30-05-2014. The terms of a letter of appointment / posting cannot override a decision made under Rule 15(a) of Part C of the Rules of

Business, 1973. The appellants have worked as Trade Officers for more than two years. In accordance with the policy decision taken by the competent authority on 10-02-2015, they must return and serve wherever posted by their departments. These officers do not have a vested right to remain posted at a particular place. For the foregoing reasons, it is our view that as the competent authority has made a departure from an important policy, the appellants cannot question the subsequent policy decision taken by the Prime Minster in the constitutional jurisdiction of this court.

68. The learned counsel for the appellant somewhat obliquely argued that as appellant No.1's children have been admitted to a school in Montreal, her recall to Pakistan would disrupt her children's education and cause them hardship. The recall of the appellants from their postings abroad have been made in pursuance of an amended policy of the Federal Government and for administrative exigencies. There is no malice in affecting the appellants' transfers back to their country. A government servant is bound to serve wherever the employer posts him/her. The hardship pleaded is no ground for not recalling/transferring the appellants, which is an ingredient part of the service. An employee, while accepting service, is aware that he/she could be transferred/posted at any place by the employer/ Government.

69. Before parting with the judgment, it must be mentioned that in his rejoinder, the learned counsel for the appellants submitted that after the Policy for Selection and Monitoring of Trade Officers dated 01.02.2005 as supplemented by the Strategic Trade Policy Framework 2002-2015 was departed from by the Federal Government, some Trade Officers who had been selected and posted in the same batch as the appellants had been asked by the respondent to either continue working as Trade Offers in the country of their posting or have been posted as Trade Officers to other countries. If that is so, we find it to be *ex*

facie discriminatory and in violation of Article 25 of the Constitution. Since the continuation of Trade Officers in their country of posting beyond two years has not been pre-conditioned on their performance evaluation, all the Trade Officers sent in the same batch as the appellants must be treated alike. We expect that the respondents would not adopt a policy of pick and choose and treat the appellants in a discriminatory manner, or else they shall be furnished with a fresh cause to approach this court in its constitutional jurisdiction against the discriminatory treatment meted out to them.

70. In the case of Gul Khan Vs. Government of Balochistan, reported as PLD 1989 Quetta 8, it has been held that an admission policy being applicable to all students who seek admission in educational institutions in the Province could not be deemed to be a policy as violative of equality clause as envisaged in Article 25 of the Constitution for the reason that it applies to all students of the Province, who get their education outside that Province but fail to satisfy Selection Committee that reasons of their doing so were beyond their control. The Hon'ble Balochistan High Court did not interfere in the policy as it was being applied across the board to all students. By the same analogy, we expect that all Trade Officers appointed along with and posted in the same batch as the appellants would be treated alike and the departure from the earlier policy by the respondents would not be applied or acted upon in a discriminatory manner. The decision taken by respondents on 10-02-2015 was that the tenures of Pakistan's Trade Officers serving in foreign countries shall not be extended upon expiry of their current terms. The learned Deputy Attorney General assisted by the Joint Secretary from the Ministry of Commerce, had submitted that the Trade Officers, including the appellants, had been appointed for a tenure of two years. Therefore, all the Trade Officers sent abroad in the same batch as the appellants must be treated alike and subjected to the

decision dated 10-02-2015 across the board without any discrimination. Officer specific exceptions made in the policy decision of 10-02-2015 would be hit by Article 25 of the Constitution and, consequently, of no legal effect.

71. For the aforementioned reasons, the appeal is dismissed with no order as to costs.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE) **(JUDGE)**

APPROVED FOR REPORTING

Qamar Khan*