

Form No: HCJD/C-121.

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Intra Court Appeal No.411 of 2019
In
Writ Petition No.2718 of 2019

Khurshid Ahmad Khan Marwat.

Vs.

Federation of Pakistan through Secretary, Commerce & Textile,
Islamabad and 02 others.

Appellant's by : Mr. Afnan Karim Kundi,
Advocate.

Respondent's by : Mr. Sajid Ilyas Bhatti, learned
Additional Attorney General, Mr.
Saqlain Haider Awan, learned
Assistant Attorney General.

Date of decision : 09.01.2020

AAMER FAROOQ, J. - This appeal is directed
against judgment dated 22.10.2019, whereby the writ petition
filed by the appellant was dismissed.

2. The facts, in brief, are that the appellant is a civil
servant working in Inland Revenue Service (BS-20). Pursuant
to the advertisement by respondent No.1, he applied for the
post of Trade and Investment Officer (TIO). In this behalf, last
date for application was 03.07.2019 with absolute cut-off date
of 09.07.2019. The appellant sat in the written examination on
27.07.2019 and passed the same. He also appeared for the

interview on 17.09.2019. On merit, he was listed at Serial No.5, however, no posting was allocated to him due to the ground that he did not complete the period of four years pursuant to clause 3(a) of the Policy Guidelines for Selection, Appointment and Posting of Trade Officers (BS-18 to BS-21) in Pakistan Missions Abroad. The appellant earlier remained posted as Trade Investment Officer at Afghanistan from 07.03.2013 till 15.08.2015. He challenged the objection against his candidature by way of a petition under Article 199 of the Constitution (Writ Petition No.2718 of 2019). The said petition was dismissed vide the impugned judgment, hence the appeal.

3. Learned counsel for the appellant, *inter-alia*, contended that 2019 policy which provides for a gap of four years between the two tenures, however, the referred policy has not been framed in accordance with Rules of Business, 1973. It was submitted that the seminal policy on the foreign postings is the one of 2005, which was framed by Establishment Division and the same was replaced by the policy of 2015, again framed by Establishment Division. It was contended that under the Rules of Business, 1973 the policy should have been framed by the Establishment Division or at least permission of the said Division was required to be obtained before seeking approval of the Prime Minister. It was submitted that the period of four years between the postings abroad has been fixed arbitrarily, whereas previously the gap

was of three years. It was further pointed out that the requisite date for a person to be eligible is 30th of June with respect to that respective year for a person to be eligible and four years gap to be counted. Learned counsel further contended that the Single Judge-in-Chambers fell in error by placing reliance on the decision of the Hon'ble Division Bench of Balochistan High Court rendered in C.P. No.729 of 2019, dated 13.09.2019. Learned counsel took the Court through various clauses of Rules of Business, 1973 to substantiate his argument that respondent No.1 was not competent to frame the policy qua postings of the Trade Officers and seeking its approval from the Prime Minister.

4. It was also contended by Mr. Afnan Karim Kundi, Advocate Supreme Court appearing on behalf of the appellant that the period of four years as prescribed in clause 3 of 2019 Policy is in violation of the fundamental rights of the appellant. In this behalf, learned counsel placed reliance on Articles 4, 25 and 27 of the Constitution of Islamic Republic of Pakistan, 1973 to contend that it is right of the every individual to be dealt with in accordance with law and there should be equality between the citizens. It was pointed out that the case of candidate at Serial No.4 of the merit list is at par with the appellant, however, his posting has been made. In support of his contentions, learned counsel placed reliance on the cases reported as "*Messrs Mustafa Impex, Karachi and others. Vs.*

The Government of Pakistan through Secretary Finance, Islamabad and others.” (PLD 2016 SC 808), “Azra Jamali and others Vs. Federation of Pakistan, through Secretary, Ministry of Commerce and another.” [2017 PLC (CS) 533 Islamabad], “Tariq Aziz-ud-Din and others. Vs. Government of Pakistan” (2010 SCMR 1301), “Muhammad Ashraf Tiwana and others Vs. Pakistan and others.” (2013 SCMR 1159), “Barrister Sardar Muhammad Vs. Federation of Pakistan and others” (PLD 2013 Lahore 343), “Ahmad Nawaz Shah, Senior Intelligence Officer, Director General, Intelligence and Investigation (Customs and Excise), Islamabad Vs. Chairman Central Board of Revenue, Islamabad and others” (2002 SCMR 560) and “Muhammad Ilyas Khokhar Vs. Federation of Pakistan.” (2006 SCMR 1240).

5. Mr. Sajid Ilyas Bhatti, learned Additional Attorney General and Mr. Saqlain Haider Awan, learned Assistant Attorney General appearing on behalf of the respondents and contended, *inter-alia*, that under the Policy of 2015, any deviation from the same could be made by the concerned Ministry and since the postings, in question, pertain to Trade Officers which fall within exclusive domain of Ministry of Commerce and Textile, hence the summary for postings was made by Ministry of Commerce and Textile (Commerce Division). It was contended that under Rule 3 read with Schedule II, Commerce Division is competent to move

summaries to the Prime Minister of Pakistan with respect to Trade Officers and postings by Special Selection Board (SSB) in the Foreign Missions of the Trade Officers. It was submitted that the matter already stands decided by the decision of the Hon'ble Division Bench of Balochistan High Court and no exception can be taken thereto. Learned counsel further contended that the Interview Committee which was to interview the candidates and make representation to the Board constituted Members of Secretary level and was a High Powered Committee. It was submitted that the judgment impugned does not suffer from any error and the appeal should be dismissed.

6. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

7. The facts, leading to filing of the instant appeal, have been mentioned hereinabove with brevity, therefore, need not be reproduced.

8. The appellant is aggrieved of clause 3(a) of the Policy Guidelines for Selection, Appointment and Posting of Trade Officers (BS-18 to BS-21) in Pakistan's Missions Abroad. For ease of convenience, the relevant clause is reproduced below:-

“3(a). The tenure of TOs shall be set as three years. There shall be an intervening period of at least four years (on 30th

June in the year when written test is held) between two tenures. A maximum of two tenures of posting in Pakistan's Missions Abroad shall be allowed."

The bare perusal of the said clause shows that there should be an intervening period of at least four years between the two tenures of the Trade Officers; on 30th of June in the year when the written test is held, the four years ought to have expired. As noted above, the appellant sat for written test on 27.07.2019, whereas his four years gap was to expire on 14.08.2019, hence four years gap had not expired. The Policy of 2019 was made by moving a summary by Ministry of Commerce and Textile (Commerce Division) to the Prime Minister of Pakistan. The appellant has attacked the said policy on the basis that Commerce Division was not competent to move summary to the Prime Minister. Previously, the policy guidelines for foreign appointments and postings in Pakistan Missions abroad and against Pakistan's Seats in International, Multilateral, Bilateral and Regional Organizations, Fora and Bodies, was framed by the Establishment Division and was made public through Office Memorandum dated 16.02.2016. In the said Office Memorandum, the gap between the tenures is three years, however, in clause xiii of the said policy, it is provided that no relaxation or exception to the above policy guidelines shall be granted without prior approval of the Prime Minister for which the concerned Ministry shall provide detailed justifications in a Summary. The examination of the caption

and the contents of the Office Memorandum dated 16.02.2016 show that the guidelines/policy is broad and general and is with respect to all foreign appointments in Pakistan Missions and even other various positions; whereas, the postings for the purpose of present *//s* is with respect to Trade Officers and the relevant/Competent Authority for making the appointment of Trade Officers in Trade Offices or Foreign Missions is the Commerce Division. In the referred backdrop and pursuant to Clause xiii of the Office Memorandum dated 16.02.2016, summary was prepared by the Commerce Division for approval by the Prime Minister and there were material deviations from the policy guidelines provided in Office Memorandum dated 16.02.2016. The deviations/variations were duly approved by the Prime Minister and the same culminated into policy guidelines of 2019. The thrust of the arguments by learned counsel for the appellant was that permission should have been obtained from Establishment Division or the summary should have been prepared by the said Division before approval by the Prime Minister. The said argument by the learned counsel is misconceived inasmuch as the policy guidelines of 16.02.2016 empower the relevant Ministry to make variations or deviate from the policy guidelines by moving an appropriate summary to the Prime Minister justifying the variations. Even otherwise, in the Schedule-II of Rules of Business, 1973, the matters falling within the domain of Commerce Division are provided. Under item No.5(1)(ii)

promotion of foreign trade including trade offices abroad is within the scope of Commerce Division. Special Selection Board (SSB) for selection of Commercial Officers for posting in Pakistan Mission abroad is also within the domain of the Commerce Division. In view of the referred position of law and facts, respondent No.1 correctly moved summary to the Prime Minister for approval of guidelines in variance to the guidelines of 2016. Learned Deputy-Attorney General justifying the variance submitted that the sole purpose was that opportunity should be provided to fresh candidates, hence the gap between the two tenures was widened. The said decision by the respondents is one of policy which cannot be interfered by this Court. Under Rule 15(1)(a) of the Rules of Business 1973, no order is to be issued without approval of the Prime Minister in cases involving important policy or departure from important policy. Since departure from Office Memorandum dated 16.02.2016 was to be made and a new policy vis-a-vis the Trade Officers was to be formulated, hence the Commerce Division initiated the summary to the Prime Minister and latter approved the same.

9. The policy of 2019 came up for consideration before the Hon'ble Division Bench of Balochistan High Court in the judgment dated 13.09.2019. The Hon'ble Division Bench elaborately discussed the rules of business and on the basis thereof held the policy to be intra vires and the decision of the

respondents to be in accordance with law. For ease of convenience, the relevant portion of the judgment of the Hon'ble Balochistan High Court handed down in C.P. No.729/2019 dated 13.09.2019 is reproduced below:-

5. The Federal Government has framed Rules of Business 1973 (the Rules) for the allocation and transaction of its business to achieve harmonious functions of its Divisions and Ministries and to safeguard the State's interest. Rule 5 of the Rules delas with the procedure for the preparation of a Policy by any department, which is reproduced as under:-

“5. Transaction of Business.—(1) No important policy decision shall be taken except with the approval of the Prime Minister.

(2) It shall be the duty of a Minister to assist the Prime Minister in the formulation of policy.

(3) The Minister shall keep the Prime Minister informed of any important case disposed of by him without reference to the Prime Minister.

(4) No decisions of policy taken by the Prime Minister shall be varied, reversed or infringed without consulting him.

(5) Subject to sub-rule (1), the Minister shall be responsible for policy concerning his Division.

(6) No officer other than a Secretary, Additional Secretary or Joint Secretary shall take the initiative in approaching a Minister in connection with the official business. If an Additional Secretary or Joint Secretary holds an oral discussion with his Minister, he shall communicate the points made during discussion to the Secretary at the first possible opportunity.

(7) The Head of an Attached Department [may see] a Minister: Provided that the Secretary of the Division concerned shall be informed of the proposed interview so that he can be present if he so desires.

(8) The business of the Division shall ordinarily be disposed of by or under the authority of the Minister-in-Charge.

(9) The Secretary shall –

(a) assist the Minister-in-Charge in the formulation of policy;

(b) duly execute the sanctioned policy; (c) submit all proposals for legislation to the Cabinet with the approval of the Minister.

(d) keep the Minister-in-Charge generally informed of the working of the Division and of any important case disposed of without reference to the Minister;

(e) be the principal accounting officer of his Division, its Attached Departments and Subordinate Offices, and ensure that the funds controlled by him are spent in accordance with the rules laid down by the Finance Division;

(f) subject to the provisions of these rules and with the approval of the Minister-in-Charge, issue standing orders laying down the manner of disposal of cases in the Division, including the distribution of work amongst the officers of his Division and such orders may specify the cases or class of cases which may be disposed of by an officer subordinate to him; and

(g) be responsible for the careful observance of these rules and, where he considers that there has been any material departure from them, either in his own or any other Division, he shall bring the matter to the notice of the Minister-in-Charge and, if necessary, to the notice of the Prime Minister or the Cabinet.

(10) When the Secretary submits a case to the Minister, the latter may accept the proposals or views of the Secretary or may over-rule him. The Secretary will normally defer to the decision of the Minister and

implement it. In case, however, the Secretary feels that the decision of the Minister is manifestly wrong and will cause gross injustice or undue hardship, he may state his reasons and re-submit the case to the Minister. If the Minister still adheres to his earlier decision and the matter is important enough, the Secretary shall request the Minister to refer the case to the Prime Minister and the Minister shall so refer the case for orders of the Prime Minister. If the case is not referred to the Prime Minister, the Secretary shall submit it directly to the Prime Minister with observations of the Minister-in-Charge.

(11) The Minister-in-Charge shall be responsible for conducting the business of the Division in the Assembly. 8 (11A) Verbal orders given by a functionary of the Government should as a matter of routine be reduced to writing and submitted to the issuing authority. If time permits, the confirmation shall invariably be taken before initiating action. However, in an exigency where action is required to be taken immediately or it is not possible to obtain written confirmation of the orders before initiating action, the functionary to whom the verbal orders are given shall take the action required and at the first available opportunity obtain the requisite confirmation while submitting to the issuing authority a report of the action taken by him.

(12) If any doubt or dispute arises as to the interpretation of these rules or the Division to which a case properly pertains, the case shall be referred to the Cabinet Division, whose decision shall be final. The Cabinet Division shall obtain the orders of the Prime Minister where necessary.

(13) Instructions ancillary to these rules shall, whenever considered desirable, be issued by the Cabinet Division: Provided that the special or general orders required to be framed by the Divisions in terms of these rules may be issued by them after consulting the Cabinet Division.

(14) If any order passed happens to contravene a law, rule or policy, it shall be the duty of the next below officer to point out this to the authority passing the order.

(15) Detailed instructions for the manner of disposal of business in the Federal Secretariat shall be issued by the Establishment Division in the form of Secretariat Instructions."

Similarly Rule 15 clause (1) of the Rules says that, "no order shall be issued without the approval of the Prime Minister (a) cases involving important policy or departure from important policy". According to Rule 3(3) of the Rules "the business of the Government shall be distributed amongst the Divisions in the manner indicated in schedule-II". As per Schedule II and III, the Commerce Division has to look after the business of imports and exports, cross customs frontier, promotion of foreign trade including trade of offices abroad, trade delegations to and from abroad, overseas trade exhibitions and conferences and committees connected with foreign trades. The Commerce Division is also responsible for selection of Commercial Officers in Pakistan Missions abroad.

6. The Rules of Business empowers the Govt. Departments to frame Policy Guidelines to run its affairs, however, any important policy decision of any department is subject to prior approval of the Prime Minister. Such decision of the department is not open to review under Article 199 of the Constitution, except in cases of lack of jurisdiction, excess of jurisdiction or arbitrariness. Under such circumstances, the Ministry of Commerce was competent to make a policy decision and sine it was important decision, therefore, the Ministry has rightly got its approval from the Prime Minister. The material available on the record, especially the documents submitted by the respondents with their para-wise comments, reflect that while preparing the Policy Guidelines in question, the Ministry of Commerce has adopted the procedure provided by the Rules, where after summary for the Prime Minister

was prepared, who subsequently approved the Policy, which was uploaded on the website. The advertisement, published in the month of June 2019, through which the Ministry of Commerce has invited applications from the candidates, also mentioned eligibility criteria including ineligibility criteria for the posting of Trade Officers. The manner, in which process for the preparation of the Policy Guideline was adopted, does not reflect contravention of law, rules, regulations or guidelines. IT is the prerogative of the Prime Minister to approve important Policy Guidelines for the betterment and improvement of working of any department, promoting trade, education etc. in the best interest of the State and the General Public. Section 21 of the General Clauses Act, provides that an authority, which could pass an order is entitled to vary, amend, and to or rescind the same in the larger interest of the State and the General Public. The previous Policy was also framed by the Ministry of Commerce with the prior approval of Prime Minister, upon which the petitioner has no objection, then he is estopped under the law to challenge the authority of the Ministry and the Prime Minister to frame fresh policy, unless it is shown to have been framed in contravention of law, rules, regulations or guidelines. The petitioner has also leveled an allegation of mala fide upon the officers involved in making the Policy, but there is nothing on record to prima facie prove the allegation. The petitioner has raised a factual controversy, which requires evidence to be proved, hence the same cannot be dealt with by this Court, while exercising its Constitutional jurisdiction. Besides, the petitioner has otherwise failed to point out any illegality, irregularity or jurisdictional defect in the process of preparing and approving the Policy in question. It is, however, important to mention here that there is always a room for improvement of nay Policy. The Ministry of Commerce Government of Pakistan and the Prime Minister are, therefore, expected to consider more improvement into the Policy in future, especially taking into consideration the objection so raised by the petitioner, i.e. to avoid involvement of officers in preparation of the policy, who are expected to be candidates

for the post, besides other factors. It would also be appropriate if all the stake-holders are taken into confidence and an input from all the Chief Secretaries and the Secretary Establishment Division Government of Pakistan is also taken, which will be helpful for the just and proper policy framing in future.

Thus, in view of above, the petition is dismissed. The interim orders passed earlier stand vacated.”

10. The Single Judge-in-Chambers has correctly placed reliance on the decision of the Hon’ble Balochistan High Court and has lucidly discussed the relevant law on the issue of judicial interference in the policy decisions of the executive and even the framing of the policy. The impugned judgment does not suffer from any error of law warranting interference in the instant appeal.

11. For what has been stated above, the instant appeal is without merit and is accordingly **dismissed**.

(GHULAM AZAM QAMBRANI)
JUDGE

(AAMER FAROOQ)
JUDGE