

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.1147 of 2020
Zaigham Abbas and others

Versus

Federation of Pakistan through Secretary, Ministry of Overseas
Pakistanis & Human Resource Development and others

Date of Hearing:	23.07.2020
Petitioners by:	Mr. Shahid Mehmood Khokhar, Advocate
Respondents by:	Mr. Arshid Mehmood Kiyani, learned Deputy Attorney-General Mr. Jehangir Khan Jadoon and Fayyaz Brohi, Advocates for respondents No.5 to 13 Mr. Umair Majeed Malik, Advocate for respondents No.14 and 15 Mr. Nadeem Arshad, Section Officer Establishment Division Mr. Omer Farooq Rana, Human Resource Advisor Mr. Noor-ul-Ain, Section Officer Ministry of OP&HRD

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioners impugn the recommendation of the Interview Committee not to appoint them against the posts of Community Welfare Attaches in Pakistan's diplomatic missions abroad. Furthermore, the petitioners assail the retrospective application of the amendments approved by the Prime Minister in the *"Policy Guidelines for Foreign Appointments and Postings in Pakistan's Diplomatic Missions Abroad and against Pakistan's Seats in International, Multilateral, Bilateral and Regional Organizations, Fora and Bodies."*

2. The facts essential for the disposal of this petition are that on 27.10.2019, the Ministry of Overseas Pakistanis and Human Resource Development ("the Ministry of OP&HRD") published an advertisement inviting applications for selection of Community Welfare Attaches ("CWAs") for posting in Pakistan's diplomatic missions abroad. It is not disputed that the selection pursuant to the said advertisement was to be carried out in accordance with the *"Policy Guidelines for Foreign Appointments and Postings in*

Pakistan's Diplomatic Missions Abroad and against Pakistan's seats in International, Multilateral, Bilateral and Regional Organizations, Fora and Bodies" set out in the Establishment Division's Office Memorandum ("O.M") dated 16.02.2016 ("the 2016 Policy"). The Prime Minister had approved this Policy.

3. As per the contents of the said advertisement, the written test of the candidates was to be conducted by the Institute of Business Administration, Karachi ("I.B.A.") on 24.11.2019. The minimum qualifying score in the written test was stated to be 60%. It is an admitted position that all the petitioners participated in the written test and were able to secure more than the required threshold of 60%. The result of the written test was announced by I.B.A. on 01.12.2019.

4. Paragraph (viii) of the 2016 Policy provided 80% weightage will be given to the written test scores and 20% weightage to the interview scores whereas paragraph (ix) of the said Policy provided that no minimum passing marks shall be fixed for the interview and no candidate will be deemed to have failed in the selection process merely on the basis of his or her performance in the interview.

5. On 23.10.2019, the Ministry of OP&HRD moved a summary for the Prime Minister proposing therein that paragraph (ix) of the 2016 Policy may be amended to provide that the minimum passing marks for the interview shall be 60%, and that the candidates scoring less than the required threshold shall be deemed to have failed to qualify for the position of CWA. The Establishment Division did not agree with the said proposal of the Ministry of OP&HRD. Instead, on 20.11.2019, the Establishment Division recommended *"40% marks for the interview and 50% passing marks in the interview."* On 10.12.2019, the Prime Minister approved the said proposal made by the Ministry of OP&HRD in its summary as well as the said recommendation of the Establishment Division. The effect of the Prime Minister's approval was that 60% weightage was to be given to the written test scores and 40% weightage was to be given to the interview scores. Additionally, the passing marks in the interview were to be 50%. A

candidate scoring less than 50% marks in the interview could not be appointed as CWA.

6. Vide notification dated 25.04.2019 issued by the Ministry of OP&HRD, the Special Selection Board (“S.S.B.”) for the selection of the CWAs was constituted. The Chairman of the S.S.B. was the Special Assistant to the Prime Minister for Overseas Pakistanis and Human Resource Development. The members of the said Board were (i) Secretary, Establishment Division, (ii) Secretary, Overseas Pakistanis and Human Resource Development, (iii) Secretary, Ministry of Foreign Affairs and (iv) Additional Secretary, Prime Minister’s office.

7. Interviews of the candidates who had secured more than 60% in the written test were conducted by the S.S.B. between 30.12.2019 and 06.01.2020. It is an admitted position that the S.S.B. had failed the candidates who were not able to score 50% or more marks in the interview. This was done on the basis of the amendment in paragraph (ix) of the 2016 Policy having been approved by the Prime Minister. Additionally, the learned Deputy Attorney General admitted that the recommendations for the posting of the CWAs were to be made by giving 60% weightage to the written test scores and 40% weightage to the interview scores.

8. The petitioners’ grievance is that since the 2016 Policy was amended after the competitive process had started and they had participated in the written test *albeit* not in the interview, the amendment in the said Policy could not be given retrospective effect by making it applicable to the competitive process which had already started when the said amendment was made.

9. Learned counsel for the petitioners submitted that in response to the advertisement published on 27.10.2019, the petitioners appeared in the written test held on 24.11.2019, and obtained passing marks; that after the result of the written test was announced on 01.12.2019, the petitioners were interviewed; that at the time when the said advertisement was issued and when the petitioners participated in the written test, the policy in vogue was the one set out in the Establishment Division’s O.M. dated

16.02.2016, i.e. the 2016 Policy; that under the said Policy, 80% weightage was to be given to the written test scores whereas 20% was to be given to the marks given to a candidate in the interview; that under the said Policy, a candidate who passed the written test could not be deprived from being appointed on the basis of his performance in the interview; that it was the petitioners' vested right to be examined and judged on the basis of the criteria set out in the said Policy; that amendment of the said Policy after the petitioners had successfully passed the written test could not be given retrospective effect; and that it was the petitioners' vested right to be dealt with in accordance with the 2016 Policy contained in the said O.M. dated 16.02.2016. Learned counsel for the petitioners prayed for the writ petition to be allowed in terms of the relief sought therein. In making his submissions, learned counsel for the petitioners placed reliance on this Court's judgment dated 25.02.2020 passed in writ petition No.3055/2019.

10. On the other hand, learned Deputy Attorney General submitted that the summary dated 23.10.2019 proposing therein an amendment in paragraph (ix) of the 2016 Policy was moved by the Ministry of OP&HRD four days prior to the issuance of the advertisement dated 27.10.2019; that no embargo could be placed on the power/authority of the Prime Minister to amend the 2016 Policy; that since the amendment in the 2016 Policy was made prior to the petitioners' interviews, no vested rights have been created in their favour to be dealt with in accordance with the un-amended 2016 Policy; that an amendment in the 2016 Policy for introducing passing marks in the interview was a step in a positive direction; that the selection process was carried out in accordance with the 2016 Policy as amended with the approval of the Prime Minister; that the S.S.B. had conducted the interviews in a fair and transparent manner; that the members of the S.S.B., in their collective wisdom, did not find the petitioners fit to be selected for posting as CWAs; that the nomination of the Special Assistant to the Prime Minister for Overseas Pakistanis and Human Resource Development as Chairman of the S.S.B. did not suffer from any legal infirmity; that in the summary dated

23.10.2019, the Ministry of OP&HRD had given an adequate rational for amendment in paragraph (ix) of the 2016 Policy; that not to have any passing marks for an interview would have resulted in the selection of officers who were not the best of the best; and that since the recommendations for the appointments of CWAs have been made in accordance with the amended 2016 Policy, the same do not suffer from any legal infirmity. Learned Deputy Attorney General prayed for the writ petition to be dismissed.

11. Mr. Jehangir Khan Jadoon, learned counsel for respondents No.5 to 13 and Mr. Umair Majeed Malik, Advocate for respondents No.14 and 15 adopted the arguments of the learned Deputy Attorney General. Furthermore, they submitted that the S.S.B. had awarded marks to the interviewed candidates for (i) experience / qualification, (ii) knowledge of international law / immigration trends, (iii) presentation / quality of expression, (iv) leadership skills / personality profile, and (v) suitability for the post / job.

12. I have heard the contentions of the learned counsel for the petitioners as well as the learned Deputy Attorney General and the learned counsel for the private respondents and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 8 above and need not be recapitulated.

13. Indeed, there is no fetter on the Government in amending its policies for the better. The Superior Courts in Pakistan have generally exercised judicial restraint in interfering with the policy-making domain of the Executive while exercising its 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 the cases reported as Farzand Ali Vs. Province of West Pakistan (PLD 1970 SC 98), Government of Pakistan Vs. Zamir Ahmed Khan, (PLD 1975 SC 667), Watan Party Vs. Federation of Pakistan, (PLD 2006 SC 697), Suo Moto Case No.10 of 2007 (PLD 2008 SC 673), Dr. Akhtar Hussain Vs. Federation of Pakistan (2012 SCMR 455), Dossani Travels (Pvt.) Ltd. Vs. Travels

Shop (Pvt.) Ltd. (2013 SCMR 1749), Ghulam Rasool Vs. Government of Pakistan (PLD 2015 SC 6), and Ministry of Inter-Provincial Coordination Vs. Major (R) Ahmad Nadeem Sadal (2014 CLC 600). In the case of Azra Jamali Vs. Federation of Pakistan through Secretary, Ministry of Commerce (2017 PLC (CS) 533), the Division Bench of this Court held as follows:-

“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.”

14. Perusal of the 2016 Policy as contained in the Establishment Division’s O.M. dated 16.02.2016 shows that the Prime Minister had approved the said Policy. The petitioners do not dispute the authority of the Prime Minister to make or approve amendments in the said Policy so long as such amendments are aimed at improvements therein. Their grievance pertains only to the retrospective application of the amendments in the said Policy approved by the Prime Minister in the midst of the competitive process for the selection of CWAs for posting in Pakistan’s diplomatic missions abroad.

15. It is an admitted position that the Ministry of OP&HRD, in its summary dated 23.10.2019, had not proposed an amendment in paragraph (viii) of the 2016 Policy. It had only proposed an

amendment in paragraph (ix) of the 2016 Policy so that the minimum passing marks in the interview of the candidates should be 60% and the candidates who score less than passing marks in the interview should not be appointed as CWAs. The recommendation for 40% weightage to be given to the interview scores was not made by the Ministry of OP&HRD but by the Establishment Division in its letter/recommendation dated 20.11.2019 to the Prime Minister's office. Be that as it may, the Prime Minister, on 10.12.2019, approved not just the Ministry of OP&HRD's proposal but also the Establishment Division's recommendation. As mentioned above, the effect of the Prime Minister's said approval was that 60% weightage was to be given to the written test scores and 40% weightage was to be given to the interview scores. Additionally, the passing marks in the interview were to be 50%. A candidate scoring less than 50% marks in the interview could not be appointed as a CWA.

16. It is pertinent to mention here that till date the amended 2016 Policy has not been issued in the form of the Establishment Divisions' O.M. as was done with respect to the original 2016 Policy. There is nothing on the record to show that the said amendment to the said Policy approved by the Prime Minister was in the public domain.

17. Prior to the said approval given by the Prime Minister, the petitioners had emerged as successful candidates in the written test by scoring more than 60% qualifying marks. Since the candidates who had not scored 50% or more marks in the interview are stated to have failed, and since the recommendations for the selection of CWAs are stated to have been made by giving 60% weightage to the written test scores of the candidates and 40% weightage to their interview scores, the vital question that needs to be determined is whether the amendment to the 2016 Policy could be made applicable to the competitive process which had already commenced and the petitioners had already obtained the qualifying scores in the written test.

18. As mentioned above, the 2016 Policy as contained in the Establishment Division's O.M. dated 16.02.2016 did not fix any minimum passing marks for the interview. Rather, the said Policy provided that no candidate will be deemed to have failed in the selection process merely on the basis of his or her performance in the interview. Furthermore, under the said Policy, 80% was to be given to the written test scores and 20% weightage to the interview scores.

19. When the petitioners sat in the written test, they did so bearing in mind that their result in the written test would play a dominant role in the appointment process. Their endeavor to obtain good marks in the written test was on the basis of the 2016 Policy providing for 80% weightage to be given to the written test scores and for their performance in the interview not to result in their ouster from competition. These provisions of the 2016 Policy were amended to the petitioners' disadvantage after they had obtained the qualifying scores in the written test. True, the petitioners' interviews had not been conducted when the Prime Minister approved amendments to the Policy but the said amendments have neither been notified nor issued in the form of an O.M. Indeed, such amendments will apply to the competitive process for posting as CWAs which is commenced after these amendments were made. However, these amendments cannot be given retrospective effect by making them operate to the disadvantage of those candidates who had successfully participated in the written test prior to the said amendments having been approved by the Prime Minister. There is a catena of case law in support of the proposition that notifications do not operate retrospectively unless the statute under which they are issued provides for such retrospectively. This principle would also apply to policies made by the Executive. The documents pertaining to the process leading to the decision of the Prime Minister to approve amendments to the 2016 Policy do not show that such amendments were to operate retrospectively. Therefore, I am of the view that such amendments, which were made after the competitive process had commenced and the

petitioners had qualified the written test, cannot be given retrospective effect by making them applicable to the process. In holding so, reliance is placed on the following case law:-

- (i) In the case of Government of N.-W.F.P. Vs. Rukhsar Ali (2007 PLC (C.S.) 833), the Supreme Court held *inter alia* that a policy made by the government was bound to take effect prospectively and not retrospectively.
- (ii) In the case of Flying Cement Co. Ltd. Vs. Government of Pakistan (PLD 2015 Lahore 146), it was held by the Hon'ble Lahore High Court that it is a settled proposition of law that no legislation or policy can be given retrospective effect until and unless the legislature has decided to do so.
- (iii) In the case of Muhammad Ali Vs. Lahore Development Authority (2017 YLR 1087), it has been held by the Hon'ble Lahore High Court that policy decisions by the Executive, unless beneficial, cannot be given retrospective effect.
- (iv) In the case of Additional Chief Secretary, Government of Punjab Vs. Mansoor-ul-Haq (2017 PLC (C.S.) 358), the Division Bench of the Hon'ble Lahore High Court held as follows:-

“6. The judgment under challenge in the instant case has declared that the Amended Policy will apply prospectively and not retrospectively, hence will not be applicable to those employees who applied prior to the proclamation of the Amended Policy. The Appellants have challenged this declaration on the ground that the Respondent does not have a vested right for government residence under the Amended Policy. We are of the opinion that the declaration with respect to the effectiveness of the date of the amendment made in the Amended Policy is in accordance with law and the Amended Policy will have prospective effect and will not apply retrospectively. ...”

20. The interviews of the candidates for posting as CWAs was conducted by the S.S.B. whose members included Federal Secretaries, and marks were given to candidates on the basis of (i) experience / qualification, (ii) knowledge of international law / immigration trends, (iii) presentation / quality of expression, (iv) leadership skills / personality profile, and (v) suitability for the post / job. The record of the interviews was produced before the Court to confirm this fact. I am not inclined to disturb the marks given to

each candidate in the interview process. However, a candidate's scoring less than 50% marks shall not be considered as disqualified for appointment as CWA. Furthermore, in the final selection process, 80% weightage is to be given to the written test scores whereas 20% weightage is to be given to the interview scores. The competitive process for the appointment of CWAs initiated after 10.12.2019 (i.e. the date when the Prime Minister approved the amendments to the 2016 Policy) shall be in accordance with the amended 2016 Policy.

21. In view of the above, the instant writ petition is allowed. It is declared that the amendments approved on 10.12.2019 by the Prime Minister to the 2016 Policy cannot be given retrospective effect by making them applicable to a competitive process for the selection for posting as CWAs which had commenced prior to the approval of the said amendments. Furthermore, it is directed that the petitioners shall be dealt with by giving 80% weightage to their written test scores and 20% weightage to the interview scores, and that they shall not be considered as failed by not obtaining 50% marks in their interview. It is expected that the amended 2016 Policy would be brought in the public domain in the same manner as the original 2016 Policy was. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**