

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SHAHID WAHEED
MR. JUSTICE IRFAN SAADAT KHAN

C.P.L.A. No.1417-K of 2022

(Against judgment dated 17.11.2022 passed
by the High Court of Sindh at Hyderabad in
C.P. No.D-1879/2022.)

Dr. Khalid Iqbal Talpur ... **Petitioner**

vs

Province of Sindh & others ... **Respondents**

For the Petitioner : Malik Naeem Iqbal, ASC

For Respondents No.1-3 : Mr. Hakim Ali Sh., Addl. AG., Sindh
Mr. Saghir Ahmed Abbasi, Addl.
AG., Sindh
(via Video-Link, Karachi)

For Respondent No.4 : Mr. Sarmad Hani, ASC

Date of Hearing : 23.05.2024

JUDGMENT

Munib Akhtar, J: On 23.05.2024, after hearing learned counsel for the parties, judgment was reserved in the following terms:

“We have heard the learned counsel for the respective parties and also learned Addl. AG Sindh. In terms of the order dated 19.01.2024, CPLA No.282-K of 2022 is disposed of as *infructuous*.

2. Insofar as CPLA No.1417-K of 2022 with reference to which learned counsel for the parties and learned Addl. AG have been heard, judgment is reserved. Learned counsel for the parties may submit their written submissions, if any, within two weeks.”

2. The present dispute, which has gone through two rounds of litigation, is essentially a tussle between the present petitioner (“Dr. Talpur”) and the private respondent No. 4 (“Dr. Lodhi”). The dispute is in relation to the eligibility to be appointed as the

Executive Director ("ED") of the Sindh Institute of Ophthalmology and Visual Sciences ("Institute") which is a statutory body created by the eponymously named provincial Act of 2013 (as amended; "2013 Act"). More particularly, the dispute centers on whether (as contended by Dr. Talpur) an applicant for the post of ED can be up to 65 years of age, or (as contended by Dr. Lodhi) cannot be older than 60 years. We may note that the Institute was originally the Liaquat University Eye Hospital, Hyderabad which was part of, or affiliated with, the Ophthalmology Department of the Liaquat University of Medical and Health Sciences, Jamshoro. By the 2013 Act the foregoing units of the University (including the employees and personnel thereof) were transferred to, and became, the Institute which is a body corporate in its own right (see s. 3(2) of the 2013 Act).

3. Before proceeding further, it will be convenient to set out the relevant statutory provisions. Section 11 of the 2013 Act is as follows:

"11. Executive Director of the Institute.- The Executive Director to be appointed by the Board on the prescribed terms and conditions, shall possess prescribed qualification from a University established by law in Pakistan or a University of International repute and shall have experience in the field of Ophthalmology and Visual Sciences institutions for at least ten years:

Provided that the person holding office of the Professor of Ophthalmology of Liaquat University of Medical and Health Sciences, Jamshoro, immediately before the commencement of this Act shall be the first Executive Director of the Institute."

Section 24 confers power on the Board of Directors ("Board") to frame regulations for the Institute with the previous approval of the Provincial Government. In exercise of the powers so conferred the Board has framed the Sindh Institute of Ophthalmology and Visual Sciences Administrative Structure, Powers and Duties of Institute Officers Rules, 2021 ("2021 Rules"). Rule 4 relates to the ED and for present purposes is relevant only to the extent of its sub-rule (7). This, and sub-rule (1), are as follows:

"4. Executive Director:- (1) The Executive Director shall be the Chief Executive for all academic and administrative activities carried out in the Institute.

...

(7) The Executive Director shall be appointed by the Board under section 11 of the Act, on the following terms and conditions:-

- (i) He shall be appointed by the Board from amongst the Senior Professors of Institute having at least 10 years experience in the field of Ophthalmology with sufficient administrative experience;
- (ii) His appointment shall be approved as recommended by the Board and notified by the Health Department, Government of Sindh;
- (iii) He shall enjoy the perks and privileges of BPS-22 and shall draw salary of MP-1 on his extraordinary achievements in the field of Ophthalmology;
- (iv) That the Board shall recommend the re-appointment of eminently qualified person having experience in field of ophthalmology and has contributed to the Institute to the greater extent during the period, he has remained the Executive Director for a term of four (4) years with the perks and privileges as may be determined by the Board."

As will be seen, the proper interpretation and application of clause (iv) of sub-rule (7) is key to the resolution of the present dispute.

4. On the creation of the Institute by the coming into force of the 2013 Act, Dr. Talpur became the first ED by reason of the proviso to s. 11. He served in this capacity from 2013 onwards. He continued in service till 31.12.2020, when he would have retired on reaching the age of 60 years, and a notification dated 03.11.2020 was in fact issued in this regard. However, a subsequent notification dated 26.11.2020 provided that the Board, in exercise of its powers under s. 11 and with the previous approval of the Chief Minister (the competent authority) had re-appointed him to a term of four years from 01.01.2021 i.e., a term starting immediately after the date of retirement with the result that there would, in effect, be no break in his service as ED.

5. The notification just mentioned, and the re-appointment, triggered the first round of litigation. Dr. Lodhi filed a writ petition

in the High Court challenging the same on various grounds. This petition (CP D-1769/2021) was allowed by judgment dated 24.12.2021. The operative part of the decision stated as follows:

“18. In view of the above, instant petition stands allowed, with direction to the competent authority to de-notify the re-appointment of respondent No.4 [i.e., Dr. Talpur] as Executive Director SIOVS forthwith and make appointment against the said post after advertising the post and observing all the codal formalities as provided under the law. The respondent No.4 would be free to compete such process.”

6. Dr. Talpur presented a leave petition in this Court against this decision, being CPLA 282-K/2022, which has been noted in the order set out at the beginning of this judgment. Before this petition came up for hearing however, it got overtaken by events and was thus, eventually, disposed of as having become infructuous.

7. Subsequent to the aforementioned decision of the High Court, the Board met on 19.01.2022 to finalize the terms and conditions for the advertisement of the post of ED. As presently relevant, one of the conditions was as follows: “The candidate shall not be more than 65 years of age on the last date fixed on the submissions of applications”. The consequent advertisement, which appeared in the newspapers on 10.05.2022, duly carried this condition. Dr. Talpur was (or would have been) one of the applicants for the post as would, it appears, Dr. Lodhi. This decision of the Board and the advertisement galvanized Dr. Lodhi who swung into action again by filing another writ petition—the second round of litigation (CP D-1879/2022). Appropriate declaratory and injunctive relief was sought against the Board’s decision and the advertisement, and to the effect that no person over the age of 60 years could be appointed, or reappointed, as ED. This petition was disposed of by means of the impugned judgment in terms that it was declared that an applicant for the post of ED could not be more than the age of 60 years. It was held that the right granted to Dr. Talpur in terms of the earlier decision to apply for the post as a candidate was not “in rem” but subject to the proper application of the 2013 Act and the 2021 Rules. Those provisions, it was held, did not allow for the increase in the

eligibility of the age requirement from 60 to 65 years. Para 12 of the impugned judgment is as follows:

"12. In this petition, the criteria outlined in the advertisement for appointment of the Executive Director of SIOVS is that the candidate must be a Professor in Ophthalmology with experience, however, another rider is made that candidate shall be up to 65 years of age on the last date fixed on the submission of applications. Both these conditions are contradictory to each other for the reason that the Executive Director is required to be appointed amongst serving Professor in terms of Section 11 of the Act, 2013 and rule 47(1) of Sindh Institute of Ophthalmology and Visual Sciences Administrative Structure, Powers and Duties of Institute Officers Rules, 2021, meaning thereby he must be 60 or less than 60 years; as such the enhancing age limit from 60 to 65 years in the advertisement was unwarranted and seems to be person specific, contradictory and ultra vires to rule 47(1) of Sindh Institute of Ophthalmology and Visual Science Administrative Structure, Powers and Duties of Institute Officers Rules 2021 (referred as SIOVS Officers Rules 2021) and is hereby, therefore, declared to be against the law and so also various pronouncements of the Honorable Supreme Court on the subject. Since the upper age cap enhanced from 60 to 65 years in the subject advertisement has been declared unlawful; therefore, the advertisement is required to be read to the extent that the candidate must be within the age limit i.e. 60 years and not beyond that."

The concluding para of the judgment is as under:

"16. This petition, therefore, is disposed of with direction to the competent authority to announce the result of shortlisted candidates for appointment of Executive Director of SIOVS forthwith strictly in terms of Section 11 of the Act, 2013 read with rule 7(1) SIOVS Officers Rules 2021 and in the light of what has been discussed and concluded above. The pending application(s) are also disposed of in the above terms."

The present leave petition has been presented by Dr. Talpur against this judgment.

8. Learned counsel for Dr. Talpur, after setting out the facts and the relevant provisions as above, submitted that the learned High Court had erred materially in its understanding and application thereof to the facts and circumstances of the case. It was submitted that the reading preferred by the learned High Court in effect rendered clause (iv) of sub-rule (7) of rule 4 redundant and inoperative. This specifically dealt with the matter of re-appointment and there could not be any "cap" of 60 years, as erroneously concluded. It was submitted that the Board was well

within its powers to lay down the condition of 65 years and the advertisement issued in terms thereof was unexceptionable. Accordingly, learned counsel prayed, the impugned judgment ought to be set aside.

9. Learned counsel for Dr. Lodhi submitted that the learned High Court had reached the correct conclusion in the impugned judgment, which ought to be sustained. Learned counsel placed strong reliance—indeed virtually rested his case—on a judgment of the Lahore High Court authored by one of us (Shahid Waheed, J.) reported as *Prof. Dr. Asad Alam Khan and others v Government of Punjab and others* 2021 PLC (CS) 304. We will consider this decision in due course. It was prayed that the leave petition be dismissed. The learned AAG also made submissions.

10. We have heard learned counsel as above, considered the record and the case law relied upon. The contention advanced by learned counsel for Dr. Lodhi is, in effect, that the age of 60 years is an absolute limit. No employee of the Institute, including the ED, can hold office (and therefore *ipso facto* be reappointed) once this limit is reached; retirement necessarily follows. Clearly, if this is so then the dispute would end there and then; Dr. Talpur has admittedly exceeded that age. Now, this limit of 60 years is itself derived from another set of rules, which were also framed contemporaneously with the 2021 Rules by the Board in exercise of its powers under s. 24. These are the Sindh Institute of Ophthalmology and Visual Sciences Employees (Terms and Conditions of Service) Rules, 2021 ("TCS Rules"). Indeed, both sets of rules were gazetted on the same day. Rule 6 of the TCS Rules provides as follows:

"6. Age of Superannuation:- An employee shall retire from service-

- (i) on such date, after he has completed twenty-five years qualifying service for pension or other retirement benefits, as the competent authority may direct; or
- (ii) where no direction is given under Rule 1, on the completion of (60) sixty years, of age."

Both sets of rules are obviously at the same “level” of law-making inasmuch as they are enacted by the same body (the Board) exercising the same statutory power (s. 24). The first point therefore is that neither set of rules can take priority over the other. This is all the more so since both were framed contemporaneously, and gazetted simultaneously. More particularly, neither the aforesaid rule 6, coming from the TCS Rules on the one hand, nor rule 4, coming from the 2021 Rules on the other, can trump, or prevail over, the other. That the retirement age of 60 years is an absolute limit cannot, at least in the facts and circumstances of the present case, therefore be regarded as a correct proposition. The two sets of rules must be read conjointly, and harmonized.

11. This brings us to clause (iv) of sub-rule (7) of rule 4 of the 2021 Rules (herein after “clause (iv)”). This is, to say the least, an unhappily worded provision. It starts by using the term “shall” which is usually regarded as mandatory. This implies that if the conditions of clause (iv) are met, the Board is bound to recommend reappointment of the outgoing ED. This can hardly be a sensible construction. Clearly, the provision is intended to be directory, i.e., that the Board has a discretion to recommend reappointment. “Shall” must, in other words, be read as “may”. The provision then identifies the qualifications and condition that would allow for reappointment to be recommended. As to the first, the outgoing ED has to be an “eminently qualified person having experience in field of ophthalmology”. Inasmuch as clause (i) of sub-rule (7) (herein after “clause (i)”) requires the ED to be appointed from amongst the senior professors of the Institute having at least 10 years’ experience, it can be readily appreciated that this requirement would almost always be met. Indeed, it would be hard to imagine otherwise, since that would impugn the very appointment as ED. As to the second, clause (iv) then goes on to require that the ED being recommended for reappointment must have contributed “to the Institute to the greater extent during the period, he has remained the Executive Director”. This may or may not be true of the outgoing ED, and is clearly an assessment to be made by the Board, on an objective basis

keeping in mind what is said below and the well settled principles of law in this regard.

12. Finally, clause (iv) allows for the reappointment to be for four years. This, in a sense, is the nub of the matter. It should be remembered that s. 11 empowers the Board to appoint the ED on "prescribed" terms and conditions. If therefore the retirement age of 60 years prescribed by rule 6 of the TCS Rules were an absolute limit that would mean that the outgoing ED, who is being considered for reappointment under clause (iv) must not be more than 60 years, and preferably be no more than 56 years. In other words, he must have retired at an age less than 60 years. It is only then that, if reappointed, he could have a term of four years under clause (iv) (or less, if he is more than 56 years) and then leave office at 60 years. But there is nothing to suggest in either the TCS Rules or the 2021 Rules that the ED retires, or is required to retire, at an age earlier than 60 let alone at 56; he retires at the age of sixty years. As is at once clear, this reading would more or less render clause (iv) redundant. It would hardly ever apply in the ordinary course. More specifically, it could conceivably apply but only in the limited situation where clause (i) of rule 6 is applied to the ED, and at a time when he has not crossed the age of 60 years. That contingency may hardly, if ever, arise. For all practical purposes, clause (iv) would be a dead letter. However, it is well settled that any interpretation of a statutory provision which renders it redundant or essentially (legally speaking) deadweight is to be avoided. This is all the more so when the provision (here rule 6) that is causing the redundancy is at the same "level" of law making. The proper interpretation and application of clause (iv) must therefore be approached from this perspective.

13. Having considered the matter, it seems that the only way to properly harmonize the two sets of rules is to recognize that clause (iv) creates an exception. For clause (iv) must be harmonized not only with the retirement age limit but also (and perhaps more importantly) with clause (i). It must be kept in mind that in terms of the statutory regime here under consideration, appointment (under clause (i)) is distinct from reappointment (under clause (iv)). The two cannot be confused with each other nor conflated. Each operates in its own orbit. However, this does not mean that

the two are separate and independent. There is a direct link between the two, the most obvious being that for there to be a reappointment under clause (iv) there must first have been an appointment under clause (i). The other is that the appointment under clause (i) is capped by the retirement age of 60 whereas, as seen above, the reappointment under clause (iv) allows for that limit to be crossed. Thus, there is a need for harmonization. This can, in our view, only happen if clause (iv) is interpreted as an exception, and have a narrow scope and application. It is concerned not with appointment but with reappointment, and that too of the immediately outgoing ED. Thus, it cannot apply in the case of a person who has served his term as ED and between whose leaving of office and consideration for reappointment, there was an intervening appointment of another person as ED. Furthermore, clause (iv) can only apply as a one-off. If an outgoing ED is reappointed he cannot then be reappointed again by a second (or further) resort to the provision. The reason is that reappointment must be preceded by an appointment under clause (i). Any second (or further) resort to clause (iv) for the same person would mean that reappointment is followed by reappointment, which would alter clause (iv) from an exception to an independent provision. As noted that would be incorrect. Furthermore, and this is vital for a proper understanding and application of clause (iv), reappointment can only be in exceptional circumstances and for truly outstanding performance and service by the outgoing ED, measured objectively and for reasons that must be given in writing by the Board and made public (by, inter alia, posting the same on the website of the Institute). It cannot be resorted to casually or frequently (whereby it may, e.g., become almost standardized practice). It can only be applied sparingly. It cannot be used as a reward for past service but only when such performance has been truly singular and there is a genuine need and a real expectation of its continuance in the future. Reference may also be made here to rule 56 of the TCS Rules. This lays down, generally, in sub-rule (1) the parameters within which reappointment of employees may be possible. The sub-rule emphasizes that reappointment is very much an exception and not the rule, and provides that recourse to it can be had "only in cases where the Institute considers that the experience gained by the retiring person is of vital importance and

can be gainfully utilized, particularly in fields where suitably qualified and experienced persons are not available". While these factors are no doubt also to be taken into consideration while considering the reappointment of the outgoing ED under clause (iv), it must also be remembered that, in a sense, the position of the ED is unique. As noted above, sub-rule (1) of rule 4 of the 2021 Rules expressly states that the ED is the chief executive of the Institute "for all academic and administrative activities". This is a position not shared with any other employee. It is for this reason why clause (iv), which is an exception as is rule 56(1) of the TCS Rules, must have an even more restrictive application. The factors mentioned in this judgment (including as set out in this para and herein after stated) must also be held to apply objectively in accordance with well settled principles of law before the clause can be lawfully invoked. In other words, any legally permissible and sustainable reappointment under clause (iv) requires the Board to cross a stiff and high threshold.

14. Keeping all of the above factors in mind, in our view a proper resort to clause (iv) must be regarded as a two-stage process. In the first stage, the Board must, if it is so minded, consider whether the outgoing ED is at all suitable for reappointment under clause (iv), in terms of what has been stated above and applying well settled principles of law. If it concludes that reappointment is not warranted or legally permissible the matter ends, and the Board must then move to appointing a new ED in terms of clause (i) and other applicable provisions. If however, the Board is of the view that a reappointment is both legally permissible and desirable for the purposes, and in the best interests, of the Institute the matter would move to the second stage. The Board must then move to seeking applications for appointment of other persons as ED under clause (i) and other applicable provisions. Any advertisement or other circular etc issued in this regard must clearly state that the outgoing ED is also under consideration for reappointment under clause (iv). Once the fresh applications have been received and shortlisted and interviews held etc (which must be done independently of, and separately from, any consideration of the outgoing ED) the Board must then consider why the (best of the) applicants under

clause (i) should not be appointed as the new ED and the outgoing ED be reappointed under clause (iv). Here, the Board must also keep in mind the possibility of a “chilling effect” on actual or potential applicants of the fact that the outgoing ED is also under consideration for reappointment. If a decision is reached in favor of reappointment, then detailed reasons for the same must be given in writing by the Board and made public (by, inter alia, posting the same on the website of the Institute). It is only by applying this two-stage process that there will be a proper, legally valid and harmonized application of clause (iv), as would allow for a reappointment of the outgoing ED that is sustainable in law.

15. In our view, the learned Division Bench failed to properly appreciate the question before it in the foregoing perspective. It was not kept in mind that the retirement age was set by the Board itself, in exercise of the same provision (i.e., s. 24) whereby the power of reappointment was reserved. The two sets of rules were, as noted, at the same law making “level”. Being contemporaneous resort could not even be had to the “later in time” rule to draw a distinction between them. The learned Bench, with respect, erred materially in displacing a provision from one set of rules by giving precedence to a provision from the other set. Clause (iv), the creation of the 2021 Rules, could not be found wanting and discarded as unlawful (or otherwise rendered nugatory) on the anvil of another rule, i.e., the age of retirement, that was the creation of the TCS Rules. The only way forward was by harmonization. That exercise (to be done in the two-stage manner as set out above) was however patently not done. With respect, the impugned judgment suffers from a material failing. Furthermore, the learned High Court failed to keep in mind that the only manner in which clause (iv) could be actuated, for purposes of reappointment, was by recognizing that the age limit would get enhance beyond the sixty years set by the TCS Rules, which was for appointment.

16. At the same time, one cannot lose sight of the fact that the procedure actually adopted by the Board was also legally defective. There was no application at all of the two-stage process by which alone a lawful resort could be had to clause (iv). In setting a uniform age of 65 years in its decision of 19.01.2022 and

the consequent advertisement of 10.05.2022, the Board failed to keep in mind that it was dealing with two distinct exercises, one of appointment and the other of reappointment. The latter, if at all, applied (and could only apply) solely to Dr. Talpur, while the former applied to other aspirants such as, apparently, Dr. Lodhi. Dr. Talpur could not be considered for appointment and other aspirants could not be considered for reappointment. However, the Board unlawfully intermingled and merged the two provisions, and failed to maintain the distinction between clauses (i) and (iv). This conflation (indeed, confusion) was legally impermissible and patently unlawful. Clause (i) applied in the ordinary course, subject to its own parameters. Clause (iv) applied as an exception, in terms as explained above. In our view, the legally proper way for the Board would, by applying the two-stage process identified above to the facts and circumstances of the present case, have been in the following terms. Firstly, if at all it was so minded, it ought to have considered the case of Dr. Talpur in terms of clause (iv) as explained above. If it did not consider Dr. Talpur fit for reappointment on such basis (or if his reappointment would not have been legally permissible) then insofar as he was concerned the matter would have ended there. The Board could then have proceeded with making an appointment in accordance with clause (i) and applicable law of a new ED. However, if the Board considered Dr. Talpur fit for reappointment on the basis set out above then, secondly, it should have placed an advertisement seeking applicants for appointment as ED in terms of clause (i), with a suitable caveat that the outgoing ED was also under consideration for reappointment. It should then have considered the applications so received in terms of their own merits and strengths and if it concluded that the Institute would be better served with Dr. Talpur's reappointment, only then could it have gone ahead with the same while giving reasons in writing as to why the (best of the) applicants was not being appointed as the new ED. Such reasons would also mandatorily be made public. In this manner there would be a harmonization between, on the one hand, the power of appointment (where the newly appointed ED would be subject to the retirement age of 60) and the power to reappoint (where the outgoing ED would be not). With respect, these aspects of the case were overlooked in the impugned

judgment, and the reasoning and analysis of the learned Division Bench turned in a direction that cannot legally be sustained.

17. We now consider the judgment relied upon by learned counsel for Dr. Lodhi, *Prof. Dr. Asad Alam Khan and others v Government of Punjab and others* 2021 PLC (CS) 304. Reliance was placed, in particular, on paras 12 and 13 (pp. 313-5). Two separate cases were decided by this decision. They arose under different provincial statutes but the relevant provision in each was couched in the same language. The disputes related to the appointment as Pro-Vice Chancellor of two universities. Each statute provided for a term of three years. In one case, the petitioner's grievance was that he had been denied consideration for appointment on the ground that he would attain the age of retirement before the term of three years expired, and hence was ineligible. In the other, the petitioner was aggrieved by (and thus challenged) the appointment of a Pro-Vice Chancellor who would reach the age of retirement before the three years expired. A Full Bench of the High Court concluded that the fact that the age of retirement would be reached during the three year term was no legal impediment to appointment. The petition first mentioned was accordingly allowed and the other dismissed.

18. We have carefully considered the decision relied upon. It is concerned with appointment and reaching the age of retirement during the tenure. This is the context in which the observations in paras 12 and 13 have been made. The issue here however is not of appointment but of reappointment. The retirement age has admittedly been reached. The question is whether, in terms of the statutory regime here applicable, the outgoing ED (as to whose appointment there is no dispute) can be reappointed. Since the issued involved is fundamentally different, the cited decision does not, with respect, apply in the facts and circumstances before us. It is of no assistance to Dr. Lodhi.

19. The upshot of the above discussion is therefore as follows. The reasoning and analysis of the learned High Court cannot, with respect, be sustained. At the same time, the manner in which the Board has proceeded is also legally unsustainable. Enough time has already passed and therefore, if the whole exercise has to be

started afresh that would leave the Institute without an ED for even longer. Accordingly, we convert this leave petition into an appeal and dispose it of as follows, in terms of what has been said above: the Board shall, if it is so minded, consider the case of Dr. Talpur for reappointment in terms of clause (iv) in terms as explained above. If, in the manner as so set out it is of the view that Dr. Talpur cannot or ought not to be considered for reappointment his case will come to an end. The Board shall then proceed to consider the shortlisted candidates (referred to in para 16 of the impugned judgment) for appointment in terms of clause (i). If however, in the manner set out above, the Board is of the view that Dr. Talpur can be considered for reappointment, it shall then proceed to consider the shortlisted candidates for appointment in terms of clause (i) and thereafter and thereupon make a decision for appointment or reappointment, as the case may be, in terms as set out and explained above. The detailed reasons in writing required (twice) from the Board must be made public by inter alia posting the same on the website of the Institute and, in particular, provided to Dr. Lodhi.

Judge

Judge

Judge

Announced in the Court on 15/11/2024

Sd/-
Judge

Approved for reporting