

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Justice Qazi Faez Isa, CJ
Justice Naeem Akhtar Afghan
Justice Shahid Bilal Hassan

Civil Petition No.3390 of 2021

(On appeal against the order dated 13.04.2021 of the Peshawar High Court, Peshawar passed in W.P. No. 4609-P of 2020)

General Post Office, Islamabad & others ...Petitioners

Versus

Muhammad Jalal ...Respondent

For the petitioners: Malik Javed Iqbal Wains, Addl.A.G.P.
Assisted by Miss Maryam Rasheed, AHC
Mr. Gulistaj Ahmed Kiani, Senior Postmaster

For the Respondent: Nemo

On Court Notice: Mr. Khalid Ishaq, Advocate General, Punjab assisted by
Barrister Muhammad Mumtaz Ali, Addl.A.G., Pb
Mr. Saifullah, Addl.A.G., Sindh
Mr. Shah Faisal Ilyas, Addl.A.G., KPK
Mr. Muhammad Ayaz Swati, Addl.A.G., Balochistan

Date of Hearing: 26.09.2024

JUDGMENT

Naeem Akhtar Afghan, J. The respondent (herein) filed a Writ Petition in the Peshawar High Court for issuing directions to the petitioners (herein) to consider him for appointment against the quota reserved for the children of class-IV employees who retired on medical grounds. The respondent relied upon the Office Memorandum ('OM') dated 13 April 2005¹ of the Establishment Division, Government of Pakistan ('**the Establishment Division**') whereby the following paras were added to the Establishment division's OM dated 21 March 2000² which provided guidelines for contract appointments for a period of two years to civil posts under the Federal Government:

'The condition of open advertisement may also be relaxed by the Prime Minister for the purpose of appointment on contract basis of widow/widower of one child of a deceased civil servant who dies during service and wife/husband or one child of a serving civil servant who becomes 'permanently disabled during service' and

¹ OM No.4/1/2005-CP.1 dated 13 April 2005

² OM No.8/10/2000-CP.1 dated 21 March 2000

he/she takes retirement from service provided that such special dispensation may be allowed only for appointment to posts in BS-10 and below.

Provided further that the widow/widower or a child of a civil servant who dies during service and wife/husband or a child of a serving civil servant who becomes 'permanently disabled during service' and he/she takes retirement from service will have to apply for contract appointment within one year after the death of a civil servant or retirement of a permanently disabled civil servant. In case of a minor child of a civil servant, the one year period will start from the date he/she attains the age of 18 years.'

2. The Writ Petition was contested by the petitioners on the ground that the father of the respondent on 7 August 1996 availed of his retirement as Postman (BPS-4) on medical grounds, therefore, the OM dated 13 April 2005 cannot be applied retrospectively to appoint the respondent, who was the son of a retired civil servant.

3. The Writ Petition was disposed of by a Division Bench of the Peshawar High Court *vide* impugned order dated 13 April 2021 by issuing directions to the petitioners to appoint the respondent on contract basis in terms of OM dated 13 April 2005 (wrongly mentioned as notification in the impugned order) in accordance with the policy, notwithstanding that the OM dated 13 April 2005 could not be applied retrospectively to appoint the respondent as his father had retired from service on 7 August 1996, when at that time there was no policy for appointment of a child of a civil servant who dies during service or becomes permanently disabled during service and on this ground takes retirement from service.

4. The notice of this case issued to the respondent was received by his cousin who stated that the respondent has shifted abroad, but he did not disclose his address. Learned Additional Attorney-General ('**AAG**') stated that the respondent was not appointed by the petitioners as directed by the impugned order because he had shifted abroad.

5. During the hearing of this matter the following questions arose, which were noted in our order of 4 January 2024 as under:

'(1) Whether the policy conforms with Article 25 and 27 of the Constitution of Islamic Republic of Pakistan insofar as it creates separate categories of persons who are to be given preference in employment; and

(2) Whether the Prime Minister of Pakistan has the power to relax rules and/or to issue the Policy.'

6. To ascertain as to whether the policy accords with the Constitution of the Islamic Republic of Pakistan, 1973 ('**the Constitution**'), notices

were issued to the learned Attorney-General for Pakistan as well as to the learned Advocate-Generals of the Provinces under Order XXVII-A of the Code of Civil Procedure, 1908 ('**CPC**').

7. Sub-section (1) of section 25 of the Civil Servants Act, 1973 ('**the Civil Servants Act**') empowers the President of Pakistan ('**the President**') or any person authorized by him in this behalf, to make necessary rules for carrying out the purposes of the Civil Servants Act. The President authorized the Prime Minister of Pakistan ('**PM**') *vide* SRO No.S.R.O.120(1/98) dated 27 February 1998 to make necessary rules. There are similar provisions in the provincial laws. Sub-section (1) of section 23 of the Punjab Civil Servants Act, 1974 ('**the Punjab Civil Servants Act**') empowers the Governor of Punjab or any person authorized by him in this behalf, to make necessary rules for carrying out the purposes of the Punjab Civil Servants Act. Sub-section (1) of section 26 of the Sindh Civil Servants Act, 1973 ('**the Sindh Civil Servants Act**') empowers the Government of Sindh or any person authorized by it in this behalf, to make necessary rules for carrying out the purposes of the Sindh Civil Servants Act. Sub-rule (1) of rule 26 of the Khyber Pakhtunkhwa Civil Servants Act, 1973 ('**the Khyber Pakhtunkhwa Civil Servants Act**') empowers the Governor of the Province or any person authorized by him in this behalf, to make necessary rules for carrying out the purposes of the Khyber Pakhtunkhwa Civil Servants Act. The Governor had authorized the Chief Minister ('**CM**') Khyber Pakhtunkhwa to make necessary rules. Sub-rule (1) of Section 25 of the Balochistan Civil Servants Act, 1974 ('**the Balochistan Civil Servants Act**') empowers the Government of Balochistan or any person authorized by it in this behalf, to make necessary rules for carrying out the purposes of the Balochistan Civil Servants Act.

8. The rules for carrying out the purposes of the relevant Civil Servants Acts have to be respectively made by the PM, the Governor of Punjab, the Government of Sindh, the CM Khyber Pakhtunkhwa and the Government of Balochistan. However, the laws and the rules made thereunder must conform with Article 25 of the Constitution, which guarantees equality of citizens and their entitlement to equal protection of law, and with Article 27 of the Constitution, which safeguards against discrimination in the service of Pakistan.

9. The Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 does not provide for nor envisages what OM dated 13 August 2001³ issued by the Establishment Division had sought to do, that is, the appointment, without open advertisement, of a widow or one child of a civil servant of the Federal Government who dies during service, to a post in BPS-5 and on lower grade on contract basis. Through OM dated 5 January 2002⁴ issued by the Establishment Division, the same benefit was extended up to those in BPS-10. Thereafter, *vide* OM dated 13 April 2005⁵ issued by the Establishment Division the widow/widower/child of a civil servant who dies during service or who becomes permanently disabled during service and takes retirement from service, were made entitled for appointment on contract basis to any position up to BPS-10 without the same being advertised.

10. The Establishment Division introduced the Prime Minister's Assistance Package (**'the Package'**) *vide* OM dated 13 June 2006⁶ for the families of Federal Government employees who die in service grants for different grades which covered pensionary benefits, accommodation, free education, free health, allotment of plot, house building advance and employment to the posts in BPS-1 to 15 for two years on contract without the post being advertised. The Package was amended *vide* OM dated 20 October 2014⁷ and additional benefits were granted with effect from 15 June 2013 to the families of Government employees who die in service including employment of widow/widower/one son or daughter to the posts in BPS-1 to 15 on regular basis without advertising the post provided the applicant fulfils the criteria of the said post.

11. The Package was further amended *vide* OM dated 22 October 2014⁸ with effect from 15 June 2013 and included the retention of official accommodation by the family of a Government employee who dies in service or payment of rent for five years or till the age of superannuation, whichever is later. The Package was again revised by the Establishment Division *vide* OM dated 4 December 2015⁹ with effect from 9 February 2015 with the grant of a three hundred percent increase in lump sum grant in the package earlier issued in 2006 and provided for other benefits, including employment to posts in BPS-1 to 15 on two years contract without the post being advertised. The Package was again revised

³ OM No. F.No.8/10/2000-CP.1 dated 13 August 2001

⁴ OM No. F.No.8/10/2000-CP.1 dated 5 January 2002

⁵ OM No.4/1/2005-CP. 1 dated 13 April 2005

⁶ OM No. 7/40/2005-E.2 dated 13 June 2006

⁷ OM No. 8/10/2013-E.2 dated 20 October 2014

⁸ OM No. 8/10/2013-E.2 dated 22 October 2014

⁹ OM No. 8/10/2013-E-2(Pt) dated 4 December 2015

by the Establishment Division *vide* OM dated 23 December 2022¹⁰ with effect from 4 December 2015 whereby the provision of contract employment under the Package of 2015 was replaced with regular appointments with immediate effect and the services of all the contract employees appointed under the Package of 2006 and the Package of 2015, who were contractual employees were regularized with immediate effect.

12. The learned AAG conceded that appointments of a widow/widower/child of a civil servant who dies in service and those who become permanently disabled during service and takes retirement from service, either on contract or on regular basis, in different grades and without open advertisement was in violation of Articles 25 and 27 of the Constitution.

13. Rule 17-A of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 existed in the Province to provide Government job to the widow/wife/child of a civil servant in BPS-1 to 11 who dies in service or is declared invalidated/incapacitated for further service; it is reproduced hereinbelow:

'17.A. Notwithstanding anything contained in any rule to the contrary, whenever a civil servant dies while in service or is declared invalidated/incapacitated for further service, one of his unemployed children or his widow/wife may be employed by the Appointing Authority against a post to be filled under rules 16 and 17 for which he/she possesses the prescribed qualification and experience and such child or the widow/wife may be given 10 additional marks in the aggregate by the Public Service Commission or by the appropriate Selection Board or Committee provided he/she otherwise qualifies in the test/examination and/or interview for posts in BS-6 and above;

Provided further that one child or widow/wife of a Government servant who dies while in service or is declared invalidated/incapacitated for further service shall be provided a job against posts in BS-1 to 5 and the posts of Junior Clerks (BS-7) in the department in which the deceased Government servant was working, without observance of formalities prescribed under the rules/procedure. Provided such child or the widow/wife is otherwise eligible for the post.

Provided further that only one child or widow or wife of an employee who dies during service or is declared invalidated or incapacitated for further service, if otherwise eligible for the post, shall be appointed to a post in BS-1 to BS-11 in the department where the Government servant was serving at the time of the death or the declaration, without observance of the procedural requirements prescribed for such appointment.'

¹⁰ OM No. F. No.8/23/2021-E-2 (pt) dated 23 December 2022

14. Learned Advocate-General, Punjab informed that the policy for appointing one child/wife/widow in BPS-1 to BPS-11 (including the post of Patwari and Junior Clerk) of a civil servant who dies in service or is declared invalidated/incapacitated for further service in pursuance of the provisos to the above rule 17-A was discontinued with effect from 21 November 2023 *vide* notification dated 7 December 2023. Thereafter, *vide* notification dated 26 July 2024 rule 17-A was omitted. He further stated that the Government of Punjab has approved a Financial Assistance Package with effect from 22 February 2017 for the families of the civil servants who die while in service, with different rates of compensation for different pay scales and the rate of compensation has been revised from time to time. The Financial Assistance Package in the Province of Punjab does not contain any provision to provide a Government job, either on contract or regular basis, in any grade, to a child/wife/widow of a civil servant who dies in service or is declared invalidated/incapacitated for further service.

15. Rule 11-A of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 provided Government jobs in BPS-1 to 11 to a child/spouse of a civil servant who dies in service or is declared invalidated/incapacitated for further service; it is reproduced hereinbelow:

'Where a civil servant dies while in service or is declared invalidated or incapacitated for further service, one of his/her children or, as the case may be, [spouse] (when all the children of the deceased employee are minor) shall be provided job who applies within a period of two years of death or declaration of invalidity or incapacity of civil servant on any of the [Basic Pay Scale 1 to 11] in the Department where such civil servant was working:

Provided that such appointment shall be made after fulfillment of formalities as required in the recruitment rules and holding interview, for the post applied for:

Provided further that the cut of date shall be within two years of the death of the officer or official.

[Provided further that if a right of employment has already accrued to any of the children of deceased or invalidated or incapacitated civil servant then the former shall not be deprived of the benefit accrued to him under Notifications dated 11.03.2008 and 17.07.2009 of these rules.]'

While conceding that the above rule is discriminatory and violates Articles 25 and 27 of the Constitution, learned Additional Advocate-General, Sindh stated that the above rule has not been omitted by the Government of Sindh.

16. Rule 10 (4) of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989 provided for the appointment of one child or spouse to a post in BPS 1 to 10 of a civil servant who dies in service or is rendered incapacitated/invalidated permanently during service; it is reproduced hereinbelow:

'Where a civil servant dies or is rendered incapacitated/invalidated permanently during service then notwithstanding the procedure provided for in sub-rule (2), the appointing authority may appoint one of the children of such civil servant, or if the child has not attained the age prescribed for appointment in Government Service, the widow/wife of such civil servant, to a post in any of the Basic Pay Scales 1-10:

Provided that the child or the widow/wife as the case may be, possesses the minimum qualification prescribed for appointment to the post:

Provided further that if there are two widows/wives of the deceased civil servant, preference shall be given to the elder widow/wife.

Provided also that the appointment under this sub rule is subject to availability of a vacancy and if more than one vacancies in different pay scales are available at a time, and the child or the widow/wife, as the case may be, possesses the qualifications making him or her eligible for appointment in more than one post, he /she shall ordinarily be appointed to the post carrying higher pay scale.'

While conceding that the above rule is discriminatory and violates Articles 25 and 27 of the Constitution, the learned Additional Advocate General of the Province stated that the same has not been omitted as yet.

17. Rule 12 of the Balochistan Civil Servants (Appointment, Promotion and Transfer) Rules, 2009 provided for the appointment of a child or spouse of a civil servant in BPS-1 to 15 who dies in service without observing the condition of open advertisement; it is reproduced hereinbelow:

'Notwithstanding anything contained in any rule to the contrary, whenever a Civil Servant dies while in service, his/her spouse or a child may be employed by the appointing authority against a post in BPS-1 to 15 in the department in which deceased Government Servant was working, without observing the condition of open advertisement;

Provided that –

(a) the spouse or child as the case may be, shall possess the qualification prescribed for the post; and

(b) If the child of the deceased Government Servant is under-age, his name shall be included in the

waiting list from the date of death of his/her Father or Mother. However he/shall be considered for appointment after he/she attains the age prescribed for the post.'

Rule 12-A of the above Rules of 2009 provided for the appointment, without open advertisement, one child in BPS-1 and BPS-2 of a civil servant who, while serving in BPS-1 and 2, retires on superannuation or due to invalidation; it is reproduced hereinbelow:

'Notwithstanding anything contained in any rule to the contrary, whenever a Government Servant in BPS-1 and BPS-2 retired on superannuation or due to invalidation, one of his/her children may be employed by the appointing authority against a post in BPS-1 and BPS-2 in the Department in which the retired Government Servant was working, without observing the condition of open advertisement;

Provided that –

- (a) the child possesses the qualification prescribed for the post; and
- (b) If the child of the retired Government Servant is under-age at the time of retirement, his name shall be included in the waiting list from the date of retirement/invalidation of his/her Father or Mother. However he/shall be considered for appointment after he/she attains the age prescribed for the post.'

The learned Additional Advocate-General, Balochistan informed that *vide* notification dated 9 May 2023 rule 12-A had been omitted but that rule 12 still exists. He further stated that in the case of *PWD Employees Union Balochistan v. Secretary Communication and Works*¹¹ a Division Bench of the Balochistan High Court declared the said rule 12 to be discriminatory and *ultra vires* Articles 2A, 3, 4, 9, 18, 25 and 27 of the Constitution, but the judgment passed by the Balochistan High Court was held not sustainable by a three member Bench of this Court *vide* order dated 19 September 2022 passed in Civil Appeal Nos. 691 and others on the ground that the question of *vires* of rule 12 was not before the High Court and that it could not take *suo moto* notice of the same since it did not have *suo-moto* jurisdiction to take up the matters on its own accord as was held in the case of *Dr. Imran Khattak v. Ms. Sofia Waqar Khattak*¹².

18. The widow/widower, the wife/husband and the dependent children of a civil servant who dies during service or becomes permanently disabled/invalidated/incapacitated for further service and takes

¹¹ 2015 PLC (C.S.) 1182

¹² 2014 SCMR 122

retirement from service get pensionary and other benefits from the public exchequer, to which they are entitled. However, the above mentioned rules, policies, OMs, etc. which secure or provide appointments in different grades, without open advertisements and competition, to the widow/widower, wife/husband or a child of a civil servant of the Federal and Provincial Governments, who dies during service or becomes permanently disabled/invalidated/incapacitated for further service and takes retirement from service, is *ex facie* discriminatory against the other or ordinary citizens of Pakistan and the same cannot be termed as a reasonable classification as their object is to give an advantage by excluding others, which is not permissible under Article 25 of the Constitution. Article 27 of the Constitution which specifically attends to the service of Pakistan prohibits discrimination in services.

19. The Government and public sector employment cannot be allowed to be parceled out to the functionaries of the State. These jobs neither are nor can be made hereditary. The Constitution stipulates that equal employment and economic opportunities must be provided to all citizens. Economic justice, if we may add, is a component of social justice which focuses on creating equal opportunities for all within a society in all aspects.

20. Article 4 of the Constitution embodies the concept of equality before law, equal protection of law, right of individuals to be dealt with in accordance with law and saving the citizens from arbitrary/discriminatory laws and actions. It is the duty and obligation of the public functionaries under Article 4 of the Constitution to act in accordance with law.

21. Article 5(2) of the Constitution bounds everybody to obey the command of the Constitution. Every public functionary has to act in good faith, honestly and within the precinct of its power so that the persons concerned should be treated in accordance with the law as guaranteed by Article 4 of the Constitution, which include principles of natural justice, procedural fairness and procedural propriety. While discharging official functions every effort should be made to ensure that none is prevented because of unfair and discriminatory treatment.

22. Under Article 3 of the Constitution it is obligatory for the State to ensure elimination of all forms of exploitation and the gradual fulfilment of the fundamental principles, from each according to his ability to each according to his work. To achieve the object of good governance and to fulfil the obligation under Article 3 of the Constitution, transparency and

merit in appointments in the service of Pakistan that includes government jobs must be adopted.

23. The appointment of a widow/widower, wife/husband or child of a civil servant in different grades on contract or regular basis, without open advertisement, competition and merit is also violative of Article 18 of the Constitution which provides that subject to such qualification, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business. Appointments obstructing ordinary qualified citizens to compete for entering into the profession of the service of Pakistan in accordance with their ability and eligibility also violate this fundamental right, and if such appointments are made they negate equality of opportunity, competition, merit and also defeat the object of good governance.

24. Good governance cannot be achieved by exercising discretionary powers unreasonably or arbitrarily. This objective can be achieved by following the Constitution and the rules of justness, fairness and openness as enshrined in the above referred Articles of the Constitution.

25. Any law, policy or rule which is manifestly inconsistent with the Constitutional commands, retrogressive in nature and discriminatory *inter se* the citizens is subject to judicial review. In the case of *Government of Khyber Pakhtunkhwa through Secretary Agriculture v. Tahir Mushtaq and others*¹³, while dismissing the claim of the son of a retired civil servant of the Agriculture Department of Khyber Pakhtunkhwa who sought appointment in BPS-5 on the basis of employee's son quota policy, it was held by a four member Bench of this Court that:

'The Constitution of the Islamic Republic of Pakistan prohibits discrimination as stated in Article 25 and further stipulates and entrenches the principle in respect of service of Pakistan in Article 27. In preferring the children of a government servant or reserving seats for them offends the Constitution. The same also detracts from a merit based system of employment. The taxpayers hard earned monies pay for the salaries, benefits and pensions of government servants. The people's interest lies in having the best person for the job, and not to suffer those who secure employment on the basis of a filial relationship. The stated instructions undermine transparency and good governance, therefore, the government of Khyber Pakhtunkhwa will be advised to withdraw all such instructions/notifications.'

For the above reasons, while granting leave, Civil Petition No. 3390 of 2021 is converted into an appeal and is allowed. The impugned order

¹³ Civil Petition No.288-P of 2015 decided on 12 September 2024

dated 13 April 2021 passed by the Peshawar High Court in favour of the respondent is set aside. Policies, office memorandums, employment under the Package of the Prime Minister, the Financial Assistance Package, Rule 11-A of the Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974, Rule 10 (4) of the Khyber Pakhtunkhwa Civil servants (Appointment, Promotion and Transfer) Rules, 1989, Rule 12 of the Balochistan Civil Servants (Appointment, Promotion and Transfer) Rules, 2009 or any other rule, policy, memorandum, etc. whereunder appointments without open advertisement, competition and merit, of the widow/widower, wife/husband or child of civil servants in different grades, who die during service or become permanently disabled/invalidated/incapacitated for further service and take retirement from service, are declared to be discriminatory and *ultra vires* Articles 3, 4, 5(2), 18, 25(1) and 27 of the Constitution. The prescribed Federal and Provincial authorities are directed to withdraw the same. However, it is clarified that the instant judgment shall not affect the appointments already made of the widow/widower, wife/husband or child of deceased or retired civil servants. It is further clarified that this judgment shall not affect the policies, rules or compensation packages of the Federal and Provincial Governments for the benefit of the legal heirs of martyred personnel of the law enforcement agencies and of civil servants who die on account of terrorist activities.

Chief Justice

Judge

Judge

Announced in the open court on 18 October 2024

ISLAMABAD
26 September 2024
Approved for reporting
Atif/Zohaib Afzal*