SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:
Kh. Muhammad Nasim, J.
Raza Ali Khan, J.

1. **Civil Appeal No.331/2023**
(PLA Filed on 19.04.2023)

Muhammad Safdar Mir, Machine Operator (B-5), presently posted in the office of Director Wildlife & Fisheries, New District Headquarter Complex "F", Saheli Sarkar Road, Muzaffarabad.

…… APPELLANT

VERSUS

1. Syed Adil Hussain Naqvi, s/o Syed Imtiaz Hussain Naqvi (late), r/o Pajgran, Tehsil and District Muzaffarabad.

2. Secretary Wildlife & Fisheries, Azad Government of the State of Jammu and Kashmir, having its office at New Secretariat Complex, Chatter, Muzaffarabad.

3. Director Wildlife & Fisheries, Azad Government of the State of Jammu and Kashmir, having its office at New District Headquarter Complex, Block "F", Ground Floor, Saheli Sarkar Road, Muzaffarabad.

4. Assistant Director, Wildlife & Fisheries, Azad Government of the State of Jammu and Kashmir, having its office at New District Headquarter Complex, Block "F", Ground Floor, Saheli Sarkar Road, Muzaffarabad.

…. RESPONDENTS

[On appeal from the Judgment of the High Court dated 21.02.2023, in Writ Petition No.523/2018]

FOR THE APPELLANT: Mr. Maqsood Ahmed Sulehria, Advocate.

FOR RESPONDENT No.1: Ch. Muhammad Ishaque, Advocate.

FOR THE OFFICIAL

RESPONDENTS: Sheikh Masood Iqbal,
Advocate General.

2. **Civil Appeal No.128/2024**
(PLA Filed on 04.03.2024)

Raja Waqas Khalid s/o Raja Khalid Khan, r/o Raheem-Kot, Constituency No.5, Tehsil & District Muzaffarabad, Azad Jammu and Kashmir.

…… APPELLANT

VERSUS

1. Rahat Mumtaz s/o Syed Mumtaz Hussain Khan, r/o Village Lower Kot, Tehsil & District Muzaffarabad.

2. Secretary E&S Education Schools, Azad Government of the State of Jammu and Kashmir, having his office at New Secretariat Chatter Muzaffarabad.

3. Director Public Instructions E&S Education Schools (Female), Azad Jammu and Kashmir, having his office at Old Secretariat/New District Complex, Muzaffarabad.

4. Divisional Director E&S Education Schools (Female) Muzaffarabad, Division Muzaffarabad, having its office at New District Complex, Muzaffarabad.

5. Headmistress Government Girls High School Katkair Tehsil & District of Azad Jammu and Kashmir, Muzaffarabad.

…. RESPONDENTS

[On appeal from the Judgment of the High Court dated 13.12.2023, in Writ Petition No.1092/2021]

FOR THE APPELLANT: Mr. Saqib Ahmed Abbasi,
Advocate.

FOR RESPONDENT No.1: Raja Shujaat Ali Khan,
Advocate.

FOR THE OFFICIAL RESPONDENTS: Sheikh Masood Iqbal,
Advocate General.

Date of hearing: 03.06.2024.

JUDGMENT:

Kh. Muhammad Nasim, J.- The captioned appeals by leave of the Court arouse out of the judgments dated 21.02.2023 and 13.12.2023, passed by the High Court of Azad Jammu and Kashmir in separate writ petitions No.523/2018 and 1092/2021. As both the appeals involve common question of facts and law, therefore, the same have been heard together and are being decided as such.

2. The brief summary of facts is that respondent No.1 in civil appeal No.331/2023, filed a writ petition in the High Court, alleging therein, that his father was a permanent employee of Wild Life & Fisheries Department, serving as Superintendent (BPS-17), who was died during service on 14.12.2015. It was alleged that the Government of Azad Jammu and Kashmir had issued an office memorandum dated 12.09.2006, through which an Assistance Death Package was introduced for families of the Government employees who die during their service. It was averred that the petitioner/respondent No.1, herein, is holder of a certificate in Faculty of Arts (F.A.) along with 6 months' computer course in software and 6 months' computer course in Hardware from the National Institute of Computer Sciences, Lahore. The petitioner/respondent No.1, herein, being son of the deceased employee, applied for appointment in the light of said office memorandum but the concerned authorities failed to adjust the petitioner and prayed for a direction to adjust him against any vacant position. Similarly, respondent No.1, herein, in civil appeal No.128/2024, filed a writ petition in the High Court, alleging therein that her father was serving in the Education Department as Primary Teacher who had died during his service on 06.12.2017.

It was stated that according to the Death Assistance Package, the petitioner being daughter of the deceased employee, is entitled to be appointed against any vacant position as the petitioner is Bachelor of Arts (B.A.). The petitioner submitted various applications for her appointment but all the applications went in vain, hence, a direction may kindly be issued to the official respondents for the appointment of the petitioner in the light of said Death Assistance Package. The learned High Court after necessary proceedings, accepted both the writ petitions through separate impugned judgments and directed the official respondents to appoint the petitioners therein, against suitable posts in the light of the Death Assistance Package dated 31.03.2020. The appellants, being aggrieved, challenged the said judgments by way of separate appeals by leave of the Court.

3. M/S Maqsood Ahmed Sulehria and Saqib Ahmed Abbasi, the learned Advocates appearing on behalf of the appellants in both the appeals after narration of necessary facts submitted that the impugned judgments passed by the High Court are against law, facts and the record, hence, are not sustainable in the eye of law. They further submitted that the notification dated 31.03.2020 was issued incompetently against the Rules of Business, without proper authority and on the basis of said notification, no direction could have been issued for appointment, hence, the impugned judgments passed by the learned High Court are liable to be set aside. They requested for acceptance of appeals. The learned Advocate representing the appellant in civil appeal No.331/2023 referred to and relied upon the case law reported as [2019 SCR 617] [2020 SCR 20] and [2017 SCR 87] in support of his version.

4. On the other hand, M/S Ch. Muhammad Ishaque and Raja Shujaat Ali Khan, the learned Advocates appearing on behalf of the private respondents defended the impugned judgments and stated that the same are perfect and legal. They submitted that the Government has issued a Death Assistance Package for the families of the Government employees who die in service. On the basis of the said notification, the private respondents herein, were entitled to be appointed against vacant positions according to their qualifications hence, the learned High Court has rightly directed to appoint the petitioners, therein, in the light of the Death Assistance Package. The appellants, herein, were neither party in the High Court nor they have any locus standi to challenge the judgments of the High Court, because they do not fall within the definition of an aggrieved person. The learned Advocate representing respondent No.1 in civil appeal No.331/2023, referred to and relied upon an unreported judgment of this Court titled *"Shoaib Farooq vs. Secretary Forest Department & others"* (civil appeal No.71/2017, decided on 02.11.2017), in support of his version.

5. Sheikh Masood Iqbal, the learned Advocate General appeared on behalf of official respondents and contended that the Azad Jammu and Kashmir Civil Servants Act, 1976, and Azad Jammu and Kashmir Civil Servants (Appointment and Conditions of Service) Rules, 1977, are statutory laws under which the prescribed mode is provided for appointments of the civil servants against different posts. Any appointment which is made in violation of the prescribed mode is illegal, hence, the notification dated 31.03.2020 to the extent of permanent employment offends the Constitutional Provisions and the aforementioned Act and Rules thus, is liable to be set aside. The learned High Court has got no jurisdiction to direct the official respondents to appoint the

petitioners, therein, against vacant posts without adopting due process of law. He lastly prayed for acceptance of both the appeals.

6. We have considered the arguments advanced at bar by the learned Advocates representing the parties and gone through the record of the case along with the impugned judgment. A perusal of the record reveals that vide office memorandum dated 12.09.2006, issued from the office of the Finance Department, a Death Assistance Package was introduced for families of the Government employees who die during their service. Through the aforesaid Death Assistance Package along with lump sum grant, the employment against the posts in BPS-1 to BPS-15 on contract for two years without advertisement of the posts, has also been granted to the children, or widow of the deceased. Subsequently, vide notification dated 31.03.2020, the revised Death Assistance Package for families of the Government employees who die in service was introduced. For better appreciation, the said notification in verbatim speaks: -

"Finance Department
Azad Government of the State of Jammu and Kashmir
Muzaffarabad

"Muzaffarabad"
Dated: March 31, 2020

Notification

No.FD/R/4649-4748/2020. Consequent upon the decision of the Cabinet in its meeting held on 23.01.2020, the President Azad Jammu and Kashmir has been pleased to accord approval with immediate effect for the following revised Assistance Package for families of the Employees of the Azad Government of the State of Jammu and Kashmir who die in service: -

LUMP SUM GRANT

Grades	Rates (Rs.)
1-4	4,00,000/-
5-10	6,00,000/-

11-15	8,00,000/-
16-17	1,000,000/-
18-19	1,600,000/-
20 & above	2,000,000/-

PENSION

100 % Pension to the families of the deceased Government employees shall be provided as per their length of service and last pay drawn. Moreover, in case of less than 10 years' service of the deceased employees, rate of minimum 10 years' service shall be applicable.

ACCOMODATION

Family of a deceased Government employees shall be allowed to retain the allotted Government house till the age of superannuation of deceased Government employee as per allotment policy of Azad Government of the State of Jammu and Kashmir.

EMPLOYMENT

The appointment of one child/widow of Government employees who die in service shall be made against the posts in BS-01 to BS-15 without advertisement of post, subject to the conditions below:

i. He/she must be having requisite qualification for the post concerned already prescribed under Rules.

ii. The appointment shall be made (under death package) initially for a period of 2 years and appointee shall be confirmed/regularized on satisfactory completion of 2 years term as probationary period.

HEALTH

Free health facilities to the family of the deceased Government servant shall be allowed under the provisions of the AJK Medical Attendance Rules.

2. All existing Policies/Notifications/Instructions/ Circulars to the extent of the above shall stand modified accordingly.

Raja Muhammad Latif
Deputy Secretary Finance (Regs.)

Copy to: -
1……. to ……13…….

Raja Muhammad Latif
Deputy Secretary Finance (Regs.)"

Admittedly, the fathers of both the private respondents, herein, were permanent Government employees in the Forest/Wild Life & Fisheries and Elementary and Secondary Education Departments, and the said employees died during service on 14.12.2015 and 06.12.2017, respectively. At that time, the office memorandum dated 12.09.2006 was holding the field. Through the aforesaid office memorandum along with lump sum grant, the employment against the posts falling in BPS 1 to BPS-15 on contract for two years, of the children of the deceased according to their qualification without advertisement of the post, was also offered. The learned High Court through the impugned judgment while relying upon the notification dated 31.03.2020, directed the official respondents to appoint the petitioners, therein, on permanent basis. It may be stated here that the learned High Court was not justified to issue such direction while relying upon the notification dated 31.03.2020 because at the relevant time, the said notification was not holding the field, hence, could not be relied upon.

Now, we advert to the notification dated 31.03.2020, issued from the office of the Finance Department wherein, the appointment of one child/widow of Government employees who die in service, shall be made against the posts in BPS 1 to BPS-15 without advertisement of the posts and thereafter, the appointee shall be confirmed/regularized on satisfactory completion of two years term as probationary period. It may be stated here that the said notification has been issued incompetently which is contrary to the Rules of Business and without proper authority. According to the Rules of Business, the said notification had to be issued from the office of the Services and General Administration Department. It is pertinent to mention here that in Azad Jammu and Kashmir, the appointments in the service are regularized by

the law known as the Azad Jammu and Kashmir Civil Servants Act, 1976, and the Rules made thereunder i.e. the Azad Jammu and Kashmir Civil Servants (Appointment and Conditions of Service) Rules, 1977. The spirit of law emphasizes that the appointment should be made on the basis of merit determined by the concerned selection authorities. The AJ&K Interim Constitution, 1974, has guaranteed the right of equality before law and equal treatment of law; thus, this right can only be enforced by following the prescribed mode for appointment by advertising the vacancies and determining the merit of the eligible candidates through a transparent selection process. Law does not admit any such mode that any person, who has been appointed on temporary/contract basis and thereafter becomes entitled for permanent induction. Such induction in fact, amounts to violation of constitutionally guaranteed fundamental right of equality before law and the enforced law regulating the mode of appointment. This Court in the case reported as *"Azad Government & others vs. Muhammad Younas Tahir & others"* [1994 SCR 341] had even struck down an Act called AJ&K Civil Servants (Regularization of ad-hoc Appointments) Act, 1992, passed by the Legislative Assembly and it was observed by this Court as under: -

> "It seems necessary to first advert to the argument of Mr. S.M. Zafar that Right No. 15 (equality before law) is not applicable to entry into Government Service and that the only fundamental right applicable is Right No. 17. This argument has no force and must be repelled. The Constitution has to be treated, in accordance with all pronouncements of superior Courts, as one organic whole and must be harmoniously construed. In this connection I may refer to *"Azad Government of the State of AJ&K vs. Kashmir Timber Corporation"* [PLD 1978 SC (AJ&K) 42]in which it was observed that: -
>
> "Besides these he has also referred to Maxwell and Crawford which support the broad principle of

interpretation. From these authorities the following principles of interpretation of statutes emerge: -

(1) that a Constitutional instrument should be read as a whole and its provisions construed harmoniously;

(2) xx xx xx xx xx xx xx xx

(3) xx xx xx xx xx xx xx xx

(4) xx xx xx xx xx xx xx xx

Even otherwise the established rule is that in case of apparent inconsistency between two provisions of law, attempt should be made to harmonize them as there is presumption against inconsistency. In fact, there is no inconsistency between the two Rights under consideration. Fundamental Right No. 15 refers to all state subjects without exception. It does not lay down that state subjects who are in service of Azad Jammu and Kashmir or those who want to join service will not be entitled to equal protection of law.

In my view the guarantee of equality before law is more fundamental than all other fundamental rights. It is also my view that most of other rights would in some situations becomes meaningless without Right No. 15. The first fundamental right guarantees that no person shall be deprived of liberty save in accordance with law. Can a "law" contemplated by this right be discriminatory? The answer to this question must be in the negative because it cannot be visualized that, for instance, person belonging to a particular ideology or political creed may be deprive of liberty under a harsher law than the others. Similar is the case of other rights for instance freedom of speech, movement, assembly, association, trade etc.

If Right No. 17 is alone applicable then discrimination on the basis of place of birth, parentage and many other considerations would become valid. In that case it would be possible to make laws, for instance, that judicial service in Azad Jammu and Kashmir will be reserved for sons of serving or retired Judges or that persons in Police service shall only be

recruited from a particular Tehsil or that only who are recommended by the members of the Legislative Assembly shall be appointed to posts in Government service. If we test these laws against the touchstone of Right No.17, the said laws will have to be declared valid.

However, if Right No. 15 is applied in all probabilities such laws will be declared invalid on the ground that they deny equality before law and equal protection of law and create a class which is not reasonable. This analysis shows that the argument of Mr. S.M. Zafar is without substance.

The Interim Constitution Act through Right No. 15 holds out a firm and forthright guarantee that all state subjects are equal before law and are entitled to equal protection of law. Its meanings are plain enough to ensure that laws of the State shall equally apply to all subjects and there would be no discriminatory treatment amongst them. Since there is no particularization in the phraseology these guarantees cover all laws dealing with state subjects whether they relate to life, honour, property, freedom, employment and all rights and liabilities. These lofty pronouncements have, however, been rationalized were experienced in literally implementing these guarantees. These difficulties are real and substantial. Therefore, reasonable classification was recognized.

Supposing a law is to be enacted to regulate grant of driving licenses. Going by the plain phraseology of Right No. 15 every citizen must be allowed to have a driving license but a problem may be faced that it would mean that minors, blind persons and physically unfit citizens would also be entitled to obtain a driving license. If a law makes no distinction such a driver would put to risk the lives of citizens, including his own. Thus, law may be made to meet this situation and citizens falling in a well-defined class may be treated differently for grant of driving licenses. Such a law may be covered by the class legislation rule. However, if it is provided in the statute that women will not be allowed to drive any vehicle there might be a valid challenge that it violates the equality clause. Although women

> may be a class by themselves but it may be said that the classification is not reasonable.'
>
> 'Finally, this Court passed the order: -
>
> > "The Azad Jammu and Kashmir Civil Servants (Regularization of ad-hoc appointment) Act, 1992 is found to be void as it was violative of Fundamental Rights No. 15"

6. So far as the contention of the learned Advocates representing the private respondents that the learned High Court has issued direction to appoint the petitioners therein, in the light of the notification dated 31.03.2020, and the said notification/policy of the Government has the force of law, is concerned, it may be stated here that the said notification can only be implemented by the Courts of law if it is issued according to spirit of law and under the powers vested by law. The policy/notifications inconsistent with law, cannot be implemented by the Courts of law. Our view is fortified from the following case law:

In a case reported as "*Syed Sharif Hussain Bukhari vs. Azad Govt. of the State of Jammu and Kashmir and others"* [PLJ 1983 AJ&K 8] it was observed as under: -

> "If an order issued by the Government which affects the right of a citizen adversely, is not shown to have been made in pursuance of some statutory provisions, that order, being without any lawful authority, is to be struck down, especially when it offends against any constitutional provisions."

Similarly, in another case reported as *"Muhammad Bhai and another vs. Islamic Republic of Pakistan Islamabad and another"* [PLD 1980 Kar. 166] it has been observed as under: -

> "Besides any policy decision contrary to the Remission Rules which have been framed under the

> provisions of the statute cannot be held to have been amended by an inconsistent policy decision."

The aforementioned view is further corroborated from another case reported as *"Maj. Muhammad Aftab Ahmad vs. AJ&K Govt. and others"* [1992 SCR 307] it was held as under: -

> "Even if it is assumed for the sake of arguments that the Prime Minister had made the order for the appointment of the appellant to the post of Superintendent of Police still it cannot be given effect to or enforced by way of issuing writ directing the respondent to issue the order of his appointment to the said post as it is a settled law that the writ jurisdiction cannot be exercised to direct a person to give effect to an unlawful order of any authority even though it is competent authority to pass such an order in a lawful manner. Since, as said earlier, the appointment of the appellant could not be made to the post of Superintendent of Police under the rules the orders of the Prime Minister claimed by the appellant to be the orders of his appointment to the said post being violative of the relevant rules were unlawful and consequently were not enforceable by the High Court in its writ jurisdiction which is discretionary in nature and its exercise is always refused where the ends of justice and facts of the case do not justify and call for to do so."

7. The judgment referred to and relied upon by the learned Advocate representing the private respondent in civil appeal No.331/2023, is not applicable to the case in hand, hence, need not to be discussed.

8. As we have reached the conclusion that the policy/notification dated 31.03.2020, to the extent of employment of civil servants on contract/permanent basis without adopting due process of law, directly offends the constitutional provisions and enforced law, hence, cannot be implemented. Although the appellants, herein, have not specifically challenged the said notification, therefore, while exercising the powers conferred upon

this Court under Article 42-A of the Azad Jammu and Kashmir Interim Constitution, 1974, read with Order XLIII, Rule 4 of the Azad Jammu and Kashmir Supreme Court Rules, 1978, the policy/notification dated 31.03.2020, to the extent of contract/permanent employment is hereby struck down.

Resultantly, both the appeals are accepted. The impugned judgments passed by the High Court dated 21.02.2023 and 13.12.2023 are hereby set aside. Consequently, the writ petitions filed by the private respondents, herein, before the High Court stand dismissed. No order as to costs. A copy of this judgment shall be transmitted to Secretary Services and General Administration for circulation to all the Heads of the Departments.

JUDGE (J-I) **JUDGE** (J-II)

Muzaffarabad
06.06.2024.