Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 3801 OF 2016

Hafiz Muhammad Bilal and others.

Vs

Auqaf Department through Chief Commissioner, ICT and others.

PETITIONERS BY:	Mr. Attaullah Hakim Kundi and Mr. Misbah Ul Mustafa Safir, Advocates.
RESPONDENTS BY:	Mr. Rabbi Bin Tariq, State Counsel.
	Mr. Muhammad Usman Warraich, Assistant Attorney General.
	Mr. Fawzi Zafar, Additional Advocate General, Sindh.
	Malik Akhtar Abbas, Assistant Advocate General, Punjab.
	Mr. Waqas Ali Khan, Section Officer, ICT.
DATE OF HEARING:	30.10.2024

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BABAR SATTAR, J.- The petitioners have impugned advertisement dated 23.09.2016, pursuant to which applications were invited for the posts of *Khateeb* in Islamabad and the criteria for such posts were prescribed.

2. The learned counsel for the petitioners submitted that there were three sets of grievances in relation to the impugned advertisement. First, the upper-age limit prescribed in the impugned advertisement was 25 years for the post of *Khateeb*,

which rendered the petitioners ineligible for such posts. It was submitted that the age limit was in conflict with Rule 7 of the West Pakistan Auqaf Department (Khateebs and Imams) Service Rules, 1968 **("Khateebs & Imams Service Rules")**, which prescribed an age limit between 30 and 45 years for the post of *Khateeb*. Second, the regional quotas prescribed in the impugned advertisement were *ultra vires* Article 27 of the Constitution of the Islamic Republic of Pakistan, 1973 **("Constitution")**, and undermined the rights of petitioners as residents of Islamabad to compete for such *Khateeb* posts. And third, the impugned advertisement prescribed no quota for the children of former *Khateebs* and *Imams*, who had a legitimate right to be considered on a preferential basis to fill posts previously occupied by their fathers.

3. The learned counsel for the petitioners submitted that the impugned advertisement had been issued pursuant to Recruitment Rules notified through SRO 1311(I)/2008 dated 21.11.2008, which had not been framed under the Auqaf (Federal Control) Act, 1976 **("Auqaf Act")**. He submitted that the criteria prescribed by the impugned advertisement ought to have been in accordance with the Khateebs & Imams Service Rules. It was submitted that the cut-off age of 25 years was irrational, as in order to be eligible to perform the duties and functions of the post of *Khateeb*, certain training and experience was required, which a 25-year-old could not possess. It was further submitted that there was a long-standing practice that the children of *Khateebs* were given a preference while filling the post of *Khateeb.* And in view of such practice, the petitioners had

the legitimate expectation that their applications would be given preference over others.

4. The learned State Counsel on behalf of respondent No.1 took the Court through the laws regulating Waqf Properties, starting from the West Pakistan Waqf Properties Ordinance, 1961 **("Waqf Properties Ordinance")** all the way through till the enactment of Islamabad Capital Territory Waqf Properties Act, 2020 **("ICT Waqf Act")**. It was submitted that the impugned advertisement had prescribed age criteria in accordance with the Islamabad Capital Territory Auqaf Employees Service Rules, 1998 **("ICT Auqaf Rules")**, which had been enacted in exercise of authority under Section 25 of the Auqaf Act. Rule 5 of the ICT Auqaf Rules provided that in order to be eligible for appointment, a person must be eligible to be appointed under the rules of the Federal Government. Consequently, pursuant to the ICT Auqaf Rules, the criteria for eligibility as prescribed under the rules framed under the Civil Servants Act, 1973 **("Civil Servants Act")** had been incorporated for purposes of the Auqaf Act and ICT Auqaf Rules. It was submitted that the impugned advertisement had been issued pursuant to conditions prescribed through SRO 1311(I)/2008, which had been issued in exercise of powers under Rule 3(2) of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973 **("APT Rules")**. And the said SRO was issued by the Federal Government that was vested with authority to frame rules pursuant to Section 25 of the Auqaf Act. It was submitted that the ICT Auqaf Rules would have precedence over the Khateebs & Imams Service Rules, as they were protected under Section 26 of the Auqaf Act.

5. He submitted that the petition was without merit and was liable to be dismissed as there existed no law providing that sons of former *Khateebs* or *Imams* ought to be given priority in filling the posts of *Khateeb* and/or *Imam*.

6. As the impugned advertisement and SRO 1311(I)/2008 dated 21.11.2008, were challenged for being in conflict with Article 27 of the Constitution. Notices were issued to the Office of the Attorney General for Pakistan. As the question raised before the Court involved provincial quotas allocated to residents of the Provinces of Pakistan, notices were also issued to the provinces.

7. The learned Assistant Attorney General as well as the learned AAG's for the Provinces submitted that there was nothing unconstitutional about allocating quotas for representation to be afforded to the provinces in filling posts in Islamabad. It was submitted by the learned Assistant Attorney General that through OM’s dated 26.01.2016 and 14.02.2020 and notification dated 24.08.2020, quotas have been prescribed for residents of ICT as well as the residents of other Provinces. Through notification dated 24.08.2020, it has been provided that for purposes of pay-scales BS-06 to BS-15, at least 50 percent posts are to be filled by initial appointment and shall be filled by persons domiciled in ICT. This has been done by adding appropriate provisos to Rules 15 and 16 of the APT Rules. It was submitted that this ensured that at least 50 percent posts were filled by residents of ICT, and for filling the remaining 50 percent of the posts, quotas were allocated to the provinces in proportion to the population of such Provinces.

The relevant statutory framework

8. The Waqf Properties Ordinance was enacted to provide for management of Waqf Properties in the Province of West Pakistan. Section 21 of the said Ordinance empowered the Government of West Pakistan to frame rules to give effect to its provisions. In exercise of authority under Section 21 of the Waqf Ordinance, the Auqaf Services Rules were enacted. These are the Rules that the petitioners rely on to argue that upper-age limit to fill the posts of *Khateebs* in ICT ought to have been 45 years.

9. The Waqf Properties Ordinance was repealed by the Auqaf Act, which vested in the Government the power to frame rules for purposes of the Act, including, *inter alia*, to regulate the conditions of service of persons employed under the Act. Rule 26 of the Auqaf Act, saved the rules framed under the Waqf Properties Ordinance, to the extent not inconsistent with provisions of the Auqaf Act. The Auqaf (Federal Control) (Repeal) Ordinance 1979 repealed the Auqaf Act, except to the extent of Islamabad Capital Territory. This makes logical sense as the subject of Auqaf was handed over to the provinces Auqaf (Federal Control) (Repeal) Ordinance 1979 and as the Waqf properties in ICT did not fall within the territorial domain of any Province, the Auqaf Act was retained to the extent of Islamabad Capital Territory under the administrative control of the Federal Government.

10. Pursuant to Rule 3(2) of the APT Rules, the qualifications and conditions for appointment to posts in the Islamabad Auqaf Directorate were described pursuant to SRO 82(I)/88 dated

01.02.1988. It has been contended by the petitioners that as the eligibility criteria in the said SRO were prescribed pursuant to provisions of the APT Rules. And the said rules having been issued under the Civil Servants Act could not be given priority over the Khateebs & Imams Service Rules.

11. The contention of the petitioners has not impressed the court for two reasons. One, the actual eligibility criteria that has been prescribed for posts in the Auqaf Directorate of ICT has been done pursuant to ICT Auqaf Rules, which has been issued under the Auqaf Act. Rule 3 of the ICT Auqaf Rules vests in Administrator General the power to prescribe qualifications and conditions for appointment to posts under the Auqaf Act with the approval of the Federal Government. The ICT Auqaf Rules incorporate for purposes of regulating the terms and conditions of service of Auqaf employees in ICT, the rules framed by the Federal Government to regulate the terms and conditions of its public servants, which in turn has been done in exercise of authority under the Civil Servants Act. It is, therefore, through statutory incorporation by reference that the prescriptions made pursuant to Rule 3(2) of the APT Rules have been made applicable to Auqaf employees in terms of ICT Auqaf Rules. Further, the authority to frame rules under the Auqaf Act has been vested in the Federal Government. Even to the extent that the Federal Government prescribes the criteria and terms and conditions for recruitment for those employed under the Auqaf Act by virtue of rules framed under the APT Rules, such criteria and terms and conditions cannot be deemed to be without legal authority merely because of reference to the APT Rules as

opposed to the Auqaf Act. The legal entity empowered to issue rules under the Auqaf Act remains the Federal Government, which is the same authority that is authorized to enact the APT Rules. Thus, a claim to exercise of authority by the Federal Government under the Civil Servants Act, as opposed to the Auqaf Act, would neither rob the Federal Government of its rule-making power vested by the legislature pursuant to Section 25 of the Auqaf Act, nor render the rules enacted or adopted devoid of legal authority due to jurisdictional defect.

12. The latest legislative enactment for our purposes is the ICT Waqf Properties Act, which under Section 5 vests power in the Chief Administrator, with the sanction of Chief Commissioner ICT, to determine the terms and conditions of persons employed for purposes of the Act. Section 27 of the ICT Waqf Properties Act vests in Chief Commissioner ICT the power to make rules for purposes of the Act, subject to the approval of the Federal Government. Section 28 of the ICT Waqf Properties Act repeals the Auqaf Act while saving the rules framed thereunder.

13. In view of the above statutory framework, the ICT Auqaf Rules trump the Khateebs & Imams Service Rules and the terms and conditions and criteria prescribed in exercise of authority pursuant to the former shall have legal force. It can therefore not be argued that the prescribed age of 25 years (subject to relaxation of up to 5 years as provided under the rules framed by the Federal Government under the Civil Servants Act) suffered from legal infirmity as applied in relation to recruitments being made to the posts of *Khateeb* in ICT.

Constitutionality of Provincial Quotas.

14. The second challenge to the impugned advertisement is that regional and/or provincial quotas have been prescribed, which are *ultra vires* Article 27 of the Constitution. Article 27 of the Constitution states the following:

> ***"Safeguard against discrimination in services***.
>
> *27. (1) No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth:*
>
> *Provided that, for a period not exceeding [forty] years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan:*
>
> *Provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex:*
>
> *Provided also that under-representation of any class or area in the service of Pakistan may be redressed in such manner as may be determined by an Act of Majlis-e-Shoora (Parliament).*
>
> *(2) Nothing in clause (1) shall prevent any Provincial Government, or any local or other authority in a Province, from prescribing, in relation to any post or class of service under that Government or authority, conditions as to residence in the Province, for a period*

not exceeding three years, prior to appointment under that Government or authority".

15. Also relevant for our purposes is Article 38(g), which states that, *"the shares of the provinces in all federal services, including autonomous bodies and corporations established by, or under the control of, the Federal Government, shall be secured and any omission in the allocation of the shares of the provinces in the past shall be rectified."* Article 38 falls within Chapter 2 of the Constitution that outlines the Principles of Policy, which remain guiding principles for the State while exercising its authority but cannot be enforced by the courts.

16. There are a few other provisions of the Constitution that are relevant for our present purposes. Article 9 of the Constitution guarantees the right of a person to liberty. Article 18 guarantees the right of every citizen *"to enter upon any lawful profession or occupation."* And Article 25 holds that *"all citizens are equal before law and are entitled to equal protection of law."* Article 4(1) of the Constitution declares that, *"to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen…."* Article 4(2)(b) states that, *"no person shall be prevented from or be hindered in doing that which is not prohibited by law."* Articles 9, 18 and 25, when read together, constitute a guarantee that all citizens shall be afforded a level-playing-field in dealing with the State, including while competing for jobs, contracts and distribution of other State largesse by the State.

17. It is in the larger context of the Constitution promising a level-playing-field to all citizens competing for State jobs that Article 27 of the Constitution has to be read and understood. Article 27(1) provides a guarantee that no citizen qualified to be appointed in the service of Pakistan shall be discriminated against on grounds of residence or place of birth. Thus, the right to compete for any appointment in the service of Pakistan is a fundamental right guaranteed by the Constitution. The first proviso to Article 27(1) suspended the application of this guarantee for a period of 40 years from the date of promulgation of the Constitution, within which period the framers of the Constitution envisaged that persons belonging to underrepresented classes and/or areas could be adjusted against posts reserved for them. This period has however expired and in view of Article 27(1) of the Constitution, no quotas can be affixed against which persons belonging to any particular areas are to be appointed, as that would constitute discrimination against other citizens on grounds of residence or place of birth and would fall foul of the guarantee in Article 27(1).

18. Article 27(1) deals with appointments in the service of Pakistan. Article 240 of the Constitution vests in the Parliament the authority to make appointments to and set conditions for those in the service of the Federation. And Article 240(b) vests similar authority in the Provincial Assembly in connection with the services of a Province. Article 260 of the Constitution defines the service of Pakistan as *"any service, post or office in connection with the affairs of the Federation or of a province…"* Article 27(1) unambiguously provides that after the expiry of 40

years, since the entry into force of the Constitution, no quotas can be prescribed or affixed for purposes of making appointments in the service of Pakistan, as defined in Article 260 of the Constitution. As provided in its definition, the service of Pakistan includes service in connection with the affairs of the Federation or that of a Province.

19. Article 27(2) creates a carve-out from the restriction imposed by Article 27(1) against fixation of quotas on grounds of place of birth or residence, as it empowers the Provincial Government or any other authority in the province to prescribe *"in relation to any post or class of service under that government or authority, conditions as to residence in the province for a period not exceeding three years, prior to appointment under that government or authority."* In other words, while there is an absolute bar against reservation of quotas or imposition of other eligibility criteria that have the effect of discriminating against a citizen on grounds of his residence or place of birth, when it comes to service in connection with the affairs of the Federation, a Provincial Government or other authority in the Province has been given some leeway under Article 27(2) to prescribe residency requirements, not exceeding a period of three years, for purposes of posts or any class of service within the Province. The policy guideline provided under Article 38(g), as reproduced above, can also not be construed as permitting provincial or regional quotas. Such interpretation, would contradict the unambiguous and explicit directive in Article 27 of the Constitution.

20. Articles 4, 9, 18, 25, 27 and 38(g) of the Constitution, when read together, provide that quotas or reserved posts in relation to the service of the Federation to be filled by individuals hailing from particular Provinces or regions is outright unconstitutional. The allocation of provincial quotas would be in conflict with the right guaranteed by Article 27(1) of the Constitution and would also undermine the right of a citizen to be afforded a level playing field in competing for jobs within the Federation, as guaranteed by Articles 9, 18, 25 and 27 of the Constitution.

21. Article 27(2), however, enables a Province or any authority within the province to prescribe residency requirement for up to three years within such province as part of the eligibility criteria to apply for a job being offered by the province or any authority within the province. What this means is that a province or any authority within the province may require that any person interested in the post being advertised must have been a resident of the province for a period of up to three years, but cannot prescribe that a certain percentage of posts are being reserved to be filled by residents of other Provinces. In other words, a province or any authority within the province can reserve posts for individuals who have been residing in such Province for up to three years, but cannot prescribe quotas for residents of other Provinces in terms of Article 27(1) or Article 27(2) of the Constitution.

22. When Article 38(g) is read together with Article 27 of the Constitution, it emerges that the State, including the Federal

Government and the Provincial Government, can adopt affirmative action policies to encourage underrepresented groups and citizens of underrepresented regions to be afforded equal opportunity in competing for jobs. But such affirmative action policies cannot be given the form of quotas, which would then fall foul of Article 27 of the Constitution apart from being discriminatory in terms of Article 25 of the Constitution. The foundational promise made by the Constitution to the citizens is that of equality. While the Constitution cannot ensure social or economic equality between citizens, it guarantees legal equality and equal protection of laws. This entails all citizens across the federating units being guaranteed equal opportunity to compete for jobs all across Pakistan, subject to any residency requirement imposed by a Province or authority in such Province in relation to jobs being offered by such Province or authority.

23. In view of the aforesaid Constitution scheme, the Federal Government (which is also the Provincial Government for purposes of ICT as explained by this Court in ***Shehryar Afridi vs. Federation of Pakistan*** **W.P No.2491 of 2023**) has the authority to declare that the individuals eligible to apply for a job proposed in the Auqaf Department of ICT, under the ICT Waqf Act, can only be filled by citizens of Pakistan who have resided in ICT for a period of three years prior to their appointment. This is so because the posts in question that are being offered are not posts established in connection with affairs of the Federation. Auqaf, as a subject, was listed in the Concurrent Legislative List prior to promulgation of the 18th Constitutional Amendment. Following the promulgation of the 18th Constitutional

Amendment, Auqaf is a provincial subject. It is thus that the Parliament has enacted the ICT Waqf Act, vesting in the Chief Commissioner ICT, the authority to frame rules with the approval of the Federal Government, which grants such approval in its capacity as the Provincial Government for ICT. As posts in the Auqaf Department qualify as posts in relation to a Province, the Chief Administrator and/or the Chief Commissioner, vested with authority under Section 3 of the ICT Wafq Act, can determine in exercise of their delegated statutory authority that posts in the Auqaf Department ought to be filled by those who meet certain residency requirements in consonance with Article 27(2) of the Constitution. In exercising such authority and prescribing eligibility requirements under the ICT Wafq Act or the ICT Auqaf Rules, no quotas can however be prescribed or reserved for residents of other Provinces.

24. This Court, therefore, finds that to the extent that the impugned advertisement prescribes and fixes quotas for residents of other Provinces in relation to posts within the Auqaf Department of ICT, such quotas are unconstitutional and *ultra vires* Article 27 read together with Articles 9, 18 and 25 of the Constitution.

25. The learned counsel for the petitioners has relied on ***Rizwan Ashraf vs. Federation of Pakistan*** **(2020 PLC (C.S) 605)**. In ***Rizwan Ashraf*** this Court relied on the law laid down by the Supreme Court in ***Khawaja Ahmad Hassaan vs. Government of Punjab*** **(2005 SCMR 186)**, ***Nusrat Baig Mirza vs. Government of Pakistan,*** **(PLD 1992 Federal**

Shariat Court 412), where the Federal Shariat Court had held that quota system is un-Islamic, and ***Mushtaq Ahmed Mohal vs. Honourable Lahore High Court*** **(1997 SCMR 1043)**, where the Supreme Court found quotas to be unlawful. It then held that the fixation of provincial quotas by the Ministry of Interior for purposes of filling posts advertised by the United Nations was in violation of Article 27 of the Constitution.

26. The learned counsel for the petitioners also relied on judgments of this Court in ***Muhammad Zaryab Ali vs. Ministry of Religious Affairs*** **(2019 PLC (CS.) 1361)** and ***Nadeem Abbas vs. Chief Commissioner, ICT*** **(W.P No.3352 of 2018)**, wherein it was held that the quotas for other Provinces are illegal and the posts ought to be reserved for individuals domiciled in ICT, in terms of Rules 15 and 16 of the APT Rules. To the extent that posts were in BS-01 to BS-16, as has been held above, quotas in any form are illegal in view of Article 27 of the Constitution. The only exception is that provided under Article 27(2) of the Constitution that allows a Province or authority of the province to impose residency requirements for a period of three years prior to the appointment in question. In this context, the nomenclature does not matter, whether it is called a local quota or something else. To the extent that the eligibility requirement, while imposing any condition, limits the condition to a three-year residency requirement in a post announced by an authority in ICT, such condition would pass constitutional muster in view of Article 27(2) of the Constitution. Any further or more onerous requirement in relation to the place

of birth etc., would fall foul of Article 27 of the Constitution, even if imposed in connection with local posts in ICT.

Quotas for the children of ex-*Khateebs*.

27. The final contention of the learned counsel for the petitioners was that the petitioners, being sons of former *Khateebs*, have a preferential right to be considered against posts advertised through the impugned advertisement. The argument is devoid of merit as explained most recently by the Supreme Court in ***General Post Office, Islamabad vs. Muhammad Jalal*** **(C.P.L.A. No. 3390 of 2021)** decided by judgment dated 26.09.2024. The question before the Supreme Court was the entitlement of widows and children of employees retired on medical grounds, in terms of the office memoranda issued by the Prime Minister of Pakistan that have come to be called PM Assistance Package. The Supreme Court, while holding the PM Assistance Package was *ultra vires* to the Constitution, emphasized that, *"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 equal opportunities must be provided to all citizens. Economic justice, if you may add, is a component of social justice which focuses on creating equal opportunities for all within society in all aspects."* It was further observed that, *"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 [Article 18], and if such appointments are made, they negate equality of opportunity, competition, merit and also defeat the object of good governance."

28. In view of the above any quotas, if they were to be reserved for employees of former *Khateebs* or *Imams*, would fall foul of Articles 9, 18, 25 and 27 of the Constitution and there can exist no legitimate expectation that such quotas would be reserved for the kin of former Khateebs and Imams in breach of requirements of the Constitution.

29. For the aforementioned reason, the petition is **allowed** to the extent that it reserves quotas for other Provinces in filling posts advertised pursuant to the impugned advertisement. However, the age criteria as prescribed in the impugned advertisement is in accordance with the law and suffers from no infirmity. Further, the impugned advertisement and the criteria prescribed therein suffer from no infirmity to the extent that no quotas have been reserved for the children of former employees of the Auqaf Department ICT.

(BABAR SATTAR)
JUDGE

Approved for reporting

Shakeel Afzal/-