From No:HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Case No. Writ Petition No. 9010 of 2021

Mohammad Umer Khalid **Versus** Government of Punjab etc.

S. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of Parties of Counsel, where necessary.
	21.06.2021	Mr. Ishtiaq A. Chaudhry, Advocate for the petitioner. Barrister Syed Ali Nouman Shah, AAG.

The petitioner claims to be a former contractual employee of the provincial health department whose contractual services were brought to an end by way of termination order dated 04.04.2019.

2. The learned counsel for the petitioner seeks reinstatement in contractual service and also submits that since the petitioner had completed three years in service, therefore, he was eligible and qualified to be considered for regularization in terms of the Regularization of Service Act, 2018. Adds that he was appointed on 30.06.2015 by way of a contract and on 30.06.2018, he had completed three years in service so as to qualify. However, by way of order dated 04.04.2019, his contract of service was brought to an end and therefore, after 04.04.2019, he was no more a contractual employee. Learned counsel further submits that he was also denied due process in the matter and which is why he had sought recourse to this Court by way of Writ Petition No. 40412/2020 whereby the matter was sent back to the respondent to provide procedural safeguards to the petitioner before taking action against him.

3. Heard. Record perused.

4. It is trite and established that a contractual employee cannot seek extension in contractual service or for that matter reinstatement in service. If any authority is required, the case reported as **Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs vs. Muhammad Azam Chattha** (2013 SCMR 120) may be perused. Furthermore, the judgments reported as **Pakistan Defence Officers' Housing Authority and others vs. Lt. Col. Jawaid Ahmed** (2013 SCMR 1707), **Pakistan Telecommunication Co. Ltd. through Chairman vs. Iqbal Nasir and others** (PLD 2011 SC 132), **Nadeem Shahid and another vs. Chairman, State Life Insurance Corporation of Pakistan and 3 others** (2003 PLC (C.S.) 719), **Aurangzeb vs. Messrs Gool Bano Dr. Burjor Ankalseria and others** (2001 SCMR 909), **Federation of Pakistan, Chamber of Commerce and Industry, Karachi vs. Ali Ahmad Qureshi** (2001 SCMR 1733) also hold to the same effect and are relied upon with aplomb. The petitioner whose contract of service was terminated on 04.04.2019, has approached this Court for seeking reinstatement as also regularization.

5. Quite interestingly the petitioner is trying to achieve indirectly what cannot be achieved directly. In the garb of seeking regularization, the petitioner wants this Court to first reinstate the petitioner in service. This is not possible because the Hon'ble Supreme Court of Pakistan has held that a contractual employee, even in the event of arbitrary dismissal, can only seek damages from the Civil Court since his relationship with his employer is governed by the principle of master and servant.

6. Furthermore, the issue of due process raised by the petitioner has been adequately taken care of and the

petitioner was not only heard but even a show cause notice was issued to him and replied by him. His reply was found unsatisfactory and therefore, his contract of service was brought to an end. Even in the order rejecting his representation, instances of misconduct, non-cooperative attitude and lethargy were highlighted. These instances prevailed with the competent authority in bringing his contractual service to an end.

7. Clause 18 of the contract of service of the petitioner envisages such a dismissal without any hearing. However, the petitioner has not only been heard twice but he has also been allowed the facility of rebutting the allegations levelled against him and even then he could not succeed. However, this is only one part of the matter before this Court. The other prayer of the petitioner pertains to being regularized in service. It is this part which needs consideration.

8. It may be noted that even if it is considered that termination of contractual service of the petitioner was in accordance with the Contract, even then the petitioner may have a right to be considered for regularization in terms of the Regularization of Service Act, 2018. This, because at the time of promulgation of the Act, 2018, he was not only in service but had also gained the requisite eligibility required for being considered for regularization. In this regard reference may be made to sections 1(3) and 10 of the Act of 2018 which are reproduced:-

> *1(3) It shall apply to all the persons employed on contract in a department, who have completed three years continuous service before or after the commencement of the Act.*
> *10. Option for regularization.- A contract employee who does not wish to be regularized shall furnish his option to the appointing authority within sixty days from the commencement of the Act; otherwise,*

> *he shall be deemed to have opted for regularization.*

In a recent reported judgment **Mst. Nabila Niaz and others vs. Secretary Health and others** (2020 PLC (C.S.) 675), it has been held at page 680, as follows:-

> *"Collective reading of both subsections under section 3 shows that a person appointed on contract, if completes three years of service, even after commencement of this Act, shall be eligible to be considered for appointment on regular basis if; (i) regular vacancy is available for initial appointment, (ii) he has required qualification for the post, (iii) the contract appointment was not against a special pay package, (iv) his performance during the contract period was satisfactory and (v) he did not opt to continue as contract employee. Under section 10, if a contract employee does not opt against regularization within sixty days, he shall be deemed to have opted for regularization."*

The petitioner was a contractual employee who fulfilled the eligibility threshold at the relevant time and his case therefore squarely attracts section 10 of the Act of 2018.

9. It may also be noted that the provisions of the Act of 2018 are more in the nature of self-executory provisions inasmuch as these are not dependent on any further legislative action outside of the Act of 2018. The considerations for being regularized, the eligibility thereof, the posts against which such regularization is permissible, the posts against which such regularization is not permissible, the qualifying criteria and factors, are all provided in the Act of 2018 itself and the Act does not require the crutches of any other rules, bye-laws, policy or notifications for being brought into force.

10. Likewise, the Act of 2018 does not reserve its coming into force or its promulgation for a later date and this is also indicative of the self executory nature of the Act of 2018 and that it operates from the day it came into force and it establishes that it goes into operation from the day it was brought into force. Eligibility of the

employees and the time period after which all contractual employees shall be considered eligible (60 days after the commencement of the Act of 2018) as well as procedure and forum are clearly defined in the law. Hence, the provisions of Act of 2018 are self-executory since they create a right [if the matter falls in Section 1(3) & 2(c)] for being considered for regularization which is enforceable by courts without there being any need for any further legislative action.

11. Learned counsel for the petitioner claims that by virtue of operation of section 10, the petitioner should have been deemed to have opted for regularization and that had the process of regularization been undertaken at the relevant and the proper time, he would have been eligible and qualified to be regularized since at that point in time, neither there were any disciplinary proceedings initiated against him nor had his contract been terminated on account of unsatisfactory service. In addition to the above, it is also true that the petitioner, in the event that he had been regularized, would also have had the benefit of procedural safeguards of a proper, as opposed to a slipshod, inquiry in terms of PEEDA, 2006, not to mention a proper remedy of an appeal before a Tribunal with all trappings of a Court. The above is reinforced by the fact that the petitioner was shown the door on 04.04.2019 and ever since, i.e. 24.05.2019, he has been clamoring for being regularized. Applications dated 24.05.2019, 31.08.2020 & 28.10.2020 serve as proof of the petitioner's persistence and efforts.

12. Learned Law Officer submits that while Regularization of Service Act, 2018 may be self executory, its application is hedged by a post being available and the case built by the petitioner may crumble if there is no post available. The answer to this again lies in the fact that had the petitioner been considered in time, (reference is made to section 10 of the Act, 2018), the post was indeed available and this being the one occupied by the petitioner at

that point in time. Furthermore, after the expiry of 60 days from the commencement of Regularization of Service Act, 2018 when the petitioner was well in service, the competent authority was bound to submit his case for regularization either before the Scrutiny Committee constituted under section 5 or before the Commission for the purpose of recommendation under section 4. Sections 4 & 5 are reproduced below:-

> ***4. Procedure for regularization**.– (1) The case of a contract employee appointed on the recommendations of the Commission shall be submitted to the appointing authority for regularization without reference to the Commission or the Scrutiny Committee.*
> *(2) If the post falls within the purview of the Commission but the contract employee was appointed otherwise than on the recommendations of the Commission, the case shall be referred to the Commission for recommendations.*
> *(3) If the post is outside the purview of the Commission, the case of a contract employee shall be placed before the Scrutiny Committee constituted under the Act for recommendations.*
>
> ***5. Scrutiny Committees**.– (1) The appointing authority shall constitute one or more Scrutiny Committees for purposes of the Act.*
> *(2) A Scrutiny Committee shall scrutinize the academic record and other relevant documents of the contract employee and verify that the contract employee is eligible and qualified for regularization.*
> *(3) The Scrutiny Committee shall forward its recommendations to the appointing authority.*

Some statutes delegate authority to outside agencies while others do not and hence, some statutes are self-executing while others are not. Self-executing statutes announce legal norms that are supposed to govern part of the social world as of the statute's effective date-whether or not an agency is delegated authority-while non-self-executing statutes do not announce any such legal norm in advance of agency or other official action. Self-executing statutes purport to govern people immediately, while non-self-executing

statutes permit people to wait until another official speaks before facing the implications of such law. (Cooley on constitutional limitations).

13. In the case of **Nestle Pakistan Lted. and others vs. Federal Board of Revenue and others** (2017 PTD 686(LHC), NS Bindra has been quoted, "it is recapitulated that a provision is self-executing if rights granted or duties imposed are enforceable in absence of any supplementary legislation; in other words if manifest intention is found in language of the provision that power conferred should go into immediate effect and no ancillary legislation is necessary, then the provision is self-executing".

14. The Hon'ble Supreme Court of Pakistan in the case of **Aacher and others vs. Dur Muhammad Usto and others** (2001 SCMR 958) has held at paragraph 7 that a self executory provision does not await the decision of any authority or court for taking effect. In the case of **Mst. Hazan and 2 others vs. Govt. of Baluchistan, Board of Revenue Balouchistan through Secretary and 13 others** (PLD 1997 Quetta 104), a Division Bench of Baluchistan High Court has ruled that any statutory provision which is not required to be operated by a subsequent Act is deemed to be self executory.

15. In **Jahangir Mirza v. Government of Pakistan** (PLD 1990 SC 1013) the Apex Court reiterated its earlier decision given in **M. U. A. Khan v. Rana M. Sultan and another** (PLD 1974 SC 228), holding that non-framing of Rules does not render a Statute as nugatory or unworkable unless the legislation indicates an intention to this effect in clear and unmistakable terms. Relevant excerpt from the judgment in M. U. A. Khan's Case (ibid) is reproduced hereunder:--

> *"It is universally recognized that as regulatory statutes have to deal with a variety of situations and*

subjects, it is not possible for the Legislature itself to make detailed regulations concerning them, and, therefore, the Legislature delegates its power to specified or designated authorities to make such detailed regulations, consistent with the statute, for carrying out the purposes of the parent legislation. The power so conferred is generally in the nature of an enabling provision, intended to further the object of the statute, and not to obstruct and stultify the same. As a consequence, the failure or omission of the designated authority to frame the necessary rules and regulations, in exercise of the power conferred on it by the Legislature, cannot be construed as having the effect or rendering the statute nugatory and unworkable. Such an eventuality could arise only if the Legislature indicates an intention to this effect in clear and unmistakable terms." [emphasis supplied]

For what has been discussed above, the arguments by petitioner's side fail on this ground. Perusal of the Sections 72B, 214C and 42B of the Federal Taxing Statues, in light of discussion supra shows that these are self-executing provisions because, the power and manner of exercising the power has been provided therein, without use of any word showing intention for further/subordinate legislation to carry out the selection. FBR has been empowered to select persons or classes of persons for audit through computer ballot, with additional discretion that the ballot may be parametric or random as the Board may deem fit".

16. The above discussion brings to fore the doctrine of direct applicability and direct effect, as understood in the Jurisprudence laid down by the European Court of Justice under the European Union regime. The doctrine of direct effect, in other words, and another name for, self executory provisions, reveals that if a law is

clear, unconditional and not dependent on further action outside of that law, then it is directly applicable which means that the law confers rights and duties without further Legislative participation whatsoever. The European Court of Justice articulated the theoretical basis for the principle of direct effect in **case 26/62 NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v. Nederlandse Belastinggad-ministratie (1963).** The European Court of Justice ruled that a provision is directly applicable if it has specified that it applies to individuals, is clear and precise, is unconditional and does not require the medium of another law to come into effect. In issue before the European Court of Justice was Article 12 of the European Economic Community Treaty "*Custom duties between member states shall be prohibited"*. After explaining that the aim of the European Community Law was to ensure its maximum outreach, even to citizens of its member States, the Court held that Article 12 contained clear wording. The prohibition was clear and did not require a legislative implementing measure. This made it ideally adapted to produce direct effects and create individual rights which national Courts must protect. This doctrine was not kept confined to negative statutory commands but also extended to positive obligations creating rights. **See case 57/65 ALfons Gmbh Vs. Hauptzollamt SaarLouis (1966).**

17. The Regularization of Service Act, 2018 makes it abundantly clear that the Act is clear, categorical, self-executory and not dependent on further legislative action.

18. A Single Bench judgment of this Court in Writ Petition No. 63240/2020 titled as **Mst. Tanzeela Ilyas vs. Govt. of Punjab etc.** has been produced by the learned counsel for the petitioner. In this case, facts similar to the facts before this Court were in issue. Even in that case, it was argued on account of self executory nature of the Act of 2018, especially section 1(3) and section 10 read with sections 4 & 5 thereof, that contractual employees who at the time of promulgation of the Act of 2018, had completed the requisite

duration of service were entitled to be considered for regularization in terms of the Regularization Act, 2018.

19. The Hon'ble Supreme Court of Pakistan in the case of **Govt. of Khyber Pakhtunkhwa vs. Liaquat Ali** (2021 SCMR 630) has eloquently ruled at paragraph 10 that the pre-conditions of regularization having been met and with the Act itself providing that it shall come into force at once, the contractual employee who had completed the requisite period of time and had become eligible was qualified to be considered for regularization.

20. In this view of the matter, while rejecting the petitioner's plea for reinstatement in service which cannot be allowed since the same is forbidden from being taken up in constitutional jurisdiction, the other prayer of the petitioner pertaining to being considered for regularization is allowed and the respondents are directed to consider the petitioner for regularization in terms of the Regularization of Service Act, 2018 on the basis of what has been discussed above and without being influenced by the Disciplinary proceedings or their result. The petitioner shall be heard properly while considering his case for regularization.

21. It must be added here that the only reason why interference has been made in the present matter is because of the presence of a statutory framework i.e. Act of 2018. Since the petitioner has prayed for the observance and implementation of the provisions of Act of 2018 and since the aim of judicial review is to ensure legality in governmental action, the present petition has been entertained. In **Workers Welfare Board v. Raheel Ali Gohar** (2020 SCMR 2068), it has been provided as under:-

> "6. In any case, this Court in recent judgments has unequivocally held that contractual employees have no automatic right to be regularized unless the same has specifically been provided for in a law. Most recently, in a judgment of a bench of this Court in Civil Petitions Nos.

4504 to 4576, 4588 and 4589 of 2017 dated 08.01.2013 this court has held that:

> *"Having heard the learned counsel for the parties, we find that contractual employees have no right to be regularized until there is a law provided to that effect and we are not confronted with any such legal proposition".*

22. It is, therefore, that the petition is partly allowed.

(MUHAMMAD SHAN GUL)
JUDGE

Approved for reporting

Judge

"A.Rehman"