

\$~

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Reserved on: 03.10.2018

Pronounced on:15.11.2018

+

W.P.(C) 4116/2015

DR. JACQUELINE JACINTA DIAS & ORS. Petitioners

Through: Mr. Sachin Datta, Sr. Adv. with
Ms. Ankita Patnaik and Ms. Rijuta
Mohanty, Advs.

versus

UNION OF INDIA & ORS. Respondents

Through: Ms. Barkha Babbar and Mr. Het
Shah, Advs. with Lt. Col. Navin Kaul, AD
Camps for respondents.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K.CHAWLA

S.RAVINDRA BHAT, J.

1. The petitioners seek appropriate relief for quashing of the merit list dated 08.12.2004 as well as the appointment orders issued to the respondent nos.4 to 40 (hereafter as “contesting respondents”) to the post of Oral Dental Surgeons in the Army Dental Corps.

2. On 12.07.2014, an advertisement was published, for recruitment to the Army Dental Corps on Short Service Commission (SSC) basis; the total vacancies advertised were 37 in the Dental Corps. The advertisement stipulated that the candidates had to possess BDS/MDS

qualifications with minimum 55% marks in the final year of the bachelor's course (BDS) from a college and university recognized by the Dental Council of India. The candidates should have completed one-year rotary internship recognized by DCI by 31.08.2014, as well. Furthermore, only those in possession of the two prescribed qualifications and were also in possession of Permanent Dental Registration Certificate valid up to 31.12.2014 (and were less than 45 years as on that date), were eligible.

3. It is not in dispute that the petitioners did apply and were eligible for consideration. Following previous practice, based on procedures and in accordance with prevailing instructions, apparently, the applications received in response to the advertisement were scrutinized by the Board and shortlisted. Finally, 556 candidates were called for interview. A merit list based upon the results of interview (held between 10.11.2014 and 15.11.2014) was compiled. The final merit list of 66 successful candidates was published eventually sometime in January, 2015 and the successful candidates- based upon their position in the merit list were appointed to the 37 vacancies.

4. The petitioners complain of arbitrariness and discrimination in the selection procedure followed by the respondents (hereafter referred to compendiously as "Indian Army"), especially of gender discrimination. They urged that despite their high academic achievements (inasmuch as they scored high percentage of marks in the University examinations, and also that one of them had also published papers to her credit) they were not selected. The allegations leveled by the petitioners are that the procedure adopted and the approach of the

selection board was such that, as against the large number of women candidates, only a small percentage (33%) or 22 out of 66 women candidates were shortlisted. Of these only 10% were selected. It is therefore, alleged that it facially points to gender discrimination.

5. It is pointed out in this regard that the first petitioner was ranked 48th; the second was at the 65th position and the third was at the 63rd position. The merit list consisted of 33 men and only 4 women and even the women so selected were lower in terms of their academic achievements than the petitioners. It was next alleged in the pleadings that though the respondents published the merit list on 19.02.2015, they claim that it was approved on 08.12.2014 and that shockingly even before such publication, appointment letters were issued to many candidates.

6. The respondents denied allegations with respect to the gender discrimination or any kind of bias. In the counter affidavit filed, it was urged that the procedure followed for selection of candidates for SSC in the Army Dental Corps conformed to what were described in Appendix 'B' to the Central Government letter of 10.06.1996 – as amended on 11.12.2000. According to Appendix, all candidates who were interviewed by the Recruitment Selection Board, marked firstly for oral professional test (with a maximum marks of 200) and a personality test for which the maximum marks were 100. Furthermore, it is pointed out that the composition of the Board too was prescribed; the Chairman had to be an officer of the rank of Major General to be detailed by the Directorate General of Armed Forces Medical Services (DGAFMS); there were to be four other members including representatives of the

DGAFMS; representative of Adjutant General and two other members in the form of Dental Advisors and classified specialists not below the rank of Colonel. In addition, there was to be a representative of the Directorate General of Health Services i.e. Civilian Dental Officer. The Secretary to the Board was to be DDGDS/JDDS.

7. It was submitted that in the present case, since there were 556 candidates, Indian Army constituted two selection Boards whose composition confirmed to the terms of the instructions of 10.06.1996. These two Boards held interviews of candidates on 6 days i.e. 10th to 15th June, 2014. It is further stated that the list was approved by the DGAFMS on 08.12.2014 and candidates selected were sent to undergo medical examination. Of the 66 candidates, 16 were declared unfit. 15 candidates appealed. Out of these 15 candidates, 8 had been placed among the top 37 positions in the merit list. The final merit list approved was strictly according to the final merit after the results of the medical board -keeping in mind the circumstance of the 8 candidates who had appealed 6 candidates were declared medically fit; one was declared unfit and had applied for the review medical board and the other did not report for the appellate medical board (and therefore, was declared unfit in absentia). Consequently, 6 more candidates within the first 37 positions were eligible for appointment.

8. It is stated that of the original 29 candidates offered Commission, three failed to report. These vacancies and the one vacancy of the candidate who did not report, were filled by those placed at merit positions 38, 39, 40 and 41. Subsequently, another candidate who had applied for review medical board was declared fit by the

review medical board on 02.03.2015 and appointed. She however, did not report and that vacancy was offered to merit list candidate on Sr.No.42 on 17.04.2015.

9. It was urged on behalf of the Indian Army that the procedure adopted and the results declared were strictly in conformity with the prescribed norms and that the process was neither tainted by arbitrariness nor can be challenged on the ground of gender discrimination.

10. After the filing of the counter affidavit, the petitioners sought and were granted leave to amend the pleadings. In the amended pleadings, it was reiterated that the allegations with respect to arbitrariness were repeated as are the allegations with respect to the “gender bias” and discrimination. The publication of the selection/merit list on 15.02.2015, after several candidates were appointed, is challenged as arbitrary.

11. Besides these, it is alleged by the petitioners as follows:

“13A: It is submitted that though while inviting applications the Petitioners were informed that the candidates found eligible will be shortlisted based on their final year BDS Marks and attempts taken in final year BDS and the short listed candidates would be called for interview and subsequently while letter dated 16.10.2014, the Petitioners were asked to produce their BDS marks-sheets alongwith BDS/MDS Degree Certificate at the time of the interview and therefore they were never informed that the final selection would be based only on their performance in the interview and their personality test during the interview and the Petitioners have now from the Counter Affidavit

learnt that the entire selection was based on the marks in the interview which were very subjective and no weightage has been given either to their qualifications or their academic achievements.

13B. It is further submitted that from perusal of the Counter Affidavit, the Petitioners have also learnt that 556 candidates had been short listed for interview and out of the said 556 candidates, there were 335 girls and 221 boys. That after the interview the Respondents had made a merit list of 66 candidates which included 44 boys and 22 girls but the Respondents have strategically and deliberately placed most of the girls lower in the merit as they were aware that there were only 37 vacancies and therefore finally only 4 girls have been selected out of the total 37 candidates selected for grant of SSC in the Army Dental Corps. For kind perusal of this Hon'ble Court the Petitioners are giving herein in a tabular for the number of girls vis-a-vis boys at each stage:

<i>Selection stage</i>	<i>No. of Boys</i>	<i>% of Boys</i>	<i>% of Girls</i>	<i>Ratio</i>
<i>Total application of 556</i>	221	39.75 %	335	60.25 %
<i>Short listing of 66</i>	44	67.00 %	22	33.00 %
<i>Final Merit of 37</i>	33	89%	04	11%
<i>The % of Girls kept decreasing at each stage of selection process while the 1% of boys kept increasing indicating bias to women gender.</i>				

It is submitted that the aforesaid fact in itself show that the Respondents have deliberately ousted the girls despite their merit and have in fact misused the marks for interview.

13C. The Petitioners have also now learnt that the interviews for selection of candidates for grant of SSC was conducted by two parallel boards which comprised of different members and had given marks to all the candidates with pencil and thus, the selection of candidates is illegal, discriminatory and arbitrary as the candidates have been evaluated on different parameters by two different boards.”

12. The respondents have denied the allegations and specially the new pleadings. The Indian Army denies that the interview was for a very short duration and essentially subjective; reiterates that the two Boards assessed the candidates on the basis of the Central Government's instructions of 10.06.1996, as amended subsequently. The allegations of gender discrimination especially that the Indian Army strategically and deliberately placed most of the women lower in the merit list, is denied.

13. It is pointed out in the counter affidavit of the amended writ petition that from 2015, the Central Government adopted different standards; instead of basing their eligibility exclusively on the marks obtained in the degree and post graduation courses, having regard to the diversity of standard of marking practices, the Indian Army itself conducts a scrutiny test for the purpose of shortlisting candidates. It is pointed out that for the subsequent recruitment, as against 23 vacancies, 1256 applications were received of which, 41.48% (521) were of male applicants and the balance 58.52% (735) were of female applicants. If the previously adopted procedure were applied, the total shortlisted candidates in the ratio of 1:10 (230) would have been in the ratio of

74.78% : 25.22% as between female and male candidates. However, based upon the performance in the scrutiny test, the ultimate picture was that 123 male candidates were shortlisted as against 107 female candidates.

14. It is emphasized thus that merely succeeding in the University examination and obtaining higher percentage of marks *per se* is inconclusive as to the professional competence of merit for any given candidate – male or female.

15. Mr. Sachin Datta, learned senior counsel for the petitioners, reiterated the submissions and argued that the merit list *per se* discloses predominant male bias and that furthermore the approach of the Indian Army in splitting the selection boards into two, is not borne out by a plain reading of 10.06.1996 circular. It is emphasized that apart from the issue of gender discrimination and arbitrariness, the procedure adopted by constituting two boards has resulted in palpable prejudice inasmuch as the candidates were judged on the basis of the predereliction of individual members of disparate boards.

16. Learned Senior Counsel urged that the instructions in the Central Government's letter uniformly use the expression "the Board" which meant one Board and not a plurality of bodies. It was furthermore urged that the apparent neutrality sought to be projected by the Indian Army of participation by an outside agency i.e. representative of the DGAFMS was inconsequential given that he or she was a lone member. It was further urged that there was hardly any female representation or at least none was mandated by the instructions and that the court should take cognizance of these circumstances and

the past record of the Indian Army in showing hostility to entry of women to the institution.

17. Ms. Barkha Babbar, learned counsel for the respondents in compliance with the previous directions of the court produced the relevant files and the proceedings of the Selection Commission. It was highlighted that the petitioners' allegation with respect to gender bias and arbitrariness are unfounded and unsupportable by the record. She reiterated that merely because a candidate is successful and obtains higher percentage of marks in the university or board examination, does not *per se* ensure that there is sufficient proficiency or domain knowledge of the concerned subject. It is to precisely guard against the entry of such mediocre candidates that a comprehensive two stage test to determine professional competence and also personality traits, is followed. It was contended that being a time-tested procedure, its application cannot be challenged merely because the results seem to project an imbalance which can then conveniently be portrayed as gender discriminatory approach by the Indian Army.

18. Learned counsel relied upon the tabular statement disclosing the results of pre-2015 selection process on the one hand and the post-2015 selection process to say that the boards adopted an independent criterion uninfluenced by the gender and other consideration. What is important is the knowledge and competence of a candidate, displayed by her during the course of interview for which she would be appropriately marked as against a total of 200 marks. Likewise, depending on the answers to queries made by the members of the Board in the personality test, she would be appropriately assessed and

evaluated against the maximum marks of 100.

19. Learned counsel relied upon the decisions of the Supreme Court reported as *Madan Lal v. State of Jammu and Kashmir*, (1995) 3 SSC 486; *Dhananjay Malik & Ors. v. State of Uttaranchal & Ors.*, (2008) 4 SCC 171 and *Manish Kumar Shahi v. State of Bihar & Ors.*, (2010) 12 SCC 576.

Analysis and conclusions

20. The Guidelines/instructions of the Central Government of 10.06.1996 to the extent they are relevant are extracted below:

“CONFIDENTIAL
No 22623/DG AFMS/DENTAL/1141/96/D(Med)
Government of India
Ministry of Defence
New Delhi, the 01/June, 1996

To

The Director General
Armed Forces Medical Services
New Delhi (50 copies)

Subject:PROCEDURE TO BE FOLLOWED BY THE
AD CORPS SELECTION BOARD FOR
SELECTION OF OFFICERS FOR
APPOINTMENT TO COMMISSION IN THE
ARMY BENTAL CORPS.

Sir,

*In supersession of Government of India, Ministry
of Defence letter No.22623/DG
AFMS/DENTAL/4910/D(Med) dated 27 Oct, 1972,*

I am directed convey the approval of the President to the procedure laid down in Appendices 'A' and 'B' to this letter being followed by the AD Corps Selection Board for selection of candidates for appointment to commission in the Army Dental Corps, as detailed below:

a) Procedures for Tests and Interviews for grant of Permanent Commission in the AD Corps through AD Corps Examination and Departmental Examination. ...Appendix A

b) Procedure for selection of civilian candidates for grant of short service commission. ...Appendix B

Yours faithfully

(G.S. Vindi)

(Under Secretary to the Government of India)

xxx

xxx

xxx

CONFIDENTIAL

*Appendix 'A' to Government of India, Ministry of Defence,
LetterNo.22623/DFMS/DENTAL/1141/96/D(Med)
dated 10-6-96*

**PROCEDURE FOR TESTS AND INTERVIEWS
FOR GRANT OF PERMANENT COMMISSION
IN THIS CORPS THROUGH AD CORPS
EXAMINATION AND DEPARTMENTAL
EXAMINATION**

Tests and Marks

1. *Civilian Dental Graduates from open market with minimum 60% of marks in Final BDSL as well as serving Short Service Commissioned officers will be eligible to take this examination, if they satisfy the conditions prescribed in Army Instructions No.57/78, as amended. In the case of Serving SSC officers no relaxation of age on account of present spell of AD Corps service will be admitted for the grant of direct Permanent Commissioner. After grant of permanent Commission both open market candidates as well as SSC officers will be governed by the provisions of the Army Instruction ibid. the procedure to be followed by the AD Corps Selection Board for Clinical, Oral Professional Tests and Interviews and the allotment of marks will be as under:*

a. Clinical Test: This will consist of the following:

i. Long Cases- The candidates will be required to examine, diagnose, and treat three cases, one each in oral surgery (including EXODONTIA), Operative Dentistry (including Endodontic) and Dental Prosthetics. Each case will carry 75 marks and time allotted is 15 minutes for each case.

Total marks: 225

Total time: 2 Hrs & 15 mts

ii. Short cases- Candidates will be required to examine, diagnose and discuss two cases on each in Periodontia and Orthodontia. Each case will carry 25 marks and time allotted is 30 minutes for each case.

Total marks: 50

Total time: 1 Hour

iii. Specimens/Skiagrams- Candidates will be required to interpret Dental Pathological conditions from Skiagrams and Pathological

specimens. Total marks 25 and time allotted is 15 minutes.

Total time of para 1(a),(i),(ii) & (iii) – 3 ½ hrs

Total time of Para 1(a) (i), (ii) & (iii) – 300”

21. Appendix ‘A’ prescribes *inter alia* that the personality test – to which a maximum of 100 marks are permissible should be assessed based upon qualities of the intellect (quickness in grasp and response; logicity; capacity to deal with an intricate problem)– 20 marks; social qualities (cheerfulness; spirit of co-operation tact; adjustability to company) – 20 marks; dynamic qualities (determination; forcefulness; energy for work; initiative) – 20 marks; leadership (calmness under stress; capacity to infuse morale; persuasiveness; assertiveness) – 20 marks. Appendix ‘B’ to the letter is extracted below :

“CONFIDENTIAL

Appendix ‘B’ to Government of India, Ministry of Defence,

LetterNo.22623/DFMS/DENTAL/1141/96/D(Med) dated 10-6-96

PROCEDURE FOR SELECTION OF CIVILAN CANDIDATES FOR GRANT OF SHORT SERVICE COMMISSION IN THE ARMY DENTAL CORPS

Tests And Marks

1. For grant of Short Service Commission in the Army Dental Corps, Civilian candidates having BDS/Post Graduate Degree will be required to appear before the Selection Board for viva voce/Interview only. They will not be required to appear in the written examination.

2. All candidates will be interviewed by the AD Corps Recruitment Selection Board as mentioned in Para 1(b) of Appendix 'A' and given marks under the following heads :-

a) Oral Professional Test
Max. Marks

The Chairman and other Medical/Dental 200 members of the Board will ask questions in Professional subjects.

Each examiner will mark independently and average will form the final marking.

b) Personality Test

Details vide Annexure 'A' to Appendix 'A' 100
The Chairman and non-medical/Dental member of the Board will assess the candidates and mark independently.
The average will form the final marking.

Note : Assessment of the candidate will be done independently by each member of the Board both in respect of the Personality as well as Professional Oral Tests.

Merit List

3. The Selection Board Proceedings along with the Merit List will be submitted to DGAFMS for his approval.

4. All candidates will be finally placed on a merit list according to the marks obtained by them out of a total of 300 marks and commissions will be granted to the candidates from the above list according to the number of vacancies subject to their being medically and otherwise fit."

22. The letter of 10.06.1996 described the composition of the Selection Board. The relevant extract of the letter is as follows:

“b) The composition of AD Corps Selection Board will be as under:

Chairman - An officer of the rank of Maj Gen to be detailed by DGAFMS

Members - 1. Rep of DGAFMS

2. Rep of AG

3. Dental Adviseres/

4. Classified Specialists

5. Rep of DGHS (Civilian Dental Officer)

Secretary - DDGDS/JDDS

Quoram: Chairman, Rep of AG, Rep of DGAFMS and Dental Adviser/Classified Specialist.”

23. It is apparent, therefore, that the Indian Army had established the procedure for evaluation of candidates. The composition of the Board indicates that the authorities strived to bring about diversity in the manner of considering the worth of candidates. The selection procedure, it is noticeable, is two pronged: eligibility is based on the marks obtained by the candidates in the College or University examination; a prescribed minimum percentage is stipulated; in addition, candidates had to be registered with the Dental Council. Now, in this case, the respondents received a large number of applications; 556 of them were deemed eligible. The conduct of personal evaluation, whereby the candidates were to be marked for professional attainments (oral professional test) for which maximum 200 marks were prescribed

and a personality test – for which 100 marks were prescribed.

24. This court proposes first to deal with the complaint of gender bias and consequent discrimination against women, in the selection process and procedure. The data and facts made available to the court, on a reading of the files would disclose that of a total of 556 candidates, 441 appeared for the interview for the post, conducted between 11 and 15 November, 2014. Of the 441 candidates, 146 men and 295 women (i.e. a ratio of 33:67). Every candidate was marked out of a total of 200 marks (for Professional Skills) and 100 marks for Personality. For assessment, the pool was divided between two Boards - Board 1 (219 candidates) and Board 2 (222 candidates).

25. The court's analysis (of the data) for convenience, is to proceed with a tabular chart which divides the marks under each criterion into marking ranges - Professional Skills: 40-75, 76-100, 101-125, 126-150, 151-175, and 176-200; and for Personality: 25-50, 51-75 and 76-100; for each of the Boards, they have gender ratio or spread, i.e. the number of men and women marked under each range to check if it was apparent that men were marked significantly higher as compared to women leading to a discrimination between the two genders.

26. The first Board (No 1) assessed 219 candidates, amongst which there were 77 men and 142 women (35: 65). Under Professional Skills, of the men, 27% were marked in the range of 40-75, 44% in 76-100, 12% in 101-125, 14% in 126-150, 3% in 126-150 and none in 176-200. Of the women candidates, 30% are in 40-75, 60% in 76-100, 8% in 101-125, 3% in 126-150 and none in either 151-175 or 176-200. While assessing the personality of the individuals, Board No. 1 had marked

71% men between 25-50, 28% between 51-75 and 1% between 76-100 whereas, 88% women were marked in the range of 25-50, 12% in 51-75 and none in 76-100.

27. Board No. 2, i.e. the second selection board assessed 222 candidates, amongst which there were 69 men and 153 women (31: 69). Under Professional Skills, out of the men, 55% were marked in the range of 40-75, 13% in 76-100, 10% in 101-125 and 22% in 126-150. Out of the women, 71% in 40-75, 24% in 76-100, 3% in 101-125 and 0.65% each in 151-175 and 176-200. Board No. 2, while assessing under the head “Personality assessment” evaluations show that of the men, 70% were marked in the range of 25-50 and 30% in 51-75. Out of the women, 95% were marked in the range of 25-50 and 5% in 51-75.

28. The above factual narrative, is based on the statistics, prepared on the basis of the Indian Army’s records including the results compiled by the two boards, which is, for convenience, presented in the following tabular manner, for the two Boards:

TABLE A: BOARD NO. 1

Category	Professional Skills						Personality		
	40-75	76-100	101-125	126-150	51-75	176-200	25-50	51-75	76-100
Male	21	34	9	11	2	0	55	21	1
Female	42	85	11	4	0	0	125	17	0
% Male	27.27%	44.16%	11.69%	14.29%	2.60%	0	71.43%	27.27%	1.30%
% Female	29.58%	59.86%	7.75%	2.82%	0	0	88.03%	11.97%	0
Total present	219								
Men	77								
Women	142								

TABLE B: BOARD No. 2

Category	Professional Skills						Personality		
Marks	40-75	76-100	01-25	26-50	51-75	76-00	25-50	51-75	76-100
Male	38	9	7	15	0	0	48	21	0
Female	109	37	5	1	1	0	146	7	0
% Male	55.07%	13.04%	10.14	21.73	0	0	69.57	30.43	0
% Female	71.24%	24.18%	3.28%	0.65%	0.65%	0	95.42%	4.58%	0
Total	222								
Total Men Present	69								
Total Women Present	153								

TABLE C: OVERALL POSITION

Category	Professional Skills						Personality		
Marks	40-75	76-100	01-125	26-150	51-175	76-00	25-50	51-75	76-100
Male	59	43	16	26	2	0	103	42	1
Female	151	122	16	5	1	0	271	24	0
% Male	40.41%	29.45%	10.96%	17.81%	1.37%	0	70.55%	28.77%	0.68%
% Females	51.19%	41.36%	5.42%	1.70%	0.34%	0	91.86%	8.14%	0
Total Students Present	441								
Total Male Candidates	146								

Total Female Candidate s	295								
-----------------------------------	-----	--	--	--	--	--	--	--	--

29. The petitioners here complain of bias and some kind of indirect discrimination. This court, recollects, in this context, a recent decision of the Division Bench of the court in *Madhu & Anr v Northern Railways* 2018 SCC OnLine Del 6660 (judgment delivered on 17-01-2018), which had dealt with the impact of indirect discriminatory practices:

“The Constitution in Articles 15 and 16 recognises the principle that certain groups have been historically disadvantaged and that post the enactment of the Constitution, actions of the State that discriminate against women (not falling within the exceptions of Article 15(4) and Article 16(4) are constitutionally untenable. Thus, while affirmative action to secure the interests of women is allowed, the Constitution, irreproachably, does not permit discrimination against women. This understanding has been articulated by the Supreme Court in Jeeja Ghosh v. Union of India (2016) 7 SCC 761 where the court stated,

“The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by

introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society.”

17. Since the actions of Northern Railways result in denial of benefits and rights to this special class, it must be closely examined to see if the actions, or their effect, are discriminatory. The Northern Railways contends that the Appellants are not denied the medical card because they are women, but rather because their husband and father had not made the requisite declaration. However, this explanation is not enough. It is not sufficient to say that the reasoning of Northern Railways did not intentionally discriminate against the Appellants because they were women. Law does not operate in a vacuum and the reasoning and consequent decision of Northern Railways must be examined in the social context that it operates and the effects that it creates in the real world. Even a facially neutral decision can have disproportionate impact on a constitutionally protected class. This has been recognised by the Supreme Court in Anuj Garg v. Hotel Association of India (2008) 3 SCC 1 where the Court stated,

“Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects [...] 51. No law in its ultimate effect should end up perpetuating the oppression of women.”

18. Similar observations were made by the Supreme Court in the landmark case of R.C Cooper v. Union of India 1970 SCR (3) 530. The Court stated,

“[...] To hold that the extent of, and the circumstances in which, the guarantee of protection is available depends upon the object of the State action, is to seriously erode its effectiveness. Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the Individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion, in our judgment, is inevitable that the validity of the State action must be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all their dimensions.”

[...] it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim: it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.”

19. Thus, the touchstone of validity for State action is not the intention behind the action, but rather the actual impact and effect on a citizen's life. This is clearly seen by the observations by the Supreme Court in *Maneka Gandhi v. Union of India* 1978 SCR (2) 621 where the Court noted,

“[...] In testing the validity of the state action with reference to fundamental rights, what the

Courts must consider is the direct and inevitable consequence of the State action.”

20. This Court itself has recognised that actions taken on a seemingly innocent ground can in fact have discriminatory effects due to the structural inequalities that exist between classes. When the CRPF denied promotion to an officer on the ground that she did not take the requisite course to secure promotion, because she was pregnant, the Delhi High Court struck down the action as discriminatory. Such actions would inherently affect women more than men. The Court in Inspector (Mahila) Ravina v. Union of India W.P(C) 4525/2014 stated,

“A seemingly “neutral” reason such as inability of the employee, or unwillingness, if not probed closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here: though CRPF asserts that seniority benefit at par with the petitioner's colleagues and batchmates (who were able to clear course No. 85) cannot be given to her because she did not attend that course, in truth, her “unwillingness” stemmed from her inability due to her pregnancy.”

21. The principle that a facially neutral action by the State may disproportionately affect a particular class is accepted across jurisdictions in the world. In Europe for instance, the principle has received statutory recognition. Council Directive 76/207 (9 February, 1976) states,

“the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status...”

22. Council Directive 2000/78/EC (27 February, 2000) defines the concept of 'indirect discrimination' as,

"indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

23. It is also worth paying attention to the case of *Bilka-Kaufhaus GmbH v. Webber von Hartz* (1986) ECR 1607. Bilka was a supermarket that paid all employees who had worked full-time for more than 15 years a pension. Mrs. Webber worked part-time at Bilka for over 15 years, but was denied the pension because she was only a part-time employee. Mrs. Webber alleged that the requirement to be a full-time employee before securing the pension was discriminatory against women, since women were far more likely than men to take up part-time work, so as to take care of family and children. The Court noted,

"Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex."

24. The Canadian Supreme Court has also espoused an understanding of "disparate impact", where the touchstone to examine the validity of an allegedly discriminatory action is whether or not the effect of the action has a disproportionate

impact on a class of citizens. The Court in Andrews v. Law Society of British Columbia [1989] 1 S.C.R 143 noted,

“Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[...] The words “without discrimination” require more than a mere finding of distinction between the treatment of groups or individuals. These words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage. The effect of the impugned distinction or classification on the complainant must be considered.

[...] I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.”

25. The Canadian Supreme Court had similar observations in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.,

[1985] 2 S.C.R 536 where the court noted that discrimination arises when:

“It arises where an employer [...] adopts a rule or standard [...] which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.”

26. Thus, the Court concluded there was no requirement to show that the employer had the intention to discriminate against the complainants because of a constitutional prohibited ground, merely that the effect on the constitutionally protected class of people was adverse.”

30. The reasoning in *Madhu* appears to have been approved by the Supreme Court, subsequently, in *Navtej Singh Johar v Union of India* 2018 SCC Online (SC) 1350, in the judgment of Dr. Justice D.Y. Chandrachud (under the heading “E.I Facial neutrality: through the looking glass” especially Paragraph 396). The judgment noticed and relied upon the same judgments mentioned and relied on in *Madhu* (supra).

31. Having recognized that indirect (or, if one may so characterize it, low intensity below the radar and seemingly imperceptible) discrimination is proscribed, it is unclear as to what is the appropriate test or procedure, to discern it. In *Essop & Orsv Home Office (UK Border Agency)* [2017] UKSC 27, a recent judgment of the UK Supreme Court, the disproportionate effect of a uniform criteria, i.e. the

Core Skills Assessment in a public servant's career, was the subject of scrutiny, in the context of a challenge by a group of employees. The test is best described in the court's words, in its judgment:

“In 2010, a report commissioned by the Home Office from a firm of occupational psychologists, Pearn Kandola, revealed that Black and Minority Ethnic (BME) candidates and older candidates had lower pass rates than white and younger candidates. All non-white candidates were pooled into a single BME grouping, although a more detailed breakdown of ethnicity was available, in order to maximise the size of the group and thus the reliability of the analysis. (Whether this is an appropriate approach is not in issue before this Court but was left open by the Employment Tribunal.) The BME pass rate was 40.3% of that of the white candidates. The pass rate of candidates aged 35 or older was 37.4% of that of those below that age. In each case, there was a 0.1% likelihood that this could happen by chance. Of course, they did not all fail. No-one knows why the proportion of BME or older candidates failing is significantly higher than the proportion of white or younger candidates failing.”

The UK Supreme Court then went on to describe the prevalent definitions of indirect discrimination, under the European directives and the UK Equality Acts and analysed the position as follows:

“20. In 2001, a new section 63A was added to the Sex Discrimination Act to cater for this in relation to particular fields of activity covered by European Union law. A new section 54A was added to make equivalent provision in the Race Relations Act, although not yet required by European law

(although it soon would be, by article 8 of Council Directive 2000/43/EC, referred to below). Section 136 of the Equality Act 2010 (above, para 6) has extended the shifting burden of proof to all activities covered by the Act (although not to criminal proceedings).

21. The next European definition of indirect discrimination came in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origins (“the Race Directive”). Article 2(2)(b) provided that:

“indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”

Thus it was sufficient that the PCP “would put” such persons at a particular disadvantage when compared to others. Article 8 made the same provision for shifting the burden of proof as had the earlier Directive in relation to sex. The same definition of indirect discrimination was adopted in article 2(2)(b) of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation on grounds other than sex or race, in article 2(b) of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services and article 2(1)(b) of Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men

and women in matters of employment and occupation (recast).

22. In 2003, both the Sex Discrimination Act and the Race Relations Act were amended to apply this new concept of indirect discrimination to specified fields of activity covered by European Union law. Thus a new section 1(2)(b) in the 1975 Act provided that, for those purposes, a person discriminated against a woman if

“he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but (i) which puts or would put women at a particular disadvantage when compared with men, (ii) which puts her at that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.”

Equivalent provision was made in a new section 1(1A) of the 1976 Act. That is the same concept of indirect discrimination as has now been applied to all the areas of activity covered by the Equality Act 2010.

23. It is instructive to go through the various iterations of the indirect discrimination concept because it is inconceivable that the later versions were seeking to cut it down or to restrict it in ways which the earlier ones did not. The whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment. All the iterations share certain salient features relevant to the issues before us.

24. The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation

of the reasons why a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them

cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

*26. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them “context factors”). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between “women’s jobs” and “men’s jobs” or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in *Homer v Chief Constable of West Yorkshire* [2012] UKSC 15; [2012] ICR 704, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are “but for” causes of the disadvantage: removing one or the other would solve the problem.*

27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The

later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the “particular disadvantage” might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance

of those correlations. But a correlation is not the same as a causal link.

29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

32. From the analysis of results, in the tabular charts extracted above, it is apparent that under the head "Professional Skills", of male candidates, 40% were marked in the range of 40-75, 30% in 76-100, 11% in 101-125 and 18% in 126-150 and 1% in 151-175. Of the women candidates, 51% were marked in the 40-75, 41% in 76-100, 5% in 101-125 and 2% in 151-175 and 0.3% in 176-200. Under the head "Personality", of the male candidates, 70% were marked in the range of 25-50 and 29% in 51-75 and 1% in 76-100. Of the women candidates, 92% were marked in the range of 25-50 and 8% in 51-75. Whereas

women candidates in greater number scored between 76-100 than men, in professional skills, a few men scored higher (17.10% candidates) in the 126-150 marks range, whereas women scored in lesser number (1.7% of the candidates). In the immediately lower range of marks (101-125), one finds the same number (16) of candidates, whereas it translates into a greater percentage for men, because they are fewer in number than women candidates.

33. On a conspectus of the data – and the overall results, with respect to Professional Skills, men and women were marked or evaluated similarly with the maximum variation of about 10% under each range. With respect to Personality, the maximum variation is about 20%. These variations appear too low to conclusively prove, or establish *prima facie*, the existence of gender bias.

34. This court is conscious of the fact that indirect discrimination is harder to prove or establish. Hidden biases, where establishments or individuals do not overtly show bias, but operate within a discriminatory environment therefore, is hard to establish. Yet, to show such bias – especially, given that the Board comprised of many members, one of whom was a civilian and ranking Central Director General Health Services Officer, there should have been something in the record- such as pattern of marking, or predominance of some element, manifesting itself in the results declared. This court is unable to discern any; Nor is there any *per se* startling consequence apparent from the granular analysis of the results carried out. Furthermore, equality jurisprudence in India has not yet advanced as to indicate clear norms (unlike legislative rules in the EU and the UK) which guide the

courts. Consequently, it is held that the complaint of gender discrimination or arbitrariness is not made out from the record.

35. The second issue is whether the Indian Army violated its guidelines, and thereby acted arbitrarily, in setting up two selection boards (and consequently disparate nature of results) for drawing the merit list. The letter of 10.06.1996, which requires the setting up of Selection Boards while describing the composition of the Board, states that “*b) The composition of AD Corps Selection Board will be as under*”. The petitioners’ grievance that several selection boards leading to dissimilar consideration of merit, appears facially merited. Intuitively, the reaction of any individual would be that if two individuals are subjected to appraisal by two different selection boards, there would be disparity in result. Yet, a deeper analysis would reveal that it need not be the inevitable inference. In University examinations, especially in humanities where the examination process involves appraisal of tens of thousands of candidates, multiple examiners evaluate marksheets. These are acceptable universally. The reason for such a procedure, involving multiple examiners is obvious: requiring one examiner to mark all answer sheets places a near impossible burden, which would break down the examination system.

36. At first glance, setting up two selection panels for a total of 441 candidates seems to be unjustified. However, what this court is to be conscious of is that the committee/panel is a multi-member one; to ensure that all seven were available at a stretch of 5 days was a logistical challenge. If the same committee were to have interviewed all the 441 candidates, quite possibly its members would have been away

from their normal duties for about 10 days. If one sees that each panel spent five working days (assuming they functioned for 8 hours) would have meant that each day they had 480 minutes (8 hours). Five days would have meant that each committee spent 40 hours. Given that both panels interviewed about 220 candidates each, the time spent on each candidate would have been just over 10 minutes. In addition, each candidate underwent personality assessment, which was a separate process. The intense scrutiny of these candidates would have meant that the panel would have spent at least two working weeks, if the task had been performed by one body. Given these logistical challenges, the disadvantage of disparate evaluations was in one way offset by the fact that each committee comprised of seven members. This eliminated the possibility of arbitrariness and bias.

37. Another aspect or reality is that whether one or more, if an interview process is spread out inordinately (in terms of time) even one selection panel would struggle to maintain the same standard of evaluation- it would be difficult to comparatively evaluate candidates especially if one batch of say 20 are considered on the first day, and the last batch of 20 are considered 10 days later. In other words, there would be dissonance in measurable standard in regard to evaluation of candidates, even by the same selection panel.

38. In view of the above consideration, this court is of the opinion that mandating more than one selection board to carry out *viva voce* evaluation was, in the facts of this case, not arbitrary.

39. The above findings would be dispositive of the present petition. However, this court is of the opinion that the respondents should

examine that given the present policy of holding a professional written examination, some weightage to that exam should also be considered for the purpose of final selection (even while retaining a minimum percentage weightage for viva-voce evaluation). This would be in consonance with the judgment of the Supreme Court in *Ajay Hasia v. Khalid Mujib* 1981 (2) SCR 79 and subsequent rulings which have followed it. This court is also of the opinion that as a rule, the interview panel should also comprise a certain minimum number of female members. The Central Government shall consider the feasibility of these issues and make appropriate policy changes, as the need arises.

40. In view of the findings, the court is of opinion that the challenge to the selection process on the grounds urged by the petitioners cannot succeed; the writ petition therefore, fails and is dismissed.

S. RAVINDRA BHAT
(JUDGE)

A.K.CHAWLA
(JUDGE)

NOVEMBER 15, 2018