



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

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Date of decision: March 07, 2024

+ W.P.(C) 3525/2024

(52) VIKASH DAHIYA & ORS.

..... Petitioners

Through: Mr. Anoop Kumar, Ms. Neha Jaiswal,
Mr. Shivam Kumar and Ms. Shruti
Singh, Advocates through VC

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Ripu Daman Bhardwaj, CGSC
with Mr. Kushagra Kumar, Mr.
Abhinav Bhardwaj and Mr. Vinod
Tiwari, Advocates for UOI with
DC/JAG Deeptiman.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE SAURABH BANERJEE

V. KAMESWAR RAO, J. (ORAL)

CM APPL. 14335/2024

Exemption allowed subject to all just exceptions.

Application is disposed of.

W.P.(C) 3525/2024, CM APPL. 14335/2024 (for stay)

1. This petition has been filed by the petitioners with the following prayers:

*“Under the circumstances, it is most respectfully prayed that
this Hon’ble Court may be pleased to:*



- I. Issue a writ in the nature of certiorari or an appropriate writ(s)/order (s)/direction(s) quashing the Impugned corrigendum dated 05.01.2024 to S.O No.04/2017 issued by Directorate General, ITBP; and*
- II. Issue a writ in the nature of certiorari or an appropriate writ(s)/order (s)/direction(s) quashing the Impugned EMAIL MSG dated 29.02.2024 issued by DIG(OPS) IS DTE GEN ITBP; and*
- III. Issue a writ in the nature of mandamus or an appropriate writ(s)/order(s)/direction(s) commanding the concerned respondent authority to strictly adhere to Standing Order No. 04/2017 and Standing Order No.02/2023 for the purpose of selection and deployment of ITBP troops for Security of Indian Missions abroad (Afghanistan); and*
- IV. Issue a writ in the nature of mandamus or an appropriate writ(s)/order(s)/direction(s) commanding the concerned respondent authority rectify the Impugned E-MAIL MSG dated 29.02.2024 issued by DIG(OPS) IS DTE GEN ITBP by to strictly adhering to Standing Order No. 04/2017 and Standing Order No.02/2023; and*
- IV. Confirm rule nisi after hearing the respondents; and*
- V. Allow the present writ petition with exemplary compensation, costs and litigation expenses in favor of the petitioner; and*
- VI. Pass any such other and further order (s) as this Hon'ble Court may deem fit under the circumstances."*

2. In effect the petitioners are challenging the corrigendum dated January 05, 2024 to S.O No.04/2017, whereby the respondents have amended the S.O No.04/2017 in the following manner:

“Dated: 05-01-2024

CORRIGENDUM TO S.O. 04/2017

SUB: SELECTION OF ITBP TROOPS (GO'S AND NGO'S) FOR SECURITY OF INDIAN MISSIONS ABROAD (AFGHANISTAN ON DEPUTATION BASIS AND DEPLOYMENT WITH FPU ON U.N. MISSION (D.R. CONGO)

The following provision is hereby amended in Standing Order no. 04/2017 for deputation in Indian Mission (Afghanistan):-



Para No.	FOR	READ
1. (B) (v)	<i>Selection of all the eligible officers will be based on seniority. However officers having special achievement e.g., recipients of Gallantry medal, Summiteers of peak of height 8000 Mtr (asl) and above, gold/silver medal winner at National/international Sports and AIPDM will be given preference at the time of preparation of panel.</i>	<i>a. On receipt of list of officers qualified pre-selection test for development in foreign mission, Pers Branch Dte General will draw panel based on merit having maximum EHA/HA points earned by the officer along with special achievement e.g., recipients of Gallantry medal, Summiteers of peak of height 8000 Mtr (asl) and above, gold/silver medal winner at National/International Sports and AIPDM followed by their seniority in respective ranks. The EHA/HA service will be reckoned on the date of drawal/submission of panel by Pers branch. b. In case of tie in EHA/HA points the officer senior in age shall be sponsored first for deputation to Indian Mission abroad.</i>

2. All the other terms and conditions of the SOP will remained unchanged.

3. This has the approval of the DG, ITBP.”



3. Suffice to state an amendment to the Standing Order dated 04/2017 was also made on February 24, 2023, which amendment was challenged by certain personnel working in ITBP in W.P. (C) 7476/2023. Their challenge in the writ petition was in the following manner:

“It is, therefore, most respectfully prayed that your Lordships may graciously be pleased to issue directions or writ more than one in nature including Certiorari and Mandamus against the Respondent and that:- (i) This Hon’ble Court may graciously be pleased to quash and set aside impugned order I.2101/28/2022 (E13229)/Estt-2298 dated 24.02.2023 as unconstitutional and ultra vires the ITBP Act & Rules; and (ii) This Hon’ble Court may further be pleased to quash and set aside order No. I-21017/28/Afghanistan/ 2022/ Estt-8701-99 dated 27.02.2023 and direct the Respondents to draw a fresh list of empanelled personnel on the basis of Standing Order No. 04/2017 as it stood prior to amendment dated 24.02.2023.”

4. Suffice also to state the plea of the petitioners therein was primarily that the corrigendum to S.O No.04/2017 dated February 24, 2023 which gave preference to personnel having longest period of stay in the EHA/HA as against the seniority is bad. The challenge was rejected by this Court in the judgment dated February 05, 2024.

5. The challenge in this petition to the corrigendum is concerned the same is primarily to the extent, the respondents have specified that the panel for deputation shall be drawn based on merit having maximum EHA/HA points earned by an officer alongwith special achievement example recipients of Gallantry Medals, summiteers of peak of height 8000 mtr (asl) and above, gold/silver medal winner at National/International Sports and AIPDM followed by their seniority in respective ranks.



6. The learned counsel for the petitioners has drawn our attention to the S.O No.02/2023 dated February 01, 2023 more specifically para 17 thereof which reads as under:

“17. This order supersedes all standing orders and corrigendum thereto issued in this regard, However, the Standing Order No. 04/2017 regulating the guidelines for selection of troops on deputation basis for the Indian Mission Abroad (Afghanistan) shall remain intact and operative.”

7. He thus submits that the above SO (Standing Order) which has been implemented from April 13, 2023 has no effect on the Standing Order No.04/2017, or the amendment therein, which is under challenge in this petition. In other words, the S.O No.04/2017, regulating the guidelines for selection of troops on deputation shall remain intact and operative.

8. According to him, in view of this stand of the respondents at page 112, the corrigendum/amendment to S.O No.04/2017 dated January 05, 2024 is bad in law. In as much as, since S.O 02/2023 supersedes the S.O 04/2017, if the respondents wanted any clarification they could have brought corrigendum to S.O 02/2023.

9. We are unable to agree with the submission made by the learned counsel for the petitioners for the simple reason that the Standing Order No.04/2017 relates *“to selection of ITBP (Gos and NGOs) for security of Indian missions abroad (Afghanistan) on deputation basis and deployment with FPU on UN Mission (D.R. Congo)”*, whereas the Standing Order 02/2023 dated February 01, 2023 are guidelines for deputation of ITBPF personnel (GO's and NGOs) to other organisations.

10. In other words, both the Standing Orders operate in different fields for different purposes in as much as the Standing Order No.04/2017 relates to



deputation of ITBP personnel only for a limited purpose i.e. for providing security to Indian missions abroad (Afghanistan) and deployment with FPU on UN Mission (D.R. Congo), whereas the Standing Order No.02/2023 as the name itself signify relates to deputation of ITBP personnel (Gos and NGOs) to other organisations like NSG, SPG and NDRF etc.

11. We are of the view that the representation in the para 17 of the S.O 02/2023 is right in as much as it states the Standing Order No.04/2017 shall remain intact and operative, to the extent it stipulates deputation of ITBP personnel to Afghanistan/UN mission.

12. It is for the reason that as both the Standing Orders operates in different fields; the respondents did not want that the issuance of Standing Order 02/2023 dated February 01, 2023 create any confusion with the Standing Order No.04/2017 which operates in a different field.

13. In so far as the challenge to corrigendum dated January 05, 2024 to S.O No.04/2017, to the extent as reflected in paragraph 2 is concerned, the same is also on the same grounds as were pleaded in the challenge to amendment dated February 24, 2023, which are the following :

“(1) changing the rules brining the corrigendum is against the established rule of law which says that the rules of selection could not be modified in between the process.

(2) Weightage of EHA/HA posting, special achievements and seniority has not been assigned, in existing practice no weightage to seniority has been given and panel is being prepared on the basis of EHA/HA points generally. The provision is arbitrary.”

14. We are of the view that the corrigendum is justified, more particularly for the reasons stated in paragraphs 42 to 49 of our judgment dated February 05, 2024 in W.P. (C) 7476/2023. The same are reproduced as under:



“42. It is also stated that it is not a case of the petitioners that by issuance of impugned corrigendum dated February 24, 2023, they have been ousted altogether from the zone of consideration. In fact, we have been told that the names of the petitioners find mention in the list issued on February 27, 2023 and surely, they can be sent on deputation to Afghanistan as and when their turn would come.

43. It is also the plea of Mr. Sheel that the tenure of deputation being for two years and there being a list consisting of around 441 personnel, it is highly unlikely, that the petitioners herein would get an opportunity to go on deputation. We are afraid that such a plea would not warrant quashing the corrigendum, specially, when the ITBP has issued it with specific objective sought to be achieved as per its requirements, i.e., to give preferences to those personnel, who have much more experience of being posted in EHA / HA for manning the technical mission in Afghanistan. In any case, the petitioners must endeavour to gain experience in EHA / HA so that they may also get preference for being posted on deputation to „Technical Mission of India“ at Kabul (Afghanistan).

44. Another submission which has been canvassed by Mr. Anshuman is that due to change in political and security scenario in Afghanistan in 2022, the Embassy of India and 4 consulates have been shut down. Consequently, the respondents Force had to pull back its employees and as such the requirement of personnel to be sent on deputation in Afghanistan has also been reduced.

45. Now, coming to the plea of Mr. Sheel of the rules of the game have been changed in the midstream, the said principle may not be applicable in the facts of this case, when a larger public interest is sought to be served by the respondents by sending those personnel on deputation to Afghanistan, who have an experience of being deployed in EHA / HA like Leh, Ladhak and North-East, from the perspective of weather conditions / topography in Afghanistan.

46. Additionally, we may state here, that SO-I, though stipulate that personnel in order to be eligible for being deputed to Indian Mission in Afghanistan, must have minimum three years



of service in EHA / HA, but, the said stipulation did not give preference to the personnel, who may have put in more service in EHA / HA, resulting in personnel meeting the eligibility criteria of having minimum three years of service in EHA/HA and having the seniority, getting selected, as against those, who may have more years of service in EHA / HA.

47. In other words, by way of the amendment/corrigendum, the preference is sought to be given to those personnel, who have more necessary service in EHA / HA. In this regard, we may refer to the paragraph 28 above, wherein the respondents have stated that as against personnel (petitioner No.13 herein) having served 119 months in EHA / HA, preference has been given to a personnel who has served 151 months in EHA / HA. Similarly, as against a personnel i.e., (petitioner No. 43, who has the highest number of experience amongst the petitioners, having served 139 months in EHA/HA), a personnel having 143 months of experience in EHA/HA, who is also the last selected Constable (GD) in the impugned list, has been given preference. Therefore, we do not see any illegality in the impugned action of issuing the corrigendum by the respondents, more so, as it has rightly been pointed out by Mr. Anshuman, that the deputation cannot be sought as a matter of right.

48. In any case, the impugned corrigendum does not completely exclude the consideration of petitioners for deputation. Moreover, when a larger public interest is involved, the same must give way to personal/individual interest. In this regard, a reference could be made to the recent judgment of the Supreme Court in the case of Yamuna Expressway Industrial Development Authority v. Shakuntla Education & Welfare Society, 2022 SCC OnLine SC 655, wherein, in paragraphs 59, 60, 61, 62, 63 and 65, it has been held as under:-

“59. The law with regard to interference in the policy decision of the State is by now very well crystalized. This Court in the case of Essar Steel Limited v. Union of India had an occasion to consider the scope of interference in the policy decision of the State. After referring to various decisions of this Court, the Court observed thus:

“43. Before we can examine the validity of the impugned



policy decision dated 6-3-2007, it is crucial to understand the extent of the power vested with this Court to review policy decisions. 44. In DDA [DDA v. Allottee of SFS Flats, (2008) 2 SCC 672 : (2008) 1 SCC (Civ) 684] on issue of judicial review of policy decisions, the power of the Court is examined and observed as under : (SCC pp. 697-98, paras 64-65)

“64. An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review.

65. Broadly, a policy decision is subject to judicial review on the following grounds: (a) if it is unconstitutional; (b) if it is dehors the provisions of the Act and the Regulations; (c) if the delegatee has acted beyond its power of delegation; (d) if the executive policy is contrary to the statutory or a larger policy.”

45. Thus, we will test the impugned policy on the above grounds to determine whether it warrants our interference under Article 136 or not. Further, this Court neither has the jurisdiction nor the competence to judge the viability of such policy decisions of the Government in exercise of its appellate jurisdiction under Article 136 of the Constitution of India. In Arun Kumar Agrawal v. Union of India [Arun Kumar Agrawal v. Union of India, (2013) 7 SCC 1], this Court has further held as under : (SCC p. 17, para 41)

“41. ... This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications,



unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives.”

(emphasis supplied)

46. *In Villianur Iyarkkai Padukappu Maiyam v. Union of India [Villianur Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561], it was held as under : (SCC p. 605, para 169)*

“169. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to “trial and error” as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts.”

(emphasis supplied)

47. *A three-Judge Bench of this Court in Narmada*



Bachao Andolan v. Union of India [Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664] cautioned against courts sitting in appeal against policy decisions. It was held as under : (SCC p. 763, para 234)

“234. In respect of public projects and policies which are initiated by the Government the courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in public interest to require the court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the court to go into the matter afresh and, in a way, sit in appeal over such a policy decision.”

(emphasis supplied)

48. A similar sentiment was echoed by a Constitution Bench of this Court in Peerless General Finance & Investment Co. Ltd. v. RBI [Peerless General Finance & Investment Co. Ltd. v. RBI, (1992) 2 SCC 343], wherein it was observed as under : (SCC p. 375, para 31)

“31. ... Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can



seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.”

49. A perusal of the abovementioned judgments of this Court would show that this Court should exercise great caution and restraint when confronted with matters related to the policy regarding commercial matters of the country. Executive policies are usually enacted after much deliberation by the Government. Therefore, it would not be appropriate for this Court to question the wisdom of the same, unless it is demonstrated by the aggrieved persons that the said policy has been enacted in an arbitrary, unreasonable or mala fide manner, or that it offends the provisions of the Constitution of India.”

60. It is trite law that an interference with the policy decision would not be warranted unless it is found that the policy decision is palpably arbitrary, mala fide, irrational or violative of the statutory provisions. We are therefore of the considered view that the High Court was also not right in interfering with the policy decision of the State Government, which is in the larger public interest.

61. It will also be apposite to refer to the following observations of this Court in the case of APM Terminals B.V. v. Union of India:

“67. It has been the consistent view of this Court that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. Several decisions have been cited by the parties in this regard in the context of preventing private monopolisation of port activities to an extent where such private player would assume a dominant position which would enable them to control not only the berthing of ships but the tariff for use of the port facilities.”

62. It could thus be seen that it is more than settled that a



change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest. The additional requirement is that such change in policy is required to be guided by reason.

63. Insofar as the reliance placed by the respondents on the judgment of this Court in the case of ITC Limited (supra) is concerned, in our considered view, the said judgment would not be of any assistance to the case of the respondents. This Court in the said case in paragraph 107.1 has clearly observed that in the case of conflict between public interest and personal interest, public interest should prevail.

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65. We have hereinabove elaborately discussed that when a policy is changed by the State, which is in the general public interest, such policy would prevail over the individual rights/interests. In that view of the matter, we do not find it necessary to refer to the said judgments. The policy of the State Government as reflected in the said G.O. was not only in the larger public interest but also in the interest of the respondents.

(emphasis supplied)

49. That apart, we must note that in the case in hand, what has been sought to be included in the criteria of selection process is the component of the preference to be given to personnel having longest period of stay in EHA/HA. The same does not have any effect on the eligibility of the petitioners for being considered for deputation. In fact, as stated above, the names of the petitioners are also in the list prepared by the respondents for sending the personnel on deputation to Afghanistan.”

15. In so far as the plea of learned counsel for the petitioners, by drawing our attention to Standing Order No.04/2017 to the extent under the heading “Eligibility Criteria”, Clause B (iv) (iii) which states “No eligible senior has been left out”, that the clause contemplates that, a senior need to be



empanelled irrespective of length of EHA/HA, though looks appealing on a first blush but on deeper consideration, we are in agreement with the learned counsel for the respondents who stated that the said Clause cannot be read independently but has to be read in conjunction with other Sub-Clauses (i), (ii), (iv) and (v). The main Clause (iv) states that while forwarding the nomination of GOs, the HoD has to certify, what has been asked for in the sub-Clauses. The said Clause is reproduced as under:

“iv) While forwarding nomination of GOs the following may be certified by the Head of Office:-

- i) Cooling off period completed.*
- ii) Foreign mission cooling off period completed.*
- iii) No eligible and senior has been left out.*
- iv) Prescribed EHA/HA service have been completed.*
- v) Selection of all the eligible officers will be based on seniority. However, officer having special achievement e.g. recipients of Gallantry Medals, summiteers of peak of height 8000 mtr (asl) and above, gold/silver medal winner at National/International Sports and AIPDM will be given preference at the time of preparation of panel.”*

16. It is Clause (1) B (iv) (v), which has been amended on February 24, 2023 and on January 05, 2024 respectively. The Clause which states that, *“No eligible and senior has been left*, does not mean, a senior need to be empanelled. It must be read to mean that, a senior shall be considered. The consideration has to be in the manner stated in Clause (1) B (iv) (v), as amended and impugned.

17. In view of our above discussion, we are of the view that this Court in exercise of its power of judicial review more particularly under Article 226 of the Constitution of India cannot interfere with the decision of the respondents dated January 05, 2024.



18. The writ petition is without any merit. The same is dismissed.

V. KAMESWAR RAO, J

SAURABH BANERJEE, J

MARCH 7, 2024/So..