

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-6654 of 2018

Present:

Mr. Justice Aziz-ur-Rehman

Mr. Justice Adnan-ul-Karim Memon

Capt. S. Kamal A. Mahmoodi

Petitioner

through:

Mr. Shakeel Ahmed, Advocate

Federation of Pakistan & another

Respondents No.1 & 2 through: Mr. Muhammad Nishat Warsi, DAG

Date of hearing: 19.04.2019

Date of announcement: 24.04.2019

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. Petitioner through this Constitutional

Petition has prayed for the following relief(s):-

a) To hold that the petitioner has lawfully been appointed as First Honorary Consul of Republic of Fiji in Karachi, Pakistan.

b) To hold that the act and deeds on the part of the respondent No.2 of illegally withholding the issuance of the Letter of Exequatur is illegal, arbitrary, unlawful, colorable exercise of power and authority, and against all norms of law, principle of natural justice and equity.

c) To direct the Respondent No.2 to immediately issue the Letter of Exequatur to the Petitioner as being the First Honorary Consul of Republic of Fiji in Karachi, Pakistan.

2. The basic grievance of the petitioner is that the Respondent No.2 is not issuing letter of exequatur to him as being the First Honorary Consul of Republic of Fiji. The petitioner has premised his case on the basis of a letter dated 05.02.2017 issued by the Prime Minister and Minister of Foreign Affairs Republic of FIJI, whereby the Ministry of Foreign Affairs, Islamic Republic of Pakistan was requested to recognize the petitioner as their Honorary Consul at Karachi. Petitioner has submitted that since his appointment on the aforesaid post by the foreign country, he moved an application dated 10.01.2018 to the Secretary Ministry of Foreign Affairs Islamabad with the request that the letter of exequatur

may be issued in his favour as he has completed all codal formalities as required under the law. Petitioner having seen no response from the Respondents has filed the instant petition on 18.09.2018.

3. We inquired from the learned counsel as to how this petition is maintainable for grant of letter of exequatur in favour of the petitioner, when the Respondents have taken the instance that under Article 12(2) of the Vienna Convention on Consular Relation 1963, the State can refuse to grant an exequatur without assigning any reason.

4. Mr. Shakeel Ahmed, learned counsel for the petitioner has argued that Under Article 5 of the Constitution it is imperative for the functionaries of the State to abide by the Constitution and the law; that the Respondents cannot withhold the letter of exequatur because the petitioner has been lawfully appointed as First Honorary Consul of Republic of Fiji in Karachi, Pakistan, for which the Ministry of Foreign Affairs, Republic of Fiji has furnished all the relevant documents to the Ministry of Foreign Affairs of Pakistan; that the representation made by the petitioner, forwarded by the Note dated 29.11.2017 is very clear in its terms, but the respondents are delaying to grant the letter of exequatur without any justiciable cause; that there is no refusal by the respondents in black and white, merely saying that under Article 12(2) of the Vienna Convention on Consular Relation 1963, the State can refuse to grant an exequatur without assigning any reason, is a lame excuse, which is not sustainable under the law.

5. We posted another question to him as to how this petition is maintainable when Government of Pakistan has taken the policy decision by not allowing the letter of exequatur to the petitioner on the ground of security concern. He, in reply to the query, has submitted that since the respondents have already issued no objection through Office Memorandum dated 26.10.2016, therefore, they have no reasonable cause to refuse and withhold the letter of exequatur; that the respondents have not disclosed which security concern has compelled them to

withhold the letter of exequatur in favour of the petitioner; that the Petitioner has been given highly discriminatory treatment for no plausible reason whatsoever by the respondents; that this court can declare the impugned action of the official Respondents to be in violation of strict and prohibitory command contained in Article 25 of the Constitution; that the Petitioner is an aggrieved person and being victim of inordinate delay on the part of respondents to issue a letter of exequatur in his favour, which is the requirement of law. In support of his contentions, he relied upon documents attached with the memo of petition at Page No.17 to 25. He next relied upon the case of M. Enver Shoukat v. Federation of Pakistan & others (1981 PLC (CS) 15) and argued that all the official acts and orders must be in writing for the purpose of not only reference and record, but also responsibility and accountability. He lastly prayed for allowing the instant Petition.

6. Mr. Muhammad Nishat Warsi, learned DAG has raised the issue of maintainability of the instant Petition and argued that Federal Government can refuse to grant an exequatur without assigning any reasons; that no fundamental right of the petitioner has been infringed; that petitioner has no right to call in question the authority of the respondents to refuse him the letter of exequatur, which is a foreign policy matter. He concluded by saying that the instant Petition is devoid of any merit and not maintainable under Article 199 of the Constitution.

7. We have heard the learned counsel for the petitioner as well as learned DAG on the issue involved in this petition with regard to the issuance of a letter of exequatur from Ministry of Foreign affairs, Government of Pakistan.

8. A bare reading of the afore-quoted prayers would indicate that the issues raised in the instant Constitution petition and the prayer made are relatable to matters of foreign policy, and security of the country. Such issues are neither justiciable nor they fall within the judicial domain for interference under Article 199 of the Constitution of Islamic Republic of Pakistan. Our view is supported by the decision rendered by the Honorable Supreme Court in the case of Wukla

Mahaz Barai Tahfaz Dastoor Versus Federation of Pakistan and another (2014 SCMR 111). The Honorable Supreme Court has held that “Any such interference by the courts would be violative of one of the foundational principles of the Constitution, which envisages a trichotomy of powers between the Legislature, Executive and Judiciary.”

9. To elaborate further on the aforesaid issue, it is expedient to define the word `exequatur`, which is a legal document issued by a sovereign authority that permits the exercise or enforcement of a right within the jurisdiction of the authority. Apparently an exequatur is an official document given to a consul or commercial agent by the government of the country to which the person is assigned, authorizing the performance of duties there. However, the exequatur may be withdrawn, but in practice, where a consul is obnoxious, an opportunity is afforded to his government to recall him.

10. Here the assertion of the petitioner is that he being appointed as Honorary Consul by the Republic of Fiji, he applied for the aforesaid letter which was denied to him on the premise that the appointment of Honorary Consul is subject to security clearance by the agencies and approval by the Prime Minister. In our view, it is the prerogative of the Federal Government to consider the appointment of the Honorary Consul of a foreign country and if it is conflicting with the interest of the country, the Federal Government can withhold / cancel such letter, without assigning any reason.

11. We have noticed that the recognition of Honorary Consul of a foreign country is a foreign policy decision and the letter of exequatur to the petitioner has been denied on the aforesaid reasons, therefore, the petitioner cannot insist for issuance of the letter, as discussed supra in his favour through the Writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan. Our view is supported by the Article 12(2) of Vienna Convention on Consular Relations 1963, which explicitly shows that a State can refuse to grant an exequatur without

assigning any reasons. For the sake of convenience, the relevant portion of Article 12 is reproduced as under:-

“1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an exequatur, whatever the form of this authorization.

2. A State which refused to grant an exequatur is not obliged to give to the sending State reasons for such refusal.

3. Subject to the provision of articles 13 and 15, the head of a consular post shall not enter upon his duties until he has received an exequatur”.

12. Reverting to the main contention of the petitioner regarding no objection from security point of view to the appointment of the petitioner as Fiji’s First Honorary Consul in Karachi, Pakistan. In our view the Ministry of Foreign Affairs cannot issue a letter of exequatur to anybody without approval of the competent authority i.e. Prime Minister.

13. In view of the forgoing, Since, this is a policy decision and under the foreign policy, this Court has no jurisdiction to entertain the policy decision of the Government of Pakistan for the simple reason that the power to prescribe or modify the criteria for issuing letter of exequatur vests in the Federal Government pursuant to Article 90 of the Constitution of Pakistan. The said Article vests exclusive power in the Executive to not only recognizes the Honorary Consular of any foreign Government, diplomat etc. on the basis of security of the country under the Acts / Ordinances and Rules framed thereunder. The Cabinet/Competent Authority is well within its right to prescribe criteria under Article 90 of the Constitution of Pakistan. Responsibility of fixing criteria of recognizing the appointment of Honorary Consular of any foreign Government Primarily falls on the Executive Branch of the State subject to the law. It is also settled law that Courts ordinarily refrain from interfering in the foreign policy making domain of the Executive.

14. The case law cited by the learned counsel for the Petitioner is distinguishable from the facts and circumstances of the present case.

15. The Petitioner failed to point out any malice on the part of Respondents or infringement of his right warranting interference of this Court in its Constitutional jurisdiction.

16. This petition appears to be wholly misconceived is hereby dismissed along with all pending application(s).

JUDGE

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