

**ORDER SHEET
HIGH COURT OF SINDH AT KARACHI**

C.P.Nos.D-2526 & 2623 of 2021

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Before:-

Mr.Justice Muhammad Ali Mazhar.

Mr. Justice Amjad Ali Sahito.

1. Shumaila Salman Shah & others
(C.P. No.D-2526 of 2021)
2. Nabeel Rashid
(C.P. No.D-2623 of 2021).....Petitioners

Versus

Federation of Pakistan & othersRespondents

Heard on 22.04.2021 & 23.04.2021.

Mr. Muhammad Jibran Nasir, Advocate for the Petitioners in C.P. No. D-2526 of 2021.

Mr. Abdul Ghaffar Ahmed, Advocate for the Petitioner in C.P. No.D-2623 of 2021 along with M/s. Mazhar Ali Shaikh and Samil Malik Khan Advocates.

Mr. Jawad Sarwana, Advocate for Cambridge Assessment International Education/Respondent No.2 in C.P.No.D-2526/ 2021 & Respondent No.3 in C.P. No.D-2623 of 2021

Mr. Asim Mansoor Khan, Advocate for the Intervener (CMA No.11730/2021 in C.P. No.D-2526 of 2021 a/w M/s. Zeeshan Bashir Khan, Farmanullah and Amir Haider Advocates. Mr. Asim Iqbal, Advocate/Intervener.

Mr. Kashif Sarwar Paracha, Acting Additional Attorney General of Pakistan.

Mr. Hussain Bohra, Assistant Attorney General.

Mr. Jawad Dero, Addl. A.G. Sindh.

Dr. Ghulam Ali Mallah, CEO/Secretary, Inter Board Committee of Chairmen (IBCC), Ministry of Federal Education & Professional Training, Government of Pakistan, Islamabad.

Muhammad Ali Mazhar, J: The aforesaid petitions were decided vide our short order dated 23.4.2021. While wrapping up the matter to finale, we advocated our conclusions and aspired to release the detailed judgment in aid of our short order. The minutiae of the case was incorporated in our earlier order in a

transitory form, however, for fairer understanding, the gist of the case is yet again bring to light in its fact-based matrix. In essence, the above-mentioned petitions were targeted to implore a declaration that decision of National Command and Operation Centre (NCOC) for holding physical exams for A and AS Levels and O Level were in violation of Articles 4, 8, 9 and 25 of the Constitution of the Islamic Republic of Pakistan hence the said decision be declared illegal. Next prayer was made for directions against the respondent No.1 (Federation of Pakistan through Ministry of Federal Education & Professional Training) to take on the alternative provided for evaluating the students in O, A and AS level exams thru School Assessed Grades method failing which approximately 85,000 students will face irretrievable loss. Together with the main petition, an interlocutory application was also moved under Order 39 Rules 1 and 2 CPC to refrain the respondents from conducting physical examination and evaluate and weigh up the students' proficiency in keeping with the formula of school assessed grades. Intrinsically, the petitioners avowed that during third wave of pandemic, there is no justification or *raison d'être* to hold physical examinations in Pakistan.

For the ease of convenience, nucleus of our short order dated 23.4.2021 is reproduced as under:-

“i) Holding physical exams for A and AS levels and O level according to notified schedules does not infringe or intrude any fundamental rights of the petitioners. The petitioners cannot claim any vested right to evaluate or appraise their credentials and competence by dint of “school assessed grades” and not by means of physical examination.

ii) The decision of physical examination of O/A/AS levels was taken in the meeting of respondent No.1/National Command and Operation Centre on 18.04.2021. Under the dominion of Judicial review, the court reviews the lawfulness of a decision or action made by a public body. In fact this is a process under which executive or legislative actions may be subject to review by the judiciary. The court may invalidate laws, acts and governmental actions that are incompatible with a higher authority more so, an executive decision may be invalidated for being unlawful and also maintains check and balance. This can be sought on the grounds that a decision arises when a decision-maker misdirects itself in law, exercises a power wrongly, or improperly purports to exercise a power that it does not have, which is known as acting *ultra vires*; a decision may be challenged as unreasonable if it is so unreasonable that no reasonable authority could ever have come to it or a failure to observe statutory procedures. (Ref: PLD 2020 Sindh 42. Hajj Organizers Association of Pakistan vs. Federation of Pakistan). In our view the policy decision impugned in these constitution petitions is based on number of circumstances on facts and expert opinion, forethought and premeditation of all pros and cons and it does not seem to be arbitrary, discriminatory or violative of any constitutional, statutory or any other provisions of law hence we do not find any justification or rationale to

interfere in this policy decision when all arrangements have already been made for physical examination and large number of students throughout the country are geared up to appear in the examination while few students only approached to the court of law for staying the examination and hamper the entire process which is totally unwarranted and prejudicial to the interest of large number of those students who are ready to appear and making preparation religiously.

iii) On 22.04.2021, Ministry of Federal Education and Professional Training, Government of Pakistan communicated Country Director British Council Pakistan for enforcement of SOPs during physical examination of A, AS levels and O level according to the schedule. In the same letter it is visibly conversed to the British Council for observance and adherence to Covid SOPs that Desk to be placed 6 ft. apart; face masks to always be worn; hand wash facilities to be provided at all venues; mandatory temperature checking and venues to be sanitized completely before and after exams. The counsel for the Cambridge Assessment International Education has also produced a copy of SOPs with clear assurance and undertaking that during the physical examination the SOPs shall be strictly followed and implemented. He has also produced a copy of letter communicated by British Council to the Federal Minister Education and Professional Training, Government of Pakistan assuring to follow the SOPs and also attached the document. For the ease of convenience, the SOPs document is reproduced as under:

“Health and Safety SOPs O and A Level Exams.

SOPs for venues

- Venue sanitization before every exam session.
- Minimum 2 meters distance between candidates throughout their exam journey.
- Minimum 2 meters distance between candidates’ desks.
- Mandatory temperature check for all security guards.
- Mandatory masks for all venue and security staff.
- Hand sanitizers and disinfectant wipes will be available at all venues.
- Dedicated team of venue staff to implement the H&S SOPs at venues.

SOPs for Candidates

- Candidates and schools are informed about early arrival at venues and late departure to ensure the social distance and crowd control.
- Mandatory temperature check by using thermal gun before entry in exam hall.
- Candidates quick scanning and ID check.
- Candidates to directly enter in exams hall and wait on their designated desks until exams start. No waiting area for candidates.
- Mandatory masks for all candidates throughout their exam journey.
- Candidates exit in batches with 05 minutes gap to ensure the social distancing.
- Waiting area only for under 18 candidates those will opt safe collection option.
- Where possible, different entry and exit points for candidates to ensure the social distancing.

SOPs for Venues Staff

- Weekly consent and forms are signed by invigilators.
- Temperature check for all venue staff upon arrival at venue.

- Masks are provided by the British Council and it is mandatory for venue staff to wear the mask.
- Gloves are provided to handle the question papers and answer scripts.
- Face shields are provided and mandatory for the venue staff performing candidates scanning and ID check duties.
- Mandatory social distance at venues throughout the exam activity.

SOPs for Staff

- Wearing mask is mandatory for staff.
- Use of gloves while handling question papers and answer booklets.
- Regular use of hand sanitizer.
- To ensure social distancing while performing their duties at venues.
- Dedicated staff to manage the exam venues and back office work to eliminate their physical interaction.
- Only one staff will travel in vehicle along with driver (mask is mandatory for driver)."

iv) The counsel for the Cambridge Assessment International Education (CAIE) referred to certain assurance given in their comments in order to safeguard and protect the interest of all candidates, the relevant paragraphs are reproduced as under:-

"B26. The Respondent No.3 ("CAIE") also has put in place measures to ensure that most students taking exams can get a result, even if they miss some exam components due to Covid-19.

B-27. Respondent No.3 ("CAIE") recognizes that the Covid pandemic has increased the likelihood that some candidates may miss some or all their exams due to Covid illness or a requirement to self-isolate, and has introduced measures to ensure that as many of these students can still receive a result. For example, (1) Respondent No.3 has relaxed its normal rules so that if a student misses all but one of the component exams for a qualification, Respondent No.3 can still assess a grade on the basis of the one component exam, as shown in the two (2) documents titled "Covid-19 Exemption Components 9 December 2020" and "Covid-19 Exemptions for March and June 2021 Factsheet" which are attached and marked as Annexures "CAIE/9" and "CAE/10", respectively.

B-28. The Respondent No.3 ("CAIE") has put in place measures to ensure that most students taking exams can get a result, even if they miss some exam components due to Covid-19.

B-29. Respondent No.3 recognises that the Covid pandemic has increased the likelihood that some candidates may miss some or all their exams due to Covid illness or a requirement to self-isolate, and has introduced measures to ensure that as many of these students can still receive a result.

For example, Respondent No.3 has relaxed its normal rules so that if a student misses all but one of the component exams for a qualification, Respondent No.3 can still assess a grade on the basis of the one component exam. If a student is not able to take any component for covid-related reason and if they inform Respondent No.3 ("CAIE") within seven days of the exams, the Answering Respondent will refund their full exam fee and they will be able to sit in exam in CAIEs future series, for example, the October / November 2021 series. This is shown in the two (2) documents titled "Covid-19 Exemption Components 9 December 2020" and "Covid-19 Exemptions for March and June 2021 Factsheet" which are attached and marked as Annexures "CAIE/9" and "CAE/10", respectively.

B-30. Unfortunately, there may be some candidates who miss all of the component exams for a qualification and it will not be possible to provide them with a result; the latter will however work with their school to help them sit in a subsequent exam series. Even in normal years, this happens to a small number of students who are unwell during their exams or prevented by some other means from taking exams, such as natural disaster. The Respondent No.3 recognises that this will be disappointing for these students and will support their schools and them to prepare for the next available exams;

however, health, safety and wellbeing of students and staff is the highest priority.

B-31. Respondent No.3 is also providing advice to schools to help them support the mental health, safety and wellbeing of all students during these very difficult times, as shown in documents titled "How to Manage Stress and Learn Effectively at Home", and "Transcript Mental Health and Wellbeing during a Time of Uncertainty" which are made available as resources by Respondent No.3 online and are attached and marked as Annexures "CAIE/11" AND "CAIE/12", respectively.

B-32. It is incorrect to suggest that students in Pakistan who are able to take exams will be at a clear disadvantage to candidates in countries where exams have had to be cancelled and alternative school assessed grades used. Respondent No.3 has always and will continue to take clear steps to ensure that the grades awarded by either route are comparable, as set out in Annexure "CAIE/7".

B-33. The Respondent No.3 will and has ensured that students taking exams are not systematically disadvantaged (or advantaged) in their results, compared to students receiving results by other assessment methods. This does not, however, detract from Respondent No.3's clear position, which is accepted by education ministries and exam regulators, that assessment of candidates by exam is the fairest method, where those exams are safe.

B-34. The Respondent No.3 ("CAIE") charges the same fees to schools whether they are in a country taking exams or a country where school assessed grades are being used. There is no monetary benefit to the Respondent No.3, and the Answering Respondent strongly refutes that monetary concerns are guiding its policy. The Respondent No.3 is acting foremost to protect the health, safety and wellbeing of students and school staff during the pandemic, and second most to use the fairest forms of assessment to enable students to progress with their education."

v) The counsel for the CAIE during course of arguments also produced a letter dated 08.04.2021 issued by Cambridge Assessment International Education to all Principals across Pakistan in which a further relaxation has been given that if a student or parent is not comfortable to take exam in May/June 2021 series they can withdraw their entries any time until the end of the series and sit in any future exam series without any additional financial burden. If the petitioners are not in a position to appear in physical examination according to the present schedule they may avail the relaxation which is across the board.

vi) Nevertheless, we have upheld the NCOC decision of holding physical examination in Pakistan in line with notified schedule and also rejected the prayer for awarding school assessed grades in lieu of physical examination but in unison, we also direct the respondents to ensure the strict adherence and compliance of SOPs reproduced in paragraph (iii) and the fair assurances given by CAIE which are mentioned in paragraph (iv) and (v) of this order".

2. Mr. Muhammad Jibrán Nasir, learned counsel for the petitioners in C.P. No. D-2526 of 2021 argued that the Federal Government and Provincial Governments are imposing ban and harder restrictions on social, educational and other cultural gatherings across Pakistan due to third wave of U.K. variant Covid-19 resulting in higher mortality rate and also suspended classes for all students from grades 1 to 12 and postponed other local board exams but on the other hand they are putting the petitioners and other like students at risk to appear in physical examination, which action is tantamount to violation of Articles 4, 8, 9 and 25 of the Constitution of Islamic Republic of Pakistan. He further argued that the respondents No.1 and 3 postponed the on-

campus academic term(s) across the country in all educational institutions as well as annual SSC and HSSC examinations were moved to third week of May but they decided that A and AS level exams shall begin on 26.04.2021 and O level exam will commence on 10.05.2021 as per schedules. Such type of decision was beyond the reasonable comprehension as to why the similar risk was not calculated for at least 85,000 students registered with respondent No.2. He further argued that respondent No.2 conveyed an option to the respondent No.1 either to arrange the physical exams or the qualification of the students may be evaluated and appraised on the method of School Assessed Grades. He further argued that in many countries i.e. U.K., Saudi Arabia, Bangladesh, UAE, Oman and Kuwait they opted for evaluating the students through School Assessed Grades rather than physical examination. He further raised a question on the competency to ensure measures for safety of students, invigilators and staff during examination with strict implementation of SOPs. It was further averred that the combined interests of all such students shall be secured in the option of accepting the formula of School Assessed Grades which was devised and presented as an alternative to the physical exams by the respondent No.2 and exercise of such option will not cause any disadvantage to the students. Mr. Abdul Ghaffar Ahmed, learned counsel for the petitioner in C.P. No.D-2623 of 2021 adopted the arguments of Mr. Muhammad Jibrán Nasir.

3. Mr. Kashif Sarwar Paracha, learned Acting Additional Attorney argued that in the Covid-19 pandemic, the Federal Government has established a platform in consultation with all stakeholders i.e. National Command and Operation Centre (NCOC) which is a policy decision making authority for the Inter-Provincial Education Ministers Committee. Every decision is based on consensus and implemented in letter and spirit. During the pandemic all decisions of school closure and opening were discussed in Inter-Provincial Education Ministers Committee Conference based on the data collected by the NCOC experts and Provincial Governments. It

was further averred that the British Council informed that for the current academic year there is no possibility for the School Assessed Grades and in case of no exams the only option would be left for the students either to appear in November 2021 exams or lose their academic year. The respondents No.1 and 3 decided for the physical examinations on the firm assurance of British Council and Cambridge authorities that they will comply with all notified SOPs in the examinations and the Federal Government will also carry out proper monitoring to see the compliance of SOPs in O and A level exams. It was further stated that the Federal Government has also conveyed to the Provincial Governments to ensure the strict compliance of SOPs during the examinations. He further argued that the petitioners have no right and authority to question the policy decision which is neither arbitrary nor discretionary but applicable to all students. The petitioners cannot force for any particular way of exams or to avoid the physical examinations. At least 15000 students are privately enrolled and if the petitioners are allowed the option of School Assessed Grades, then it will be discriminatory to the privately enrolled students who have no option for such type of evaluation except to appear in physical examinations.

4. Mr. Jawad Dero, Addl. A.G. Sindh argued that the decision of physical examinations by NCOC was taken with the consultation of all stakeholders and the representatives of Provincial Governments. There is no vested right of petitioners to ask for the school assessed grades. The policy decision of the Government cannot be challenged in the writ jurisdiction. So far as the implementation of the Covid-19 SOPs is concerned, the learned Addl. A.G. Sindh assured us that the SOPs will be implemented in letter and spirit.

5. Mr. Jawad Sarwana, learned counsel for Cambridge Assessment International Education (CAIE) argued that the Cambridge Assessment International Education (CAIE) is a UK entity existing under the laws of UK and it has neither any office nor carries on business within the territorial jurisdiction of this

court. The examination arrangement of CAIE's O, AS and A level examinations is between two private contracting parties. It was further argued that the alternative method of School Assessed Grades is not desirable except in the exceptional circumstances and cannot be used where the country's government and its public health authorities determine that the school exams can be held safely. It is too late to switch from physical exams to contingency option of school-assessed grades as no such effort was made by the Government of Pakistan. It was further averred that in the global Covid-19 pandemic the CAIE's first priority is to support governments and public health authorities in protecting the health, safety and wellbeing of citizens. He also pointed out the SOP document attached with the reply for ensuring due compliance. In order to ensure the safety, the learned counsel also pointed out some documents attached with the reply i.e. emails on SOPs for schools and candidates, power Point presentation on SOPs, important messages for parents and British Council letter to the Federal Minister for Education and Professional Training regarding O and A level exams. It was further contended that CAIE believes that where exams can take place safely it is the fairest form of assessment to show students' learning. He further argued that it is the prerogative of the governments in countries affected by Covid-19 to take wide range of possible action annulling the exams, changing exams content, delaying exams date, deferring exams timetable by up to six or more or having system of school based assessment where exams are not possible at all. He further refuted the contention that the students of Pakistan will be disadvantaged to the candidates in countries where exams are cancelled and alternative assessed grades are adopted. The learned counsel assured that CAIE will continue to take clear steps to ensure that grades awarded by either route are comparable and they will also ensure that students taking exams are not systematically disadvantaged (or advantaged) in their result as compared to the students receiving results by other assessment methods.

6. Mr. Asim Mansoor Khan, learned counsel for the intervener (CMA No.11730/2021 in C.P. No.D-2526 of 2021) supported the decision of physical examinations taken by the Federation and the NCOC. According to him, intervener's daughter is appearing in GCE AS and A Levels examination with the Cambridge Assessment International Education in April/May 2021 alike thousands of other students and shall be gravely affected and if CE exams are delayed and or conducted on the basis of School Assessed Grades which is based on an extremely low threshold which puts hard working students at the mercy of the school management which is, in most cases, is easily influenced. In reality, allowing the upcoming examinations to be conducted through the SAG system shall allow parents/guardians of students belonging to influential and strong families to manipulate grades/results through unfair means. This will also use as a tool for the students who made no efforts towards the preparation of the upcoming CAIE examinations session scheduled in April/May 2021. It was further averred that thousands of students have worked hard tirelessly for upcoming CAIE exams and if the same are delayed and/or conducted on the basis of School Assessed Grades, all their hard-work shall go to waste which will resultantly crush their morale and motivation.

7. Heard the arguments. The compass and magnitude of judicial review of governmental policy is now well settled and defined in which neither we can act out or represent as appellate authority with the aim of scrutinizing the rightness, fittingness and aptness of a policy nor may act as advisor to the executives on matters of policy which they are entitled to formulate. The extensiveness of judicial review of a policy is to test out whether it violates the fundamental rights of the citizens or is at variance to the provisions of the Constitution, or opposed to any statutory provision or demonstrably arbitrary or discriminately. The court may invalidate laws, acts and governmental actions that are incompatible with a higher authority more so, an executive decision may be invalidated for being unlawful and also maintains

check and balance. This can be sought on the grounds that a decision arises when a decision-maker misdirects itself in law, exercises a power wrongly, or improperly purports to exercise a power that it does not have, which is known as acting ultra vires; a decision may be challenged as unreasonable if it is so unreasonable that no reasonable authority could ever have come to it or a failure to observe statutory procedures. The dominance of judicial review of the executive and legislative action must be kept within the precincts of constitutional structure so that there may not be any incidence to give thought to misgivings concerning the role of judiciary in outstepping its bounds by uncalled-for judicial activism.

8. Indubitably, education being an indispensable and primary fundamental right is the course of action of accelerating learning, or the attainment of knowledge, competence, values, moral beliefs and habits and this right flows directly from right to life which is also concomitant to the fundamental rights enshrined in our Constitution . The benefit of education cannot be restricted to one or the other genera or classes. The effect and end result of holding right to education is implicit in the right to life which the State cannot deprive. Education is somewhat worthy contrivance which transforms educated people as a valuable source of knowledge for the society.

9. Article 25A has been inserted in the Constitution of Islamic Republic of Pakistan by means of 18th amendment which identifies the education as one of the fundamental rights and it is State responsibility and commitment to provide free and compulsory education to all children of age of 5 to 16 years in such manner as may be determined by the Law. In unison Article 37 embodied under the principle of policy explicates in principal that State shall promote with special care the education and economic interests of the backward classes or areas; remove illiteracy and provide free and compulsory secondary education within minimum possible period and make technical and

professional education generally available and higher education equally accessible to all on the basis of merit. Whereas, under Article 38, it is the responsibility of State to provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment. It is shimmering beyond any shadow of doubt that right of education is indispensable fundamental right enshrined under the Constitution but it does not lead to or give rise to any particular right of examination method at the sweet will of students. The Constitution does not confer or vest in any such fundamental right in which the petitioners may claim any special treatment that they should be assessed through a method of School Assessed Grade rather than physical examination. The NCOC being a policy making body during pandemic chalked out and laid down a policy for physical examination subject to fulfillment of SOPs and even in our short order, we have already incorporated the SOPs circulated by the British Council for the strict adherence and implementation. Moreover, certain assurances were given by the CAIE which were also properly jot down in the short order. In order to safeguard and guarantee the best interest of the students with different options and the treatment in different scenarios, the learned counsel for the CAIE, during course of arguments, also produced a letter dated 08.04.2021 issued by CAIE to all principals for according further relaxation that if students or parents are not comfortable to take exams in May/June 2021 series they can withdraw and sit in any future exam series without any additional financial burden and we further observed in our short order that if the petitioners are not in a position to appear in physical examination according to the present schedule they may avail the relaxation which was across the board. In the end we also upheld the NCOC decision in our short order and rejected the prayer for awarding School Assessed Grades in lieu of physical examination. At the same time we directed the respondents to ensure the strict adherence and compliance of SOPs as reproduced in para (iii) and the

assurance given by the CAIE examination in para (iv) & (v) of short order. The policy decision of holding physical examination rather than awarding school assessed grades does not infringe or contravene the fundamental rights of the petitioners as enshrined under Articles 4, 8, 9 and 25 of the Constitution of Islamic Republic of Pakistan. While contributing the reasons of our short order, we came to know through some public announcement that NCOC has revisited their policy decision and the Federal Education Minister has announced that Cambridge exams are postponed till October/November for all grades with exception of those in A-2 that decision seems to be in line with the option given by CAIE which freedom of choice was also assimilated in para (v) of our short order.

Judge

Judge

Karachi.

Dated: 21.05.2021.