
(2021) 03 AFT CK 0009

In the Armed Forces Tribunal

Case No : Original Application No. 1967 Of 2020

Vidhu Singh

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 16-03-2021

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 31(1)

Citation : (2021) 03 AFT CK 0009

Hon'ble Judges : Rajendra Menon, J;P.M. Hariz, Member (A)

Bench : Division Bench

Advocate : Garima Sachdeva, S.R. Swain

Final Decision : Disposed Of

Judgement

1. Vide our detailed order of even date, we have partly allowed the OA No.1967/2020. Faced with this situation, learned counsel for the respondents makes an oral prayer for grant of leave for impugning the order of the Tribunal to the Hon'ble Supreme Court in terms of Section 31(1) of the Armed Forces Tribunal Act, 2007.

After hearing learned counsel for the respondents and going through our order, in our considered view, there appears to be no point of law much less any point of law of general public importance involved in the order rendered by us, therefore, prayer for grant of leave to appeal stands declined.

The applicant, a commissioned Short Service Officer (SSC Officer), commissioned on 211d January, 2007 in the Aeronautical Engineering Branch and trained on the Mirage 2000 Aircraft in the Aircraft Stream, has invoked the jurisdiction of this Tribunal and challenges the impugned order (Annexure A-I) by which she has been denied grant of Permanent Commission (PC) and was proposed to be released on 1st January, 2021. The prayers made in this application in para -8 read as under:

"(A) Set aside the Policy dated 16.01.2019 to the extent that it denies the

Applicant a fair opportunity to be considered for the grant of Permanent Commission before the BOO;

(B) Direct Respondents to grant Permanent Commission to the Applicant;

(C) Pass any other appropriate order or relief, which this Hon'ble Tribunal deems fit and proper."

2. The applicant, as indicated hereinabove, was commissioned as a SSC Women Officer on 2nd January, 2007 and according to her she was the second women officer in the entire Mirage 2000 fleet. In the pleadings she has indicated in detail her unblemished service record; the exceptional outstanding work performed and various awards and appreciations received by her.

3. After commissioning on 21st January, 2007, it is her case that she completed the initial ten years stint as a SSC Officer and was granted the four years extension and at the time of filing of this application, after completing about thirteen years of service, her grievance is that PC has been denied to her. According to her initially at the time of her recruitment in the year 2007 and while entering into the service, the qualification and other requirements for considering an officer for grant of PC were different, i.e., as per HRP 21 / 2006 dated 25th May, 2006. It is the case of the applicant that in January 2019 the respondents, with a view to grant fair opportunities to all SSC Officers, released a HRP dated 16th January, 2019 (Annexure A-5) whereby two new pre-requisites were added for the very first time, which were to be complied with for grant of PC. According to the applicant adding of these two conditions was done in an arbitrary manner; a sudden change was brought about with regard to the rules of the game and the SSC Officers who were already fulfilling the ACR criteria and medical fitness, as contemplated in the original minimum qualification prescribed in 2006, was changed. It is stated that the two new categories laid down were; first a candidate should now possess a minimum score in the mandatory course as an average of 6 CGPA and the second condition was that he or she should also have a valid category of at least 'Cat C'. According to the applicant, the said new qualitative requirements, in fact, pertained to examination and courses which were already undertaken by the officer in the initial years of service and these courses were not given any weightage at that point of time. They were merely in-service mandatory courses for professional growth. However, all of a sudden now by prescribing a minimum qualitative requirement of mandatorily having 6 CGPA, the right which had accrued to the applicant for consideration at the time of recruitment, is suddenly changed. That apart, it is stated that the applicant, because of the arbitrary implementation of the new HPR, suffered a lot as she has not only lost the basic three chances guaranteed under the policy for consideration as she is due to be released on 1st January, 2021, but her claim was put for consideration before the Board of Officers (BOO) for grant of PC within one month and fifteen days of coming into force of the new HPR on 16th January, 2019. In the first Board held in March 2019 she was held not qualified for want of category of 'Cat C'. According to the applicant this was not at all

possible because after coming into effect of the policy of 16th January, 2019, within a span of one and a half month, the applicant could never get the 'Cat-C' certificate. That apart, though the applicant obtained the 'Cat-C' certificate but when her case was considered in May 2020 for the second time, she was denied the benefit on the ground that she did not come within the merit criteria as per the vacancy. It is her case that the merit criteria evolved on the basis of certain additional eligibility criteria brought into force with regard to a course undertaken in the initial period of recruitment is unsustainable and is an arbitrary decision. The applicant, apart from challenging the policy in question, submits that her right to be considered for three times will now be taken away as she is to be discharged in January 2021,

4. Ms. Garima Sachdeva, learned counsel for the applicant, took us through various aspects of the matter; the original policy as it existed and was issued in the year 2006, the change in the policy brought about in 2019, the law based on the judgments of the Hon'ble Supreme Court and Delhi High Court in the matter of granting PC to women SSC Officer new criteria laid down, the arbitrariness in implementing the new policy and canvassed that without granting any sufficient time to obtain the "Cat-C" certificate and based on an illegal criteria laid down with regard to fulfilling the QR conditions with respect to a mandatory course, which was already undertaken by the candidate at the initial years of service, the respondents have committed grave error and illegality. It is stated that the minimum criteria laid down and the change brought into force in January 2019, i.e., 16th January, 2019 has deprived the applicant a fair and reasonable opportunity to be considered for grant of PC and, therefore, learned counsel submits that the policy in vogue, i.e., Annexure A-5 dated 16th January, 2019 be quashed and the applicant's case be directed to be considered in accordance to the earlier policy or in the alternate at least she should be granted three considerations which are contemplated in the policy.

5. The respondents have refuted the aforesaid and they argue that as far as bringing into place the criteria and qualification required for grant of PC and issuance of the policy dated 16th January, 2019 is concerned, it is purely an administrative and executive decision, based on the requirement of service and the same cannot be the subject matter of judicial review in a proceeding before this Tribunal. Referring to various judgments, particularly, the judgment of the Hon'ble Supreme Court in the case of Air Commodore Naveen Jain Vs. Union of India (CAD/3019/2017) decided on 3rd October, 2019, enclosed with the Annexure, learned counsel argued that the applicant cannot challenge the policy once she has participated in the selection process and has been declared unsuccessful. Learned counsel for the respondents submitted that in a policy matter like this no judicial review is permissible. As far as right to be considered for the third time is concerned, learned counsel argued that in Note 1 to the policy in question, it is clearly stipulated at page 33 that consideration shall be made only when the officer is in service. Once the officer is not in service the consideration cannot be made and in this case as the applicant's services as a

SSC Officer has come to an end on 1st January, 2021, in view of an order passed by a Coordinate Bench of this Tribunal in the case of Ws Cdr Suprita Kaur Vs. Union of India and Ors. (OA No.2299/2019) decided on 11th March 2020, now consideration for the third time cannot be made. It is argued by learned counsel for the respondents that the policy (Annexure A-5) dated 16th January, 2019 is a valid and justifiable policy. Laying down policies is a matter of administrative decision and until and unless constitutional provisions or statutory rules or regulations are shown to be violated, interference into the policy cannot be made. It was further argued that no right accrues to the applicant to challenge the policy or to claim any further consideration and relying upon the judgment in the case of Naveen Jain (supra), it was argued that once as per the policy the applicant participated in the selection process conducted by 2 BOO now she cannot turn around and seek further indulgence into the matter. Learned counsel for the respondents, therefore, argued that now no further indulgence can be made. In the second BOO held in May 2020, applicant was considered, but she did not make it to the merit and as all the vacancies were filled up as per the requirement on merit, she is not entitled to any benefit. It is stated that in the second Board of officers held in May 2020, 47 candidates were considered. The applicant's position was at Sl. No.29 and as per the merit list all the available 8 vacancies were filled up and, therefore, there is no case made out for consideration.

6. Learned counsel for the applicant Ms. Garima Sachdeva thereafter took us through the judgments of the Hon'ble Supreme Court in the case of The Secretary, Ministry of Defence Vs. Babita Funia and Ors. (Civil Appeal No.9367-69 of 2011) dated 17th February, 2020 and Union of India and Ors. Vs. Lt Cdr Annie Nagaraja and Ors. (Civil Appeal Nos.2182-87 of 2020) decided on 17th March, 2020 emphasized upon the cardinal principle of law laid down in both these judgments, the question of gender bias in the services and the observations made by the Hon'ble Supreme Court, particularly with regard to grant of reasonable and fair chance to women officers for the purpose of granting PC and argued that in the case of the applicant the fair and reasonable chance to participate in the process of selection was denied to her and therefore intervention should be made and suitable orders passed. 7. We have considered various aspects of the matter and the submissions that were made before us at the time of hearing. The first and foremost question that was canvassed before us on behalf of the applicant was to the extent that the new policy for grant of PC brought into force with effect from 16th January, 2019 vide Annexure A-5, introducing new parameters for consideration, is arbitrary and unsustainable. It was tried to be emphasized that the policy is too harsh on the applicant and it would amount to not granting a reasonable consideration to her.

8. In our considered view it is a well settled principle of law that judicial review of an executive instruction or a policy decision, which are based on a highly technical and scientific expert opinions, is normally not permissible, and until and unless it is found to be based on arbitrary or irrational consideration, contrary to

constitutional mandate or statutory provisions, in the absence of these facts, judicial review of an executive policy should not be made. It is a well settled principle of law that the domain of policy making rests exclusively with the executive authorities and they are beyond the scope of judicial review until and unless they are found to be arbitrary or in violation to statutory rules or regulations. In this case except for contending that the policy operates harshly to the applicant, nothing has been brought to our notice to hold that the policy is unsustainable in law. Merely because it is inconvenient or harsh to the applicant, we cannot interfere with the policy particularly when as per the requirement of the policy the applicant not only gave her willingness to participate in the selection process but also got herself categorized by obtaining 'Cat-C' certificate in accordance to the policy. That being so the first ground canvassed to the effect that policy is unsustainable is rejected. However, having held so we find that in the policy in question an incumbent officer is granted three chances for consideration. Granting three chances for consideration is nothing but a thinking by the policy makers to the applicant that a candidate should get a fair and reasonable opportunity for consideration and merely because on one or two occasions the candidate has been unsuccessful but if he or she has continued in service she may be granted one more opportunity. According to learned counsel for the respondents once the candidate has participated in the process of selection and when the note to the policy indicates that the candidate who is in service would only get the benefit of consideration, we are required to advert and consider this question in view of the order based in the case of Suprita Kaur (supra) rendered by a coordinate Bench of this Tribunal. We will advert to consider this question at a later stage. At this stage, we feel that the policy makers, when they changed the policy on 16th i January, 2019, were conscious of the fact that the change in the policy may have adverse effect and may act in a manner which may be detrimental to the interest of some of the officers at the time of implementation and it seems to be the only reason why consideration for three chances has been indicated in the policy so that the officer gets time to improve his or her performance. Admittedly, for the purpose of improving the performance the applicant has to be in service and once he or she is out of service, the question of consideration would not be there. That being so, in our considered view when we analyze the facts of the applicant's case in the backdrop of her grievance, we find that the policy came into force on 16th January, 2019 and the applicant's first consideration was made in March 2019. At that point of time she was held ineligible as she did not possess the 'Cat-C' categorization certificate. However, she obtained this certificate before the second consideration was made in her case sometime in May 2020 and it is clear from the record that the applicant appeared and cleared the 'Cat-C' certificate examination on 25th July, 2019. When the second consideration was made in May 2020, she fulfilled all the conditions but on merit on account of non availability of vacancy she was not granted the benefit of PC.

9. Now, the sole question before us is as to whether in the peculiar facts and

circumstances of this case the applicant is entitled to a third chance for consideration or not? Even though based on Note 1 to the policy in the case of Suprita Kaur (supra) a Coordinate Bench of this Tribunal of which one of us (Hon'ble Mr. Justice Rajendra Menon) was a member has held that once the candidate is out of service he or she cannot be considered for grant of PC. This was done by us not only based on the facts and circumstances of that particular case but also on account of the fact that the applicant in that case invoked the jurisdiction of this Tribunal just five days before her release from service and as she had been released from service more than three months back, in the facts of that case the benefit was not granted. However, the case in hand is entirely different. The applicant invoked the jurisdiction of this Tribunal well in time, immediately after the impugned order was communicated to her and by virtue of an interim protection granted to her by the Delhi High Court she continues to be in service even as on that day. That being so, it is a case where the applicant still continues in service and considering the fact that the policy in question contemplates a provision for grant of three opportunities, interest of justice requires that the case of the applicant should be placed before the next available Board for consideration and based on the decision of the Board or its recommendation further action should be taken. Till such consideration is made, the applicant may be permitted to continue in service so that the period she has been in service till consideration is evaluated for the purpose of assessing her merit when consideration is made by the Board. We may clarify that the direction given for consideration of the applicant for the third chance has been made by us looking to the fact that the applicant continues to be in service by virtue of the interim protection granted to her and looking to the fact that the Hon'ble Supreme Court while dealing with the issue of granting PC to women officers in the Armed Forces particularly in the case of Annie Nagaraja (supra) has emphasized and laid down the principle that consideration for grant of PC should be done in an objective and reasonable manner and the consideration should not be an empty formality. Even though, we have not made any observation with regard to the manner in which consideration has been made but taking note of the spirit of the law laid down by the Hon'ble Supreme Court and the facts and circumstances of this case, we deem it appropriate in the interest of justice to give the third opportunity to the applicant to be considered for grant of PC.

10. With the aforesaid, we allow this OA in part and dispose it of.

11. Pending application(s), if any, also stands disposed of.

Pronounced in open Court on this 16th . day of March, 2021.