

IN THE HIGH COURT OF DELHI AT NEW DELHI

**WRIT PETITION (C) No. 19103-04/2006 &
CM APPL Nos. 15865/2006, 13527, 13535/2008**

Reserved on: October 24, 2008
Date of decision: November 14, 2008

HEMRAJ SINGH CHAUHAN & ORS. Petitioners
Through: Mr. P.S. Patwalia, Senior Advocate with
Mr. S.K. Sinha, Advocate for Petitioner in
WP(C) 19103/2006.
Mr. G.D. Gupta, Senior Advocate with Mr. S.K.
Sinha, Advocate for petitioner in
WP(C) No. 19104/2006.

versus

UNION OF INDIA & OTHERS Respondents
Through: Mr. H.K. Gangwani, Advocate for R-1.
Mr. Shail Kumar Dwivedi, Additional Advocate
General with Mr. Upendra Nath Mishra and Mr.
Ashok Chabbra, Advocates for R-3 and 4
(State of UP).
Mr. Sunil Gupta, Senior Advocate with Mr.
Ravindra Kumar, Advocate for Intervener.

CORAM:
HON'BLE DR.JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE SURESH KAIT

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
14.11.2008

S. Muralidhar, J.

1. The judgment dated 15th December 2006 passed by the Central Administrative Tribunal ('Tribunal'), Principal Bench, New Delhi in OA No. 1097 of 2006 filed by the petitioners, along with certain others, is

challenged by them in this writ petition. Petitioner No.1 is a Special Secretary in the Trade Tax Department, Government of Uttar Pradesh and Petitioner no.2 is a Controller, Legal Metrology, Government of Uttar Pradesh.

The Background: The relevant Rules and Regulations

2. The petitioners who are members of the State Civil Services ('SCS') of Uttar Pradesh completed eight years of service on 23rd July 1985 and 4th June 1986 respectively. An officer of the SCS is entitled to be considered for appointment to the Indian Administrative Service ('IAS') by promotion after completing 8 years of service in terms of the third proviso to Regulation 5 (3) of the IAS (Appointment by Promotion) Regulations 1955 ('Promotion Regulations'). Under Regulation 5 (3) of the Promotion Regulations, members of the SCS who have attained 54 years of age on the 1st day of January for which the Select List is prepared shall not be considered for promotion to the IAS. Under the Regulation 5 (1) of the Promotion Regulations, a Committee has to be constituted which shall "ordinarily meet every year" and "prepare a list of such members of the State Civil Service as are held by them to be suitable for promotion to the Service." The number of members of the SCS to be included in this list "shall be determined by the Central Government in consultation with the State Government concerned and shall not exceed the number of substantive vacancies as on the first day of January of the year in which the meeting is held, in the posts available for them under rule 9 of the Recruitment Rules." The second proviso to Regulation 5 (1) of the Promotion Regulations is important and it reads as under:

“Provided further that where no meeting of the Committee could be held during a year for any reason other than that provided for in the first proviso, as and when the Committee meets again, the select list shall be prepared separately for each year during which the Committee could not meet, as on the 31st December of each year.”

3. Rule 2 (g) (ii) of the IAS (Recruitment) Rules 1954 (Recruitment Rules) defines the expression “State Civil Service” to mean any service approved for the purpose of the said Rules by the central government. The expression “Service” is defined under Rule 2 (e) to mean the Indian Administrative Service. Rule 4 (1) of the Recruitment Rules indicates that there are three methods of recruitment to the IAS. These are (a) by competitive examination (b) by promotion of a substantive member of a SCS and (c) by selection, in special cases from among persons, who hold in a substantive capacity gazetted posts in connection with the affairs of a State and who are not members of a SCS. Therefore, the recruitment to the IAS can, apart from the competitive examination, be by way of promotion or selection.

4. Rule 4 (2) of the Recruitment Rules which is relevant to the present case reads as under:

“4 (2) Subject to the provisions of these rules,

(a) the method or methods of recruitment to be adopted for the purpose of filling up any particular vacancy or vacancies as may be required to be filled during any

particular period of recruitment, shall be determined by the Central Government in consultation with the Commission and the State Government concerned.

(b) The number of persons to be recruited by each method shall be determined on each occasion by the Central Government in consultation with the State Government concerned.”

5. It is not in dispute in the present case that the petitioners are SCS officers seeking promotion to the IAS in terms of Rule 4 (1) (b) of the Recruitment Rules. On the other hand the interveners (who have been permitted to do so by this Court by its Order dated 23rd April 2008 in CM No. 11847 of 2007) are non- SCS officers of UP seeking appointment to the IAS under Rule 4 (1) (c) of the Recruitment Rules.

6. Rules 8 and 9 of the Recruitment Rules deals with the recruitment by promotion or selection for appointment to State and Joint Cadre and they read as under:

“8. Recruitment by promotion or selection for appointment to State and Joint Cadre:

(1) The Central Government may, on the recommendations of the State Government concerned and in consultation with the Commission and in accordance with such regulations as the Central Government, after consultation with the State Governments and the Commission, from time to time, make, recruit to the Service persons by promotion from amongst the substantive members of a State Civil Service.

(2) The Central Government may, in special circumstances and on the recommendation of the State Government concerned and in consultation with the Commission and in accordance with such regulations as the Central Government may, after consultation with the State Government and the Commission, from time to time, make recruit to the Service any person of outstanding ability and merit serving in connection with the affairs of the State who is not a member of the State Civil Service of that State but who holds a gazetted post in a substantive capacity.

(3)(a) Where a vacancy occurs in a State Cadre which is to be filled under the provision of this rule, the vacancy shall be filled by promotion of a member of the State Civil Service or, as the case may be, by selection of any other officer serving in connection with the affairs of that State.

(b) Where a vacancy occurs in a Joint Cadre which is to be filled under the provision of this rule, the vacancy shall, subject to any agreement in this behalf, be filled by promotion of a member of the State Civil Service of any of the States constituting the group or as the case may be, by selection of any other officer serving in connection with the affairs of any such State(s).

9. Number of persons to be recruited under rule 8

(1) The number of persons recruited under rule 8 in any State or group of States shall not, at any time, exceed $\frac{1}{3}$ per cent of the number of senior posts under the State Government, Central Deputation Reserve, State Deputation Reserve and Training Reserve in relation to that State or to the group of States, in the Schedule to the

Indian Administrative Service (Fixation of Cadre Strength) Regulations 1955.

Provided that the number of persons recruited under sub-rule (2) of the rule 8 shall not at any time exceed fifteen per cent of the number of persons recruited under rule 8.

Explanation: For the purpose of calculation of the posts under this sub-rule, fractions, if any, are to be ignored.

(2) Notwithstanding anything contained in this rule, in relation to the State of Jammu and Kashmir, the number of persons recruited under sub-rule (1) shall not upto 30th April 2002, exceed at any time, fifty per cent of the number of senior posts under the State Government, Central Deputation Reserve, State Deputation Reserve and the Training Reserve in relation to that State in the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations 1955.

7. The selection of non-SCS officers to the IAS is covered by the IAS (Appointment by Selection) Regulations 1997 ('Selection Regulations'). In terms of Regulation 3 thereof the central government shall, in consultation with the state government, determine the number of vacancies which are to be filled up by way of selection from non-SCS officers, The number of vacancies are to be determined with reference to the 1st day of January of the year in which the selection is to take place. Regulation 4 of the Selection Regulations which is relevant for the present case reads as under:

“4. State Government to send proposals for consideration of the Committee: (1) The State

Government shall consider the case of a person not belonging to the State Civil Service but serving in connection with the affairs of the State who

(i) is of outstanding merit and ability; and

(ii) holds a Gazetted post in a substantive capacity; and

(iii) has completed not less than 8 years of continuous service under the State Government on the first day of January of the year in which his case is being considered in any post which has been declared equivalent to the post of Deputy Collector in the State Civil Service and propose the person for consideration of the Committee. The number of person proposed for consideration of the Committee shall not exceed five times the number of vacancies proposed to be filled during the year.

Provided that the State Government shall not consider the case of a person who has attained the age of 54 years on the first day of January of the year in which the decision is taken to propose the names for the consideration of the Committee.

Provided also that the State Government shall not consider the case of person who, having been included in an earlier select list, has not been appointed by the Central Government in accordance with the provisions of regulation 9 of these regulations.”

8. The IAS (Cadre) Rules 1954 (“Cadre Rules”) determines how often the examination of the strength and composition of the cadres should be undertaken. Rule 4 of the Cadre Rules reads as under:

“4. Strength of Cadres

(1) The strength and composition of each of the cadres constituted under rule 3 shall be determined by regulations made by the Central Government in consultation with the State Governments in this behalf and until such regulations are made, shall be as in force immediately before the commencement of these rules.

(2) The Central Government shall ordinarily at the interval of every five years re-examine the strength and composition of each such cadre in consultation with the state Government or state Government concerned and may make such alterations therein as it deems fit.

Provided that nothing in this sub-rule shall be deemed to affect the power of the Central Government to alter the strength and composition of any cadre at any other time.

Provided further that State Government concerned may add for a period not exceeding two years and with the approval of the Central Government for a further period not exceeding three year to a State or Joint Cadre one or more posts carrying duties of responsibilities of a like nature to cadre posts.

It is common ground that Rule 4 (2) was amended on 14th July 2000 and the word “ordinarily” was introduced therein. Further, the words “three years” were substituted by the words “five years.”

9. Under the IAS (Fixation of Cadre Strength) 3rd Amendment Regulations 1995 notified on 31st March 1995, the strength of the IAS cadre in the State of Uttar Pradesh was determined as under:

Direct Recruitment	401
Promotion	<u>126</u>
Total authorized strength	<u>527</u>

Under the Cadre Rules as they stood prior to the amendment in 2000, a cadre review was to take place after every three years. Accordingly a cadre review took place in April 1998 and the IAS (Fixation of Cadre Strength) 3rd Amendment Regulations 1998 was notified on 30th April 1998 under Rule 4 (2) of the Cadre Rules. As per this notification, the cadre strength of IAS officers of the State of Uttar Pradesh was determined as under:

“Direct Recruitment	373
Promotion	<u>162</u>
Total authorized strength	<u>535”</u>

Formation of Uttaranchal and the present controversy

10. The present controversy has arisen as a result of the formation of the new State of Uttaranchal in terms of Section 3 of the Uttar Pradesh Reorganisation Act, 2000 (‘Reorganisation Act’). Certain members of the Uttar Pradesh Cadre of the IAS were allocated to the newly formed cadre of the Uttaranchal in terms of the Section 72 of the Reorganisation Act which reads as under:

“72. Provisions relating to All India Services – (1) In this section, the expression “State Cadre”-

(a) in relation to the Indian Administrative Service, has the meaning assigned to it in the Indian Administrative Service (Cadre) Rules, 1954;

(b) in relation to the Indian Police Service, has the meaning assigned to it in the Indian Police Service (Cadre) Rules, 1954; and

(c) in relation to the Indian Forest Service, has the meaning assigned to it in the Indian Forest Service (Cadre) Rules, 1966.

(2) In place of the cadres of the Indian Administrative Service, Indian Police Service and Indian Forest Service for the existing State of Uttar Pradesh, there shall, on and from the appointed day, be two separate cadres, one for the State of Uttar Pradesh and the other for the State of Uttaranchal in respect of each of these services.

(3) The initial strength and composition of the State cadres referred to in sub-section (2) shall be such as the Central Government may, by order determine before the appointed day.

(4) The members of each of the said services borne on the Uttar Pradesh cadre thereof immediately before the appointed day shall be allocated to the State cadres of the same service constituted under sub-section (2) in such manner and with effect from such date or dates as the Central Government may, by order, specify.

(5) Nothing in section shall be deemed to affect the operation, on or after the appointed day, of the All India Services Act, 1951, or the rules made thereunder.”

11. The Reorganisation Act was passed on 25th August 2000 and the impending date of the creation of the State of Uttaranchal in terms of the Act was 1st November 2000. On 23rd September 2000 the Chief Secretary, Government of Uttar Pradesh wrote to the Government of India that out of the 290 Senior duty posts in UP, only 17 posts deal exclusively with the proposed State of Uttaranchal. In the circumstances, it was requested that the remaining 273 posts should still be given to the UP cadre of IAS. This request was apparently not acceded to at that stage as is evident from the notification issued on 21st October 2000. Two notifications were issued on that date. The first was under Section 3(1) of the All India Services Act, 1951 read with Section 72 (2) and (3) of the Reorganisation Act and Rule 4 (2) of the Cadre Rules whereby the Central Government constituted “for the State of Uttaranchal an Indian Administrative Service Cadre with effect from 1st day of November 2000.” On the same date 21st October 2000 a separate notification as issued fixing the cadre strength for the State of Uttar Pradesh and determining the number of senior posts under the same Government as 253. The relevant portion of the said notification reads as under:

“No. 11031/4/2000 – AIS (II) A

Government of India
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel and Training

New Delhi, the 21st October 2000

NOTIFICATION

GSR No. 806 E In exercise of the powers conferred by sub-section (1) of Section 3 of the All India Services Act, 1951 (61 of 1951), read with Section 72 (2) and 72 (3) of the Uttar Pradesh Reorganization Act, 2000 and the first proviso to sub-rule (2) of Rule 4 of the Indian Administrative Service (Cadre) Rules 1954, the Central Government in consultation with the Government of Uttar Pradesh hereby makes the following regulations further to amend the Indian Administrative Service (Fixation of Cadre Strength) Regulations 1955, namely:-

1. (1) These regulations may be called the Indian Administrative Service (Fixation of Cadre Strength) Third Amendment Regulations 2000.

(2) They shall come into force from the First day of November 2000.

2. In the Schedule to the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1955, for the heading "Uttar Pradesh" and the entire occurring thereunder, the following shall be substituted."

12. The Schedule of the notification indicating the number of posts on the different categories is under:

1. Senior Posts under the State Government	253
2. Central Deputation Reserve @ 40% of Item 1 above.	101

3. State Deputation Reserve @ 25% of Item 1 above.	63
4. Training Reserve @ 3.5% of item 1 above.	9
5. Posts to be filled by promotion and selection Under Rule 8 of the Indian Administrative Service (Recruitment) Rules, 1954, not exceeding 33-1/3% items 1,2,3 and 4 above.	142
6. Leave Reserve and Junior Posts Reserve @ 16.5% of item 1 above.	41
7. Posts to be filled up by direct recruitment (items 1+2+3+4+6-5)	325

Direct recruitment posts	325
Promotion posts	142

Total authorized strength	467

13. The very same notification contained a separate schedule for the State of Uttaranchal and the number of posts for the new State was separately indicated as under:

Direct Recruitments	48
Promotion posts	<u>20</u>
Total authorized strength	<u>68</u>

14. According to the petitioners, the next quinquennial cadre review for U.P should have taken place on 30th April 2003. It appears that an Advisory Committee was constituted under Section 76 of the Reorganisation Act under the Chairmanship of Shri U.C. Agarwal, IAS (Retired) by an order dated 29th August 2000 by the Central Government. The terms and reference of the Committee were inter alia to recommend the initial strength and composition of the cadres of IAS, Indian Police Service (IPS) and Indian

Forest Service (IFoS) for the States of Uttar Pradesh and Uttaranchal in terms of Section 72 (3) of the Reorganisation Act. The Committee was further to recommend “as to which of the members” of the aforementioned IAS/IPS/IFoS and “borne on the cadre of the existing State of Uttar Pradesh, should be allocated to the cadres of Uttaranchal of the same Service.” The recommendations of the said Committee, a copy of which has been annexed as Annexure Z-1 to the rejoinder-affidavit dated 4th May 2000 filed by the petitioners, were the following:

“17.1 The determination of initial strength and composition of the All India Service Cadres of the State of Uttaranchal and the residual State of Uttar Pradesh made within the authorized sanctioned strength of the existing cadres of Uttar Pradesh. The demand of the Government of Uttar Pradesh that Cadre Posts of Uttar Pradesh should not be automatically reduced by the number of posts being created for Uttaranchal has been considered. The Committee, is however, of the view that for the time being the existing cadre of Uttar Pradesh be bifurcated between individual Uttar Pradesh and Uttaranchal and any need based requirement for additional cadre posts be considered at the time of cadre reviews under Rule 4 of the IAS/IPS/IFoS of the Uttar Pradesh and Uttaranchal Cadres respectively. The Committee, in this context, further recommends that the cadre review for Uttar Pradesh and Uttaranchal for the All India Services be taken up as soon as the concerned State Governments come up with the necessary proposals.”

In Para 17.6 of its report, the Committee recommended the total authorized strength of the IAS/IPS/IFS “for the States of Uttaranchal and residual Uttar Pradesh out of the existing State of Uttar Pradesh” to be determined as under:

Type of Post	Present State Uttar Pradesh	State Uttar Pradesh After reorganization	New State of Uttaranchal
1. Total No. of senior Duty posts	290	253	37
2. Central deputation Reserve @ 40% of SDP	116	101	15
3. State deputation Reserve @ 25% of item 1 above	72	63	09
4. Training reserve @ 3.5% of SDP	10	09	01
5. Posts to be filled By promotion and Selection @ 33.3%	162	142	20
6. Leave reserve and Junior posts reserve	47	41	06
7. Posts to be filled up By direct recruit (1+2+3+4+5+6)	373	325	48
Promotion posts	162	142	20
Total authorized Strength	535	467	68

15. It is clear that the aforementioned report formed the basis of the notifications issued on 21st October 2000 whereby the strength of the State cadre of Uttaranchal and the modified strength of the State cadre of U.P were notified. From para 17.1 of the report, it appears that although the Government of Uttar Pradesh had demanded that the strength of the Uttar

Pradesh cadre should be maintained as 273, the Committee recommended that “the existing cadre of Uttar Pradesh be bifurcated between individual Uttar Pradesh and Uttaranchal and any need based requirement for additional cadre posts be considered at the time of cadre reviews under Rule 4 of the IAS/IFS/IFoS of the Uttar Pradesh and Uttaranchal Cadres respectively.” The Committee further recommended that “the cadre review for Uttar Pradesh and Uttaranchal for the All India Services be taken up as soon as the concerned State Governments come up with the necessary proposals.”

16. As far as the central government is concerned, it understood the next cadre review for the State of U.P as falling due on 30th April 2003. Accordingly, on 23rd January 2003 a letter was written by the Additional Secretary in the Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions, Government of India to the Chief Secretary, Government of Uttar Pradesh stating as under:

“The cadre review of IAS cadre of Uttar Pradesh is due on 30.4.2003. The Supreme Court in 613/1994 (*TANSOA vs Union of India*) has stated that the Central Government has the primary responsibility of making cadre reviews and to consider whether it is necessary or not to encadre long existing *ex-cadre* posts. Delay in conducting the cadre review results in avoidable litigation as officers of the State Civil Service approach the Courts that the delay has stalled their promotional avenues. It is important that the cadre reviews are held on time.

2. I shall, therefore, be grateful if you could take into the matter personally and instruct the concerned officials to sponsor the review proposals in the prescribed proforma, after taking into consideration the requirement of the State Government by 28th February 2003 to this Department for processing the case further.”

17. Reminders were sent on 5th March, 3rd September, 17th September and 8th December 2003. However, the Government of Uttar Pradesh did not respond. On 13th February 2004 a further reminder was sent by the Government of India stating as under:

“The quinquennial cadre review of IAS cadre of Uttar Pradesh was due on 30.4.2003. The State Government was requested vide this Department’s D.O. letter No. 11031/5/2003-AIS-II dated 24.1.2003 to furnish the cadre review proposal by 28.2.2003. The proposal has not been received in spite of four reminders dated the 5th March, 3rd September, 17th September and 8th December 2003.

2. The Supreme Court in WP 613/1994 (*TANSOA v. UOI*) has stated that the Central Government has the primary responsibility of making cadre reviews and to consider whether it is necessary or not to encadre long existing ex-cadre posts. In two cases, one pertaining to IPS cadre posts and another pertaining to the IFS cadre, the High Court has upheld the order of the CAT that the applicant should be given appointment and seniority from the retrospective date as there was considerable unexplained delay.

3. I would, therefore, be grateful if you could issue suitable directions to the concerned officials to furnish the cadre review proposal by 28.2.2004 positively.”

There was no response to the above reminder. The subsequent reminders sent by the Government of India on 14th/17th June 2004 and 8th October 2004 also did not yield any response from the Government of U.P.

18. In both its affidavits filed before the Tribunal as well as in these proceedings the consistent stand of the Government of India has been that the cadre review was due on 30th April 2003. The Government of India has further stated that a proposal was received by it from the Government of Uttar Pradesh only in January 2005 and this led to the fixing of the preliminary meeting on 21st February 2005. Thereafter the cadre review meeting under the Chairmanship of the Cabinet Secretary was held on 20th April 2005 and the minutes duly signed by the Chief Secretary, Government of Uttar Pradesh was received by the Government of India on 27th June 2005. After the approval of the Minister of State (Personnel and Pension) a notification was issued on 25th August 2005 re-fixing the cadre strength of the State of Uttar Pradesh as under:

1. Senior Posts under the State Government	290
2. Central Deputation Reserve	116
3. State Deputation Reserve	73
4. Training Reserve	10
5. Posts to be filled by promotion and selection under rule 5 of the IAS (Recruitment) Rules 1954	163

6. Leave Reserve and Junior Posts Reserve	48
7. Posts to be filled up by Direct Recruitment (Items 1+2+3+4+6-5)	374
Total authorized strength	537

19. On 29th August 2005 the Chief Secretary, Government of Uttar Pradesh wrote to the Central Government explaining that “the increase in cadre strength has been made by 68 posts as per need and requirement in the cadre review due on 30th April 2003 from 467 posts to 534 posts i.e. about 15%. Non-availability of 15% officers is substantial in number and its shortage is adversely affecting the administrative functioning of the State of Uttar Pradesh.” The Chief Secretary requested that “the Government of India may kindly issue the formal notification of cadre strength as per the minutes finalized on 20th April 2005 immediately and thereafter determine the vacancies of 33 posts for SCS to be filled in by appointment by selection to the Uttar Pradesh IAS cadre for the vacancies as on 1st January 2005 and if necessary, the power under Rule 3 (1) of the All India Service (Condition of Service - Residuary Matters) Rules, 1960 may be invoked by the Central Government.”

20. On 6th January 2006 a letter was written by the Secretary, Appointment Division-I, Government of Uttar Pradesh to the Secretary, Personnel & Training Department, Government of India giving the total number of those working in the SCS as 109 out of which 48 had been selected in relation to the Selection List for the years 2000 (Review), 2001,

2002, 2003 and 2004 and 61 were officials of the SCS working as on 1st January 2005. The total vacancies available for promotion to the IAS for the year 2005 from the SCS was determined as 13. It was noted that in terms of the Cadre Review Notification dated 25th August 2005, the posts in the promotion quota had been increased by 21. It was pointed out that no appointment could be made in the IAS from the non-SCS in the year 2005 and, therefore, officials of the SCS could be promoted to seven posts available in the Non-SCS. Thus 20 posts were available for the appointment through promotion in the IAS from SCS for the year 2005. It is further pointed out that as on 1st January 2006, 105 officials of SCS and 13 officials of Non-SCS were working in the State. Therefore, for the year 2006 14 vacancies would be available for promotion in the IAS from SCS and 11 posts would be available for appointment through selection in the IAS from Non-SCS.

21. Based on the above determination by the State Government, the Central Government issued on 1st February 2006 the following letter to the State Government:

“The Chief Secretary,
Government of U.P.,
Lucknow.

Sub.: Determination of vacancies for promotion in the IAS during the years 2003-2005 – proposal reg.

Sir,

I am directed to refer to your letter No. 43/2-1-2006-29/1(1)/2005 dated 06.01.2006 on the above subject and

to say that in terms of the provisions contained in Rule 4(2)(b) of the IAS (Recruitment) Rules 1954 read with regulation 5(1) of the IAS (Appointment by Promotion) Regulations 1955, it has been decided that during the years 2005 and 2006 recruitment by promotion to IAS UP Cadre from amongst members of the State Civil Service of UP may be made as follows:

Sl.No.	Year	No.of vacancies
1.	2005	19 (Nineteen)
2.	2006	14 (Fourteen)

2. It has further been decided in terms of the provisions contained in Regulation 3 of the IAS (Appointment by Selection) Regulations 1997 read with the relevant provisions in the Recruitment Rules that the number of posts up to which recruitment may be made by selection to IAS U.P. Cadre during the current year is 11 (Eleven) only.

3. It is requested that further action in terms of the provisions contained in the statutory promotion/selection Regulations may kindly be taken for preparation of Select List for the years 2005-2006 under intimation to the Government of India.

Yours faithfully,

Sd/-

(Jagan Lal)

Under Secretary to the Govt. of India.”

Proceedings before the Tribunal

22. Since the determination of the vacancies for being filled up by promotion took place only on 1st February 2006 and by that date admittedly both the

petitioners had crossed the age of 54 years, they obviously could not be considered for promotion to the IAS. Accordingly, these petitioners, along with certain others similarly placed, filed an application OA No. 1097 of 2006 in the Tribunal on 29th April 2006 seeking the following reliefs:

“8.1 Quash and set aside Regulation 1(2) of the amended Indian Administrative Service (Fixation of Cadre Strength) Regulations 1955 whereby the said cadre review of the Indian Administrative Service (UP Cadre) which was due to be effective from 30th April 2003, has been made operative with prospective effect i.e. the date of publication i.e. 25th August 2005.

8.2 Quash and set aside the consequential order dated 1st February 2006 whereby the vacancies for promotion in the IAS during the year 2005-06 have been determined and notified to be filled up by promotion and selection from amongst State Civil Service Officers and Non-State Civil Service;

8.3 Direct the respondents to reconsider the question of the UP State Civil Service Cadre Officers to the Indian Administrative Service on the basis of re-determined strength of cadre, vide notification dated 25th August 2005 (No. 11031/5/2003-AIS-II-A dated 25th August 2005) treating the same to be effective in the year 2003 and;

8.4 Direct the respondents to consider the case of the applicants for promotion to the Indian Administrative Service on the basis of quota available in the cadre for

the year 2003-04 with all consequential relief including seniority and pay fixation.”

23. The stand taken by the Government of India before the Tribunal has been adverted to earlier. As far as the Government of U.P. is concerned, the stand taken in its affidavit dated 5th July 2006 before the Tribunal was that “after Cadre Review of 1998 another Cadre Review was done much before its schedule (i.e. five years) in view of the bifurcation of State of Uttar Pradesh and Uttaranchal. The relevant Cadre Review notification was issued on 21st October 2000 and accordingly, next Cadre Review was due in the year 2005, which was done in time and the impugned letter dated 1st February 2006 was issued after the said exercise of Cadre Review.”

24. It must be mentioned at this stage that in OA No 1097 of 2006 no interim order was passed by the Tribunal. The petitioners and certain others then filed OA No. 1137 of 2006 before the Tribunal seeking the quashing of letter dated 1st February 2006 issued by the central government notifying the vacancies to be filled up by the promotion for the year 2006 as 19 and praying that the review DPC for appointment by promotion from amongst eligible SCS Officers of UP against the remaining unfilled vacancies of the year 2001, 2002 and 2004 should be held on the basis of the year wise selection. In OA No. 1137 of 2006 an ex parte interim order dated 26th May 2006 staying the operation of the order dated 1st February 2006 was passed by the Tribunal. The Tribunal subsequently passed an order dated 8th August

2006 directing that the DPC could proceed but “the effect of the DPC shall remain stayed till the next date.”

25. At this stage note must be taken of certain proceedings arising out of the impugned notification which are pending in the Allahabad High Court. It appears that certain other officers of the SCS had filed OA No. 362 of 2006 (*Mahesh Chandra & Ors. v. Union of India*) in the Lucknow Bench of the Tribunal challenging the notification dated 1st February 2006. Initially vide interim order dated 18th August 2006 the DPC was stayed by the Lucknow bench of the Tribunal. By a subsequent order dated 19th October 2006 the Lucknow Bench modified the earlier interim order dated 18th August 2006 so as to provide that “the selection process may take place but the result of such selection shall not be made public or acted upon till the pronouncement of the final order in the Original Application and the selection and its result shall be subject to final outcome of the Original Application.” By a final order dated 24th November 2006 the Lucknow Bench upheld the notification dated 1st February 2006 and the said judgment was challenged before the Allahabad High Court by Shri Mahesh Chandra in Writ Petition No. 1718 (S/B) of 2006. An interim order dated 18th December 2006 was passed by the Division Bench of the Lucknow Bench of the Allahabad High Court to the effect that till the next date of hearing the selection process could go on, but the final results should not be declared. The Division Bench of the Allahabad High Court in its order dated 18th December 2006 also determined the questions that arose for consideration in the writ petition. These inter alia include the question “whether Rule 8 (2), Rule 9 (1) and proviso of the Rules

1954 read with Regulation-3, Regulation-5 of the Regulations 1997 would mean selection of Non-SCS Officers to be decided by taking into account 15% of 33-1/3% posts of the entire cadre strength under Rule-8 or it would mean 15% of the total Officers recruited under Rule 8 (2).” As will be explained later, the petitioners have not urged this question and this Court too does not propose to examine it in these proceedings.

26. Reverting to the case on hand, the Principal Bench of the Tribunal, after hearing the parties, passed the impugned judgment dated 15th December 2006 dismissing both OA Nos. 1097 and 1137 of 2006. The gist of the impugned judgment of the Tribunal is as under:

(a) The two applications i.e. OA No. 1097 and 1137 of 2006 “being separate and not identical, cannot be said to be hit by Order 23 Rule 1 of CPC or by any other Rule/Provisions of the Code of Civil Procedure.”

(b) The notification dated 21st October 2000 brought about the initial constitution of the IAS cadres of State of Uttar Pradesh and Uttaranchal. The notifications concerning the reexamination and review of cadre strength could not have retrospective effect. Accordingly, the prayer for directing the State Government to give retrospective effect to the notification dated 25th August 2005 was declined.

(c) The chance of promotion being neither a statutory nor a fundamental right, the relief sought by the petitioners could not be granted since it was based on “hypothetical notions and chances of promotion expected to flow from giving retrospective effect to the notification.”

(d) The preparation of year-wise lists for promotion of SCS officers for filling up of the vacancies determined for them every year is unambiguously mandated in the relevant rules and regulations.

(e) The respondents were duty bound to convene the meetings of the Review DPC/Selection Committee to fill up the posts, which remained unfilled in the years 2001, 2002 and 2004.

Proceedings before this Court

27. In the present writ petition, an interim order was passed by this Court on 15th May 2007 directing the Respondent Government of U.P to seek leave from the Court if they wished to fill any of the vacancies. CM No. 13535 of 2008 was filed by the Government of Uttar Pradesh seeking a modification of the aforementioned interim order on the ground that there was an urgent need to fill up the posts lying vacant. However, since the main writ petition was itself taken up for final hearing, no orders were passed in the said CM.

28. It must be mentioned that an application being CM No. 9322 of 2008 was filed on 6th July 2008 by the Government of Uttar Pradesh seeking to file a “better” counter affidavit. The said application was allowed by this Court dated 9th July 2008 and the said “better” counter affidavit was taken on record. In the said application, CM 9322 of 2008, while acknowledging that in the earlier counter affidavit filed by it in the writ petition the Government of U.P had contended that the next cadre review after 2000 was due only in 2005, it was explained that

“5. .. a new development has also taken place, when the State Government received a letter dated 21st May 2008 from the Central Government, whereby all the State Governments have been asked to send the pending proposals for “Quinquennial Cadre Review” of all the India Services Cadres latest by first week of June 2008 so that Cadre Review meeting could be held for all the All India Services at one time.”

Thereafter it was explained in the said application as under:

“6..... Now on the basis of the legal opinion and also after re-examining the entire matter in-depth, including the report of the Advisory Committee, it is found appropriate for the State Government to adopt the submissions made by the Cadre Controlling Authority i.e. Central Government in its counter affidavit filed in the instant writ petition. Therefore, it is necessary for the answering respondent to file a better counter affidavit in the matter, in supercession of the submissions earlier made by it.”

29. In the “better” counter affidavit of the Government of U.P, in paras 3 to 8, the entire process that transpired with the formation of the State of Uttaranchal and the events subsequent thereto have been explained. The Government of the Uttar Pradesh now concurs with the Central Government that on 21st October 2000, the composite cadre of the then State of Uttar Pradesh was simply bifurcated between Uttar Pradesh and Uttaranchal into 467 and 68 posts respectively and no post was increased or decreased in the year 2000. No cadre review committee meeting for consideration of need

based requirement for additional cadre posts was held at the time of bifurcation. Further in para 8 it is stated as under:

“8. That though reference of Rule 4 (2) of IAS (Cadre) Rules, 1954 in the Notification dated 21.10.2000 issued by the Government of India can cause confusion, and it can give an impression of it being a “Quinquennial Cadre Review”, however an in-depth analysis of the relevant legal provisions clearly established the fact that it was merely a change introduced in the strength of the cadre due to cadre bifurcation and this was also the stand taken by the Cadre Controlling Authority of the IAS Cadre i.e. Central Government in its counter affidavit, which says that the cadre determination exercise held in the year 2000 by the Government of India was in fact an exercise of “simple cadre bifurcation”. In this view of the matter, since the last “Quinquennial Cadre Review” of the IAS Cadre was held on 30.4.1998, the next “Quinquennial Cadre Review” of the IAS Cadre became due on 30.4.2003 as stated by the Cadre Controlling Authority in para 9 of its counter affidavit.”

As regards the retrospectivity of the cadre review, it is stated as under:

“As stated earlier, the Central Government is the Cadre Controlling Authority of the IAS Cadre under the Rules and the State Government is only the implementing authority. Therefore the State Government has enforced the said Notification dated 25.8.2005 in the State of U.P. only with effect from the date of its publication in the official gazette. Accordingly the vacancies becoming available as a result of the “Quinquennial Cadre Review” during the year 2005 have been taken into account for determining the vacancies to be filled by promotion and

selection and the same were notified vide consequential order dated 1.2.2006 by the Government of India as contained at page 106 of the writ petition.”

However, as regards the issue of retrospectivity, the learned counsel for the Government State of U.P during arguments informed this Court on instructions that it would have no objection to a direction by this Court that the exercise of cadre review should be undertaken with reference to the vacancy position as on 1st January 2004.

30. For its part, the Central Government has maintained a consistent stand before the Tribunal as well as before this Court. At one stage on 25th September 2008 the parties informed this Court that the matter could be amicably resolved. Accordingly, it was recorded by this Court that “learned counsel for the parties as well as the interveners say that they will sit down and arrive at a draft statement.” However at the hearing on 22nd October 2008 this Court was informed by the Central Government that it was not agreeable to any settlement as proposed. The stand of the Central Government as indicated in its letter dated 15th October 2008 to its counsel is that “only those vacancies are taken into account, which are categorically available as on 1st January of the year for which the selection committee meeting is held. In this case, the increase in the cadre strength was notified on 25th August 2005 and therefore, the vacancies arisen on account of increase in promotion quota consequent to increase in cadre strength cannot be said to be available on 1st January 2003. In addition, the cadre review is

undertaken to meet future administrative requirement and the same is definitely not done with a view to create promotional opportunities. As such, the cadre review conducted in the year 2005 cannot be given retrospective effect.”

Submissions of Counsel

31. We have heard the submissions of Mr. P.S. Patwalia, learned Senior counsel appearing for the petitioners, Mr. Sunil Gupta, learned Senior counsel for the interveners, Mr. H.K. Gangwani, learned Standing counsel for the Union of India and Mr. Upender Nath Mishra, learned Standing counsel for the State of Uttar Pradesh.

32. It is submitted by Mr. Patwalia, learned Senior counsel that a harmonious reading of the statutory rules would indicate that the constitution of a new cadre is contemplated under Rule 3 (1) of the Cadre Rules and the review of the strength of an existing cadre is to take place in terms of Rule 4 (2) of the Cadre Rules. The stand of the Central Government and the Government of U.P that the next cadre review for the State of Uttar Pradesh was due on 30th April 2003 was based on a correct understanding of the relevant Rules and the Tribunal ought not to have held to the contrary. It is submitted that the mistake of not conducting the cadre review when it fell due ought to and can be undone by appropriate corrective action. The consideration of the petitioners for promotion to the IAS as on 1st January 2004 could not be undertaken because the Government of U.P failed to respond to the repeated reminders of the Central Government which led to

the postponement of the cadre review. Relying on the decisions of the Supreme Court in *S. Ramanathan v. Union of India (2001) 2 SCC 118* and *Union of India v. Vipin Chandra Hiralal Shah (1996) 6 SCC 721* learned Senior counsel for the petitioners submits that notwithstanding the insertion of the word “ordinarily” in Rule 4 (1) of the Cadre Rules, it is only in extraordinary circumstances that the State Government can plead inability to undertake a cadre review as and when it falls due. He submits that if the interpretation as suggested by the petitioners is accepted, then there should be no difficulty in directing the further consequential steps and redoing the exercise of notification of the vacancies as on 1st January 2004. There was nothing so sacrosanct about the notification of 1st February 2006 since it was based on the cadre review which took place in 2005 as a result of which the notification dated 25th August 2005 was issued. If indeed the cadre review had taken place on 30th April 2003, the vacancy position as on 1st January 2004 would have been taken into consideration. He states that none of the petitioners would claim any back wages and would be satisfied if they were considered for promotion to the IAS as on 1st January 2004. He further submits that the entitlements of the interveners can also be examined with reference to the same date i.e. 1st January 2004 and whatever vacancies fall to their lot should be given to them as per their entitlement. He further clarified that the present petition is not concerned with the determining of the exact number of vacancies since that is an issue pending before the Allahabad High Court.

33. Mr. Upendra Nath Misra, learned counsel for the Government of Uttar Pradesh while explaining the changed stand in the “better affidavit” as regards the cadre review falling due on 30th April 2003, added that the interveners could not have any legitimate expectation that they would be selected. As regards the notification issued on 1st February 2006, he informed the court that the consequential process of making appointments to the IAS by way of promotion and selection was yet to be completed. He submitted on instructions that notwithstanding what may have been contended in this regard in the affidavit filed before this Court, the Government of U.P would have no objection if the cadre review exercise and the consequential determination of available vacancies takes place with reference to the vacancy position as on 1st January 2004.

34. Mr. H.K. Gangwani, learned counsel appearing for the Union of India, maintained the stand communicated to him by the Central Government by its letter dated 15th October 2008. He further submitted that since the notification issued by it pertained to the vacancy position as on 1st January 2006 it would not be possible to back date any of the promotions to an earlier date only because the cadre review was due on 30th April 2003.

35. The most spirited opposition to the plea of the petitioners is from the interveners represented by Mr. Sunil Gupta, learned Senior counsel. It may be recalled that the interveners represent the non-SCS officers who expect to be ‘selected’ to the IAS. At the outset it was urged by Mr.Gupta that the Court should not go by the prevaricating stand of the Government of U.P

which, according to him, was motivated by political compulsions. He submitted that the correct interpretation of the relevant provisions could not be dependent upon the changing stand of a government. Their understanding of what took place in 2000 to be a simple “bifurcation” was erroneous. According to him, in terms of the Section 72 (2) of the Reorganisation Act read with Section 3 thereof two States were constituted: Uttaranchal and Uttar Pradesh. Therefore, the two cadres that came to be set up initially were those of Uttaranchal and Uttar Pradesh. He pointed out to the first affidavit filed by the Central Government before the Tribunal to contend that what took place on 21st October 2000 was in fact a cadre review in terms of Rule 4 (2). According to him the proceedings of the Committee constituted under Section 76 show that even the decision to defer consideration of the request of the State Government to retain the strength of senior officers at 273 tantamounted to a cadre review. Consequently, the next cadre review was due only in 2005 and not earlier.

36. Mr.Gupta further submitted that even if one were to accept the stand of the Central Government or the State Government that cadre review was due on 30th April 2003, there was no question of back dating the exercise because the vacancy position as on 1st January 2004 was not known and not considered by the Central Government in the review meeting held in 2005 as a result of which the letter dated 6th February 2006 was issued. He relied upon the judgment of the Supreme Court in *Tamil Nadu Administrative Service Officers Association v. Union of India AIR 2000 SC 1898* to argue that there was no vested right of any of the petitioners to seek an increase in

the cadre strength much less to seek a back dating such exercise. He further submitted that the petitioners were unable to make the regular promotion process for the years 2001, 2002, and 2004 and therefore, they cannot seek promotion to the IAS by an indirect method by seeking to back date the cadre review exercise itself. He submitted that it is not possible to imagine what would have been the vacancy position as on 1st January 2004 and re-do the exercise on that basis. Lastly, it was submitted that the petitioners were guilty of laches and delay in pursuing their remedies; if indeed they were aggrieved by the failure of the governments to hold a cadre review on 30th April 2003 they should have approached the Tribunal much earlier.

Was there a cadre review on 20th October 2000?

37. The first issue that arises for consideration is whether what took place on 21st October 2000 was a simple “bifurcation” of the existing State cadre between the State of Uttar Pradesh and the newly formed State of Uttaranchal or was it an initial constitution of two State cadres. A plain reading of the provisions of the Reorganisation Act shows that the State of Uttaranchal was carved out of the State of Uttar Pradesh. Section 3 of the Reorganisation Act lists out the districts which formed part of the existing State of U.P, which would form part of the State of Uttaranchal. The wording of Section 72 (2) indicates that two separate cadres were created, one for the State of Uttar Pradesh and the other for the State of Uttaranchal in respect of the IAS/IFoS/IPS. Section 72 (4) states that “the members of each of the said services borne on the Uttar Pradesh cadre thereof immediately before the appointed day, shall be allocated to the State

cadres.....” What is therefore acknowledged is that certain members of the IAS who were borne on the cadre of the State of Uttar Pradesh were to be allocated to the State of Uttaranchal. It is not possible to accept the contention of the interveners that what was constituted with the passing of the Reorganisation Act were two new cadres: one of the Uttar Pradesh and other of Uttaranchal. The cadre of the State of U.P continued as such with only its strength being depleted with the creation of the new cadre of the State of Uttaranchal. The last cadre review for U.P, before the reorganisation of that State took place in 2000, was in 1998. Therefore, as far as U.P was concerned the next cadre review, in terms of the amendment to the Cadre Rules in 2000, was due o 30th April 2003. The proceedings of the Committee constituted under Section 76 also indicate that this was also its understanding of the legal position emerging from the formation of the new State of Uttaranchal. The Committee observed that what remained in Uttar Pradesh after allocation of posts to the newly formed cadre of the State of Uttaranchal was the “residual” cadre of the State of Uttar Pradesh. Therefore, as far as the State of U.P. is concerned the next cadre review was due after five years from the previous review i.e. on 30th April 2003. In the considered view of this Court, the central government proceeded on a correct understanding of this position in law when it wrote to the Government of U.P. seeking a joint meeting for undertaking the exercise in 2003 itself. What took place on 20th October 2000 was not a cadre review and the proceedings of the Committee are consistent with this position. The decision on the demand by the Government of U.P. to retain the strength of senior posts in the cadre of U.P. at 273 was deferred for being considered at

the cadre review meeting which, in the understanding of that Committee, was due in 2003. The argument of the interveners to the contrary is based on a strained logic that does not flow from either a plain reading of the relevant legal provisions or the proceedings of the Committee.

38. It was contended for the interveners that there was no illegality resulting from the failure to undertake a review after the expiry of five years from 1998 particularly since the amendment in 2000 to Rule 4(1) of the Cadre Rules by the insertion of the word “ordinarily” took away the mandatory nature, if any, of such requirement. The purport of the word “ordinarily” has been explained by the Supreme Court in *VipinChandra Hiralal Shah*. In para 9 of the judgment it was explained as under (SCC, p.727):

“9. Clause (1) of Regulation 5 of the Regulations differs from clause (1) of Regulation 4 which was considered by this Court in *Mohan Lal Capoor* in the sense that the word “ordinarily” found in clause (1) of Regulation 5 was not contained in clause (1) of Regulation 4. **The insertion of the word “ordinarily’ does not, in our opinion, alter the intendment underlying the provision. It only means that unless there are good reasons for not doing so, the Selection Committee shall meet every year for making the selection.”**
(emphasis supplied)

39. The affidavits filed by both the Central Government and the State Government do not indicate that there any extraordinary circumstance justifying the postponement of the cadre review exercise beyond 30th April 2003 when it fell due. No factual foundation has been laid by the State

Government, much less by the interveners, to enable the Court come to a conclusion that the postponement of the cadre review was justified. To that extent, the insertion of the word “ordinarily” in Rule 4 (1) of the Cadre Rules by the amendment of 2000, does not really advance the case of the interveners.

40. We are also unable to accept the submission of the learned Senior counsel for the interveners that the changed stand of the State Government, as expressed in the “better affidavit” should be ignored as it has come about on account of certain political compulsions. It is open to a party to revise its stand on the interpretation of the legal provisions during the pendency of proceedings before a tribunal or court. That party does so at its own risk. That is by itself not going to determine the decision of the judicial forum before which such interpretation is advanced. While it is possible that the Tribunal may have taken a different view if the present “better” affidavit of the Government of U.P had been filed before it, it need not have. This part of the affidavit deals only with a purely legal question and not on any factual detail. It is therefore not necessary to examine the submission of the interveners that changed stand of the Government of U.P was on account of political compulsions. In any event the explanation offered by the Government of U.P for the change in its stand appears to be plausible one. This Court has however not gone only by the affidavits of the Central and State Governments in arriving at the conclusion that the next cadre review for U.P was due on 30th April 2003. The provisions contained in the relevant Rules and Regulations support this conclusion.

The issue of retrospectivity of the cadre review exercise

41. The next question that arises for consideration is whether the notification dated 25th August 2005 notifying the revised cadre strength ought to be set aside with a consequential direction to undertake the exercise afresh with reference to the vacancy position as of 1st January 2004. In other words is it possible for this Court to direct that the exercise that should have been undertaken as on 30th April 2003 should now be undertaken.

42. This question has arisen earlier before the Courts and a reference may be made to some of the decisions. In *S. Ramanathan*, the appellants were State Police Service Officers, who were seeking promotion to the Indian Police Service. The question was whether the triennial review for the determination of the cadre strength in terms of the IPS (Cadre Rules) 1954 was mandatory and whether the failure to undertake such a review would enable the aggrieved parties to seek a mandamus from the court. The Court noticed that although an amendment [similar to the amendment in 2002 to Rule 4(1) of the cadre rules in this case] was made to the IPS (Cadre Rules), the case before it was governed by the unamended provision. Nevertheless, the consequential directions issued by the Supreme Court are relevant for the present case. The Court distinguished its earlier decision in *T.N. Administrative Service Officers Assn. v. Union of India 2000 (5) SCC 728* where the request for a mandamus was declined by observing that in the latter case the delay in effecting the review “was found to have been sufficiently explained by the Union Government and that, therefore, the

court said that the question of fixation of seniority of the promotees with retrospective effect cannot be granted.” It was observed in *S. Ramanathan* that “in the case in hand, in the absence of any explanation for not conducting triennial review within the specified period of three years, the aforesaid decision (in *TN Administrative Service Officers Assn.*) will have no application.” On the other hand, reliance was placed upon the decision in *Devendra Narayan Singh v. State of Bihar 1996 (11) SCC 342* and it was held as under (JT, p.277):

“the Court has been insisting performance of duty upon the authority under the statute quite meticulously and **on the admitted position that the process of determining the cadre strength was initiated in the year 1989 and it was finalised in the year 1991, there is no rhyme and reason why the respondents will not be directed to reconsider the question on the basis of the altered strength of the cadre, as if it was so altered in the year 1989 when the process of determination of cadre strength was initiated.** We, accordingly set aside the impugned orders of the Tribunal and direct the Union Government as well as the State Government to reconsider the question of promotion of the State Cadre Officers to the Indian Police Service **on the basis of the re-determined strength of the cadre, treating the same to be in the year 1989 and if on such a reconsideration relief would be available to any of the appellants for promotion to the IPS on the basis of the quota available to them in the cadre, the same may be given to them.** This exercise may be done within a period of six months from the date of receipt of this order.” (emphasis supplied)

43. After referring to the decision in *Syed Khalid Rizvi v. Union of India 1993 Supp. (3) SCC 575* which was in the context of the mandatory requirement of preparing a select list, the Supreme Court in *Vipinchandra Hiralal Shah (1996) 6 SCC 721* interpreted Regulation 5 of the Promotion Regulations and held (SCC, p.728):

“11. It must, therefore, be held that in view of the provisions contained in Regulation 5, unless there is a good reason for not doing so, the Selection Committee is required to meet every year for the purpose of making the selection from amongst the State Civil Service officers who fulfil the conditions regarding eligibility on the first day of January of the year in which the Committee meets and fall within the zone of consideration as prescribed in clause (2) of Regulation 5. **The failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the select list for that year.** If for any reason the Selection Committee is not able to meet during a particular year, the Committee when it meets next, should, while making the selection, prepare a separate list for each year keeping in view the number of vacancies in that year after considering the State Civil Service officers who were eligible and fell within the zone of consideration for selection in that year.” (emphasis supplied)

44. Ultimately in *Vipinchandra Hiralal Shah* the Court issued the following directions were issued in para 13 of the judgment (SCC, p.729):

“13. Therefore, while upholding the judgment of the tribunal that the respondent is entitled to seek fresh

consideration on the basis that the selection should be made for vacancies occurring in each year separately, but in substitution of the directions given by the Tribunal in that regard, the following directions are given:

(1) The number of vacancies falling in the quota prescribed for promotion of State Civil Service Officers to the Service shall be determined separately for each year in respect of the period from 1980 to 1986.

(2) The State Civil Service Officers who have been appointed to the Service on the basis of the impugned Select List of December 1986/January 1987 and were senior to the respondent in the State Civil Service shall be adjusted against the vacancies so determined on year wise basis.

(3) After such adjustment if all the vacancies in a particular year or years are filled by the officers referred to in para (2), no further action need be taken in respect of those vacancies for the said year/years.

(4) But, if after such adjustment vacancy/vacancies remain in a particular year/years during the period from 1980 to 1986, notional Select List/Lists shall be prepared separately for that year/years on a consideration of all eligible officers falling within the zone of consideration determined on the basis of the vacancies of the particular year.

(5) If the name of the respondent is included in the notional Select List/Lists prepared for any particular year/years during the period 1980 to 1986 and if he is so

placed in the order of merit so as to have been entitled to be appointed against a vacancy of that particular year, he be appointed to the Service against that vacancy of that year with all consequential benefits.

(6) The vacancy against which the respondent is so appointed would be adjusted against the subsequent vacancies falling in the promotion quota prescribed for the State Civil Service Officers.

(7) Such appointment of the respondent would not affect the appointments that have already been made on the basis of the impugned Select List of December 1986/1987.”

45. In view of the above settled position in law, which does not appear to have been placed before the Tribunal, this court is unable to concur with the Tribunal on this aspect. Further, it is not possible to accept the objection of the Central Government to undertaking the cadre review exercise with reference to April 30th 2003 and for determining the vacancy position as on 1st January 2004. The court places on record and binds to the petitioners to their submission that if a result of such cadre review and the consequential consideration of their cases they get promoted to the IAS, they will not claim any back wages and that the retrospectivity of their promotion will count only for the purposes of their seniority. The interim order passed by this court should adequately take care of other consequential orders that may have to be made if such direction is issued. This Court is unable to agree with the Tribunal that no retrospective exercise can be undertaken.

46. At this juncture, it would be useful to notice the proviso to Rule 5(1) of the Promotion Regulations which mandates the yearly preparation of the select list. It would not be justified for the governments at the Centre and the State to delay the exercise of cadre review and then present the affected parties with a *fait accompli* by saying that the exercise cannot be carried out retrospectively even if admittedly there was a failure on their part to carry out such exercise in time. As far as the present case is concerned, there should be no difficulty in undertaking the cadre review exercise as indicated hereinabove. It is made clear that the exercise that preceded the issuance of the impugned notification dated 1st February 2006, including determining the vacancies available to those whom the interveners represent, should be undertaken as if it was taking place on 30th April 2003 and with reference to the date of 1st January 2004.

Conclusion and directions

47. Accordingly, the impugned judgment dated 15th December 2006 of the Tribunal is set aside. The impugned notification dated 1st February 2006 as well the letter dated 6th January 2006 and notification dated 25th August 2005 on which it is based are hereby set aside. It is clarified that the Cadre Review for the State of Uttar Pradesh was due on 30th April 2003. The Central Government and the State Government will now proceed to undertake the cadre review exercise which fell due as on that date with reference to the vacancy position as on 1st January 2004 in the manner indicated hereinabove within a period of eight week from today. The further consequential steps of considering which of the petitioners are eligible for

promotion and which if any of the non SCS officers (selectees) are qualified for selection should be completed within a further period of four weeks thereafter. We clarify that we have not expressed any opinion on the issue (as mentioned in para 25 of this judgment) pending consideration by the Allahabad High Court, Lucknow Bench.

48. With these directions, the petitions and the pending applications are disposed of with no order as to costs.

S. MURALIDHAR, J.

SURESH KAIT, J.

November 14, 2008

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