

AL ISMAIL HAJ TOUR

v.

UNION OF INDIA

(Writ Petition (C) No. 425 of 2016)

JULY 08, 2016

[J. CHELAMESWAR AND ABHAY MANOHAR SAPRE, JJ.]

Haj – Haj pilgrims – Private Tour Operators(PTO) for Haj – Approved policy for registration of – Said policy valid for five years, 2013-2017 – Clarification by MEA whereby PTO seeking registration for consideration for allotment of quota for Haj programme required to furnish documents – Writ petitions by PTO falling under Category-I and II – Category I PTO's registered with MEA and facilitated Hajjis at least for 7 or more years by conducting Haj tour operations – Category-II, Class-I PTOs are who facilitated Haji for less than 7 years and Class-II who facilitated at least 50 unrah pilgrims in a year for any five years – Directions sought to exempt them to furnish documents required under clause (vii) seeking production proof of the payments towards purchase of tickets and hiring of accommodation in Makkah/ Madinah, (x), (xi) and (xii) of Annexure A of the PTO Policy for Haj 2013 and Haj 2014; and to grant registration as PTO for conducting Haj Tour, 2016 – Held: Documents specified in stipulation (vii) not only go to prove a fact that a PTO had in fact conducted a Haj programme in a particular year, but also prove that the PTO has necessary information and contacts in Saudi Arabia to organize an appropriate accommodation both at Makkah/Madinah – Stipulation (vii) is relevant only for those PTOs, who are seeking registration either under Category I or Category II as PTOs eligible for consideration for allotment of quotas for Haj Programme for the first time – However, once the PTO is registered either under Category I or Category II insisting upon the PTO to produce proof for each subsequent year or to produce documents contemplated under stipulation (vii) is not supported either by the text of the APPROVED POLICY or logic – It cannot be said that the Government should be permitted to insist upon production of such documents for minimum two preceding years – Registration for PTO once made under the scheme should be valid till 2017, subject to fulfillment of other

A *relevant stipulations under the scheme – If anyone of those PTOs*
conduct a haj programme pursuant to the quota for 2015 Haj, they
must be considered for allotment of quota for Haj 2016 if they are
otherwise eligible – Respondents to consider the cases of all PTOs
 B *for allotment of quota in the light of these orders insofar as*
stipulation (vii) subject to the fact that PTOs are otherwise eligible
as per the approved scheme.

Disposing of the writ petitions, the Court

HELD: 1.1 Stipulation no. (vii) seeking production proof of
the payments (made through banking or other authorized
 C **channels) towards purchase of tickets and hiring of**
accommodation in Makkah/ Madinah) does not impose a
substantive obligation on a PTO seeking consideration for
allotment of quota by the Government of India for Haj programme
of any particular year. It only incorporates a rule of evidence to
 D **establish the fact whether a particular PTO had in fact conducted**
Haj programme in the past. [Para 25] [463-D-E]

1.2 To decide upon the eligibility of PTOs, certain criteria
was required. Therefore, the APPROVED POLICY stipulated
that those PTOs who had conducted at least 7 Haj operations or
more would be considered in Category-I and PTOs who had
 E **conducted less than 7 Haj operations would be treated as**
Category-II PTOs. The consequence of the division of PTOs into
two categories is that the total number of Visas to be provided by
the Government of Saudi Arabia for the pilgrims going through
PTOs would be distributed among the two categories in the ratio
 F **indicated which is already taken note of. PTOs which had**
conducted greater number of Haj programmes would get a larger
chunk of visas. To determine whether a particular PTO falls either
under Category-I or Category-II, some evidence to establish the
number of tours conducted by such a PTO prior to the formation
 G **of the scheme is required. The best proof, as rightly identified by**
the Government (in stipulation no. (vii) of Annexure ‘A’), is the
evidence of payments for the air tickets and hiring of
accommodation through banking or other authorized channels.
[Para 27] [464-B-D]

1.3 Stipulation (vii) is relevant only for those PTOs, who
 H **are seeking registration either under Category I or Category II**

as PTOs eligible for consideration for allotment of quotas for Haj Programme for the first time. Be that as it may, but once the PTO is registered either under Category I or Category II insisting upon the PTO to produce proof for each subsequent year or to produce documents contemplated under stipulation (vii) is not supported either by the text of the APPROVED POLICY or logic. [Paras 28, 29] [464-E-F; 465-A-B]

1.4 The scheme was not confined only to Haj 2013 and made applicable till 2017 (by orders of this Court). There is always a possibility of some new PTOs who were qualified to fall under Category-II in 2013 to acquire a qualification to fall in Category-I in a-subsequent year. [Para 30] [465-C]

1.5 The APPROVED POLICY did not stipulate a condition that experience of having conducted 7 Haj programmes is an experience of 7 consecutive years etc. Therefore, if a PTO is once registered in any one of the years, either as a Category-I or Category-II PTO, to call upon such PTOs to furnish the documents contemplated under stipulation no. (vii) for every subsequent year, would not be in tune with the text of the APPROVED POLICY. This Court is conscious of the fact that some PTOs who had successfully undertaken a number of Haj programmes may subsequently derelict their responsibility to the pilgrims. The Government of India has ample power under the APPROVED POLICY to deregister such PTOs. Thus, the understanding of the Government of India that even those PTOs who had been registered either in Category-I or Category-II would also be required to furnish the documents specified in stipulation no. (vii) every year when they are seeking consideration for allotment of quota of Haj pilgrims is wholly illogical and contrary to the text of the APPROVED POLICY. A registration for PTO once made under the scheme should be valid till 2017, subject to fulfillment of other relevant stipulations under the scheme. Ultimately, documents specified in stipulation (vii) not only go to prove a fact that a PTO had in fact conducted a Haj programme in a particular year, but also prove that the PTO has necessary information and contacts in Saudi Arabia to organize an appropriate accommodation both at Makkah/ Madinah. [Paras 31, 32 and 33] [465-F-H; 466-C-E]

A **1.6 The submission that in the absence of such documents**
for the minimum two preceding years relevant to the Haj
programme in consideration the Government would have no
means of assessing the continued ability and capacity of the PTO
to undertake a Haj operation and therefore, the Government
B should be permitted to insist upon the production of such
documents, cannot be accepted for one reason under para 4(b) of
the APPROVED POLICY, it is stipulated that “a qualified PTO
which fails to get selected under the draw of lots in any year will
be allocated 150 seats in the ensuing year without umrah, if it
C remains a qualified PTO”, obviously such a PTO would not be
able to produce such documents with reference to that year when
it failed to secure allotment of quota for Haj. Therefore, the
assessment of its ability on the basis of its previous year
performance is not possible in such cases. Still the Government
is obliged under the APPROVED POLICY to grant a quota to
such PTOs. [Paras 34, 35] [466-F-H; 467-A]

D **1.7 The submission that this Court may not interfere with**
the policy of the Government unless it is demonstrated that “the
condition(s) was purely subjective or designed to exclude any
individual or group of private operators/travel agents i.e.
bordering on malice as the statement relied upon by the Additional
E Solicitor General is not an exhaustive statement of law on the
subject, when it is demonstrated that the administrative action of
the Government of India is inconsistent with the text of the law
(APPROVED POLICY in this case) or that the government is
making an irrational application of the law, this Court is bound to
F interfere. [Paras 36, 37] [467-B-D]

1.8 It is submitted by the ASG that the prime consideration
in this matter should not be the individual rights of these PTOs
whose only motive is to secure economic benefits from the
allotment of Haj quota, but the safety and comfort of the Haj
pilgrims. Government of India must have the necessary freedom
G to make its own assessment regarding the suitability of the PTO
in this regard. The proposition is not disputed the text of the
scheme itself makes it abundantly clear that any PTO once
qualified shall “remain qualified unless it is otherwise disqualified
by the Government of India for valid reasons.” Therefore, it is
H always open to the Government to disqualify any registered PTO

for subsequent year, if there is rational complaint against the service rendered by that PTO in any previous year from any one of the pilgrims of that year or any other legally tenable information or material which calls for disqualification of such a PTO. [Para 38] [467-E-F] A

1.9 The writ petitions of those PTOs who are seeking consideration for allotment of quota for haj 2016 in the category-II Class I, their claim is that earlier that is in 2015 for the year 2015 they were allotted a quota on the ground that they were PTOs falling under Class-II of Category-II, i.e. PTOs which had the experience of having conducted five (5) umrah operations prior to 2015. Whatever be the basis on which quota was allotted to these PTOs for haj 2015, the fact remains that if anyone of those PTOs did in fact, conduct a haj programme pursuant to the quota they would be entitled for being considered even for 2016 unless there is any other good ground for not considering their cases such as inefficient or bad service rendered to the pilgrimage during 2015 haj programme, their claims now cannot be rejected. If the respondent decides to de-register such PTOs on any ground tenable in law, it is open for the respondent to de-register after giving reasonable opportunity to such PTOs but until such de-registration takes place their cases must be considered for allotment of quota for haj 2016 if they are otherwise eligible. [Paras 39, 40] [467-G-H; 468-A-E] B C D E

1.10 A law of a foreign country is a pure question of fact insofar as municipal courts are concerned, there is no reason to doubt the statement, the Government of India and therefore, there is no reason to grant any relief for those PTOs. [Para 41] [468-E-F] F

1.11 The respondents are directed to consider the cases of all the PTOs for allotment of quota in the light of these orders insofar as stipulation (vii) subject to the fact that PTOs are otherwise eligible in accordance with the approved scheme. [Para 42] [468-F-G] G

Union of India & Others v. Rafique Shaikh Bhikan & Others (2013) 4 SCC 699 : 2013 (5) SCR 428; *Jeddah Travels & Jeddah Hajj Group v. Union of India* (2014) 14 SCC 378; *Union of India and Others etc. v. Rafique Shaikh Bhikan and Another etc.* (2012) 6 SCC 265 : 2012 (5) SCR 715 – referred to. H

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Case Law Reference

2013 (5) SCR 428	Referred to	Para 1
(2014) 14 SCC 378	Referred to	Para 14
(2012) 5 SCR 715	Referred to	Para 36

B

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 425 of 2016.

[Under Article 32 of The Constitution of India]

C

WITH

W. P. Nos. 426, 427, 428, 429, 430, 431, 433, 435, 437, 438, 440, 441, 444, 447, 449, 450, 451, 452, 457, 456, 455, 458, 460, 462, 463, 465, 466, 467, 468, 473, 474, 479, 480, 481, 487, 488, 491, 494, 495, 496, 498, 500, 501, 503, 504, 505, 511, 371, 542, 544, 543, 545, 546, 548, 550, 552, 553, 554, 555, 556 and 541 of 2016.

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N. K. Kaul, ASG, Salman Khurshid, V. Giri, Harin P. Raval, Sr. Advs., Mohd. Ainul Ansari, Sulaiman Mohd. Khan, Shariq Ahmed, Chandra Bhushan Prasad, Sayid Marzook Bafaki, Zulfiker Ali P. S., Ms. Divya Anand, Sunil Kumar Verma, Sunil Khatwani, Rajat Sehgal, Mohit D. Ram, Manoj Kumar Goyal, Sayid Marzook Bafaki, Rajat Bhardwaj, Pardeep Jatav, Ankita M. Bhardwaj, Nishe Rajen Shonker, Anu K. Joy, Ritin Rai, Ms. Shweta Garg, Bhuvan Mishra, R. K. Verma, B. Krishna Prasad, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

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J. CHELAMESWAR, J. 1. This Court by its judgment in *Union of India & Others v. Rafique Shaikh Bhikan & Others* (2013) 4 SCC 699 (*hereinafter Rafique Shaikh Bhikan, 2013*), approved a policy (with some modification) framed by Government of India for the registration of Private Tour Operators (“PTOs”) for HAJ 2013 (*hereafter referred to as “APPROVED POLICY”*). This Court opined that such a policy “avoids creation of any monopoly and makes provision for entry of fresh players”.

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2. The modified and APPROVED POLICY is appended to the

judgment as Appendix-‘I’¹. It can be seen from the said judgment that though the policy as framed by the Government of India was meant only for one year i.e. for Haj 2013, this Court directed that it would be the “Policy for Private Tour Operators for Haj 2013-17” - valid for five years. A

3. Under the APPROVED POLICY, the PTOs were categorised into two groups. Category-I consists of PTOs who were registered with the Ministry of External Affairs and facilitated Hajjis at least for 7 or more years by conducting Haj tour operations. The second category consists of two classes of PTOs. Class-I consists of PTOs who had facilitated Hajjis for less than 7 years and Class-II consists of the PTOs who had facilitated at least 50 umrah pilgrims in a year for any five years. B C

4. Obviously, the requisite experience for a PTO to be categorized in one of the abovementioned two categories must be anterior to Haj 2013. It is to be noticed that though the APPROVED POLICY stipulated “experience of conducting a Haj operation” for 7 years for Category-I and 5 years experience of conducting “umrah operation” in second class of Category-II, the Scheme did not stipulate that those years should be consecutive years, or that they should be the immediate past 7 years or 5 years, as the case may be. The consequences of classification are also specified in para 4 of the Scheme; D

“4. 70% of the overall quota of seats will be allocated to eligible PTOs under Category 3(I) and 30% to eligible PTOs under Category 3(II). Distribution of seats among qualified PTOs will be done as follows: E

(a) 70% of the Haj 2013 PTO seats (31,500) will be allocated to eligible PTOs under Category 3(I) at the rate of 150 seats per PTO. In case the number of PTOs exceeds 210, the allocation of seats will be done on draw of lots. If the number of qualified PTOs is less than 210, each PTO will be allocated 150 seats and surplus seats, if any, will be distributed equally among them. F G

¹ Para 27. Having heard the Attorney General and the counsel appearing for the different private tour operators, we approve the policy presented by the Attorney General with some slight modifications. The policy, approved after modifications by this Court, is enclosed as Appendix I and forms part of this order. The approved policy will be called “Policy for Private Tour Operators for Haj, 2013-2017”. It shall remain valid for five years and shall not be questioned before any court or authority. H

A (b) 30% of Haj 2013 PTO seats (9000) will be allocated to
 eligible PTOs under Category 3(II) at the rate of 150
 seats per qualified PTO. If the number of qualified PTOs
 exceeds 90, the allocation of seats will be done by draw
 of lots. In case the number of PTOs is less than 90,
 B each PTO will be allocated 150 seats. Balance seats, if
 any, will be transferred to Category I and distributed
 equally among them. A qualified PTO which fails to get
 selected under the draw of lots in any year will be
 allocated 150 seats in the ensuing year without qurrah if
 it remains a qualified PTO.

C 5. There is no separate scheme or statute regulating the PTOs
 conducting *umrah* operations. However, we are informed by the learned
 Additional Solicitor General that the Government of Saudi Arabia would
 not permit any pilgrim for *umrah* through a PTO unless such PTO has a
 contract with one of the agencies authorized by the Government of Saudi
 D Arabia for the purpose. We are informed that as of today there are
 some 48 such agencies in Saudi Arabia. We are informed at the bar by
 the learned Additional Solicitor General that existence of such a restriction
 emanates from the law of Saudi Arabia and the Government of India's
 knowledge of such restriction is based on the information provided by
 the Diplomatic Mission of the Government of India at Saudi Arabia.

E 6. There are three annexures to the above scheme. Annexure-
 A specifies the conditions required to be satisfied by a PTO and prescribes
 the documents which are required to be produced to establish the facts
 necessary to prove that the PTO satisfies the conditions for registration
 of Private Tour Operators (PTO) for Haj 2013².

F 7. For the purpose of the present controversy, we are concerned
 with only stipulations (iv) and (vii) which read as follows:-

G “(iv) Minimum annual turnover of INR one crore during the
 financial year 2010-2011 or 2011-2012 along with balance sheet
 and profit and loss account – duly audited by the statutory
 auditors, tax audit report and income tax return (ITR) for financial
 years 2010-2011 and 2011-2012.

(vii) Proof of payment made through banking or other authorised

H ² Each PTO should establish that it is a genuine and established tour operator having
 experience in sending tourists/pilgrims abroad for which he should produce the following
 documents

channels towards purchase of tickets and hiring of accommodation in Makkah/Madinah. Payments towards purchase of tickets, hiring of accommodation for pilgrims in Makkah/Madinah, by any other means, would not be accepted.”

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8. This batch of writ petitions are filed by the PTOs falling either under Category-I or one of the two classes of Category-II. We take three writ petitions as representative cases of the entire batch i.e. Writ Petition (C) No. 425 of 2016, Writ Petition (C) No. 441 of 2016 and Writ Petition (C) No. 501 of 2016.

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9. The petitioner in Writ Petition (C) No. 425 of 2016 claims to be a PTO who is duly registered with the Ministry of External Affairs and was allotted a quota of Hajjis for the years 2009 to 2011 and also in the year 2015 (in all, four years).

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10. The petitioner in Writ Petition(C) No. 441 of 2016 claims to be “a registered PTO since 2003 to 2012 and also for the year 2015”, but it is not very clear from the writ petition whether petitioner was allotted any quota in any one of those years, except a vague statement at para 4.24³ of the writ petition.

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11. Coming to Writ Petition (C) No. 501 of 2016, the petitioner apparently belongs to the Class II of the Category-II i.e. somebody who claims experience of having conducted *umrah* programme for five years and seeks registration for conducting *Haj* programme for the year 2016.

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12. The prayers in these three writ petitions, insofar as they are relevant, read as follows:-

Prayer in Writ Petition (C) No. 425 of 2016

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“(a) Issue a Writ, order or direction in the nature of Mandamus Commanding and directing the Respondents restore paragraph 1 of Press Release dated 06.05.2016 by withdrawing second para of para 2 of Press Release dated 21.05.2016;

(b) Issue a Writ, order or direction in the nature of Mandamus Commanding and directing the Respondents to exempt the Petitioner to furnish documents required under clause (vii), (x),

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³ 4.24 - That on 1.08.2015, the respondent after scrutinizing the application submitted by the petitioner selected the petitioner as a PTO for Hajj 2015 and the “Certificate of Registration of Private Tour Operators for Hajj 2015” was issued by the respondent to the petitioner. The petitioner conducted service for hajj 2015 without any complaint.

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A (xi) & (xii) of Annexure A of the PTO Policy for Haj-2013 and Haj-2014.”

Prayer in Writ Petition (Civil) No. 441 of 2016

B (a) Issue a Writ, order or direction in the nature of Mandamus Commanding and directing the respondent to grant Registration to the petitioner as PTO for conducting Haj Tour, 2016;”

C And insofar as, the third Writ Petition i.e. Writ Petition (C) No. 501 of 2016 is concerned, the relevant prayers are prayers (a), (b) and (c). Prayers (a) and (b) are similar prayers to the prayer in the Writ Petition (C) No. 425 of 2016, and prayer (c) is as follows:-

D “(c) Issue a Writ, direction or order in the nature of Mandamus commanding and directing the Respondent not to seek copy of contract which the Respondent has sought vide paragraph 4 of press release dated 06.05.2016, as per Annexure P-2”

13. The background in which the present litigation arises is as follows:

E The Ministry of External Affairs (MEA) issued a clarification dated 8th May 2013 by which a PTO seeking registration for consideration of allotment of quota for Haj programme is required to furnish documents;

F “As regards Clause (vii) of Annexure A to PTO Haj Policy, 2013, it is clarified that the PTOs will have to submit the documents required under Clause (vii) of Annexure A to PTO Haj Policy, 2013 for a period of at least three years.”

G 14. Some of the PTOs challenged the said document on the ground that such a clarification was unwarranted and does not find any support from the text of stipulation no. (vii). Their case is that in view of the fact that stipulation no. (iv) of Annexure ‘A’ prescribes a condition that a PTO seeking registration should have a minimum annual turnover of Rs.1 crore “during the financial year 2010-2011 or 2011-12” and calls upon the PTOs to submit balance sheet and profit and loss account duly audited and other documents specified therein for the abovementioned two financial years, stipulation no. (vii) also must be understood in the light of stipulation no. (iv), and resultantly, the PTO is obligated to furnish the documents referred to therein *only* for 2 years. This Court accepted

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A the said Press Note, it appears that number of PTOs who approached this Court challenging the MEA's clarification dated 08.03.2013 was 22. Further, in purported compliance with the direction of this Court given in **Jeddah Travels** (*supra*), Government examined and found 73 more PTOs (20 under Category-I and 53 under Category-II) to have been qualified for registration for Haj 2015, apart from various other PTOs who had otherwise been found qualified. It appears from the said Press Note that a total number of 615 PTOs (253 under Category-I and 362 under Category-II) were found to have been qualified for registration for Haj 2015. It is stated in the said Press Note as follows:

C "9. This policy will remain valid from 2015 to 2017 for registration purpose for the new private tour operators who wish to be registered with the Ministry on the basis of Umrah pilgrims taken by them as per details mentioned in Para 6 above. The policy will not be changed unless there are substantive developments which affect it. The policy envisages cross category upward movement of PTOs from Category-II to Category-I. **A qualified PTO shall remain qualified for registration purpose till Haj-2017 unless it is otherwise disqualified either by Government of India or by Government of Saudi Arabia for valid reasons. The allocation of seats to the PTOs qualified for registration in each category, will be done every year on the basis of the overall quota of seats for PTOs specified in the Annual India-Saudi Arabia Bilateral Haj Agreement and the number of qualified PTOs in each category.**"

F documents of those PTOs who were given opportunity for personal hearing but were not considered qualified during 2013, have been re-verified with the assistance of the Chartered Accountant Firm, M/S S.P. Chopra & Co, hired through bidding process. The documents like Annual Turnover of Rs. 1 crore or more, Minimum Capital of Rs. 15 Lakh and documents regarding transaction through proper banking channel for purchase of air tickets for the Haj pilgrims and hiring of accommodation for them in Makkah/Madinah pertaining to the year 2010-11 (Haj-2010) or 2011-12 (Haj 2011) of the PTOs were verified. As a result, 73 more PTOs (20 under Category-I and 53 under Category-II) have been qualified for registration for Haj 2015. A list of the PTOs qualified for registration after re-verification of the documents is enclosed at Annexure B. Thus, a total of 615 PTOs (253 under Category-I and 362 under Category-II) have been qualified for registration for Haj 2015."

17. This Court passed an Order dated 18.05.2016 in a batch of writ petitions similar to the ones on hand, the operative portion of which reads as follows:- A

“8) In the light of aforesaid discussion and keeping in view the statement made by the Additional Solicitor General on behalf of the respondent-Union of India, we dispose of these writ petitions finally by granting liberty to each writ petitioner to make a fresh application with all the necessary details with the documents as prescribed for grant of permission to take the pilgrims for Hajj for the year 2016 on or before 27.05.2016 to the prescribed authority. B

9) On such application (s) being made, the concerned authority would examine, consider and decide each such application on its merit strictly in accordance with law and keeping in view the law laid down in the decisions of this Court in Union of India & Ors. vs. Rafique Shaikh Bhikan & Ors., 2013 (4) SCC 699, Order dated 07.08.2014 passed in Special Leave Petition (C) No. 20743/2014 entitled Union of India & Ors. vs. All India Haj Umrah Tour Organizers Association & Ors., Order dated 07.08.2014 passed in Writ Petition (civil) No. 480/2014 etc. etc. entitled Jeddah Travels & Jeddah Hajj Group vs. Union of India, Order dated 12.05.2015 passed in I.A. No. 33 of 2015 in Special Leave Petition (C) No. 28609/2011 entitled Union of India vs. Rafique Sheikh Bhikan and Others and Order dated 23.07.2015 in W.P. (civil) No. 344/2015 entitled Alban Hajj Umrah Service vs. Union of India. C D E

10) Let the applications be decided by the concerned authority by passing a reasoned order on each application on or before 29.06.2016 and the order so passed be communicated to each applicant (writ petitioner) immediately.” F

18. We are of the opinion that it is not necessary to examine in detail the content of these various press releases issued by the MEA. They only indicate the Government of India’s understanding of the APPROVED POLICY (as interpreted by orders of this Court in **Jeddah Travels** (*supra*)). These press notes are professedly meant to be clarificatory of the APPROVED POLICY. But they created more confusion than really clarifying the APPROVED POLICY. G H

A 19. The net result emerging from these various Press Notes and the orders of this Court is that as a matter of fact some of the PTOs (falling under either category I or II) who should have been registered by the Ministry of External Affairs for consideration of their cases for allotment of Haj quota for the year 2014 were wrongly denied registration and, therefore, they were not allotted any quota in that year.

B 20. The ultimate question in this batch of matters is – what are the documents which are required to be submitted for registration as a PTO qualified for being considered for allotment of quota for Haj 2016?

C 21. There is no dispute between the parties regarding the obligation of a PTO to furnish various documents referred to in various stipulations of Annexure ‘A’ of the APPROVED POLICY. The dispute revolves only around the stipulation (vii). It is the common understanding of the Government of India and Petitioners/PTOs insofar as stipulation no. (iv) is concerned, though the text of the stipulation speaks about submission of balance sheet and profit and loss account for the years 2010-2011 and 2011-2012, that stipulation is to be understood as the balance sheet and profit and loss account pertaining to the years 2013-2014 and 2014-2015 for the purpose of registration for the HAJ 2016.

D 22. On the only contentious stipulation that is stipulation no. (vii), according to the Government of India, when the APPROVED POLICY imposes an obligation on a PTO seeking registration to produce proof of the payments (made through banking or other authorized channels) towards purchase of tickets and hiring of accommodation in Makkah/ Madinah, obviously such an obligation is with reference to the two years preceding HAJ 2016 in view of the orders of this Court in *Jeddah Travels (supra)*.

E 23. The learned Addtl. Solicitor General submitted that they are not only bound by the orders of this Court in *Rafique Shaikh Bhikan, 2013 (supra)* and *Jeddah Travels (supra)* but also are under a constitutional duty to be satisfied that an applicant (PTO for registration for Haj 2016 programme) has the necessary ability and capacity (financial and infrastructural) to conduct such a programme because the safety and comfort of the Haj pilgrims eventually depends upon the ability and the capacity of the PTOs. It is submitted that some of the PTOs did not in the past really provide the necessary services which they ought to have provided to the pilgrims. Past performance of the PTOs is one of the factors by which the Government of India makes an assessment of the capacity of the PTOs under the APPROVED POLICY. The past

performance of a PTO is to be assessed on the basis of the documentary evidence indicated in stipulation no. (vii). Such evidence proves the facts that PTOs after having secured the allotment of quota did in fact conduct Haj programme by actually purchasing tickets and providing appropriate accommodation for the pilgrims in Makkah/Madinah. Therefore, any PTO seeking consideration for allotment of a quota for Haj 2016 must necessarily supply the documents for the years of 2014 and 2015 Haj.

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24. On the other hand, the learned counsel for the petitioners argued that some of the petitioners who were otherwise eligible to be considered for allotment of quota for Haj 2014 were wrongly denied registration and consequently they did not get any quota. Therefore, calling upon them to produce proof of the fact that they had made appropriate arrangement for that particular year is not only illogical but would be asking them to perform an impossibility, apart from being an arbitrary exercise of power. Therefore, their cases must be considered without insisting upon the documents for the years 2013-2014 and 2014-2015.

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25. In our opinion, stipulation no. (vii) does not impose a substantive obligation on a PTO seeking consideration for allotment of quota by the Government of India for Haj programme of any particular year. It only incorporates a rule of evidence to establish the fact whether a particular PTO had in fact conducted Haj programme in the past.

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26. PTOs had been in existence and conducting Haj operations without any intervention by the Government of India even prior to the coming into existence of the APPROVED POLICY under the orders of this Court in *Rafique Shaikh Bhikan, 2013 (supra)*. It is a different matter as to *how* well they had conducted the Haj programmes. Sometime in 2002⁷, after the Government of Saudi Arabia decided that only those PTOs which are approved by the Government of India could be given 'Group Visas' to perform Haj operations, this whole process of the Government of India considering allotment of quota to PTOs started

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⁷ Union of India and Others etc. v. Rafique Shaikh Bhikan and Another etc. (2012) 6 SCC 265. In this judgment, the following paragraphs are to be noted-

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5. In order to clearly understand the context in which the dispute arises a few facts are required to be taken into account. Under a bilateral agreement signed between the Government of India and the Kingdom of Saudi Arabia every year, the latter Government assigns a fixed number of pilgrims that are permitted to visit Saudi Arabia for performing Haj. Out of the overall number, a relatively small portion is specified for the PTOs and the rest for the Haj Committee of India.

6. Before 2002, the PTOs were allocated Haj seats directly by the Kingdom of

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A because the Government is under a constitutional obligation to consider the cases of all the eligible PTOs without discrimination.

B 27. To decide upon the eligibility of PTOs, certain criteria was required. Therefore, the APPROVED POLICY stipulated that those PTOs who had conducted at least 7 Haj operations or more would be considered in Category-I and PTOs who had conducted less than 7 Haj operations would be treated as Category-II PTOs. The consequence of the division of PTOs into two categories is that the total number of Visas to be provided by the Government of Saudi Arabia for the pilgrims going through PTOs would be distributed among the two categories in the ratio indicated in para 4 which is already taken note of. PTOs which had conducted greater number of Haj programmes would get a larger chunk of visas. To determine whether a particular PTO falls either under Category-I or Category-II, some evidence to establish the number of tours conducted by such a PTO prior to the formation of the scheme is required. The best proof, as rightly identified by the Government (in stipulation no. (vii) of Annexure 'A'), is the evidence of payments for the air tickets and hiring of accommodation through banking or other authorized channels

D 28. We must note it here that stipulation (vii) is relevant only for those PTOs, who are seeking registration either under Category I or Category II as PTOs eligible for consideration for allotment of quotas for Haj Programme for the first time. When an application is received from any PTO for the first time, as was rightly contended by the learned Additional Solicitor General before this Court in the **Jeddah Travels** (*supra*), the proof by documents specified in stipulation (vii) is required⁸. Unfortunately, the said submission was rejected by this Court. With this

F Saudi Arabia and there was, therefore, no involvement of the Government of India in the allocation of any Haj quota to the PTOs. After Haj 2001, the Kingdom of Saudi Arabia made it mandatory for the PTOs to come through their respective Governments. From 2002, therefore, the Government of India was obliged to evolve a system under which private operators/travel agents would be registered as PTOs and following the registration would be allocated quotas from the overall number of pilgrims specified for PTOs. It is, thus, to be seen that a private operator/travel agent needs first to get registered as PTO and it would then get a fixed number of pilgrims for carrying for Haj.

G ⁸ 6. Shri Neeraj Kishan Kaul, learned Additional Solicitor General has vehemently contended that the requirement under the order of the Court dated 16-4-2013 [F/N : Union of India v. Rafique Shaikh Bhikan (2013) 4 SCC 699], is really for a seven year period, which is evident from a reading of Appendix I, which is to be found in para 36 of the aforesaid order of this Court.

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respect we may say that we are unable to agree with the conclusion of Court in **Jeddah Travels** (*supra*) in this regard. A

29. Be that as it may, but once the PTO is registered either under Category I or Category II insisting upon the PTO to produce proof for each subsequent year or to produce documents contemplated under stipulation (vii) in our opinion is not supported either by the text of the APPROVED POLICY or logic. B

30. The scheme was not confined only to Haj 2013 and made applicable till 2017 (by orders of this Court). There is always a possibility of some new PTOs who were qualified to fall under Category-II in 2013 to acquire a qualification to fall in Category-I in a subsequent year. For example, a PTO who successfully conducted 6 Haj operations prior to 2013 would fall under Category-II for the purpose of allotment of quota in Haj 2013. If it did in fact secure a quota for Haj 2013 and did in fact conduct Haj operations for 2013 successfully, for a Haj operation for any subsequent year during the currency of the APPROVED POLICY a PTO would be entitled to be considered as a Category-I PTO as by then it had conducted 7 Haj operations. Similarly, the PTOs who facilitated 50 *umrah* pilgrims in a year for any five years prior to 2013 would be eligible for being considered in Category-II and for allotment of quota of Haj 2013 and if it is successful in securing the quota and in conducting Haj operations, in any subsequent years, it would be entitled to be considered for quota under Class-I of Category-II as a PTO who has conducted one Haj operation. C
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31. We have already noticed the relevant portion of the APPROVED POLICY which dealt with the categorization of the PTOs. The APPROVED POLICY did not stipulate a condition that experience of having conducted 7 Haj programmes is an experience of 7 consecutive years etc. Therefore, if a PTO is once registered in any one of the years, either as a Category-I or Category-II PTO, to call upon such PTOs to furnish the documents contemplated under stipulation no. (vii) for every subsequent year, in our opinion, would not be in tune with the text of the APPROVED POLICY. We are conscious of the fact that some PTOs who had successfully undertaken a number of Haj programmes may subsequently derelict their responsibility to the pilgrims. The Government of India has ample power under the APPROVED POLICY to deregister such PTOs. This aspect is amply born out of the F
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A text of the policy itself. Para 5 of the Policy insofar as it is relevant reads as follows:

B “5. ... The policy envisages cross-category upward movement of PTOs from Category II to Category I. **A qualified PTO shall remain qualified unless it is otherwise disqualified either by the Government of India or by the Government of Saudi Arabia for valid reasons.** It is to be noted that the PTOs who do not wish to take a minimum of 150 Hajis or are unable to do so, need not apply.”

C 32. Therefore, in our opinion, understanding of the Government of India that even those PTOs who had been registered either in Category-I or Category-II would also be required to furnish the documents specified in stipulation no. (vii) every year when they are seeking consideration for allotment of quota of Haj pilgrims is wholly illogical and contrary to the text of the APPROVED POLICY. A registration for PTO once made under the scheme should be valid till 2017, subject to fulfillment of other relevant stipulations under the scheme.

E 33. Ultimately, documents specified in stipulation (vii) not only go to prove a fact that a PTO had in fact conducted a Haj programme in a particular year, but also prove that the PTO has necessary information and contacts in Saudi Arabia to organize an appropriate accommodation both at Makkah/Madinah.

F 34. Another submission of the learned Additional Solicitor General is required to be examined at this stage. The submission is that in the absence of such documents for the minimum two preceding years relevant to the Haj programme in consideration the Government would have no means of assessing the continued ability and capacity of the PTO to undertake a Haj operation and therefore, the Government should be permitted to insist upon the production of such documents.

G 35. This argument is to be rejected for one reason under para 4(b) of the APPROVED POLICY, it is stipulated that “a qualified PTO which fails to get selected under the draw of lots in any year will be allocated 150 seats in the ensuing year without *umrah*, if it remains a qualified PTO”, obviously such a PTO would not be able to produce such documents with reference to that year when it failed to secure allotment of quota for Haj. Therefore, the assessment of its ability on

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the basis of its previous year performance as is sought to be argued by the learned Additional Solicitor General is not possible in such cases. Still the Government is obliged under the APPROVED POLICY to grant a quota to such PTOs. A

36. Lastly, it is argued by the learned Additional Solicitor General based on the decision of this Court in *Union of India and Others etc. v. Rafique Shaikh Bhikan and Another etc.* (2012) 6 SCC 265, that this Court may not interfere with the policy of the Government unless it is demonstrated before us that “the condition(s) was purely subjective or designed to exclude any individual or group of private operators/travel agents i.e. bordering on malice.” B

37. We reject the submission as the statement relied upon by the learned Additional Solicitor General is not an exhaustive statement of law on the subject, when it is demonstrated that the administrative action of the Government of India is inconsistent with the text of the law (APPROVED POLICY in this case) or that the government is making an irrational application of the law, this Court is bound to interfere. C D

38. It is submitted by the learned ASG that the prime consideration in this matter should not be the individual rights of these PTOs whose only motive is to secure economic benefits from the allotment of Haj quota, but the safety and comfort of the Haj pilgrims. Government of India must have the necessary freedom to make its own assessment regarding the suitability of the PTO in this regard. We do not dispute the proposition, the text of the scheme itself makes it abundantly clear that any PTO once qualified shall “remain qualified unless it is otherwise disqualified.... by the Government of India... for valid reasons.” Therefore, it is always open to the Government to disqualify any registered PTO for subsequent year, if there is rational complaint against the service rendered by that PTO in any previous year from any one of the pilgrims of that year or any other legally tenable information or material which calls for disqualification of such a PTO. E F

39. We are left with the writ petitions of those PTOs who are seeking consideration for allotment of quota for haj 2016 in the category-II Class I. Their claim is that earlier that is in 2015 for the year 2015 they were allotted a quota on the ground that they were PTOs falling under Class-II of Category-II, i.e. PTOs which had the experience of having conducted five (5) *umrah* operations prior to 2015. The learned Additional Solicitor General submitted that under the laws of Saudi Arabia G H

A PTOs are not permitted to conduct *umrah* operations unless they have a clear contract with one of the agencies duly authorised by Government of Saudi Arabia for the purpose of conducting *umrah* operations and some of these PTOs did not have any such contract. According to the learned ASG the petitioner PTOs were only sub-contractors under some PTOs which were already classified as PTOs falling under Category-I or Class-I of Category-II. They did not have any independent contract for conducting *umrah* operations, however, by some oversight some of them had been granted registration and quota under Class-I of Category-II for the year 2015. The learned ASG submitted that it does not create any right in favour of such PTOs.

C 40. Whatever be the basis on which quota was allotted to these PTOs for *haj* 2015, the fact remains that if anyone of those PTOs did in fact, conduct a *haj* programme pursuant to the quota they would be entitled for being considered even for 2016 unless there is any other good ground for not considering their cases such as inefficient or bad service rendered to the pilgrimage during 2015 *haj* programme, their claims now cannot be rejected. If the respondent decides to de-register such PTOs on any ground tenable in law, it is open for the respondent to de-register after giving reasonable opportunity to such PTOs but until such de-registration takes place their cases must be considered for allotment of quota for *haj* 2016 if they are otherwise eligible.

E 41. It is a settled principle of international law that a law of a foreign country is a pure question of fact insofar as municipal courts are concerned, we do not see any reason to doubt the statement, the Government of India and therefore, we do not see any reason to grant any relief for those PTOs.

F 42. All these writ petitions are disposed of directing the respondents to consider the cases of all the PTOs for allotment of quota in the light of these orders insofar as stipulation (vii) of Annexure A is concerned subject to the fact that PTOs are otherwise eligible in accordance with the approved scheme.

G **Writ Petition(C)No.559/2016**

Taken on board.

In view of the order passed in W.P.(C)No.425/2016, this petition also stands disposed of.

H Nidhi Jain

Writ petitions disposed of.