



Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 31 of 2020

- 1) Dr. Attiya Inayatullah, Chairperson
- 2) Syed Asim Zafar, Director
- 3) Tajammal Hussain, Director
- 4) Syed Hassan Iqbal, Director
- 5) Asif Masud Mirza, Director
- 6) Rabia Khan, Director
- 7) Amjad Ali Arbab, Director
- 8) Roshaneh Zafar, CEO/Managing Director of Kashf Foundation

...Appellants

Versus

Executive Director, Adjudication – I

...Respondent

Date of hearing:

January 16th, 2025

Present:

For the Appellants:

1. Ms. Saira Soofi (Legal Head/ Company Secretary)
2. Ms. Mehar Zafar (Legal Counsel)

For the Respondent:

1. Sohail Qadri (Director, Adjudication-I, SECP)
2. Asima Wajid (Additional Joint Director, Adjudication-I, SECP)
3. Naveed Iqbal (Deputy Director, Adjudication-I, SECP)

ORDER

1. This Order shall dispose of Appeal No. 31 of 2020 filed by the Board of Directors (“the BOD”) and the Chief Executive Officer (“ the CEO”) of Kashf Foundation (“the Appellants”) through its Company Secretary and Legal Head Ms. Saira Soofi, along with the legal counsel Ms. Mehar Zafar and Ms. Sara Majeed, (“the Authorized Representative”) under Section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (“the SECP Act”) against the Order dated March 06th,



Securities and Exchange Commission of Pakistan

2020 ("the Impugned Order") passed by the Executive Director (Adjudication-I) ("the Respondent") under Section 282J(1) read with Section 282M(1) of the Companies Ordinance, 1984 ("the Ordinance") and Section 40A of the Securities and Exchange Commission of Pakistan Act, 1997 ("the Act").

2. The brief facts of the case are that the Securities and Exchange Commission of Pakistan ("the Commission") under Section 282J of the Ordinance vide inspection order dated October 11th, 2019 initiated an inspection of Kashf Foundation ("the Company"). The inspection aimed to assess compliance of the Company with the Securities and Exchange Commission of Pakistan (Anti Money Laundering and Countering Financing of Terrorism) Regulations, 2018 ("the AML & CFT Regulations"). The inspection report inter alia, revealed various non-compliances where the Appellant had failed to comply with the applicable provisions, i.e., Regulation 6(4), 6(5a), read with Regulation 6(3)(a), 13(7), and 6(8) of the AML and CFT Regulations and further violation of Rule 7(1)(g) of the NBFC (Establishment and Regulation) Rules, 2003 ("the 2003 Rules"). Pursuant to the inspection a Show-Cause Notice ("the SCN1") dated November 29th, 2019 was issued to the Company. Another Show-Cause Notice dated January 1st, 2020 ("the SCN2"), was issued to the Appellants. After examining the submission and considering the facts it was established that the Appellants had violated Regulation 6(4), Regulation 6(5a) read with Regulation 6(3)(a), and Regulation 13(7) of the AML and CFT Regulations and Rule 7(1)(g) of the 2003 Rules. Subsequently the Respondent, in exercise of powers conferred under Section 40A of the Act imposed a collective penalty of Rs. 4,500,000/- on the Appellants for the aforementioned contraventions of the AML & CFT Regulations, and the 2003 Rules. The breakdown of the penalty is provided in the table below:

Sr. No.	Name	Designation	Penalty
1.	Dr. Attiya Inayatullah	Chairperson	500,000
2.	Mr. Syed Asim Zafar	Director	500,000
3.	Mr. Tajammal Hussain	Director	500,000
4.	Mr. Syed Hassan Iqbal	Director	500,000
5.	Mr. Arif Masud Mirza	Director	500,000
6.	Ms. Rabia Khan	Director	500,000
7.	Ms. Fatima Asad	Director	500,000
8.	Mr. Amjad Ali Arbab	Director	500,000
9.	Ms. Roshaneh Zafar	CEO/Managing Director	500,000

Mc.



Securities and Exchange Commission of Pakistan

3. The Appellant filed this Appeal on several grounds, including the assertion that the Impugned Order lacks a proper appreciation of facts and law. The Authorized Representative for the Appellants submitted before the Bench that the Commission had in proceedings related to the SCN1 determined that the Company had violated the AML & CFT Regulations and 2003 Rules, and the Appellants were not a party to this. The Authorized Representative pursuant to the submission highlighted that the SCN2 was issued to the Appellants which contained the same allegations as the SCN1 with an additional allegation of violation of Regulation 9(1) and 2(a) of the Non-Banking Finance Companies and Notified Entities Regulations, 2008 (“the 2008 Regulations”). However, the Authorized Representative regarding the SCN2 submitted that since no adverse order has been passed against the Appellants with respect to the 2008 Regulations, therefore it does not form part of the subject matter of this appeal. The Authorized Representative asserted that the Impugned Order violates the principle of natural justice since it penalizes the Appellants without affording them a right of hearing. Furthermore, the Authorized Representative submitted that the Impugned Order is illegal, since it violates the fundamental right of the Appellants to be tried by a fair and impartial judge. The Authorized Representative submitted that the determination of whether the AML & CFT Regulations and the 2003 Rules were violated or not was made in proceedings regarding the SCN1, and hence Respondents had a preconceived notion as to the facts and laws, therefore, the judge could not be considered impartial. The Authorized Representative asserted that the Regulations 6(4), 6(5a), 6(3)(a), 6(8), and 13(7) of the AML & CFT Regulations only apply to “regulated persons” and the directors and officers of the company do not fall within this ambit, therefore these do not apply to the Appellants. The Authorized Representative further submitted that the obligation placed, under Rule 7(1)(g) of the 2003 Rules, is on NBFC’s to follow directions issued against their involvement in money laundering activities and terrorist financing, and for this to apply there needs to be a direction followed by non-compliance of such a direction, however, no such direction is in force, neither has the Respondent made mention of any in the Impugned Order nor such a direction has been alluded to in the SCN2.
4. The Authorized Representative submitted that neither the SECP Act nor the AML & CFT Regulations place a positive obligation upon the directors of an NBFC to do any act, therefore, there is no question of the Appellants contravening any provision of the above. Furthermore, the Authorized Representative asserted that Section 40A of the SECP Act only empowers the SECP to penalize a person that has violated a provision applicable to them, and in view of the above there is no such provision applicable to the Appellants. The Authorized Representative also highlighted that the Respondent had failed to acknowledge that Ms. Roshaneh Zafar (“Appellant No. 9”) is not on the board of directors and therefore any alleged violation is not attributable to her. Furthermore, the Authorized Representative submitted that since the liability of Appellant No. 9 had already been determined in the SCN1 therefore, the Impugned Order is hit by the rule of *res judicata*. The



Securities and Exchange Commission of Pakistan

Authorized Representative also submitted that by issuing the Company's 2016 AML & CFT Policy ("the Policy"), the Appellants had discharged their duties and exercised all diligence to prevent any violation occurring. Moreover, the Authorized Representative submitted that the Respondent has held the policy to be compliant of the AML & CFT Regulations and hence the Appellants must be held to have fulfilled their obligations, if any, arising therefrom. Furthermore, the Authorized Representative also submitted that a plain reading of the policy suggests that the internal audit ("the IA") team of the Company was responsible for evaluating and ensuring the adherence of the staff with AML/CFT policies and procedures and that it was the duty of the IA manager to report the team's findings to the AML & CFT Officer and advise on the effectiveness of the policies and procedures, alert the head of the audit committee if it was believed that the management was failing to address AML & CFT procedures. The Authorized Representative also asserted that the Respondent has wrongly stated that the Appellants had failed to implement the Policy since there were no complaints from the IA manager because of which the head of the audit committee was not obligated to take any action and therefore it cannot be said that he has failed to discharge his duties under the Policy.

5. Furthermore, the Authorized Representative contended that the Respondent was factually and legally incorrect in holding the Company in violation of Regulation 6(5a) of the AML & CFT Regulations since the Company never established a business relationship with any person who is designated under the United Nations Security Council Resolutions as adopted by the Government of Pakistan, or who is proscribed under the Anti-Terrorism Act 1997, or who is an associate/facilitator thereof and the eight persons found by the inspection team of the Commission to be on the NACTA list of proscribed persons, none of them are the customers/clients of the Company. Moreover, the Authorized Representative submitted that the Respondent has erred in holding the customers/clients of the Company or their husbands and brothers to be the "associates/facilitators" of the Postdated Cheque ("the PDC") providers and nominees within the meaning of Section 6(5a)(c) of AML & CFT Regulations. The Authorized Representative further submitted that the AML & CFT Regulations do not define the word "associate" or "facilitator", and the ordinary dictionary meaning of the word associate or facilitator does not include guarantors, nominees, husbands or brothers. The Authorized Representative also highlighted that since no further evidence has been adduced to show that the customers/clients of the Company are the "associates/facilitators" of their PDC providers or nominees and the fact that the PDC providers are all holders of operating bank accounts and therefore, Company reasonably assumed that the banks would have verified these individuals against the NACTA list of proscribed persons and the fact that there is no evidence to suggest that the business is run by any person other than the customer/client to whom the loan has been disbursed, therefore, in all respects it is clear that the decision as to how the loan money will be utilized, the responsibility for repayment of the loan and



Securities and Exchange Commission of Pakistan

the overall financial control over the loan remains with the customer/client. The Authorized Representative also submitted that it is irrelevant for the Company to determine whether some other person is involved in the day to day operations of the business, as long as it is clear that the decision-making power with regard to the loan money is with the client.

6. The Authorized Representative also submitted that the Company by way of abundant caution is in the process of updating its Policy to ensure that no business relationship shall be formed with any customers/clients in case their PDC providers and nominees are found to be designated under the United Nations Security Council or proscribed under the Anti-Terrorism Act, 1997. The Authorized Representative highlighted that the Company has also illustrated its commitment to the AML & CFT Regulations by reporting the eight individuals regarding whom the inspection team of the SECP raised concerns.
7. Moreover, the Authorized Representative submitted that the Respondent is wrong in holding that the Appellants had failed to identify its customers/beneficial owners and verify their identity since in fact all the customers are natural persons, whose identity is verified after duly processing their CNIC's and physically meeting them whereby the CNIC is further verified and matching the CNIC on real time basis is done in person, and verification of place of residence and inspection of business is also done. The Authorized Representative further submitted that the Respondent has erred in its interpretation of the definition of "beneficial owner" as contained in Regulation 2(1)(d) of the AML & CFT Regulations. The Authorized Representative also asserted that the Respondent has erred in holding that the Company has failed to comply with Regulation 13(7) of the AML & CFT Regulations since the Company regularly monitors its relationships on a continuous basis. The Authorized Representative also highlighted that the loan officers of the Company carry out a detailed assessment of customers/clients when the loan application is first processed, including verification that the customers/clients do not fall within the ambit of Regulation 6(5a) of the AML & CFT Regulations. In addition to this, the Authorized Representative also submitted that it is a requirement of the Company's Policy that all loans have to be monitored for compliance with AML & CFT requirements on a quarterly basis and that in case it is found that any loan does not comply with AML & CFT requirements then such a loan will be recalled and the relevant reporting requirements will be fulfilled. Moreover, the Authorized Representative submitted that in case a relationship is found to exist with any person mentioned in Regulation 6(5a) of the AML & CFT Regulations then the Company would take immediate steps including reporting to the Commission. The Authorized Representative contended that it cannot on the one hand be said that the Company failed to identify proscribed persons, and on the other hand that the Company has failed to report the identified proscribed persons, and having such knowledge is an essential ingredient required to



Securities and Exchange Commission of Pakistan

be proved before one can legally be deemed to be in violation of Regulation 13(7) of the AML & CFT Regulations.

8. Moreover, the Authorized Representative submitted that the Impugned Order contains no discussion pertaining to the violation of Regulation 6(4) Annexure-1 (Note(i)) of the AML & CFT Regulations. In pursuance the Authorized Representative submitted that the Company through the Pakistan Microfinance Network ("PMN"), had requested the SECP to provide it with the NADRA Verisys facility at a reduced cost, which the SECP had undertaken to do so and since the Company was relying on the SECP to facilitate, the SECP cannot impose a penalty on the Company or the Appellants for not having availed the NADRA Verisys prior to this date as it would be completely arbitrary, irrational and biased exercise of power. Moreover, the Authorized Representative submitted that the SECP was well aware that a large number of regulated financial institutions have not availed the NADRA Verisys facility up till 30 March 2020, however the SECP has chosen not to penalize these financial institutions.
9. The Authorized Representative pertaining to violation of Regulation 6(8) of the AML & CFT Regulation contended the submission to be wrong and against the facts and the law since the Company has a comprehensive customer due diligence process, and that the Company forms relationships exclusively with those customers who fall under a low risk category. Moreover, the Authorized Representative asserted that it may be noted that as per Regulation 11 (2) (g) of AMT & CFT Regulations, all customers of the Company are *prima facie* categorised as low risk and that none of the Company's customers have any of the characteristics as described under Regulation 9(2) of the AML & CFT Regulations that would cause them to be categorised as high risk.
10. The Authorized Representative submitted that the Company comprehensively monitors all its customers through quarterly and annual visits from Compliance and the IA Departments of the Company to independently assess client verification and business authenticity and if it transpires that loans are not used for the intended purposes for which it was availed, such clients are tagged in the Company's system and are not dispersed further loans. Furthermore, the Authorized Representative submitted that the Respondent has failed to mention a single direction that the Appellants have failed to comply with but nonetheless a penalty of Rs. 4,500,000/- has been imposed without stating the reasons upon which the determination of the quantum of penalty was made and neither has a break up of the penalty been provided. The Authorized Representative referred to section 24A of the General Clauses Act, 1897 any authority making any order must provide reasons for doing so and it was also submitted that this has also been held by the honourable superior courts that orders which do not comply with the aforementioned law are void and to be



Securities and Exchange Commission of Pakistan

held as such. Moreover, the Authorized Representative submitted that the Respondents had incorrectly directed the Appellants to provide documentary evidence that the "*biometric verification, as proscribed, has been initiated*", whereas biometric verification has not been proscribed in the AML & CFT Regulations or indeed in any law currently in force that is applicable to the Company and hence the direction is therefore beyond the jurisdiction of the Respondent. In addition, the Authorized Representative to the Respondent submitted that this directive was neither included in the SCN2, nor was it mentioned in the hearing held before the Respondent, and therefore the Appellants have not been granted any right to defend themselves in respect of this directive. On the basis of these contentions the Appellants requested the Bench (the Bench) to set aside the Impugned Order and give any other relief that the Honourable Appellate Bench deems fit and appropriate, taking into consideration the aforementioned contextual factors.

11. The Respondent countered the grounds of the Appeal and proffered arguments. The Respondent, in response to the Appellant's contentions, emphasized that the Impugned Order was not only issued in strict accordance with the law but also after thorough consideration of the facts presented in this case. The Respondent submitted that two different proceedings were initiated, formerly against the Company and latterly against the BOD and highlighted that the individual directors of the Company have a fiduciary role and the Appellants being members of the Board of Director had their own specific and distinct rights and responsibilities. The Respondent also refuted the argument that the Appellants was devoid of an opportunity to be heard and submitted that the opportunity of hearing was provided on January 16th, 2020 wherein the Company Secretary along with two legal counsels appeared on behalf of the Appellants. The Respondent also submitted that during the hearing the Authorized Representative for the Appellants failed to demonstrate that the Appellants had fulfilled their responsibility regarding oversight of implementation of the Policy, and it was concluded that the Appellants had limited themselves to providing a policy direction only. The Respondent also refuted the argument regarding their impartiality and submitted that in both the proceedings neither the parties nor their liabilities were same, hence the Respondent was completely unbiased. Furthermore, the Respondent submitted that a failure to comply with the AML and CFT Regulations attracts a penal provision of section 40A of the Act, and the term "person" includes both natural and legal persons. Furthermore, the Respondent submitted that Company is an NBFC and failure to comply with the NBFC Regulations attracts the penal provision of sub-section (1) and (2) of 282J read with sub-section (1) and (2) of 282M of the Ordinance, which clearly provides that when an offense has been committed by the NBFC or the notified entity, every director, manager, or other officer or person responsible for the conduct of its affairs shall be deemed to be guilty of the offense, unless it is demonstrated that the default was committed without their knowledge or that it occurred despite all diligence being exercised to prevent its commission. Moreover, the Respondent asserted that the non-compliance of the AML and CFT Regulation 6(4), Regulation 6 (Sa) read with


ML



Securities and Exchange Commission of Pakistan

Regulation 6(3) (a) Regulation 6(8) and Regulation 13(7), and Rule 7(1)(g) of the NBFC (Establishment and Regulation) Rules, 2003 had been established clearly.

12. Moreover, the Respondent referred to Section 188 (3) of the Companies Act, 2017 regarding the terms of appointment of the chief executive and highlighted the Appellants failure to acknowledge that the SCN1 was addressed to the CEO/Managing Director (“Appellant No.9”) of the Company along with the Directors since by virtue of sub-section (1) and (2) of 282J read with sub-section (1) and (2) of 282M of the Ordinance Appellant No. 9 being the CEO was definitely an officer responsible for managing the affairs of the NBFC and the penalty had been imposed on her due to the negligence to monitor the affairs of the NBFC diligently, especially those pertaining to AML & CFT Regulations. The Respondent also submitted that Appellant No.9 was neither the respondent nor was her liability as the CEO determined in the proceeding. Moreover, the Respondent submitted that the role of the BOD demands the Appellants to be proactive, take a stronger interest in management activities to ensure impact on discharge of its fiduciary responsibilities, be informed on how the organization is being managed to protect its legal responsibilities, to oversee performance, ensure the implementation of policies, and compliance with laws, rules and regulations applicable on the Company. In pursuance of the established violation, occurring without the knowledge of the Board shows the extent to which the Board was managing its responsibilities and the directors are responsible for issuing policies and overseeing their implementation to ensure compliance with applicable regulations. The Representatives of the Appellants could not demonstrate efforts made by the board to perform oversight of the Policy implementation.

13. The Respondent further submitted that regardless of the Appellants assertion that an obligation was placed upon the Head of Audit Committee to ensure that Company’s compliance with the Policy, no reports were submitted before the Appellants either for information or approval. Moreover, the Respondent submitted by virtue of S.R.O. 245 (1)/2019 dated 22 February 2019 the risk assessment report needs to be reviewed and approved by the BOD, and the Chief Risk Officer of the Company admitted that this was not being done.

14. The Respondent also highlighted that the Company focused on regular monitoring of its client relationships to minimize the business risk rather than AML & CFT risk, and therefore the Appellants also failed to notice that out of a total of eight cases, in five cases the proscribed person was running the business, in two cases the proscribed person was the co-borrower and while in one case, the proscribed person was declared as nominee. The Respondent submitted that during the screening of the entity's database it transpired that in eight instances, the CNICs of co-borrowers or nominees of borrowers matched with NACTA list of proscribed persons. The Respondent asserted



Securities and Exchange Commission of Pakistan

that the Appellants had misconstrued the requirement of identifying beneficial owners being limited to legal persons as it entails any person deriving ultimate benefit need not necessarily be the borrower them self, i.e., in case of the Company, all loans were granted to women borrowers and the proscribed persons were either the brother or husband of the borrower and declared as co-borrowers or nominees.

15. The Respondent submitted that the Company may have regularly monitored its relationship with the client but regulation 13(7) of the AML & CFT Regulations requires to monitor and ensure that no relationship existed directly or indirectly with entities/individuals mentioned and if such a relationship was found, the obligation is to freeze the funds and assets of such proscribed entity/individual and report to the Commission. The violation had been established due to the failure of the Head of Audit Committee to inform that a relationship with the proscribed person, and furnish reports before the Appellants who moreover failed to intervene and demand the implementation status of the devised Policy.

16. The Respondent contended that NADRA *Verisys* was not being carried since incorporating the *Verisys* system involved a substantial cost, nonetheless, the efforts being made by the SECP to convince NADRA to allow NADRA *Verisys* at a reduced cost were considered. The Respondent also submitted that a lenient view was taken in the said matter and had only commented that the Company should not have risked itself to exposure of proscribed individuals and should have initiated the process of NADRA *Verisys*. Moreover, the Respondent submitted that the only way to carry out NADRA *Verisys* is through biometric verification, and hence the term biometric verification implies to carry out the *Verisys*. The Respondent furthermore referred to the argument put forth by the Company that all its customers were considered/categorized as low risk, since micro loans were being disbursed to small households for small businesses and in response submitted that the Risk Based Approach means that the financial institutions should identify, assess and understand the money laundering and terrorist financing risks to which the financial institution is exposed, and categorizing customers as low risk merely on the basis of the size of the loan is not an appropriate justification. Moreover, the Respondent highlighted that the basis for the determination of the quantum of the penalty have been clearly established to be the non-compliant of Regulation 6(4), Regulation 6 (Sa) read with Regulation 6(3) (a) Regulation 6(8) and Regulation 13(7), of the AML and CFT Regulations, and Rule 7(1)(g) of the 2003 Rules.

17. The Bench has heard the arguments of both the parties and perused the record. It is pertinent to distinguish between the roles and responsibilities of the Board of Directors and the Management of a Company. The Board is responsible for making policies, approving the business strategy and



Securities and Exchange Commission of Pakistan

carrying out oversight of the management. The Management is responsible for implementation of policies, preparation and execution of business strategy, and running the operations. The Bench has noted that, in the instant case, the Board approved the Policy to comply with the AML & CFT Regulations and the management also took various measures to implement the Policy. The Commission did identify certain lapses in implementation of the Policy for which a penalty has already been imposed on the Company through a separate order.

18. The Bench is of the view that the Board as well as the Management have done a reasonable job. The Company has been separately penalized for certain gaps in implementation. The Company has shown the commitment to stronger implementation and compliance by making various improvements in the relevant processes and procedures.
19. Considering the facts and circumstances of the case, the imposition of penalty on the Appellants in the capacity of board members is not justified. The penalty is therefore annulled. The Board is advised to regularly monitor and evaluate the implementation of the policy to ensure compliance with the legal and regulatory framework pertaining to AML & CFT.

(Abdul Rehman Warraich)

Commissioner

(Mujtaba Ahmad Lodhi)

Commissioner

Announced On:

14 MAY 2025