

Judgment Sheet

IN THE LAHORE HIGH COURT
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

Case No: WP 5062/2009/BWP

Faisal Sultan **Versus** EDO (Education) etc.

JUDGMENT

Date of hearing	11-12-2009
Petitioner by	Mr. Nadeem Iqbal Chaudhry, Advocate.
Respondents by	Mr. Naveed Khalil Chaudhry, AAG for State.
Amicus Curia:	Mr. Ejaz Ahmad Ansari, Advocate.

Syed Mansoor Ali Shah, J.- This consolidated judgment decides writ petitions no.5062, 5060, 5067, 5068, 5104, 5106, 5112, 5114, 5138, 5142, 5248, 5267, 5293, 5326, 5383 & 5445/2009.

2. All the petitioners in these cases were offered Letters of Agreement dated 14-10-2009 for the post of Secondary School Educators (SSE), District Bhawalnagar. All the petitioners accepted the offer and joined the said posts. Finally through impugned omnibus Order dated 6-11-2009 issued by Executive District Officer (EDO), Education, Bhawalnagar, the offer letters (Letters of Agreement) issued to the petitioners were withdrawn, resulting in termination of their service. Through these petitions the impugned omnibus order dated 6-11-2009 has been assailed on common grounds by all the petitioners. These petitions were, therefore, heard together and are being decided through this consolidated judgment.

3. Admitted facts are that public advertisement dated 15.2.2009 was published in the Daily “Jang” by the respondents for the appointment of Educators to various posts i.e., Elementary School Educators (ESE), Senior Elementary School Educator (SESE) and Secondary School Educator (SSE). All the petitioners applied for the post of SSE. After undergoing the process of recruitment as per Recruitment Policy (referred to below), the petitioners were declared successful and offered appointment through Letters of Agreement dated 14.10.2009. The said Letters of Agreement (offers) were accepted by the petitioners on 16.10.2009 (by signing the said Letter of Agreement). Thereafter, the petitioners gave their joining for the said posts on the same day. After having worked for almost a month, vide impugned order dated 6.11.2009 of the EDO (Education) Bhawalnagar, the Letters of Agreement (offers) extended to the petitioners were withdrawn resulting in termination of the petitioners. Aggrieved of this, the petitioners have challenged the said withdrawal Order dated 16-11-2009 through these petitions.

4. Mr. Aejaz Ansari, Advocate Supreme Court of Pakistan was appointed as *amicus curiae* to assist the court on the following question:

“Whether contractual employees of the Government, like the petitioner, can maintain writ petition pertaining to their terms and conditions. What is the scope of interference, if any, in employment matters in public sector where the relationship is based on a contract.”

5. The learned *amicus curiae* Mr. Aejaz Ansari, Advocate submitted that the concept of master and servant applies to private organizations and to statutory organizations that do not have

statutory rules. However, where there are statutory rules the said concept does not apply. He argued that the matter takes a different complexion when the employer is the government. He referred to Articles 240, 241 and 260 to submit that working for the government means to be in the service of Pakistan. The amicus submitted that government employees are either civil servants or government servants. He argued that a contractual employee is therefore, also a government servant under the said Articles and relied upon re. Federation of Pakistan through General Manager, Railway Headquarters Office v. M/s Mian Muhammad Salim & Company, (1994 SCMR 1960) for this proposition. He further submitted that in a matter of contract at least requirement of notice is a must if the employer is the government. In this respect reliance has been placed upon re. Nizamuddin and 2 others v. Chairman, Evacuee Trust Properties Board and others, (1997 SCMR 1152), re. Agha Salim Khurshid and antoher v. Federation of Pakistan and others, (1998 SCMR 1930) and re. Abdul Ghaffar Khan v. Chairman Wapda, Wapda House, Lahore and 3 others, (2008 PLC (C.S.) 415). He further relied upon Article 4 of the Constitution submitting that the said article fully applies to the instant case as the said article does not create any distinction between contractual employee or a regular employee.

6. Counsel for the petitioners argued that the impugned order being without notice was in violation of the cardinal principle of natural justice and relied upon re. Dr. Ashiq Muhammad, etc. v. Govt. of N.W.F.P., etc. (NLR 2002 Service 33), re. Arshad Jamal v.

NWFP Forest Development Corporation and others, (2005 SCJ 38), re. Hazara (Hill Tract) Improvement Trust through its Chairman and others v. Mst. Qaisra Elahi and tohers, (PLJ 2005 SC 925), re. Secretary to Government of N.W.F.P. Zakat/Social Welfare Department, Peshawar and another v. Sadullah Khan, (1996 SCMR 413), re. Muhammad Zahid Iqbal and others v. D.E.O. Mardan and others, (2006 PLC (C.S.) 1216), re. Registrar, Supreme Court of Pakistan, Islamabad v. Qazi Wali Muhammad, (1997 SCMR 141), re. Yousaf Ali v. Government of the Punjab, etc. (NLR 1997 Service 34), re. Fuad Asadullah Khan v. Federation of Pakistan through Secretary Establishment and others, (PLJ 2009 SC 441), and re. M/s Millat Tractors Limited through its General Manager, Shahdara, Lahore v. Punjab Labour Court No.3 and 2 others, (PLJ 1996 SC 1184) in support of their contention. It was also argued that the public functionaries have to act reasonably, justly and fairly as now codified under section 24A of the General Clauses Act, 1897 (Central Act X of 1897) and the impugned order violates this provision of law.

7. Learned Law Officer submits that there have been serious errors in the appointments of the said petitioners. According to him the merit list was wrongly tabulated by the department, therefore, the necessity to issue the impugned order. The law officer failed to pin point the errors committed by the respondent department in each case.

8. Private respondents failed to defend the impugned order which was passed without notice to the petitioners but submitted that

in order to avoid further litigation the matter be marked for proper investigation and verification of qualifications of all the successful candidates who applied on the basis of the public advertisement dated 15-2-2009 (including the petitioners and the private respondents) so that this issue can be resolved once and for all.

9. During the course of the arguments, the parties proposed that the matter be sent to Secretary Education, Government of the Punjab, Lahore for constitution of a proper committee to decide the merit of all the successful SSE candidates from Bhawalnagar and then appropriate action be taken as per letter of agreement after due scrutiny. Petitioners, however, argued that in the meanwhile they be reinstated to which the private respondents disagreed. No consensus could, therefore be arrived at.

10. Arguments heard and record perused.

11. The public advertisement for the Recruitment of Educators in Punjab dated 15.02.2009 was for various posts including Elementary School Educators (ESE), Senior Elementary School Educators (SESE) and **Secondary School Educators (SSE)** in the District of Bhawalnagar. The case of the petitioners pertains to SSE only. This advertisement was an outcome of the POLICY FOR RECRUITMENT OF EDUCATORS IN GOVERNMENT SCHOOLS (2008-9) (“Policy”) circulated vide notification dated 23-8-2009 [No.SO(S-IV) 2-34/2008] by the Government of Punjab.

12. The aim of the said Policy was to provide “qualified educators in public schools”. It states that the “Policy is guided by the

principles of merit, transparency, fool proof selection process and fair competition”.

13. The Policy provides for the constitution of a Selection/ Recruitment Committee with the following Members:

- i. District Coordination officer (DCO) Chairperson
- ii. Executive District Officer (EDO) Education as Member
- iii. Executive District Officer (EDO) Finance and Planning as Member
- iv. District Education Officer concerned as appointing authority Member/Secretary
- v. One Nominee of the Provincial Government as notified by Secretary, School Education Department.

14. Clause B of the Policy lists the Responsibilities of the Recruitment Committee:

- vi. Recruitment Committee shall be responsible for conducting the whole process of recruitment.
- vii. Executive District Officer (EDO) shall be the appointing authority for Secondary School Educators (SSE Science/Arts/English/Maths/ Computer Science)
- viii.
- ix. The appointing authority shall issue Letter of Agreement to the selected candidates on the recommendation of the Recruitment Committee as per approved format. (emphasis supplied)

15. Clauses 9 to 13 of the Policy lay down the role of District Monitoring Officer (DMO), procedure for processing applications, selection, interviews and preparation of merit list and third party validation. Said clauses establish that the provincial government had set up a well thought out fair and a transparent system of recruitment.

16. In line with the Policy, the public advertisement dated 15.2.2009 for Recruitment of Educators in Punjab stated:

“Government of the Punjab has approved recruitment of educators in District Bhawalnagar for provision of teachers in schools, increase student enrollment and improve quality of education.”

17. After undergoing the recruitment process, the petitioners were approved for appointment by the Recruitment Committee and successful candidates were made offers of appointment through Letters of Agreement dated 14-10-2009. At the end, the Letters of Agreement provided a box titled “**Acceptance/Rejection of Offer**” which was filled in by the candidates and their signatures confirming their acceptance were affixed thereunder. All the petitioners accepted the offer on 16-10-2009 by affixing their signatures at the end of the Letters of Agreement. As a result a valid contract took place between the respondents and the petitioners on 16-10-2009. The petitioners thereafter gave their joining on 16-10-2009 and started working on the respective posts.

18. At this stage it is important to refer to some of the important clauses of the standard format of Letter of Agreement dated 14.10.2009:

“Clause 4. Period of Contract.

The contract shall be initially for a period of Five Years extendable for the terms of five years from time to time on the basis of performance up to the age of 60 years.

Clause 8. Termination of Contract.

(i) Contract of appointment shall be liable to termination on One Month’s Notice or Payment of One Month’s Salary in lieu thereof by either side without assigning any reason. (*emphasis supplied*)

(ii) Department of Education has the right to terminate your contract at any time after giving a notice/personal hearing in case of your poor performance or conduct.

Clause 13. Appointment through Bogus Certificate/ Degrees.

If any stage, it is discovered that you have obtained this appointment on the basis of bogus/forged documents or through deceit by any means, the appointment shall be

considered to be void *ab initio* and you shall be liable to refund all amounts received.

Clause 16. Verification of Record.

It shall be the responsibility of concerned appointing authority that Academic and Professional record/ documents of the Educators be verified before the release of the salary.

Matric=639/850, Inter=610/1100, Graduation 436/800, Masters= 546/1000 M. Ed=768/1200 Experience= 4(years)” *(to the extent of these marks, the extract is from the Letter of appointment issued to the petitioner in W.P. 5062/09/BWP).*

19. On 6-11-2009 with a stroke of pen an omnibus order was issued whereby the offers made to the petitioners were withdrawn and the merit list revised resulting in petitioners being deprived of their appointments / contractual employment without any notice or reason.

20. The comments filed by the respondents state that the offer letters were withdrawn on 6-11-2009 after the respondents “**detected that some errors existed in these merit lists.**” and also that the “**recruitment policy was violated.**” According to the comments the following observations were recorded after the issuance of the offer letters to the petitioners:

x. EXPERIENCE

The marks of experience were omitted unjustifiably of some candidates.

xi. LOCAL RESIDENCE

So many variations in the award of local residence marks were detected.

xii. 10 ADDITIONAL MARLS UNDER RULE 17/A

Some deserving candidates have not been awarded 10 additional marks under Rule 17/A.

xiii. EXCLUSION OF NAMES IN MERIT LIST

The most common complaint by the candidates was that their names were not included anywhere in the merit list.

xiv. PERCENTAGE DIFFERENCE

The marks percentage awarded was different from their entries in the original document.

xv. RESOLUTION OF OBJECTIONS

The objections submitted by candidates after pre-interview merit list were resolved under recruitment policy by Education Department but a quite fair number of them were not fed by the data entry operator.

xvi. AWARD OF DOUBLE BEENFIT ON SIMPLE B.Sc DEGREE

It was also observed that some candidates got the award of M.Sc while they were only simple B.Sc.

xvii. COMPUTER LITERATE MARKS

The uniform award was not practiced in case of Computer Literate notwithstanding having the same type of certificate issued by recognized government institution.

21. It is not the case of the respondents that the petitioners had submitted bogus or forged credentials or had played fraud by tampering with the recruitment process. The comments of the respondents clearly demonstrate that the alleged “errors” crept into the formulation of the merit solely due to the mismanagement and incompetence of the respondents and their staff employed for this purpose. In spite of a transparent recruitment system put in place by the Policy, as described in detail above, the respondents, failed to follow the same, resulting in disrupting and derailing the efforts to

enhance the educational system at the District and resulting in this unfortunate litigation.

22. It is sad to note that while the spirit of the Policy was to enhance the teaching capacity of the Educators and increase student enrollment, the incompetence and ineptness of the respondents resulted in its failure. As administrators respondents should have been trained to handle crises, rectify lapses and put the system to work. However, in this case, the respondents, without any remorse and without making an effort to rectify the alleged issue, thought it convenient to “pass the buck” by issuing the impugned order, which resulted in reopening past and closed appointments without furnishing any reason whatsoever. More importantly, the educators who were to energize the education system in the district ended up in courts rather than in schools. The invaluable opportunity to increase student enrollment in schools and to increase the quality of education has been lost to the wind and the damage in terms of educational time is unquantifiable.

23. The impugned Order dated 6-11-2009 is unlawful and without lawful authority for multiple reasons as discussed hereunder:

- a. The impugned order states that the merit list was revised with the approval of the DCO/Chairman of the Recruitment Committee. Under the Policy the Recruitment Committee is responsible for the entire process of recruitment and therefore Chairman of the Committee alone could not undo the merit list approved by the Recruitment Committee after a selection and scrutiny process spanning over almost eight months. The

DCO/Chairman of the Recruitment Committee therefore outstepped his authority and jurisdiction in approving the revised merit list and the EDO (Edu) without applying his mind communicated the same through the impugned Order. Further, the Policy does not provide for the issuance of a revised merit list.

- b. Offer once accepted cannot be withdrawn. In the present case the offers (Letters of Agreement) were duly accepted and acted upon and therefore the same could not be withdrawn. The option to terminate the Agreement as per Clause 8 was available to the respondents but the same was not invoked. The impugned order violates the settled principles of the law of contract and the express provisions of Contract Act, 1872.
- c. Clause 8 of the Letter of Agreement clearly states that the contract is liable to termination on one month's notice or payment of one month's salary in lieu thereof by either side. Admittedly, the respondents failed to issue such notice to the petitioners thereby violating the said term of the Letter of Agreement, which has been authored by the respondents.
- d. The requirement of notice under Clause 8 of the Letter of Agreement emanates from the cardinal principal of natural justice which has now been largely replaced and extended under the English law to a more general duty to act "fairly." Under English and American jurisprudence to act fairly includes "Procedural Fairness" or "Procedural Propriety" or "Procedural Due Process." All these concepts deal with the process and

procedures employed in arriving at an administrative decision rather than with its substance. “An important concern of procedural justice is to provide the opportunity for individuals to participate in decisions that affect them. Another is to promote the quality, accuracy and rationality of the decision-making process. Both concerns aim at enhancing the legitimacy of that process.” (*De Smith’s Judicial Review- 6th edition*). It is, however, pointed out that the nature and methodology of “process” to be adopted in a particular case might differ, but restricting myself to the present case, the requirement of notice was a “process” that was “due” in this case. Useful reference was made to *Treatise on Constitutional Law – Substance and Procedure by Rotunda & Nowak, 4th edition 2007*

- e. The respondents cannot brush aside the requirement of Notice under Clause 8 of the Letter of Agreement. Impugned Order seriously lacks procedural due process, procedural fairness, procedural propriety and more traditionally the norms of natural justice rendering the impugned administrative decision unlawful. It does not matter if the employment is statutory or contractual as long as it is in the public domain and pertains to public and government employment, procedural fairness and due process is mandatory. Reliance is placed on: *Arshad Jamal v. NWFP Forest Development Corporation and others*, (2005 SCJ 38), re. *Pakistan International Airlines Corporation (PIAC) through Chairman and others v. Nasir Jamal Malik and others*, (2001 SCMR 934), re. *Abdul Hafeez Abbasi and others vs. Managing*

Director, Pakistan International Airlines Corporation, Karachi and others, (2002 SCMR 1034), re. Dr. Ashiq Muhammad, etc. v. Govt. of N.W.F.P., etc. (NLR 2002 Service 33), re. Rana Asif Nadeem v. Executive District Officer, Education, District Nankana and 2 others, (2008 PLC (C.S.) 715), re. Muhammad Amjad Malik v. Pakistan State Oil Co. Ltd and other, (2005 PLC (C.S.) 318), re. Pakistan State Oil Company v. M. Akram Khan and others, (2004 PLC (C.S.) 992), re. Karachi Development Authority and another v. Wali Ahmed Khan and others, (1991 SCMR 2434), re. Lal Din v. Vice-Chancellor and others, (1994 PLC (C.S.) 880), re. Mrs. Anisa Rehman v. P.I.A.C. and another, (1994 SCMR 2232) and re. Muhammad Tariq and other v. P.I.A. and another, (1998 SCMR 429).

- f. Article 4 guarantees an inalienable right to enjoy the protection of law and to be treated in accordance with law. “Law” in article 4 includes the cardinal principle of natural justice. Article 4 is a loud and clear constitutional guarantee that every citizen and every person for the time being in Pakistan must enjoy the protection of law and be treated in accordance with law. Hamood ur Rehman J in Begum Agha Abdul Karim Shorish Kashmiri, (PLD 1969 SC 14) while discussing article 2 of the 1962 Constitution said:

“Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the Superior Courts...in this sense it is as

comprehensive as the American “due process” clause in a new garb.”

An integral, intrinsic and incidental part of “law” under article 4 is the right to procedural due process, right to be treated fairly at all times, right to procedural fairness and right to procedural propriety. Right to a fair procedure is therefore constitutionally guaranteed in our country and makes our constitution stand out proudly in the constitutions of the world. Article 4 of our Constitution is a robust and dynamic amalgam of the cardinal principle of natural justice, procedural fairness and procedural propriety of the English Jurisprudence and Procedural Due process of the American jurisprudence. Our Constitution has boldly recognized this right to be an inalienable right of every citizen or of any other person for the time being in Pakistan. Reliance is placed upon re. Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri, (PLD 1969 SC 14), re. New Jubilee Insurance Company Ltd, Karachi v. National Bank of Pakistan, PLD 1999 SC 1126, re. Aftab Shahban Mirani v. President of Pakistan & others. 1998 SCMR 1863 and re. Government of Pakistan v. Farheen Rashid 2009 PLC (CS) 966.

- g. Removal of an employee from a public sector employment without due process also offends article 9 of the Constitution because right to life includes right to a lawful and meaningful livelihood. Generally, “Right to life includes all those aspects of life which go to make a man’s life meaningful, complete and

worth living...all aspects of life which alone make it possible to live must be declared to be an integral component of the right to life...it includes all that gives meaning to a man's life, his traditions, culture heritage and protection of heritage in its full measure....right to life guaranteed in any civilized society implies the right to food, water, decent environment, education medical care and shelter.” (*The Shorter Constitution of India* by Durga Das Basu relying upon re. *Ramsharan Autyanuprasi and another v. Union of India and others*, (AIR 1989 SC 549), re. *Chameli Singh and others etc. v. State of U. P. and another*, (AIR 1996 SC 1051) and re. *Air India Statutory Corporation, etc. v. United Labour Union and others, etc.* (AIR 1997 SC 645).

- h. In the recent case of titled “*Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry v. The President of Pakistan through the Secretary and others*. (CP 21/2007)” Khalil ur Rehman Ramday, J. observed:

The above-mentioned Article 9 of the Constitution guarantees protection of one's life. All the judges and jurists in different ages and from different jurisdictions have been one in saying that the word “LIFE” protected and assured by various constitutions could never be understood to have been used in a limited or a restricted sense and therefore, did not mean just the vegetative and the animal life of a man or his mere existence from conception to death. This word had, in fact, to be understood in its widest and fullest context to include all such rights, amenities and facilities which were necessary and essential for the enjoyment of a free, proper, comfortable, clean and peaceful life. When confronted with concrete situations, it was held through various judgments from various countries that the right to live meant the right to live with dignity and honour and included rights such as the right to proper health-care, the right to proper food and nutrition, the right to proper clothing, the right to education,

the right to shelter, **the right to earn one's livelihood** and even a right to a clean atmosphere and an un-polluted environment. And in some other cases, the nuisance created by municipal sewage, industrial effluents and the hazards caused by a magnetic field produced by high tension electricity wires, were found to be an interference with the enjoyment of one's right to life. In yet another case from Indian jurisdiction, even access to proper roads for people living in hilly areas was held to be an essential part of the right to life. In more than one cases from our own jurisdiction, it was also declared that since right to live in peace in a just and a fair environment was inherent in the right to life, therefore, the right of access to justice was a well recognized and an inviolable Fundamental Right enshrined in Article 9 of the Constitution and its denial, an infringement of the said right. As a necessary consequence, it was further held that since access to justice was inconceivable and would be a mere farce and a mirage in the absence of an independent judiciary guaranteeing impartial, fair and a just adjudicatory mechanism, therefore, the demand for a judiciary which was free of executive influence and pressures; was not manipulatable and which was not a subservient judiciary, was also an integral part and an indispensable ingredient of the said Fundamental Right of access to justice. (*emphasis supplied*)

- i. Right to life also includes right to livelihood. Without protection of livelihood and job security professional life is sapped of passion and desire to work which is essential for progress and development. No employment that borders on fear and favour can reap results. Livelihood provides the economic means required to lead a healthy and a regular life. Right to livelihood or right to security of tenure therefore are integral, innate and inbred in a professional career of a public sector employee. Livelihood cannot be deprived unless convincing material is placed on the record that supports a larger public interest of taking such an action. Without the presence and existence of a larger public interest the petitioner cannot be deprived of his fundamental right. In this case the impugned order fails to

disclose any reason. Reliance is placed upon re. *Olga Tellis and others, v. Bombay Municipal Corporation and others*, (AIR 1986 SC 180), re. *M.C.Mehta and another v. Union of India and others*, (1986) 2 SCC 176), re. *State of Maharashtra v. Chandrabhan*, (AIR 1983 SC 803), re. *Air India Statutory Corporation, etc. v. United Labour Union and others, etc.* (AIR 1997 SC 645), CJP CASE re. *Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry v. The President of Pakistan through the Secretary and others*, (C.P. 21/2007), re. *Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others*, (PLD 1993 SC 341), re. *Mehram Ali and others v. Federation of Pakistan and others*, (PLD 1998 SC 1445) and re. *Ms. Shehla Zia and others v. Wapda*, (PLD 1994 SC 693).

- j. Termination of public employment, especially when the contract reflects unequal bargaining as in the instant case. Clause 5(iii) of the Recruitment Policy states that “the contract employees shall have no right to demand and claim and change in terms and conditions of the agreement.” The Letter of Employment is a standardized contract with no freedom of contract available to the petitioners. If such like contracts are terminated mid stream with a stroke of pen without due process, throwing the fledgling careers of the petitioners (weaker segment of the society) to the winds, the principles of social and economic justice get attracted.

k. Admittedly, the petitioners belong to a less privileged segment of the society with limited social and economic choices in life. Petitioners have an unequal bargaining position compared to the government. It is for their protection that the constitution provides the concept of social & economic justice. “The expression social and economic justice involves the concept of ‘distributive justice’ which connotes the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequals in society....social justice is the comprehensive form to remove social imbalance by harmonizing the rival claims or the interest of different groups and sections in the social structure or individuals by means of which alone it would be possible to be build a Welfare state.” (*The Shorter Constitution of India*, 13th Edition by Durga Das Basu). Further the objectives resolution and the preamble to our Constitution state: “Wherein shall be guaranteed fundamental rights, including....social, economic and political justice....” (*emphasis supplied*). The Constitution therefore reads fundamental rights to be inclusive of social and economic justice. Social and economic justices are, therefore, indelible, ineradicable, inbred and fundamental parts of a civilized life, more so in an Islamic republic, and therefore are squarely covered under article 9 of the Constitution. With appointment comes an expectation of a lawful livelihood, hopes of a successful career, sense of wellbeing and security, social recognition and economic independence. Any process that

derails a person from this path of social progress and economic self sufficiently violates social and economic justice thereby violating Article 9 of the Constitution.

1. The impugned order also flouts the dignity of man protected under article 14 of the Constitution. Petitioners after due scrutiny, spread over eight months, have been appointed and had started their professional life when through the impugned order their professional career was brought to a naught due to the sheer incompetence and negligence of the respondents. Petitioners thrown out of their initial job so early in life can be stigmatic for a young teacher. Shadows of suspicion will haunt the character of these young teachers and the credible stature of an educationist will stand stained for a long time. The stigma is further accentuated when the order is unreasoned, thereby causing damage to the reputation of the petitioners. Respondents have to tread cautiously, when dealing with fundamental rights of the people, as it is a constitutional obligation. The impugned order offends Article 14 of the Constitution and reduces the petitioners to mere chattels who can be pushed around, in and out of service without due process, which cannot be permitted in a democratic welfare state like Pakistan. It is to curb these dehumanizing actions of the government that article 14 stand strong and tall in the Constitution. Reliance is placed upon re. Francis Coralie Mullin, v. The Administrator, Union Territory of Delhi and others, (AIR 1981 SC 746), re. Olga Tellis and others, v. Bombay

Municipal Corporation and others, (AIR 1986 SC 180), re. *Delhi Transport Corporation, v. D.T.C. Mazdoor Congress and others*, (AIR 1991 SC 101) and re. *Union of India and another v. Pratap Singh and others*, (1995) 2SCC 42).

m. Article 18, inter alia, provides that every person shall have a right to enter upon a lawful profession subject to prescribed qualifications, if any. This fundamental right not only provides entrance and access to a lawful livelihood, but also protects and safeguards a person to enjoy and hold the said lawful profession. The protection is, therefore, not limited to entrance and access to a lawful profession but extends beyond it to give it a more wholesome meaning. Entering a lawful profession is incomplete if the protection doesn't cover lawful enjoyment of the said profession and the right to lawfully hold the same with honour, dignity and security. The petitioners after appointment joined the service, therefore, having entered a lawful profession they also had the right to hold and enjoy the said profession. The only exception provided under article 18 is "subject to qualifications" besides the regulatory and licensing conditions imposed through its proviso. Other than the exceptions provided the protection to a lawful profession cannot be taken away. It is relevant to refer to article 38 (b) of the Constitution which states that: "The State shall:- (b) provide for all citizens within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure." Article 18 read with article 38(b) protects and safeguards public employment, the basic unit of our

economic activity and growth. Job security is essential to economic development and cannot be allowed to be taken away unless as provided in article 18. In the present case, the petitioners are being deprived of a lawful profession without referring to any fault in the prescribed qualifications, which cannot be permitted.

n. For the above interpretational expansion of the fundamental rights (articles 9, 14 and 18) reliance is placed on Nawaz Sharif case (PLD 1993 SC 473) wherein Nasim Hasan Shah CJ held that the basic right to form or be a member of a political party conferred by Article 17(2): “comprises the right of that political party not only to form the political party, contest elections under its banner but also, after successfully contesting the elections, the right to form the government if its members, elected to that body, are in possession of the requisite majority. The Government of the political party so formed must implement the programme of a political party which the electorate has mandated to carry into effect. Any unlawful order which results in frustrating this activity, by removing it from office before the completion of its formal tenure would, therefore, constitute an infringement of this fundamental right.”

o. In the same case Nasim Hasan Shah CJ further held: “Moreover, basic or fundamental rights of individuals which presently stand formally incorporated in the modern constitutional documents derived their lineage from and are traceable to the ancient natural law. With the passage of time and the evolution of civil

society great changes occur in the political, social and economic conditions of the society. There is, therefore, the corresponding need to re-evaluate the essence and soul of the fundamental rights as originally provided in the Constitution. They are required to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with the vision to the future.”

- p. In the words of Justice Frankfurter in *Sweezy vs New Hampshire* (354 US 234); “While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield a new and fuller import to its meaning.”
- q. In *Farooq Ahmed Khan Leghari vs Federation of Pakistan* (PLD 1999 SC 57) Ajmal Mian CJ said: “all efforts should be made to preserve and enlarge the scope of the fundamental rights while interpreting constitutional provisions.” Justice (Retd) Fazal Karim writes in his book *Judicial Review of Public Actions* (Chapter 4 on interpretation of fundamental rights): “This approach to not only preserve but to so enlarge and expand the scope of the fundamental rights that even peripheral rights, or rights of penumbra i.e., rights closely associated to the basic right which is specifically given in the Constitution, are also enforceable as basic rights, is traceable to the American case of *Griswold vs Connecticut* (381 US 479) in which Connecticut statute forbidding the use of contraceptive for birth control was held to have unconstitutionally intruded upon the right of marital

privacy. This gave birth to the right of privacy as a penumbra of the right to liberty. Justice Douglas in this case observed: “Previous cases suggest that specific guarantees in the bill of rights have penumbras formed by emanation from those guarantees that help give them life and substance.” To quote from *Maneka Gandhi's* case (AIR 1978 SC 597) even if a right is not specifically named it may still be a fundamental right if it is an integral part of a named fundamental right or partakes of the same basic nature and character of that fundamental right.”

r. Employment, especially in the public sector, cannot be terminated with a stroke of pen and without the public servant given the procedural due process of law. The quality and form of “process” employed becomes doubly important when the right flows from a fundamental right. In the present case Notice with reasons is the minimum requirement of “process” under articles 4, 9, 14 and 18 of the Constitution that should have been provided to the petitioners. It does not matter if the employment in the public sector is regular or contractual. Articles 4, 9, 14 and 18 encompass “person” and “citizen” and carry no distinction between a contractual or a regular employee. Public Sector employees must provide for procedural due process when dealing with regular or contractual employees, the “process” might be different at times as long as the process, which is due, is provided. The threshold of the process takes a higher standard in case where the right flows from a fundamental right as in this case. The impugned order miserably fails on this score.

- s. Duty cast on the respondents to act reasonably, fairly, justly and in accordance with law is now also recognized under section 24A of the General Clauses Act, 1897. The impugned order is a brazen and flagrant violation of the same. The impugned order is not only without notice it is also devoid of reasons and logic. Section 24A lays stress on a speaking order which means an order which lucidly lays out the reasons for the order.
- t. It is these reasons that ensure transparency and accountability of public institutions and make them stronger. Public authorities must take pain to give reasons in their orders and directions in most open and transparent manner without any fear or favour. Unreasoned orders generate corruption, weaken institutions and slowly eat into the foundations of a healthy democracy. Reliance is placed upon re. M/s Airport Support Service v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others, (1998 SCMR 2268), re. Liaquat Ali Memon and others v. Federation of Pakistan and others, (PLD 1994 SC 556), re. Secretary to Government of N.W.F.P. and another v. Muhammad Nawaz and another, (PLD 1996 SC 837), re. Rukhsar Ali and 11 others v. Government of N.W.F.P. through Secretary Education, Peshawar and 3 others, (2003 PLC (C.S.) 1453), re. Pakistan International Airlines Corporation through Chairman and others v. Shahzad Farooq Malik and another, (2004 SCMR 158) and re. Chairman / Managing Director, Pakistan International Airlines Corporation and another v. Nisar Ahmed Bhutto, (2005 SCMR 57).

24. For the above reasons the impugned Order dated 6-11-2009 is set aside as being unconstitutional, unlawful, opposed to public policy and totally without lawful authority. The respondents shall be deemed to be appointed since 16-10-2009 and shall be posted to their original positions.

25. The lapses and mistakes committed by the respondents in carrying out the recruitment process cannot affect the appointments of the petitioners or deprive them of the benefit accrued to them. Mistakes committed by the respondent department can result in departmental inquiry against the respondents (as discussed later) but cannot affect the concluded contracts entered into with the petitioners, except where they are not in accordance with law or violate the terms of the Agreement. This rule applies in cases where petitioners are fully qualified to hold the said posts and not otherwise. There is no room for arbitrary and unreasoned orders in the public employment sector. The comments of the respondents state that the Merit List was wrongly tabulated but fails to point out with necessary specificity the lapse(s) committed in each case. The comments and the “errors” referred to are not satisfactory. Reliance is placed upon re. Fuad Asadullah Khan v. Federation of Paksitan through Secretary Establishment and others, (PLJ 2009 SC 441), re. Hameed Akhtar Niazi v. The Secretary, Establishment Division, Governmentn of Pakistan and others, (1996 SCMR 1185), re. Secretary to Government of N.W.F.P. Zakat/ Social Welfare Department, Peshawar and another v. Sadullah Khan, (1996 SCMR 413), re. Muhammad Zahid Iqbal and others v. D.E.O., Mardan and

others, (2006 SCMR 285) and re. *Abdul Salim v. Government of N.W.F.P. through Secretary, Department of Education Secondary, N.W.F.P., Peshawar and others*, (2007 PLC (C.S.) 179).

26. The lapses committed in the recruitment process, inspite of a well thought out Recruitment Policy, by government officers starting from the DCO right down to the lowest officer involved in the recruitment process cannot be lightly dismissed. The entire purpose behind the enrollment of the Educators was to improve education and enhance enrollment of the students however the educators instead of being in schools have been dragged to court of law. The respondent officers instead of acting with prudence and applying the law acted rashly and in violation of the law with little regard for the educational careers of the petitioners.

27. The Secretary, Local Government, Government of Punjab is therefore directed to initiate departmental enquiry against the DCO and the EDO (Edu), Bhawalnagar and probe into the reasons for lapses committed in implementing the Recruitment Policy resulting in this unfortunate litigation. The Secretary will conclude this inquiry within a month from the receipt of this order and send his final report alongwith actions taken against the aforesaid officers to the Registrar of this court no later than 31st of March, 2010.

28. No one can hold a post he is not qualified to hold. Only qualified teachers can be appointed as educators. In order to avoid further litigation and to resolve the issue, Secretary Education Department, Government of the Punjab is directed to immediately constitute a new Recruitment Committee having members from districts other than Bhawalnagar. Rayim Yar Khan and Bhawalpur,

to first scrutinize the cases of the petitioners and then all the other successful candidates who applied for SSE under the advertisement for Educators dated 15-2-2009 in Bhawalnagar. The new recruitment committee will undergo a scrutiny to determine if the petitioners and others (private respondents) qualify to hold the posts applied for. In case the qualifications are not adequate the respondents on the basis of the report of the Recruitment Committee invoke the termination clause, wherever required, clearly setting out reasons for the same. This scrutiny by the new Recruitment Committee to be constituted by the Secretary Education, Government of the Punjab shall be completed latest by 31st March, 2010 and the Registrar of the Court duly informed of the actions taken. Till such time the petitioners shall forthwith resume work so that education of the young students in the district do not suffer any further.

29. I place on record appreciation for the assistance rendered by Mr. Ejaz Ahmad Ansari, learned Amicus Curiae.

30. The matter does not end here. The termination clause in the letter of agreement states:

Clause 8. Termination of Contract.

(i) Contract of appointment shall be liable to termination on One Month's Notice or Payment of One Month's Salary in lieu thereof by either side WITHOUT ASSIGNING ANY REASON. (*emphasis supplied*)

(ii) Department of Education has the right to terminate your contract at any time after giving a notice/personal hearing in case of your poor performance or contract.

31. The underlined portion above allows the local government to terminate without assigning reason (for brevity the "No Reason Clause"). This does not stand the test of fundamental rights, reason, logic, ethics or good governance. While the whole world is moving

towards accountability and transparency the above unfettered and unchecked power can be a recipe for corruption, mismanagement, nepotism and jobbery. Foundations of good governance are based on reasons, accessibility, accountability, transparency, participation, consensus, inclusiveness, efficiency, ethics and responsiveness. The “No Reason Clause” ex-facie lacks the requirement of fairness and procedural due process thereby offending article 4 of the Constitution. The said Clause is facially and ex facie discriminatory besides being liable to be used in a discriminating manner thereby violating article 25 of the constitution. Reliance is placed on *Dr. Mobashir Hassan vs Federation of Pakistan, etc* (“NRO case”) (CP 76 of 2007) and re. *Government of Baluchistan vs Azizullah Memon, etc* (PLD 1993 SC 341) discriminatorily and arbitrarily and therefore offends article 25 of the Constitution. The said Clause is also opposed to public policy and violates section 23 of the Contract Act, 1872 (IX of 1872). Finally, the No Reason Clause is offensive to section 24A of the General Clauses Act, 1897.

It might be a loud reminder to reproduce what the father of the nation Quad-e-Azam Muhammed Ali Jinnah said in his Presidential Address to the Constituent Assembly of Pakistan at Karachi on 11th August, 1947:

“The next thing that strikes me is this: Here again it is a legacy which has been passed on to us. Alongwith many other things, good and bad, has arrived this great evil- the evil of nepotism and jobbery. This evil must be crushed relentlessly. I want to make it quite clear that I shall never tolerate any kind of jobbery, nepotism or any influence directly or indirectly brought to bear upon me. Wherever, I will find that such a practice is in vogue or is continuing anywhere, low or high, I shall certainly not countenance it.” (*emphasis supplied*)

32. The No Reason Clause is a breeding ground for nepotism and cannot be allowed. Clause 8 of the termination clause to the extent where the termination can be without assigning any reason is struck

down as opposed to public policy, logic, good governance, duty of fairness, procedural due process and is facially discriminatory under Articles 4 and 25 of the Constitution. The Provincial and Local Governments shall bear this in mind before drafting employment contracts.

33. For the reasons discussed above, these writ petitions are allowed and the impugned order dated 6-11-2009 passed by Executive District Officer (Education), Bhawalnagar is set aside as being unconstitutional, unlawful and without lawful authority. The report and the actions taken by the Secretary, Local Government, Lahore and the Secretary Education, Government of the Punjab shall be sent to the Registrar of this Court latest by 31th March, 2010. Office is directed to send copies of this Order to the above mentioned Secretaries for immediate compliance.

34. The respondents who run and manage public institutions should at all times be guided by the wisdom given by our national poet Allama Iqbal:

افراد کے ہاتھوں میں ہے اقوام کی تقدیر
ہر فرد ہے ملت کے مقدر کا ستارا

(Syed Mansoor Ali Shah)
Judge