

**AT LAST RECOGNITION FOR PERSONS WITH  
DISABILITIES: COMMENT ON THE SUPREME  
COURT OF PAKISTAN’S JUDGMENT IN THE CASE  
OF *MALIK UBaidULLAH V GOVERNMENT OF  
PAKISTAN (CIVIL PETITION NO. 140-L OF 2015)***

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**DETAILS OF THE CASE**

The title of the case is *Malik Ubaidullah versus Government of Pakistan, et al.* The case number is Civil Petition No. 140-L of 2015. The case was heard by Justice Manzoor Ahmad Malik, Justice Syed Manzoor Ali Shah and Justice Qazi Muhammad Amin Ahmed of the Supreme Court of Pakistan. The judgment was released on 14<sup>th</sup> of July 2020.

**FACTS OF THE CASE**

The Petitioner applied for the post of Senior Elementary School Educator Arabic (hereinafter *SESEA*) on the disability quota in pursuance to the advertisement put out by the Education Department, Local Government, Multan. According to the advertisement, in addition to the other posts, a total of eighty-one posts of *SESEA* were advertised in various categories. Thereafter, only one Mst. Asma

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Qasim, who had the highest marks under the disability quota, was appointed against the said post under the disability quota and the Petitioner failed to secure a position. On being aggrieved for not being offered a place, the Petitioner challenged the selection process under disability quota before the High Court by invoking its constitutional jurisdiction. However, the Petitioner's writ petition and subsequently his appeal in respect thereof were both dismissed, by way respectively of, order dated 28.10.2013 and impugned order dated 01.12.2014. Resultantly, the Petitioner filed an appeal before the Supreme Court in respect of which the Honourable Court issued the judgment which forms the subject of the present note.<sup>1</sup>

### **LEGAL ISSUES**

The legal issue in the said case is the manner of allocation of the 2% disability quota for employment under the Disability Persons (Employment and Rehabilitation) Ordinance, 1981 (hereinafter *Ordinance*). On summarizing the factual context in which the judgment of the Court arose, this case note shall seek to analyse the definition of disability employed by the Court specifically in the context of employment of disabled persons.

The Supreme Court, whilst relying on the Collins Dictionary and the UN Convention on the Rights of Persons with Disabilities, defines "disability" as under:

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<sup>1</sup> *Malik Ubaidullah v Government of Pakistan*, Civil Petition No. 140-L of 2015 PLD (2020) SC 599 at para 1.

Disability means lacking one or more physical powers, such as the ability to walk or to coordinate one's movements, as from the effects of a disease or accident, or through mental impairment. According to the UN Convention on the Rights Of Persons With Disabilities\_(hereinafter *Convention*) ratified by Pakistan in 2011, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>2</sup>

Furthermore, the judgment details two distinct conceptual frameworks of disability, namely, the medical model and the social model.

a) The Medical Model

In its judgment, the Honourable Court categorizes this model as follows:

[L]ooks at disability as condition requiring medical intervention. The medical model views disability as an impairment due to various health related factors which can be identified and eradicated through medical treatment<sup>3</sup>

b) The social model, on the other hand, looks at disability:

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<sup>2</sup> Ibid at para 3.

<sup>3</sup> Ibid at para 4.

[A]s a condition that requires the transformation of societal attitudes and state policies. The social model identifies systemic barriers, negative attitudes and exclusion by society and argues that societal attitudes and environment are the main barriers for people with disabilities<sup>4</sup>

The Court further held that disability is not just a health problem but a complex phenomenon, reflecting the interaction between the features of a person's body and features of the society in which he or she lives; thus, the socio-economic development agenda requires inclusiveness and accessibility to sectors such as education and employment, which not only leads to improved livelihoods in the lives of persons with disabilities but also improves the prospects of their lives and of society as whole.<sup>5</sup>

It was further pointed out in the judgment that unemployment can cause not only poverty and social exclusion but also result in a lower sense of self-worth.<sup>6</sup> In Pakistan, estimates of the number of persons living with disabilities vary between 3.3 million and 27 million, and according to International Labour Organization an estimated 386 million of the world's working age are persons with disabilities and unemployment among them is as high as 80 per cent in some countries.<sup>7</sup> One of the major difficulties faced by the persons with disabilities, continued the bench, is that employers have the erroneous

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid at para 6.

<sup>6</sup> Ibid at para 9.

<sup>7</sup> Ibid at para 8.

assumption that they will probably underperform in most areas of their duties. Another one, linked with the previous, is that if a workplace is not accessible to persons with disabilities, employers might will need to invest money to make it accessible to them. They may see this as an investment with little returns in view of the above mentioned assumption that persons with disabilities will eventually underperform.<sup>8</sup>

Justice Mansoor Ali Shah, who penned the judgment for the Honourable Court, additionally pointed out that the approach to disability has nowadays shifted from ‘charity to investment, exclusion to inclusion and sympathy to rights-based’.<sup>9</sup> Coming to the Pakistani legal context, he clarified from the outset that the Constitution of Pakistan does not distinguish between a person with or without disabilities. The Fundamental rights provided in Article 14 and 25A of the Constitution of the Pakistan guarantee that every person is entitled to all rights and freedoms set forth therein, without any distinction of any kind. His powerful words deserve to be quoted in full:

Our Constitution, as a whole, does not distinguish between a person with or without disabilities. It recognizes inherent dignity of a human being; equal and inalienable rights of all the people as the foundation of freedom, justice and peace. Every person is entitled to all the rights and freedoms set forth

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<sup>8</sup> Ibid at para 9.

<sup>9</sup> Ibid at para 10.

therein, without distinction of any kind. It, therefore, applies equally to persons with disabilities, guaranteeing them full enjoyment of their fundamental rights without discrimination. The triangular construct of the right to life, dignity and equality under the Constitution provides a robust platform for mainstreaming persons with disabilities. ‘The purpose of the constitutional right to human dignity is to realize the constitutional value of human dignity; to realize a person's humanity; his free will; the freedom to shape his life and fulfil himself. It is a person's freedom to write his life story.’ Such vibrancy and vitality is the hallmark of a living constitution in a democracy.<sup>10</sup>

Furthermore, the Court stated that the calculation of the disability quota must not be done on the number of posts advertised as vacant, but on the total number of sanctioned posts in the organisation. This is because calculating on the vacancies deprives persons with disabilities of a significant number of job opportunities, since every time the number of advertised vacancies is less than fifty, there will be no post reserved for persons with disability.<sup>11</sup> In the present case, calculating the quota on the vacancies resulted in only one position made available for persons with disabilities, instead of the five

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<sup>10</sup> Ibid at para 13, citing Aharon Barack, *Human Dignity - The Constitutional Value and the Constitutional Right* (CUP 2015) 144.

<sup>11</sup> Ibid at para 16.

positions that would should have been open to them on the basis of their quota of the sanctioned posts.<sup>12</sup>

In deciding conclusively on the matter of how the disability quota should be calculated, the Court laid down the following five criteria:

i) [T]he (...) *Disability Quota* is to be calculated on the basis of the total sanctioned posts of the establishment; (ii) In order to ensure fair and equitable representation of persons with disabilities (PWDs) in every tier of the establishment, the total *Disability Quota* is to be further apportioned and allocated amongst different categories of posts in the establishment (...); (iii) In case the sanctioned strength of a post is less than 50, it will be for the establishment to allocate seat(s) from the overall *Disability Quota* against such a post (iv) if a particular post is not fit for a PWD, the establishment may shift the *Disability Quota* and adjust it against another post in the establishment so that the overall *Disability Quota* is not disturbed and maintained at all times. (v) The advertisement for any category of post must clearly provide the total *Disability Quota* for that category of posts and the number of seats vacant under the said *Disability Quota* at the time of the advertisement.<sup>13</sup>

Having clarified the issue of the way the disability quota must be calculated the Court did not miss this opportunity to dwell on a

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<sup>12</sup> Ibid at para 17.

<sup>13</sup> Ibid at para 18.

parallel but not less important issue: the usage of words such as ‘disabled’, ‘physically handicapped’ and ‘mentally retarded’.<sup>14</sup> Justice Mansoor Ali Shah vehemently condemned the use of such epithets stating that they ‘deeply bruise and offend human dignity of persons with different abilities’.<sup>15</sup> He continued his judgment by directing the governments, Federal and Provincial, to discontinue the use of these words in official correspondences and shift to ‘persons with disabilities’ or ‘persons with different abilities’.<sup>16</sup> Reference was made to the judgment by the same Justice Mansoor Ali Shah while serving as Chief Justice of the Lahore High Court in *Barrister Asfandiyar Khan Tareen v Govt. of the Punjab*.<sup>17</sup>

To ensure that persons with disabilities’ rights are fully protected, the Court specifically stated that the mere appointing of persons with disabilities under the quota does not discharge the Government of its duties; since it is only the half of the story.<sup>18</sup> The other half is to provide the infrastructure and facilities that are accessible for the persons with disabilities so that they can perform their job without feeling physically or emotionally incapacitated in any manner.<sup>19</sup>

The judgment ended with a decision on the relief sought by the aggrieved petitioner.<sup>20</sup>

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<sup>14</sup> Ibid at para 19.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> PLD (2018) Lahore 300.

<sup>18</sup> *Malik Ubaidullah* (n 1) at para 20.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid [22].



## IMPACT OF THE JUDGMENT

It is a welcome change that the Supreme Court of Pakistan, which in the past had refused to recognize schizophrenia as a mental disease and confirmed the execution of the death penalty for a patient of schizophrenia, is now so vocal in stating the rights of persons with disabilities.<sup>21</sup> The judgment of Court recognised the rights and dignity of all citizens of Pakistan and conclusively clarifies that persons with disabilities enjoy them on equal basis with all others . While a similar judgment was given by the authoring judge when he was the Chief Justice of Lahore High Court,<sup>22</sup> their overall effect remains to be seen. Due to the judgment of the Supreme Court of Pakistan the standing of the wordings of ‘mentally retarded’ ‘disabled’ and ‘physically handicapped’ in the *Ordinance* and in all official Government correspondence and documents, is bound to be changed.<sup>23</sup>

With regard to the quota, the Government will now need to provide much broader employment opportunities to differently abled persons, since the right method for quota calculation, as pointed out by the Court, leads to a much higher number of available posts than before. It is evident that the Supreme Court, by increasing employment opportunities for persons with disabilities, has strongly

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<sup>21</sup> *Mst. Safia Bano v Home Department, Government of Punjab* PLD (2017) SC 18.

<sup>22</sup> *Barrister Asfandiyar Khan Tareen* (n 17).

<sup>23</sup> *Malik Ubaidullah* (n 1) at para 19.

reaffirmed their fundamental rights to life, dignity and equality guaranteed under the Constitution of the Pakistan.<sup>24</sup>

However, the Court showed awareness of the fact that full realisation of dignity for a person with disability is not achieved merely by giving them a job. Proper facilities and accessible infrastructure need to be provided to differently abled persons in order that:

They may perform their job without feeling physically or emotionally incapacitated in any manner. The biggest barriers to the employment of persons with disabilities is the accessibility and their social acceptability at the workplace.<sup>25</sup>

Even though, there are some laws/regulations which place obligation on all public and commercial buildings to provide differently abled friendly infrastructures, like ramp and disability friendly toilet, yet the implementation of such laws is rarely seen.<sup>26</sup> That is the reason that the Supreme Court has emphasised squarely on this point saying that Government is ‘bound to make provisions for it, for otherwise, the *Disability Quota* and the purpose of the *Ordinance* will stand frustrated and serve no useful purpose’.<sup>27</sup> The Court specified that the type of modifications required were covered by the

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<sup>24</sup> Ibid at para 17.

<sup>25</sup> Ibid.

<sup>26</sup> LDA Building and Zoning Regulations 2007, Regulation 6.2.3.

<sup>27</sup> *Malik Ubaidullah* (n 1) at para 20.

concept of reasonable accommodation under the Convention on the Right of Persons with Disabilities.<sup>28</sup> It concluded by reiterating that accommodating persons with disabilities means:

Necessary and appropriate modification and adjustments where needed in a particular case to ensure persons with disabilities the enjoyment on an equal basis with others of all human rights and fundamental freedoms.<sup>29</sup>

This enlightened judgment will surely lead, if implemented, to more acceptance of the persons with disabilities in the society and would also allow many more of them to lead a dignified life on equal standing with all other members of the society.

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<sup>28</sup> Convention on the Rights of Persons with Disabilities 2006 (CRPD) [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en) accessed 15 December 2020.

<sup>29</sup> *Malik Ubaidullah* (n 1) at para 20.

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4. *Barrister Asfandiyar Khan vs. Government of Punjab & others*, PLD 2018 Lahore 300
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