HCJ 6778/97

Association for Civil Rights in Israel

v

1. Minister of Public Security

2. Israel Police

3. Israel Prisons Service

4. The Knesset

5. Civil Service Commission

6. Customs and VAT Department

7. Attorney-General

The Supreme Court sitting as the High Court of Justice

[12 January 2004]

Before President A. Barak, Vice-President T. Or and Justices E. Mazza, M. Cheshin, D. Dorner, D. Beinisch, E.E. Levy

Petition to the Supreme Court sitting as the High Court of Justice

Facts: The petitioner challenged the respondents' recruitment policies, which restrict the age of job applicants to a maximum of thirty-five or forty. The petitioner argued that these policies were discriminatory on the basis of age and therefore unlawful. The respondents argued that the policies were required by the demanding nature of the work.

Held: In the absence of evidence justifying their policies, the Supreme Court held that the recruitment policies of the respondent were indeed discriminatory on the basis of age and therefore void.

Petition granted.

Legislation cited:

Employment Service Law, 5719-1959.

Equal Employment Opportunities Law, 5748-1988, ss. 2, 2(a), 2(c), 17.

Police Ordinance [New Version], 5731-1971, s. 17.

Police (Recruitment) Regulations, 5718-1957, rr. 1, 2.

Prisons Regulations, 5738-1978, r. 61(2).

Israeli Supreme Court cases cited:

[1] HCJFH 4191/97 *Recanat v. National Labour Court* [2000] IsrSC 54(5) 330.

[2] HCJ 678/88 *Kefar Veradim v. Minister of Finance* [1989] IsrSC 43(2) 501.

[3] HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [1998] IsrSC 52(4) 193.

[4] HCJ 6051/95 *Recanat v. National Labour Court* [1997] IsrSC 51(3) 289.

[5] FH 10/69 *Boronovski v. Chief Rabbis* [1971] IsrSC 25(1) 7.

[6] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture & Sport* [1995] IsrSC 49(5) 1.

[7] HCJ 7111/95 *Local Government Centre v. Knesset* [1996] IsrSC 50(3) 485.

[8] HCJ 720/82 *Elitzur Religious Sports Association, Nahariya Branch v. Nahariya Municipality* [1983] IsrSC 37(3) 17.

[9] CA 3798/94 *A v. B* [1996] IsrSC 50(3) 133; **[1995-6] IsrLR 243.**

[10] CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [1998] IsrSC 52(3) 1.

American cases cited:

[11] *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983).

[12] *E.E.O.C. v. County of Los Angeles*, 706 F. 2d 1039 (1983).

[13] *E.E.O.C. v. County of Allegheny*, 705 F. 2d 679 (1983).

Canadian cases cited:

[14] *Re Can. Human Rights Com'n & Greyhound Lines* (1987) 38 D.L.R. (4th) 724.

[15] *Re Air Canada and Carson* (1985) 18 D.L.R. (4th) 72.

[16] *Saskatchewan (Human Rights Comm.) v. Saskatoon* [1989] 2 S.C.R. 1297.

For the petitioner — G. Stoppler, Dan Yakir.

For the respondents — N. Elstein, Director of the Labour Disputes Department at the State Attorney's Office.

JUDGMENT

President A. Barak

The State of Israel is not prepared to recruit policemen, prison warders and customs inspectors if the candidates are over thirty-five or forty years old (see below). Is this approach lawful? This is the question before us.

Background

1. The State of Israel invited the public to apply for jobs as police prosecutors. The invitation said that only candidates whose age was less than thirty-five years were eligible to apply and submit their candidacy. This age was also stipulated as a preliminary condition in the job specification for customs inspectors. Subsequently, an invitation was published for the employment of security personnel in a State hospital. It was stipulated that only candidates whose age did not exceed forty would be accepted for employment. The Knesset Guard also restricted entry into its ranks to twenty-five years. The petitioner, the Association for Civil Rights in Israel, applied to the State. It argued that in stipulating the requirement of a maximum age, the State was discriminating against all persons who did not satisfy the age requirement. Since it was unsatisfied by the reply, it applied to this court. With the consent of the parties, we regarded the petition as if an order *nisi* had been given. Several hearings were held. Following a decision of the original panel of judges, the panel was expanded. We delayed giving our judgment, *inter alia*, because we waited for judgment to be given in HCJFH 4191/97 *Recanat v. National Labour Court* (hereafter — 'the *Recanat* further hearing') [1]. We also asked the parties for their response to that judgment. In addition, we waited for updates concerning changes in the employment policies of the respondents. Moreover, general developments concerning the connection between the age of the employee and the employment policy were brought to our attention. Thus, for example, the report of the Public Commission for Examining the Work Retirement Age was submitted for our perusal. In the course of the trial, the problem of the candidates for the Knesset Guard was solved. We were told that the previous policy, which restricted the Guard's recruitment age to twenty-five years, had been cancelled. Instead it was stipulated that the aptitude of each candidate would be examined in accordance with his abilities, physical condition and state of health, taking into account the requirements of the position. We were also

told that the Israel Prisons Service no longer stipulates a maximum age in its advertisements, but it is a consideration that they take into account in so far as security jobs or essentially similar jobs ('specific-assignment jobs') are concerned. A similar picture was obtained from the Customs Department.

2. Several developments have occurred in the recruitment policy of the police. At first we were told that the police continue to restrict the age of all the candidates for its jobs, even though with regard to the recruitment of professional staff the age restriction is not published in the employment advertisements, and in exceptional cases even someone who is older than thirty-five may be accepted for a professional job. During the hearing that the court held on the petition, we proposed that the respondents consider the possibility of adopting an employment policy on an individual basis when accepting candidates for employment. We were further told that the police are considering undergoing a process of 'civilianization' with regard to some of its jobs. In our decision we decided that 'counsel for the respondents was requested… to submit to us a response in writing with regard to the proposal that was made to conduct a trial — or an "individual recruitment committee" — and also to prepare a timetable for the date of the "civilianization".' On 7 November 1999 we received the response of the respondents in this regard, from which it emerged that the police intended to conduct a trial during their 2000-2001 recruitment, for which the maximum age would be raised to 45 years for recruitment for non-specific assignments. We were also told in a notice from the respondents that the police have made a change with regard to the manpower that they employ. In the first stage, the police began, in the last two years, to accept civilian manpower and to carry out a 'civilianization' process for jobs with no specific assignment through personnel placement companies or by purchasing services from external contractors. By the date of filing the notice, approximately 1,000 jobs in various fields had been 'civilianized.' In response to this, the petitioner points out that the trial that the police conducted relates only to jobs that have no specific assignment, and it cannot provide a solution to the discrimination that exists, according to the petitioner, with regard to the specific-assignment jobs.

The parties' contentions

3. The petitioner claims that the respondents' policy constitutes age discrimination. This discrimination is prohibited on a general constitutional level, in view of the constitutional obligation of the respondents to uphold equality, human dignity and freedom of occupation. This discrimination is

prohibited also by statutes that specifically address labour relations, including the Equal Employment Opportunities Law, 5748-1988, and the Employment Service Law, 5719-1959. According to the petitioner, in Israel the problem of age discrimination is serious, and it should therefore be treated with the utmost seriousness. The statutory exceptions that allow the rejection of candidates for jobs — *inter alia* on the grounds of age — should be construed narrowly. It argues that the defence in s. 2(c) of the Equal Employment Opportunities Law should not be available to the respondents, since there is nothing in the jobs under discussion in this petition that justifies an age limit for someone wishing to be considered as a candidate. In any event, the respondents have not discharged the burden imposed on them to justify their discriminatory policy. The policy is not founded on facts and a proper evidential basis but on generalizations and stereotypes. Consequently the regulations that were made by the respondents and their recruitment policy, which stipulate age restrictions for entering into their employment, are void.

4. The respondents claim that the proper normative framework for contending with the petitioner's contention of discrimination is the Equal Employment Opportunities Law. Within the framework of this law, the employment policy and regulations are not discriminatory. They argue that a person's age adversely affects his physical and mental functioning and it therefore affects the ability of older candidates to carry out their job properly. Thus, in so far as customs inspectors are concerned, the job requires a high level of physical and mental fitness. An individual examination of each candidate cannot predict his ability to withstand this burden. In so far as the Prisons Service is concerned, the warders are required to have a high level of physical and mental fitness. The retirement age from the Prisons Service is an early one because of the exhausting nature of the job. Against this background, it is justified to employ the criterion of age for the purpose of recruitment into the Service. The respondents explain that in the Prisons Service there is a distinction between the job of warder and administrative or professional jobs, and with regard to the recruitment of the latter there is no age limit. With regard to employment by the police, the respondents claim that a high level of physical and mental fitness is required. Unlike the Prisons Service, in the police even policemen who work in administrative and professional jobs are sometimes required to carry out operational police activities during their service. Operational policemen start 'at the bottom' and work their way up the ranks. The employment of older policemen under the

command of younger policemen would lead to practical difficulties and harm the functioning of the police which is based on a chain of command. Creating a range of age restrictions for recruitment to different jobs in the police force would harm the police's commitment to uniformity. The respondents also claim that voiding the regulations and the employment policy of the respondents would affect the whole of the police service. It would affect the retirement age of policemen, the grounds for their dismissal and the terms of service, since a group employment outlook with internal logic and balance would be replaced by individual employment that would harm the employers. Thus, for example, the police do not dismiss older policemen whose physical strength is weakened, but takes care to assign them to other jobs that suit their capabilities. This policy, in the respondents' opinion, creates a mixture of young policemen and old policemen that can exist only by restricting the age of recruitment into the Service. In view of this, the respondents claim that cancelling the age restriction would harm their ability to carry out their public duties relating to security and other interests under their authority. The respondents refer to comparative law according to which, they claim, age discrimination is not considered to be on the highest level of severity. Greater judicial restraint should be exercised when considering an employment policy that is alleged to be age discriminatory. In view of all of the aforesaid, the respondents claim that the balance reflected by the regulations and their employment policy is reasonable and does not justify the intervention of this court.

The normative framework

5. The policy of the respondents with regard to the age of the candidates for recruitment into the police and the Prisons Service is encompassed in subordinate legislation (see r. 1 of the Police (Recruitment) Regulations, 5718-1957 (hereafter — the Police Regulations); r. 61(2) of the Prisons Regulations, 5738-1978). In so far as the employment of customs inspectors is concerned, this policy is encompassed in the internal directives issued by the Director of Customs and Excise. The main question before us is whether the respondents' policy is unlawfully discriminatory between job applicants on the basis of age. We have been referred in this regard to various legal sources. In my opinion, these arguments should be focused on the framework of the Equal Employment Opportunities Law, which also applies to the State as an employer (s. 17). The key provision is in section 2 of the law, which states:

'Prohibition against discrimination

2. (a) An employer shall not discriminate between his employees, or between candidates for employment on the basis of their sex, sexual orientation, personal status, parental status, age, race, religion, nationality, country of origin, outlook, party affiliation or reserve army service, enlistment for reserve army service or anticipated reserve army service as defined in the Defence Service Law [Consolidated Version], 5746-1986, including on account of its frequency or duration, with respect to any of the following:

(1) giving employment;
(2) conditions of employment;
(3) promotion in employment;
(4) training or professional studies;
(5) dismissal or severance pay.
(6) benefits and payments given to an employee with regard to retirement from work.

(a1) …

(b) For the purposes of subsections (a) and (a1), making irrelevant conditions shall also be regarded as discrimination.

(c) Discrimination shall not exist under this section when it is required by the character or nature of the job or position.'

The statute does not define what 'discrimination' is. In the absence of details as to a special outlook in this matter, the general laws concerning equality and discrimination in Israeli law apply (see the *Recanat* further hearing [1], at p. 343).

6. Equality in the case before us means equal treatment for persons who are equal and different treatment for persons who are different. Discrimination means different treatment for persons who are equal and

equal treatment for persons who are different (see HCJ 678/88 *Kefar Veradim v. Minister of Finance* [2], at p. 507; HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [3]; I. Zamir, M. Sobel, 'Equality Before the Law,' 8 *Mishpat uMimshal* (2000) 165. It follows that equality does not require identical treatment. Sometimes in order to achieve equality we need to act differently. Not every different treatment is discriminatory treatment. The principle of equality is therefore based on the relevant approach. 'Discrimination is, of course, a distinction between persons or things for irrelevant reasons' (Justice M. Cheshin in HCJ 6051/95 *Recanat v. National Labour Court* (hereafter — 'the *Recanat* original hearing') [4], at p. 312). 'The concept of equality means equal treatment of persons who are not different from one another in any way that is relevant to the matter that is the subject of the equality' (the *Recanat* further hearing [1], at p. 345). This was well expressed by President Agranat, who said:

> 'In this context, the concept of "equality" therefore means "relevant equality," and it requires, with regard to the purpose under discussion, "equality of treatment" for those persons in this state. By contrast, it will be a permitted distinction if the different treatment of different persons derives from their being, for the purpose of the treatment, in a state of relevant inequality, just as it will be discrimination if it derives from their being in a state of inequality that is not relevant to the purpose of the treatment' (FH 10/69 *Boronovski v. Chief Rabbis* [5], at p. 35).

The key question in the petition before us is whether the age distinction between the candidates for the job — who constitute the 'equality group' in the case before us — is relevant for the job that the candidates wish to obtain.

7. Indeed, the State's duty is to treat the candidates for the job equally, and not to discriminate between them. One typically discriminatory situation is age discrimination during recruitment for employment (see R. Ben-Israel, *Equal Opportunities and the Prohibition of Discrimination at Work*, vol. 3 (1998), at pp. 1043-1044; S. Rabin-Margaliot, 'Age Discrimination in Israel: A Power Game in the Labor Market,' 32 *Hebrew Univ. L. Rev. (Mishpatim)* (2002) 131). In the reality of modern life, in which the workforce is growing older, awareness of the existence of age discrimination should also increase (the *Recanat* original hearing [4], at p. 341; for a general discussion, see R.A. Posner, *Aging and Old Age*, University of Chicago Press, 1995). This awareness is important, *inter alia*, when considering imposing restrictions at the stage of accepting job applicants, which is the gateway into the

employment market (Rabin-Margaliot, *supra*, at p. 161). Against this background, the State's duty is to examine the candidacy of the job applicant on its merits without restricting the age of the candidate in advance, unless the job that the candidate is seeking justifies the stipulation of a maximum age. If the job requires the stipulation of a maximum age for job applicants, then the stipulation of that age does not constitute discrimination between the job applicants on a basis of age. The difference in the age requirements is justified in this situation by the difference in the job, and it does not involve any age discrimination. We have a relevant difference (in the job), which eliminates discrimination (on the basis of age) (see the *Recanat* further hearing [1], at p. 347). Indeed, the rule prescribed in s. 2(c) of the Equal Employment Opportunities Law and the rules prescribed in s. 2(c) thereof are merely the two sides of the same coin; it is not a rule (that prohibits discrimination) and an exception (that recognizes the discrimination), but two aspects of the rule itself, such that the two viewpoints 'should be read together' (Justice M. Cheshin in the *Recanat* original hearing [4], at p. 313).

8. The relevance test must provide an answer to the question whether the job particulars require the stipulation of a maximum age for the job applicants. The relevance test should determine whether the stipulation of a maximum age for the job applicant 'is required by the character or nature of the job or position' (s. 2(c) of the Equal Employment Opportunities Law). The question is whether stipulating a maximum age for the job applicants is 'reasonably required by the nature of the worker's job' and whether it is proportional (the *Recanat* further hearing [1], at p. 348; see also S. Rabin-Margaliot, 'The Elusive Case of Employment Discrimination: How Do we Prove its Existence?' 44 *HaPraklit* (1999) 529). The test is, in the final analysis, a test of reasonableness and proportionality. I discussed this in the *Recanat* further hearing [1], where I said:

> 'The relevance test demands that the job requirements… are reasonably necessitated by the nature of the job. The test is therefore a test of reasonableness… the question is always a question of balance. The question is whether the weight given to these considerations among all of the considerations is reasonable…
>
> It also follows that the question of proportionality must be taken into account. Are the job requirements that the employer

> chose — and according to which a different retirement age was determined for different employees — proportional?' (*ibid*., at p. 349).

9. Within the framework of the requirements of proportionality, one must take into account the sub-test according to which the administrative measure chosen should harm the individual to the smallest possible extent (see HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [6], at p. 12). When the alleged harm is age discrimination, one should examine whether the job qualifications that were stipulated prejudice equality between job applicants to the smallest possible extent (see the *Recanat* further hearing [1], at p. 349). Indeed, when the job requirements include physical strength and the ability to withstand physical effort, the smallest possible degree of harm will be caused to job applicants if the physical examination is done on an individual basis and a minimum age is not stipulated for the various candidates. This will make redundant the claim that the minimum age requirement is based on a stereotype that only a young person is strong, and it will prevent discrimination. In the *Recanat* further hearing [1], which it will be remembered concerned requirements that the employer made with regard to the pleasant appearance and physical strength required by air stewards, I asked:

> '… even if we say that a pleasant appearance and physical strength are *prima facie* required by the nature of the job, is it not possible to consider their existence on the basis of an individual examination of each applicant and not on the basis of a broad stipulation that does not take account of the individual characteristics of the applicants?' (*ibid.*, at p. 349).

Indeed, the employer will find it difficult to satisfy the 'smallest possible harm test' if he does not have substantial reasons to show why an individual examination will prevent the attainment of the proper purpose that he wishes to achieve (see *Re Can. Human Rights Com'n & Greyhound Lines* (1987) [14]; *Re Air Canada and Carson* (1985) [15]; *E.E.O.C. v. Wyoming* (1983) [11]; *E.E.O.C. v. County of Los Angeles* (1983) [12]; *E.E.O.C. v. County of Allegheny* (1983) [13]). This was well expressed by the Supreme Court of Canada, which said:

> 'While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of the requirement if he fails to deal satisfactorily with the question as to why it was not

> possible to deal with employees on an individual basis by, *inter alia*, individual testing. If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it' (*Saskatchewan (Human Rights Comm.) v. Saskatoon* [16], at pp. 1313-1314).

Indeed, the State must show in the petition before us why the maximum age test was chosen rather than a less harmful test, namely an individual examination of the capabilities of the various applicants. In this regard, the burden of proof is of importance. The premise is that the burden of proof lies with the applicant who claims that he has been discriminated against by the employer. When the employer stipulates a maximum age, the burden of proof passes to the employer to show that stipulating a maximum age is required by the character and nature of the job (see the *Recanat* further hearing [1], at p. 351).

The police

10. The Police Regulations stipulate that the age of a candidate for a job shall not exceed thirty-five (r. 1 of the Regulations). They allow the Inspector-General to exempt candidates from this requirement (r. 2 of the Regulations). In practice, in the vast majority of cases the police implement a recruitment policy that does not allow the recruitment of candidates over the age of thirty-five. How do the police justify this policy? The police point out that policemen who serve in the police are responsible for protecting public security and they therefore have many duties in the field of public security. The work involves operational activity that has no restriction on hours and speedy performance of unplanned tasks. There is a broad range of police work. The broad range of tasks includes, *inter alia*, activity at road blocks, patrols, security, arrests and searches. Sometimes physical force needs to be used when dealing with criminals. All of these require a commitment to a large number of work hours and a heavy work schedule. The police claim that the ability to comply with all of these decreases with age. The police rely in their reply on the research of Dr Yoram Epstein and Mr Yuval Heled, which was carried out within the framework of the Heller Institute of Medical Research (the Sheba Medical Centre at Tel-HaShomer). This research, which the police initiated in 1998, shows a decline in human ability with age. Against this background, the expert opinion concludes that for jobs that

require an element of physical activity (such as a patrol policeman), the maximum age restriction of thirty-five is reasonable (p. 12 of the expert opinion).

11. These arguments of the police justify taking the physical ability of the candidate into account when his candidacy is being considered. But they do not justify the stipulation of a maximum age without any individual examination. A distinction should be made between age and aging, which represents a process accompanied by a decrease in certain abilities (Ben-Israel, *Equal Opportunities and the Prohibition of Discrimination at Work*, *supra*, at p. 1045). Even if it is clear that there is a general correlation between age and physical abilities, there are certainly candidates over the age of thirty-five who are superior to younger persons both physically and in their ability to deal with the pressure involved in police work. Even the research to which the police refer determines a general correlation between age and aging, but it does not provide an answer to the question why the police should not examine the physical and mental capacity of its candidates on an individual basis.

12. The police claim in this regard that an individual examination for admission into the police would also require an individual examination during the service. It claims that every policeman who is found to be physically unfit will be compelled to leave the service, since every policeman will be judged according to the same physical standard. The police further argue that requiring the policemen to comply constantly with physical tests constitutes an insult to their dignity. These arguments are unacceptable to me. It is possible to have an individual examination for admission into the job without being required to have an individual examination for continuing in it. And even if such an examination is required, I do not see in this any defect that justifies adopting a recruitment policy based on a maximum age. Moreover, the existence of an individual examination involves no insult to the dignity of the policeman. 'I do not see any insult to the dignity of an employee who is asked to carry out a job in which physical fitness is relevant, if he is asked to undergo individual fitness tests' (the *Recanat* further hearing [1], at p. 355). These remarks which I made with regard to air stewards are in my opinion apposite, *mutatis mutandis*, also to policemen.

13. The argument of the police is that its recruitment policy requires overall considerations relating to the whole service, and these justify refusing an individual examination of the candidates for the job. I cannot accept this approach for three main reasons:

14. *First*, in the course of the hearing of the petition before us, a fundamental change took place in the recruitment policy of the police. At the moment, the police are undergoing a process of 'civilianization.' They intend to recruit civilians for many types of jobs in which there will be no age restriction of the type stipulated in the Police Regulations (see paragraph 2 of the judgment). Even before this, the police adopted a flexible approach when they recruited candidates for service in professional jobs (lawyers, economists, computer personnel, psychologists, forensic science laboratory personnel), which was allowed under r. 2 of the Police Regulations (see paragraph 126 of the respondents' summations dated 28 February 1999). This position weakens the arguments of the police concerning the importance of uniformity and hierarchy. These considerations do not guide the police with the same force that they guided them in the past. Certainly they are not capable of forming the basis of a wide-ranging policy of refusing to recruit policemen over the age of thirty-five, as stated in the Police Regulations, for all fields of employment in the police.

15. *Second*, even if we accept the police's arguments concerning the service as a whole — and on this question there is some doubt — the police must still show a basis for the concern that the number of recruits with good personal qualifications (both physical and in other areas) over the age of thirty-five will be so substantial that it will harm their ability to operate as a whole in a manner that meets its specifications. The police have not done this. No figures have been submitted to us to show that changing over to a method of individual examinations will make it harder for the police to an extent that justifies their policy. Therefore the police's concern that they will need to change their retirement policy and that their regular operations will be impaired is also vague and unfounded.

16. *Third*, the police's claims that their hierarchical structure will be undermined are also vague and have no foundation. A person who is accepted into the ranks of the police is not accepted unconditionally. The question of his employment can be reconsidered every five years (as stated in s. 17 of the Police Ordinance [New Version], 5731-1971). It can be assumed that the police will know how to deal with those older recruits who cannot function properly under the command of younger persons if difficulties of this kind arise. Certainly these claims are insufficient to justify an absolute prohibition preventing anyone over the age of 35 from joining the police.

17. What is the conclusion in the final analysis? My conclusion is that the police's recruitment policy, as stipulated in the Police Regulations, is discriminatory on the basis of age. The requirement with regard to a maximum age is not required by the character or nature of the job of policeman; it is unreasonable and disproportionate. Instead of a maximum cut-off age, an individual arrangement that is sensitive to the needs of the individual and the requirements of the police should be formulated.

The Prisons Service

18. The arguments that we heard from the Prisons Service justify — like those of the police — taking into account the physical condition of a candidate when his application is being considered. But has the Prisons Service complied with the burden incumbent upon it to show that age is required as a condition for admission and an individual examination is insufficient? In my opinion, the answer is no. *First*, there is a disparity between the recruitment policy in practice and the recruitment policy stated in the Regulations. This disparity concerns both the maximum age cut-off (thirty-five years in the Commissioner's order as compared with forty in the Prisons Regulations) and the extent to which the recruitment policy is implemented (general and comprehensive implementation in the Regulations as compared with implementation in certain sectors in the Prisons Service). This disparity in itself shows that in practice the stipulated policy is not followed. *Second*, unlike the police, the Prisons Service did not present any factual basis that justifies, in its opinion, the said age restriction. No medical survey examining the relationship between the requirements of the job in the Prisons Service and the restriction of age was presented. The Prisons Service raised an argument concerning the period of time required to train a warder as a justification for having an age requirement. But beyond this, we have not heard any argument concerning the length of the training of a warder in the specific-assignment job sector in the Prisons Service that prevents the employment of candidates whose age exceeds forty, or any claim to this effect. Therefore, the Prisons Service did not comply with the burden incumbent upon it to show that the age restriction is required by the character and nature of the job of warder. This restriction too is unreasonable and disproportionate.

Customs and VAT inspectors

19. The employment policy of the customs authorities is that customs inspectors should not be recruited if they are over the age of thirty-five. The customs authorities explained their employment policy by means of the

difficult requirements of the job. Here too the respondents did not discharge the burden incumbent on them to show a basis for their recruitment policy in a way that would justify a general age restriction instead of an individual examination of candidates. The claims of the customs authorities that there are requirements of physical and mental fitness are similar in essence to those that we heard from the police, and the reasons for rejecting those are equally valid for the customs authorities. These authorities also have not shown any evidence that can justify their policy.

20. In view of our acceptance of the petitioner's claims concerning age discrimination, there is no need to consider the additional claims that it raised, including its arguments concerning an infringement of freedom of occupation.

The relief

21. The provisions with regard to the maximum age as a work requirement are discriminatory and therefore void, and we so declare. This declaration will come into effect eight months from today. The purpose of the delay is to allow the respondents to organize themselves in order to comply with the obligation of equality in job admissions that is incumbent upon them.

We are making the order *nisi* absolute as aforesaid. The respondents will pay the expenses of the petitioner in a total amount of NIS 20,000.

Vice-President T. Or

I agree.

Justice E. Mazza

I agree.

Justice D. Dorner

I agree.

Justice D. Beinisch

I agree.

Justice E.E. Levy

I agree.

Justice M. Cheshin

I agree with the judgment of my colleague, President Barak.

2. On this occasion the matter before us concerns age discrimination, and at the end of a voyage of consideration and interpretation, we have arrived at the conclusion that we are indeed faced with a case of age discrimination. The provisions of s. 2(a) of the Equal Employment Opportunities Law, 5748-1988, provide and require that in job recruitment an employer shall not discriminate between job applicants on the basis of their age. The provisions of s. 2(c) of the law further tell us what is self-evident, namely that we do not regard discrimination in such a case to exist 'where it is required by the character or nature of the job or position.' The cornerstone of this case is therefore the issue of discrimination, or, if we use its other name, an infringement of the principle of equality.

3. The concept of equality is merely a framework concept, and the framework is filled with content by the fundamental values of society. As was said elsewhere (HCJ 7111/95 *Local Government Centre v. Knesset* [7], at p. 501): '… Equality is not a value in itself; it is a means to an end, where the high priest of *justice* and the high priestess of *fairness* hold office.' See also HCJ 720/82 *Elitzur Religious Sports Association, Nahariya Branch v. Nahariya Municipality* [8], at p. 20 (*per* Justice Netanyahu). It has been held for some time — and this is the rule that has accompanied us over the years — that the concept of equality means, in general, 'substantive' equality, as opposed to 'formal' equality, and on the subject of substantive equality we made the following remarks in *Local Government Centre v. The Knesset* [7], at p. 502:

> 'A close examination will show us, unsurprisingly, that "substantive" equality is merely one of the derivatives of justice and fairness. Justice and fairness have many facets, and one of their facets is equality. It is possible to formulate the principle of

> equality in many ways that are not identical to one another: equality of opportunities, equality of results, equality in starting point, equality in allocation of resources, equality of needs, etc.. But "substantive equality" in each of these is synonymous — both in theory and in practice — with justice and fairness, as it appears to members of a particular society at a particular time; in other words, equality leads to justice, and the path of equality is the path of fairness.'

See also further in this vein, *ibid*., as well as in the *Recanat* original hearing [4], at p. 322:

> 'Discrimination between one person and another offends the sense of justice that dwells deep down in our hearts, and the law exercises all of its strength and might to protect whoever has been treated unfairly and whoever has been discriminated against. The rules of equality and the prohibition of discrimination are merely the rules of justice and fairness without which a civilized society cannot live.'

Once we have characterized the concepts of equality and the prohibition of discrimination as concepts 'without which a civilized society cannot live,' it is not to be wondered at that we have placed them alongside other supreme concepts that dictate public policy (*ibid*., at pp. 320 *et seq*.). But let us remember and observe this: the ideas of equality and the prohibition of discrimination are in and of themselves worthless. However, when joined with fundamental concepts — such as sex, personal status, race, religion, skin colour, nationality, outlook, etc. — they may bring to life or may create operative legal norms that derive from the values of justice and fairness, all of which naturally in a specific context. That is what we said in CA 3798/94 *A v. B* [9], at p. 182 {307}:

> 'Morality and its imperatives are like a lake of pure water, and the law and its imperatives are like water lilies, spread over the surface of the water and drawing life and strength from the water. Morality nourishes the law at the roots and it surrounds the law… Thus we "know" that the question "Have you committed murder and also taken the inheritance" is a "worthy" question; … Thus we also "know" that the question whether a particular question is a "worthy" question, and whether it has an

> "answer in statute," is a question — it may be called: the ultimate question — that nourishes itself with the principles of morality that beat within us, principles of morality that are derived from the principles of liberty, justice, equity and peace of Jewish heritage.'

See also CFH 7325/95 *Yediot Aharonot Ltd v. Kraus* [10], at pp. 72-73.

4. The concept of reasonableness — or alternatively, the concept of a deviation from the zone of reasonableness — moves through the ranks of legal norms like a scrupulous sergeant-major, anxious to impose order and discipline on the activities of government and administrative authorities. The force that moves him is the force of logic, and objective criteria light up his path. The concept of equality and the prohibition of discrimination is, however, different. This concept, especially in certain contexts, also derives strength from the rational principles of reasonableness, but its essence lies in the 'sense of justice that dwells deep down in our hearts' and in the principle of fairness that binds man to man — a principle without which proper human relationships would not be established, nor would society endure for long. These are the deep waters that nourish our decision in this case. That is how I understand our decision.

Petition granted.

18 Tevet 5764.
12 January 2004.