HCJ 265/68

ASSOCIATION OF ENGINEERS AND ARCHITECTS IN ISRAEL AND EIGHT OTHERS
v.
MINISTER OF LABOUR

The Supreme Court sitting as the High Court of Justice

Before Sussman J., Manny J. and Kister J.

Editor's synopsis -

The Engineers and Architects Law, 1958, established a procedure for the registration of engineers and architects. It also provided that the Minister of Labour may frame regulations, after consulting with the Council of Engineering and Architecture, reserving certain activities to registered engineers and architects, which would have the effect of forbidding others with less training and experience from engaging in such activities. The Minister published such regulations, after due consultation, but postponed the date of their implementation several times. The Petitioners complain that such delay of the implementation of the regulations is unlawful.

The court issued an order *nisi*, directing the Minister to show cause why the court should not order him to confer upon each of the individual Petitioners the licenses respectively requested by them to practice as a registered engineer or architect, and further to show cause why it should not declare that the regulations took effect on a certain date, or in the alternative, why it should not order the Minister to annul the amendment to the regulations promulgated by him by which the effective date of the regulations was postponed, or in the alternative, why it should not order the Minister to implement the regulations immediately. The Minister appeared in opposition to the order *nisi*. .

The court ordered that the rule *nisi* be made absolute, holding:

1. The word "may" when used by the legislature, *prima facie* vests a power or discretion, yet sometimes, coupled with the power, there is a duty to act in accordance with the power.

2. Registration under this Law is merely preliminary to the receipt of a license to practice engineering or architecture, and the legislature has directed that a license not be issued on the basis of registration alone but also of practical experience. The licensing of engineers and architects makes no sense unless accompanied by regulations that specify the professional work which may be done only by those so

licensed. The Minister is obliged to complete the work of the primary legislation by framing regulations which reserve certain operations to engineers and architects.

3. Pursuant to section 12 of the Law, the making of regulations for reserving operations is conditioned upon prior consultation by the Minister with the Council of Engineering and Architecture. Subordinate legislation promulgated without such consultation, when required by law, is void. Section 16 of the Interpretation Ordinance provides that a power granted by law may be exercised repeatedly, upon the same conditions. In this case, the last of the series of amendments to the regulations issued by the Minister, postponing their date of implementation, was promulgated without consultation with the Council. This amendment, which purports to postpone the effective date of their regulations, is therefore void, and the regulations took effect.

4. When delay in the coming into force of an arrangement prescribed by the legislature becomes an instrument for preventing that arrangement from being implemented, the Minister is bound to act pursuant to the Law and to take the necessary steps to effect its implementation.

Israel cases referred to:

[1] H.C. 384/66, *Josef Fuchsman v. Supervisor of Transportation* (1967) 21 P.D.(2)221.

English cases referred to:

[2] *Julius v. Lord Bishop of Oxford (1980) A.* C. *214; 42 L. T. 546; 49 L.J. Q.B. 577 (H.L.).*

[3] *Rollo and Another v. Minister of Town and Country Planning* (1948), 1 All E.R.13; 64 T.L.R. 25; (1948) L.J.R. 817.

A. Ben-Porat for the Petitioners.

Y. *Barsela*, Deputy State Attorney, for Respondent.

JUDGMENT

SUSSMAN J.: In 1958 the Engineers and Architects Law, 1958, was enacted. Section 2 of the Law provides that no person shall bear the title "Registered Engineer" or "Registered Architect" unless he is registered in the Register of Engineers and Architects pursuant to section 8 of the Law. The qualifications to be complied with for registration are

fixed in section 9 of the Law. The duty to register prevents a person who is not registered from carrying the title of Registered Engineer or Architect; section 2 does not prevent a person who is not registered from doing engineering or architectural work. This Law does not provide (as the Chamber of Advocates Law, 1961, section 20, provides in relation to Advocates), that engineering or architectural operations shall only be carried out by persons entered in the Register. Nevertheless we do find in the above Law, additional provisions outlining the method for designating the operations of architects and engineers. By virtue of section 3 of that Law, the Council of Engineering and Architecture, consisting of 27 members, was established. The chairman of the Council is that Minister on whom the Government has conferred authority to implement the Law, i.e., the Minister of Labour, the present Respondent. The other members of the Council are:

a. four representatives of the Technion;
b. thirteen representatives of the Government, appointed by the Government, among them engineers and architects;
c. nine representatives of the Association of Engineers and Architects, appointed by the Minister upon the recommendation of the Association.

Section 12 of the Law provides as follows:

> The Minister may, by regulations, after consultation with the Council, reserve the right to carry out specified operations to licensed engineers and architects; where the right to carry out any operation has been so reserved, no person shall carry out such operation unless he is the holder of a license under section 11.

The license under section 11 referred to in section 12, is issued, pursuant to the provisions of section 11, to any person whose name is entered in the Register and who has worked in the branch of his profession for a specified period which shall be not less than one year and shall not exceed three years. The holder of the license, and he alone, is entitled, pursuant to section 11(c) of the Law, to bear the title, "Licensed Engineer" or "Licensed Architect". When a registered engineer (or architect) attains the standing of a licensed engineer (or architect), and the Minister, after consultation with the Council, has

reserved the right to carry out specified operations, such licensed engineer or architect is given the exclusive right to carry out the operations reserved for the member of his profession. Performance by another person of a reserved operation constitutes an offence punishable as set forth in section 14(a) of the Law.

2. The Council specified in section 3 of the Law was established, and at its meeting of December 22, 1966, the Respondent brought before it a draft set of regulations for reserving of operations, prepared by the Ministry of Labour. A representative of the Respondent explained to the meeting that

> the time had come to implement the second stage (of the Law), namely, the reserving of operations, and licensing.

A discussion followed concerning methods of reserving operations, and a committee was appointed to complete the task. The Council resolved

> to publish the regulations in another two months, even if, during that time, the committee does not complete its work.

The aforementioned regulations were drawn up by the Respondent and entitled the Engineers and Architects (Licensing and Reserving of Operations) Regulations 1967. They were published in K.H. No. 2042, on May 19, 1967. In regulation 3 we find the reservation of the right to carry out operations, and the date of the coming into force of the regulations, August 1, 1967, was prescribed in regulation 5. In the introduction to the regulations the Respondent declared that he had fulfilled the duty of consultation with the Council. However, despite regulation 5, these regulations have not been implemented to this day. The reason is that on no less than five occasions the Respondent saw fit to delay implementing them by substituting another regulation for regulation 5 and each time he fixed another date. It would serve no purpose to cite all the substituted regulations; they were published in K.H. Nos. 2081, 2126, 2162, 2249 and 2270.

3. Petitioners are the Association of Engineers and Architects in Israel (Petitioner No. 1) whose representatives serve as members of the Council, pursuant to section 3(4) of the

Law, and eight other engineers and architects. They complain that Petitioners Nos. 2-9 have not been granted a license in accordance with section 11, and they claim that the commencement of the aforementioned regulations was delayed contrary to law.

Once operations are reserved for a licensed engineer or architect, the legislature has directed, under section 12 of the Law, that a person who is not so licensed shall not carry out any of those operations. From the circular letter distributed by the Respondent to members of the Council in June 1968 (Exhibit B/2), we learn that the introduction of licensing regulations

> aroused a sharp reaction from the Federation of Technicians and Works Engineers which claimed that the regulations would seriously prejudice the livelihood of a large group of technicians and engineers.

Indeed, the interest of the technicians in the matter of reserving engineering operations was first aroused even before the regulations were drafted. When he brought the bill before the Knesset for its second and third readings, on March 24, 1958, the Chairman of the Labour Committee said (D.H. vol. 24, p. 1509) that the Committee had opened

> (the) doors wide ... before scientific and public bodies ... saying, all who so wish may come and voice their objections.

The Chairman mentioned the Federation of Technicians among those whose views were heard. It follows that there is no basis for the inference that the interest of the technicians in the designation of operations reserved for engineers had escaped the notice of those who initiated the Law. Rather, it may be assumed that as progress was made with the implementation of the Law, so the pressure applied by the technicians upon the Respondent increased: Exhibit B/2 testifies to their "sharp" reaction.

4. Whatever be the case, the Respondent, faced with the technicians' stand, decided to delay implementing the regulations until July 1, 1968. That was the third postponement. In the meantime the Ministry of Labour appointed a Commission to examine

> whether, and to what extent there is room for amending the regulations in order to prevent possible injury to professional persons at the technical level.

That Commission held fourteen sessions and heard, among others, representatives of the Federation of Technicians and Works Engineers. In a Report submitted on June 14, 1969 (Exhibit B/3), the Commission approved of "the existence of regulations for the reserving of operations," saying that undoubtedly, without such regulations, "the Law would be emptied of content". The Commission was also aware of the fact that

> during the period of transition, the implementing of the regulation concerning the reservation of operations was likely to result in injury to a limited number of technicians at the works engineers level, but the committee is of the opinion that the publication of the regulations should not be linked to the question of injury or non-injury to any sector of the working community.

On the other hand, the Commission recommended certain changes in the regulations and the speedy enactment of the Works Engineers and Technicians Law.

On June 24, 1968, the report of that Commission, called after its Chairman, the Dror Commission, was brought by the Respondent before the Council. At the same session the Respondent said that "at the time he felt that the subject of the technicians had not received appropriate consideration" and he added that the Technicians Bill was before the Government. In the same vein the Director-General of the Ministry of Labour followed with a review of the Report of the Dror Commission, saying that the Commission had been established

> not for the purpose of examining the question of the reserving of operations, which is within the exclusive jurisdiction of this Council, but rather principally to examine the question to what extent those regulations were likely to injure the technicians.

He suggested advising the Respondent to postpone bringing the regulations into force "for another few months". Mr. Dror also spoke at the session of the Council and explained, *inter alia*, that the reserving of operations pursuant to the regulations

> neither deprives works engineers or technicians of a living nor does it prejudice their source of livelihood...The reserving of operations can prevent technicians and works engineers from taking responsibility upon themselves, but it cannot prevent them from working in their profession. The regulations may indeed prejudice the status of works engineers and technicians, but there is no question here of depriving them of the means of a livelihood.

After the session of the Council the Respondent met a representative of the first Petitioner and a representative of the Federation of Works Engineers and reached the decision which he made known to the Petitioner in his letter of July 2, 1968, and to the works engineers the following day. His decision was to postpone implementing the regulations until August 15, 1968, in order to examine the objections of the works engineers to the Dror Commission Report. Yet the Respondent was persuaded - so he says - that the dates for implementing the reserving of operations for engineers and architects should not be bound up with the completion of preparations for the reserving of operations for technicians and works engineers. "Therefore I have decided not to link the two dates together."

5. Regulation 5 was changed in order to postpone the commencement of the regulations until August 15, 1968, but they did not come into force even on that day. Instead, the Respondent brought the matter before the Government, and on August 13, 1968, the Director-General of the Ministry of Labour gave Petitioner No. 1 the following twofold notice:

> At the meeting of the Government on August 11, 1968, the following resolution was adopted:
> (a) to postpone the commencement of the regulations ... until March 31, 1969;

> (b) to authorize the Minister of Labour to appoint a Commission, headed by a judge, among whose functions will be to examine the regulations and advise upon changes, if and to the extent it sees fit, with respect to operations which should be reserved solely for engineers and architects.

The first Petitioner regarded that resolution as a circumvention of the Law and informed the Respondent that it would not send representatives to the Commission. The Respondent replied on September 2, 1968, saying:

> I will have no choice but to transfer the question of the Engineers and Architects (Licensing and the Reserving of Operations) regulations to the Knesset for its decision.

Faced with the Petitioner's refusal, the Commission was not constituted. Nor did the Respondent transfer the matter to the Knesset for its decision. All that was done was to postpone the commencement of the regulations until April 1,1969.

Clearly, had the Respondent thought it necessary to amend the Law as originally enacted, he should have brought a bill before the Knesset. Otherwise, it is difficult to understand how the Knesset could have been of any assistance to him in performing the function imposed upon him by section 12 of the Law. Indeed, in paragraph 7(b) of the replying affidavit, the Respondent explains that his intention was not that the Knesset should amend the Law but rather that the subject should be clarified by the Knesset Labour Committee. But even that was not done. When we asked the Deputy State Attorney who, to the best of his ability, defended before us a position which was indefensible, what had happened to the Respondent's appeal to the Labour Committee, he directed us to the Committee's letter of August 8, 1969. That letter, however, does not contain any evidence of an appeal by the Respondent to the Labour Committee, but rather of an appeal by the Federation of Technicians and Works Engineers, and it ends with a recommendation to postpone implementation of the regulations

for an appropriate period to afford an opportunity to examine the matter further.

Given the fact that the subject had already been examined by the Dror Commission and that it had also become clear to the Respondent that the date for the reserving of operations should not be tied to a similar arrangement in relation to the technicians, what would be the appropriate period required for further investigation? From the replies of the Deputy State Attorney, it appears that not only is the period until March 31, 1969, insufficient, but that the Respondent is unwilling to specify any date whatsoever on which the arrangement will come into force, whether in its present form or in any other form as might be prescribed in other regulations. It should be remembered, that if the regulations are not satisfactory and require amendment, as the Dror Commission also pointed out, nothing prevents the Respondent, after consultation with the Council, from framing other regulations, by virtue of section 12 of the Law. The Report of the Dror Commission *prima facie* supports the Petitioners' argument that, from a technical and professional point of view, it would not be difficult to reserve the operations in the appropriate manner and to designate which operations require the knowledge and expertise of an engineer. If, in spite of Mr. Dror's finding that the present regulations do not deprive technicians of their livelihood, the Respondent does not specify a definite date when this replacement of regulation 5 will come to an end, it is no wonder that the Petitioners claim that the Respondent has decided not to decide anything. In other words, the object of the Law - the reserving of operations for a licensed engineer and a licensed architect - will not be achieved.

6. The Deputy State Attorney argues that the power given to the Respondent under section 12 of the Law, is a power which is not coupled with a duty. At his will the Respondent may exercise the power and at his will, he may refrain from doing so. We are not inclined to accept this argument. True, when the word "may" appears in legislation, its simple meaning is that *prima facie* it vests a power or discretion, yet it also empowers the person holding the authority to do something and sometimes, coupled with the power is the duty to act in accordance with its terms: see *Julius v. Lord Bishop of Oxford* (1880) [2]. The Deputy State Attorney emphasizes that the subject of the registration of engineers was dealt with in the Law itself, in section 9, and that is the principal concern. He points out

that whereas in other Laws, such as the Chamber of Advocates Law, the Knesset itself specified the reserved operations of the profession, the reservation in the present case it left to the Minister. Yet that fact does not prove that the designation of those operations which require the expertise of an engineer is on a lower level or a matter of minor importance. The opposite would appear to be true. The matter acquires greater importance because the Respondent must supplement the Law with what it lacks before it can be implemented.

When on May 21, 1956, the Minister of Labour introduced the bill for its first reading at the 129th session of the Knesset (D.H. Vol. XI, at p. 1790) she emphasized that the work of architects and engineers lacks governmental supervision, remarking as follows:

> Not once only have our eyes seen the results of this situation, and more than once have we paid the price for the absence of regulation in these areas, in human casualties and in the loss of property.

Registration under section 9 of the Law is merely preliminary to the receipt of a license, and the legislature has directed that a license shall not be issued solely on the basis of registration but depend also on the practical experience of the person registered, as provided in section 11 of the Law. In her above mentioned opening remarks, the Minister of Labour also hinted at this. Licensing makes no sense without the designation of those operations that a person not so licensed is not entitled to do. Section 11 and section 12 of the Law are interrelated one with the other, and should not be separated. By leaving to the Minister the task of the reserving of operations, the Knesset sought to achieve two objectives:

1. to make the reserving of operations conditional upon previous consultation with the Council, a process difficult for the members of the Knesset to undertake;

2. reservation of operations by way of subordinate legislation makes it easier to introduce changes when necessary and relieve the Government of the need to turn to the Knesset every time it has to change the designated operations.

But the legislative purpose of which the Minister of Labour spoke cannot be achieved by registration alone. Reasons dictates, therefore, that what the Knesset has left to the subordinate legislator must, of necessity, be done by that body so as not to leave a lacuna in the Law and in order to complete the work of primary legislation.

7. However in point of fact, we are relieved of the need to decide whether the power given to the Respondent by section 12 requires him to exercise it. The Respondent framed the regulations, reserved certain operations and later even made a declaration on the necessity of so doing, as has already been explained. Thus he revealed his own view that it was fitting for him to exercise his power of delegated legislation and the question whether he was bound to do so or not, is not before us. Should the Respondent change his mind and no longer wish to designate which operations should be reserved, nothing prevents him from annulling the regulations after holding further consultation with the Council, as specified in section 12. So far he has not done so.

The question remains whether it was lawful to amend regulation 5 of the original regulations from time to time. Under section 16(1) of the Interpretation Ordinance, where a law confers on an authority power to make regulations

> (1) a regulation may at any time be amended, varied, suspended or revoked by the same authority and in the same manner by and in which it was made.

Under section 12 of the Law, the making of regulations for the purpose of reserving operations is conditional on prior consultation with the Council, and under section 16 of the Interpretation Ordinance, so is their revocation and amendment. Where a Law authorizes an authority to enact legislation after prior consultation with a given person and that authority does not fulfill the duty of consultation, the delegated legislation is void: H.C. 384/66[1]. The duty of consultation is a restraint upon the legislative power of the subordinate legislator and a person who legislates without consultation exceeds his authority.

8. The Respondent consulted with the Council before making the original regulations and again, before postponing until August 15, 1968 - for the fourth time - their coming into force. He did not, however, consult with the Council before the fifth postponement, made for the purpose of framing The Engineers and Architects (Licensing and Reserving of Operations) (Amendment No. 4) Regulations, 1968. In those amending regulations the implementation of the principal regulations was postponed until April 1, 1969. But since they were amended without consultation the amendment is void in law. It follows that regulation 5 remains in the form prescribed in K.H. No. 2249, and the reservation of operations came into effect on August 15, 1968.

Counsel for the Respondent submitted before us two arguments in support of his claim that the Respondent was exempt from consulting with the Council before instituting the aforementioned amending regulations. He contended first, that the Respondent was not obliged to consult with the Council upon postponing the coming into force of the regulations but only upon the modes of reserving operations. We do not agree with this argument. From the minutes of the two sessions of the Council that we have mentioned, it is clear that the Council was requested to advise the Minister not only upon the methods of reserving to the profession the appropriate operations, but also to express its opinion about the date until which the regulations - and therefore in fact, the implementation of the Law - could be postponed. At the session of the Council held on December 22, 1966, Mr. Bassin, the Engineers Registrar, said:

> Only the setting in motion of the licensing system as soon as possible can bring real order into the engineering and architectural professions in Israel.

And at the second session held on June 24, 1968 (which preceded the postponement of the regulations from July 1, 1968 until August 15, 1968), the Director-General of the Ministry of Labour who was in the chair, expressed the opinion that "the matter should be delayed for another few months" in order to examine the recommendations of the Dror Commission and the objections of the technicians. Were this a question of merely a short delay it is possible that we would not regard so strictly fulfillment of the duty of consultation. But since the commencement of the regulations has already been postponed

no fewer than five times, and counsel for the Respondent informs us that when the next appointed date is reached there will be another postponement - and so it will go on, since he is unable to specify a final date - the technique of postponement has, in effect, become an instrument for preventing the designation of operations. Originally, the Respondent resolved to designate which operations would require the employment of a licensed professional. When he continues to postpone the arrangement from one date to another - in fact, indefinitely - it is as if he has withdrawn from such designation and now permits anyone who so desires, to work in the profession. To do that he must proceed in accordance with section 16 of the Interpretation Ordinance.

The second argument of Respondent's counsel was that the consultation held by the Respondent with the Council at its session on June 24, 1968 "covers", as it were, any additional postponement and not only that which followed this consultation. This argument, too, cannot be supported. We have seen that the said consultation induced the Respondent to delay implementing the regulations only until August 15, 1968, and he expressed his opinion that after that date they should be implemented "without delay". That consultation covered nothing more. If, after that date, other material came before the Respondent, or if he saw the facts which had already been considered in another light, he should have brought his thoughts before the Council and heard its advice. The decision is his, yet, as Lord Greene said in *Rollo v. Minister of Town Planning* ([3] at p. 16), he is not entitled to say: "I will not listen to any proposal that you might make!".

In that case, the Minister was obliged to consult with the local authority and in that context Bucknill J. clarified (at p. 17, *ibid*.) the meaning of consultation. The relevant passage is cited by Halevi J., in H.C.384/66[1]:

> ... on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the authority to tender that advice.

Needless to say, even if the Minister is not obliged to accept such advice he must listen to it "with a receptive mind". If no consultation is held the Council does not know

what caused the change in the Respondent's attitude after the session of June 24, 1968, and he, the Respondent, does not know how they regard those considerations which guided him.

9. In the present case, in view of the eminent status of the Council the duty of consultation takes on additional importance. The Government has a clear majority on the Council; out of twenty-seven members, fourteen are representatives of the Government. This was intentional and the Chairman of the Labour Committee explained that intention in the following words (D.H. vol. XXIV, at p. 1510).

> In order to impose upon the Government - and that was our principal object - the responsibility for implementing the Law, a parliamentary responsibility, and in order to enable us to hold it to its responsibility for upholding the Law, we safeguarded, in the bill which we are bringing before you, a majority to the Government representatives.

The importance of the views of such a body set up for this purpose cannot be underestimated.

Accordingly, we make absolute the order *nisi* and declare that the Engineers and Architects (Licensing and Reserving of Operations) (Amendment No. 4) Regulations, 1968, are invalid. The Respondent shall examine the requests of Petitioners Numbers 2-9 and shall issue each of them a license, after it is proved that they have fulfilled the conditions prescribed in the Law.

The Respondent shall pay the Petitioners' costs which shall include counsel's fees in the sum of IL.500.

Order *nisi* made absolute.

Judgment given on January 30, 1969.