IN THE

SUPREME COURT OF THE STATE OF ISRAEL

SITTING AS THE

HIGH COURT OF JUSTICE

HCJ 1/49

Before: **The Hon. Justice Cheshin**
The Hon. Justice Assaf
The Hon. Justice Zilberg

Petitioners: **1. Solomon Shlomo Bejerano,**
2. 2 others

v.

Respondents: **1. Police Minister,**
2. 4 others

Argued: **3 Av 5708 (August 8, 1948)**
29 Tevet 5709 (January 30, 1949)
Decided: **11 Shevat 5709 (February 10, 1949)**

On behalf of the Petitioners: Adv. Zakheim

On behalf of the Respondents: Adv. H.H. Cohen

ORDER

Justice Cheshin

1. This is a challenge to a conditional order given on August 8, 1948 requiring the Respondents to provide a reason why they are prohibiting the Petitioners from appearing and acting on behalf of their clients before the Transportation Department of the Tel Aviv District.

2. The Petitioners are certified drafters of official requests. Not only do they fill out official applications on behalf of their clients, automobile owners, but they also fulfill a considerable number of the Road Transportation Regulations' requirements [on behalf of their clients] like, for example, filling out applications to the relevant agencies, bringing cars in for inspection, paying the required taxes and other formal actions associated with receiving a driver's license from the Department of Transportation. [The Petitioners] have worked in this industry for a long period of time: Petitioner 1 has done it for over twenty years and the other Petitioners for at least ten years, and they have done so with the knowledge and consent of the relevant authorities. At the beginning of May 1948, the Petitioners were barred from entering the offices of the Department of Transportation of the Tel Aviv District. The clerk in charge informed them that they were henceforth prohibited from engaging in their business. Some time thereafter, the Petitioners turned to higher authorities several times, including Respondents 1, 2 (Police

Superintendent) and 3 (Police Superintendent of Tel Aviv) requesting that the decision against them be overturned. However, their efforts did not yield the desired results, and they were told, "There is no… need for 'middlemen' for the purpose of obtaining license plates or a driver's license" (*See* Exhibit 8, dated July 21, 1948, written on behalf of Respondent 1). Because of this, the Petitioners turned to the District Court of Tel Aviv, which (at the time) sat as the High Court of Justice, and a Conditional Order was given.

3. One of Mr. Zakheim's claims on behalf of the Petitioners is that the Petitioners' service benefits many car owners who, because of their work, cannot waste their time waiting in line to pay their fees or traveling to the offices of the Department of Transportation to have their cars tested. Mr. Zakheim claims that stopping the Petitioners from doing business is a severe blow to car owners and, consequently, argues that [this Court] should heed the Petitioners' request In support of this claim, several letters written on behalf of car owners to the relevant agencies were presented to [this Court]. Among them was a memo drafted by Adv. Alex on behalf of Pim Ltd., a company dedicated to safeguarding the interests of car owners in Tel Aviv that counts hundreds of car owners among its members. [The memo] asked Respondent 3 to overturn the decision barring the Petitioners [from conducting business] because of the great benefit provided by [the Petitioners] to car owners.

[However], we doubt whether this fact alone is enough for this Court to accede to the request [of the Petitioners]. If the car owners really are harmed by the Respondents' actions, why don't they complain about the harm they have suffered? It seems that the Respondents want the car owners to personally appear at the offices of the Department of Transportation [to file the necessary paperwork], and if a car owner believes that he is entitled to have an agent do the necessary work, there is no reason for the agent to appear on his own behalf for the benefit of the principal. The principal himself should come and complain about how his rights are being infringed. It seems to us, therefore, that this Court cannot heed this request unless we are convinced that the Petitioners have a right that has been infringed by the Respondents' prohibitive [policy]. The question is do the Petitioners themselves have a right that justice requires that this Court safeguard from infringement at the hands of the Respondents?

4. Mr. Cohen, on behalf of the Respondents, claims that there is no law that grants the Petitioners the right to conduct business in the offices of the Department of Transportation as "professional agents," nor does any law place a public obligation upon the Respondents towards the Petitioners. Therefore, this Court has no authority to heed the Petitioners' request. This Court's authority is covered by section 7 of the Courts Ordinance. Subsection (b) states that "[t]he High Court of Justice shall have exclusive jurisdiction over issues regarding… orders directed

towards public employees or public bodies regarding the fulfillment of their public obligations and what is required of them to perform or refrain from doing certain actions." This Court (during the time of the Mandate) has repeatedly determined (*see, e.g.*, HCJ 92/43 *Joseph Weisserberg v. District Food Controller, Haifa District* [1943] P.L.R. 10, 513, A.L.R. 2, 697; HCJ 110/43 *Salim Muhammad El-Abyad v. Food Controller, Jerusalem* [1943] P.L.R. 10, 644, A.L.R. 2, 791) that anyone turning to this Court to seek relief must first prove that a public official has an obligation towards the petitioner and, second, that in refusing to act, the official did not properly exercise his discretion or acted willfully or maliciously. However, this only applies when someone requests that the Court order the public official in question to perform a particular act. In such a case, the petitioner must demonstrate that a law exists that requires the public official in question to do what is requested of him. This does not apply, in our opinion, when someone requests not that a particular action be taken, but rather that a particular action that harms the petitioner not be taken – in other words, a request for an order to cease and desist. In such a case, the petitioner must show that he has a right to do what he wants to do, and the public official in question must prove that his actions, intended to prohibit the exercise of the stated right, are legal. In other words, when a petitioner complains that a public official is inhibiting his right to perform a specific act, the petitioner need not prove the existence of a law stating that the public official in

question has an obligation to permit him to perform the act in question; rather, just the opposite, the public official must prove that he is justified in prohibiting that which he seeks to prevent *(See* HCJ 69/25 *Hayim Federman v. Sir Ronald Storrs, District Commissioner, Jerusalem, Southern District* [1920-33] P.L.R. 1, 57, C.O.J. 3, 1190 (Rotenberg)). We will therefore examine this case pursuant to this rule.

5. The natural right of everyone to pursue any business or occupation he desires, so long as it is not prohibited by law, is a principle of the utmost importance. Regarding a profession or trade that the legislature has restricted or for which it has set preconditions for those wishing to pursue such an occupation, a person may not pursue such an occupation unless he meets the required criteria. For example, a person may not work as an attorney unless he has the required license as stated by the Lawyers Ordinance, and such a license is not granted unless one obtains the required legal knowledge. Likewise, a person may not deal in goods held by customs officials unless he has the required license under the Customs Agents Ordinance. Also, a person wishing to practice medicine, pharmacy, land appraisal, drafting requests or work as a real estate agent must also acquire the necessary license pursuant to the respective ordinances. One who engages in one of these occupations without first obtaining the necessary license may be held legally accountable. However, there is no license required of someone

wishing to work as a paid agent. We do not agree with Mr. Cohen's argument that, so long as the law does not explicitly allow the Petitioners to engage in their business, they have no right to do so; rather, to the contrary, so long as the law does not prohibit a particular trade the Petitioners have chosen for themselves, and so long as the law has not placed upon them and those like them a precondition for engaging in such a trade, they have the right to do so, and they cannot be stopped from doing so unless such limitation is sanctioned by law. The Petitioners' right to work as agents in exchange for payment does not stem, in our opinion, from their license to draft requests We presume that such a license is not enough to grant them the right to appear in the offices of the Department of Transportation, but even Mr. Cohen did not claim that a special license is necessary to appear in the offices of the Department of Transportation. Their right is not one that is in the books, but rather one that stems from the natural right of each person to seek a livelihood that will serve as a source of income.

6. What is the Respondents' obligation towards the Petitioners? Public agencies and public officials have an obligation, stemming from their respective roles, not to interfere with an individual's [right] to engage in his occupation when the occupation in question is not prohibited by law. Mr. Cohen argues that "[the Court] cannot force the Respondents to permit the Petitioners to work in the Department of Transportation offices." In our opinion, this is the wrong approach.

The Department of Transportation is not a private institution whose owners get to decide who may enter and who may not. This is a public agency whose doors must be open to all those who want to enter. We would not find any fault with the Respondents' decision if the law required car owners to personally appear [at the offices of the Department of Transportation]. In such a case there would be no need for agents or middlemen. However, this is not the case. The Road Transportation Regulations (section 3, chapter 128 of the Official Gazette) does include several rules from which it seems that a car owner must personally appear for certain matters. For example, Regulation 83 states that the agency in charge of granting driver's licenses may require an applicant to undergo a medical examination and pass a driving test assessing [the prospective licensee's] knowledge and fitness as a driver. Obviously, in order to fulfill the regulation's directives, the applicant must appear in person. However, with regards to the regulations dealing with examining the car, filling out and presenting specific forms, payment of taxes and other similar formal actions, which require nothing more than standing in line and wasting time, there is no reason for the car owner himself to appear, and in such cases one's agent is no different than the principal. Furthermore, some of these actions can be done by mail without anyone having to make an appearance (*see* Regulation 75(3) and 76(4) of the Road Transportation Regulations).

7. Mr. Cohen also argues that the Petitioners were banned as part of an effort on the agency's part to clean the Department of Transportation of corruption. In a sworn affidavit, Mr. Emanuel Feldman, Respondent 4, stated that "many years of experience… have shown us that these intermediaries cause corruption and a lack of effectiveness at work." The corruption, Mr. Feldman explains, comes from the fact that the transportation officers grant the intermediaries (the Petitioners in this case) who appear at the Department of Transportation extra services in exchange for money, and the ineffectiveness results from the fact that [the system] "provides unequal treatment between car owners who have the Petitioners working on their behalf and other car owners who do not have connections to the transportation officers." However, despite this, we see no justification in the prohibitive [policy] that has been applied to the Petitioners. There are three reasons for this. First, Mr. Feldman's conclusions are based on mere rumors, and not only does he provide no source, he also does not offer even one specific case in his sworn affidavit or in his cross-examination that would raise suspicion against the Petitioners. We cannot involve ourselves in an individual's personal life and revoke his livelihood on the basis of mere rumors alone. Mr. Feldman states in his testimony that he himself gave [money] to one of the Petitioners to quickly "resolve" an issue he had at the Department of Transportation, but he did not mention the name of the individual, and he could not even state that the issue was "resolved" outside of the regular

procedure. Second, if there is corruption in the [Department's] bureaucracy, logic dictates that fixing the [problem] should be done within the existing framework, and offenders, whether operating within the system or outside of it, should be brought to justice. So why has the fury [caused by the alleged corruption] been directed specifically at the agents of the public? Clearly, if the transportation officers were to be separated and not have any contact with the public, there would be no corruption, but in such a case they would also be unable to fulfill their purpose. Third, and most importantly, we have not found that the Respondents are authorized to administratively prevent the Petitioners from working, especially without conducting any sort of investigation. HCJ 9/38 *Joseph Weinberg v. The District Commissioner, Jerusalem District* [1938] P.L.R. 5, 126, S.C.J. 1, 116, Ct. L.R. 3, 111 116 (Applebaum), established that a district governor may not revoke the license of [one licensed] to draft applications [on behalf of another] and bar them from working because of improper behavior unless the licensed drafter has first been given the opportunity to present his defense. This leads to *a fortiori* argument: if a drafter – whose license to do business is a privilege and whose license the district governor is authorized by law to revoke – cannot be prevented from doing business without an investigation, the Petitioners – who have a right, not a privilege, [to conduct business] and concerning whom [the Respondents]

have no statute permitting them to prevent [the Petitioners] from doing their work – should certainly have the right to a hearing.

8. Therefore, our conclusion is that the policy the Respondents have enforced against the Petitioners is not a normal use of police power, but rather an infringement of one of the basic rights of a citizen, and without explicit or implicit authority rooted in law there is no justification for the prohibitive [policy]. If, however, there is no other way to fix the situation except to [enforce such a policy], the matter must be addressed by the legislature.

In light of the aforementioned, we have decided to make the order permanent, and we award the Petitioners a general amount of 10 Liras.

Decided today, 11 Shevat 5709 (February 10, 1949).