HCJ 6163/92

1. Yoel Eisenberg

2. Advocate Avraham Oren

v.

1. Minister of Building and Housing

2. Appointments Committee for the Civil Service Office

3. Civil Service Commissioner

4. Government of Israel

5. Prime Minister

6. Yosef Ginosar

7. Tarak Abed Al Hai, Mayor of Taibeh

8. Zeidan Muhammed, Head of Kefar Manda Local Council

The Supreme Court sitting as the High Court of Justice

[23 March 1993]

Before Justices A. Barak, E. Goldberg and E. Mazza

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

Facts: The sixth respondent (Ginosar) was formerly a member of the General Security Service. He was involved in the '300 bus' affair and the 'Nafso' affair.

In the '300 bus' affair, a bus was seized by terrorists. The army stormed the bus, rescued the passengers and two of the terrorists were arrested alive. It was later announced that all the terrorists died in the rescue. A commission of enquiry was appointed, and Ginosar was one of its members. He acted in this capacity to cover up the involvement of some of the General Security Service personnel in the case. Ginosar received a pardon with regard to this from the President of the State and was not indicted.

In the 'Nafso' affair, a suspected terrorist was interrogated by a team headed by Ginosar. The interrogators acted improperly in the interrogation and perjured

themselves in the trial in which Nafso was convicted. The matter was subsequently investigated by the Landau Commission, which recommended not indicting Ginosar.

Ginosar was recently appointed director-general of the Ministry of Building and Housing. The petition argues that in view of his involvement in the '300 bus' affair and the 'Nafso' affair, he was unfit to be appointed to such a senior position in the Civil Service.

Held: An administrative body making an appointment must take into account the criminal past of the candidate, notwithstanding the absence of a criminal conviction and notwithstanding the granting of a pardon by the President, if there is reasonable evidence of a criminal past. In the circumstances of the present case, Ginosar was not a suitable candidate for a senior position in the Civil Service, and his appointment was therefore disqualified.

Petition granted.

Legislation cited:

Basic Law: Administration of Justice, 5744-1984, s. 15(c).

Basic Law: Government, 5752-1992, s. 1.

Basic Law: Human Dignity and Liberty, 5752-1992, s. 1.

Basic Law: President of the State, 5754-1994, ss. 1, 11(b).

Civil Service (Appointments) Law, 5719-1959, ss. 12, 17, 19, 46, 46(a).

Commissions of Enquiry Law, 5729-1968, s. 1.

Courts Law, 5717-1957, s. 7(a).

Courts Law [Consolidated Version], 5754-1984, s. 40(2).

Criminal Register and Rehabilitation Law, 5741-1981, ss. 1, 2, 3, 4(a)(1), 5(a), 16(a), 16(c), First Schedule s (c).

Labour Court Law, 5729-1969, s. 24(a)(1a).

Labour Court Law (Amendment no. 18), 5750-1990.

Law of Return, 5710-1950.

Local Authorities (Elections) Law, 5725-1965, s. 7(6).

Military Jurisdiction Law, 5715-1955, ss. 73, 537.

Penal Law, 5737-1977, ss. 22, 24(a)(1).

Israeli Supreme Court cases cited:

[1] HCJ 264/77 *Moshe v. National Insurance Institute* [1978] IsrSC 32(1) 678.

[2] HCJ 294/89 *National Insurance Institute v. Appeals Committee for Enemy Action Victims Compensation Law* [1991] IsrSC 45(5) 445.

[3] HCJ 3/73 *Kahanoff v. Tel-Aviv Regional Rabbinical Court* [1985] IsrSC 39(1) 449.

[4] HCJ 403/71 *Alkourdi v. National Labour Court* [1972] IsrSC 26(2) 66.

[5] HCJ 40/74 *Barkol v. Minister of Education and Culture* [1984] IsrSC 38(1) 785.

[6] HCJ 578/80 *Genaim v. Muasi* [1981] IsrSC 35(2) 29.

[7] HCJ 221/69 *A v. Minister of Defence* [1970] IsrSC 24(1) 365.

[8] HCJ 7/70 *Agai v. Minister of Agriculture* [1973] IsrSC 27(1) 127.

[9] HCJ 344/69 *Kadouri v. Tel-Mond Local Council* [1969] IsrSC 23(2) 620.

[10] HCJ 991/91 *David Pasternak Ltd v. Minister of Building and Housing* [1991] IsrSC 45(5) 50.

[11] HCJ 209/68 *Simchi v. Civil Service Commissioner* [1968] IsrSC 22(2) 673.

[12] HCJ 10/59 *Levy v. Tel-Aviv Regional Rabbinical Court* [1959] IsrSC 13 1182; IsrSJ 3 161.

[13] HCJ 453/84 *Iturit Communication Services Ltd v. Minister of Communications* [1984] IsrSC 38(4) 617.

[14] CA 436/62 *Ramat-Gan Municipality v. Tik* [1963] IsrSC 17 1262.

[15] HCJ 341/80 *Duick v. Bachar*, *Postal Services Manager* [1981] IsrSC 35(2) 197.

[16] HCJ 840/79 *Israel Contractors and Builders Centre v. Government of Israel* [1980] IsrSC 34(3) 729.

[17] HCJ 688/81 *Migdah Ltd v. Minister of Health* [1982] IsrSC 36(4) 85.

[18] HCJ 653/79 *Azriel v. Director of Licensing Department*, *Ministry of Transport* [1981] IsrSC 35(2) 87.

[19] CrimA 22/89 *Azva v. State of Israel* [1989] IsrSC 43(2) 592.

[20] CrimA 124/87 *Nafso v. Chief Military Prosecutor* [1987] IsrSC 41(2) 631; IsrSJ 7 263.

[21] HCJ 428/86 *Barzilai v. Government of Israel* [1986] IsrSC 40(3) 505; IsrSJ 6 1.

[22] HCJ 88/88 *Nafso v. Attorney-General* IsrSC [1988] 42(3) 425.

[23] HCJ 727/88 *Awad v. Minister of Religious Affairs* [1988] IsrSC 42(4) 487.

[24] HCJ 58/68 *Shalit v. Minister of Interior* IsrSC [1969] 23(2) 477.

[25] CA 165/82 *Kibbutz Hatzor v. Assessing Officer*, *Rehovot* [1985] IsrSC 39(2) 70.

[26] HCJ 14/86 *Laor v. Film and Play Review Board* [1987] IsrSC 41(1) 421.

[27] CA 752/78 *Authority under the Nazi Persecution Victims Law 5717-1957 v. Frisch Estate* [1979] IsrSC 33(3) 197.

[28] HCJ 1635/90 *Jerezhevski v. Prime Minister* [1991] IsrSC 45(1) 749.

[29] HCJ 142/70 *Shapira v. Bar Association District Committee*, *Jerusalem* [1971] IsrSC 25(1) 325.

[30] HCJ 669/86 *Rubin v. Berger* [1987] IsrSC 41(1) 73.

[31] HCJ 4566/90 *Dekel v. Minister of Finance* [1991] IsrSC 45(1) 28.

[32] HCJ 531/79 *Petah-Tikvah Municipality Likud Faction v. Petah-Tikvah Municipal Council* [1980] IsrSC 34(2) 566.

[33] CrimA 884/80 *State of Israel v. Grossman* [1982] IsrSC 36(1) 405.

[34] HCJ 313/67 *Axelrod v. Minister of Religious Affairs* [1968] IsrSC 22(1) 80.

[35] HCJ 1601/90 *Shalit v. Peres* [1991] IsrSC 45(3) 353; IsrSJ 10 204.

[36] BAA 18/84 *Carmi v. State Attorney* [1990] IsrSC 44(1) 353.

[37] BAA 1/68 *A v. Attorney-General* [1968] IsrSC 22(1) 673.

[38] CA 254/64 *Hassin v. Dalyat al Carmel Local Committee* [1965] IsrSC 19(1) 17.

[39] CrimA 521/87 *State of Israel v. Einav* [1991] IsrSC 45(1) 418.

[40] CrimA 121/88 *State of Israel v. Darwish* [1991] 45(2) 633.

[41] HCJ 389/80 *Golden Pages Ltd v. Broadcasting Authority* [1981] IsrSC 35(1) 421.

[42] HCJ 935/89 *Ganor v. Attorney-General* [1990] IsrSC 44(2) 485.

[43] HCJ 156/75 *Daka v. Minister of Transport* [1976] IsrSC 30(2) 94.

[44] HCJ 127/80 *Odem v. Mayor of Tel-Aviv* [1981] IsrSC 35(2) 118.

[45] FH 9/77 *Israel Electricity Co. Ltd v. HaAretz Newspaper Publishing Ltd* [1978] IsrSC 32(3) 337.

[46] CA 461/62 *Zim Israeli Shipping Co. Ltd v. Maziar* [1963] IsrSC 17 1319; IsrSJ 5 120.

[47] HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [1953] IsrSC 7 871; IsrSJ 1 90.

[48] HCJ 10/48 *Zeev v. Acting District Commissioner of Tel-Aviv* [1948] IsrSC 1 85; IsrSJ 1 68.

[49] HCJ 732/84 *Tzaban v. Minister of Religious Affairs* [1986] IsrSC 40(4) 141.

[50] HCJ 251/88 *Oda v. Head of Jaljulia Local Council* [1988] IsrSC 42(4) 837.

[51] HCJ 436/63 *Ben-Aharon v. Head of Pardessia Local Council* [1967] IsrSC 21(1) 561.

[52] BAA 2579/90 *Bar Association District Committee*, *Tel-Aviv v. A* [1991] IsrSC 45(4) 729.

[53] HCJ 94/62 *Gold v. Minister of Interior* [1962] IsrSC 16 1846; IsrSJ 4 175.

[54] HCJ 442/71 *Lansky v. Minister of Interior* [1972] IsrSC 26(2) 337.

[55] EA 2/84 *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [1985] IsrSC 39(2) 225; IsrSJ 8 83.

[56] HCJ 31/81 *Moshav Beth Oved Workers Commune for Cooperative Agricultural Settlement Ltd v. Traffic Supervisor* [1982] IsrSC 36(3) 349.

[57] CA 492/73 *Schpeizer v. Council for Regulating Sports Gambling* [1985] IsrSC 39(1) 22.

[58] HCJ 5684/91 *Barzilai v. Government of Israel* [1992] IsrSC 46(1) 536.

American cases cited:

[59] *May v. Edwards* 529 S.W. 2d. 647 (1975).

[60] *State ex rel. Wier v. Peterson* 369 A. 2d 1076 (1976).

Jewish Law sources cited:

[61] Maimonides, *Mishneh Torah*, Laws of Repentance 7, 6.

For the first petitioner — E. Ben-Tovim.

For the second petitioner — S. Baruch.

For respondents 1-5 — A. Mandel, First Senior Assistant to the State Attorney.

For the sixth respondent — A. Zichroni.

For respondents 7-8 — D. Cohen.

JUDGMENT

Justice A. Barak

The Government appointed Yosef Ginosar as director-general of the Ministry of Building and Housing. Ginosar was involved in the '300 bus' affair. As a member of the Zorea Commission, he was instrumental in covering up the part played by General Security Service (GSS) personnel in the affair. He was granted a pardon by the President for his part in this affair and was not put on trial. Ginosar was also involved in the 'Nafso' affair. He led the interrogation team. The interrogators used improper interrogation methods against Nafso and committed perjury before the special military tribunal that convicted Nafso. For this behaviour he was not put on trial. The question that we must decide is whether, in view of Ginosar's past, the Government's decision to appoint him is lawful.

The problem of jurisdiction

1. The petitioners in this case — whose interest in the subject of the petition lies in imposing the rule of law on the Government — complain that the appointment of Ginosar (hereafter — 'the respondent') is unlawful. At the beginning of the hearing, the respondent's attorney raised an argument that the only court competent to decide the subject-matter of the petition is the Regional Labour Court, not the High Court of Justice. We must therefore consider this argument first. The argument is based on s. 24(a)(1a) of the Labour Court Law, 1969, as introduced by the Labour Court Law (Amendment no. 18), 5750-1990. The text of the provision is as follows:

> '(a) The Regional Labour Court shall have exclusive jurisdiction to try —
>
> (1a) An action arising from negotiations towards making a contract to create an employee-employer relationship, an action arising from a contract as stated before an employee-employer relationship is created or after termination of the said relationship, or an action arising from accepting someone for employment or refusing to accept him.'

Counsel for the respondent argues that the petition before us is essentially an action 'arising from accepting someone for employment…' and therefore the Regional Labour Court has exclusive jurisdiction to try it. This argument is unacceptable both to the petitioners and to the counsel for the other respondents, the Minister of Building and Housing, the Appointments Committee, the Public Service Commissioner, the Government of Israel and the Prime Minister (hereafter — 'the respondents'). According to counsel for the petitioners, the purpose of the new jurisdictional provision was to give the Labour Court jurisdiction that was in the past vested in the civil courts (the Magistrates or District Court). The provision is not intended to negate the jurisdiction of the High Court of Justice. According to counsel for the respondents, the change of jurisdiction applies only to matters raising issues that are closely related to labour law. In this case, the substantive issue that the court is asked to examine is the exercise of executive power. The consequence whereby employee-employer relations are created is marginal. Therefore the High Court of Justice has the jurisdiction to try the petition before us, whether this is exclusive jurisdiction or concurrent jurisdiction.

2. Section 24(a)(1a) of the Labour Court Law extends the jurisdiction of the Labour Court. This exists now not only for actions arising from an employee-employer relationship but also for actions arising from events that

preceded the creation of an employment relationship or that took place after the employment relationship ended. Within this framework, it was also provided that the Labour Court has jurisdiction to try actions arising from accepting someone for employment. It seems to us that the case before us falls into this category, and that the Labour Court — as well as the High Court of Justice — has jurisdiction to try the action which is the subject of the petition. When the respondent was appointed by the Government, he was accepted for employment. An employee-employer relationship was created between him and the State as a result of the act of the Government as the competent authority. There is no material difference, formally, between accepting the respondent for employment and accepting other candidates for employment in the Civil Service. It is true that other employees are sometimes chosen by tender (s. 19 of the Civil Service (Appointments) Law, 5719-1959 (hereafter — 'the Appointments Law') and the authority acting on behalf of the State is not the Government. Notwithstanding, at the end of the process, irrespective of the form of selection, an appointment is made by the Civil Service Commissioner (s. 17 of the Appointments Law), and an employee-employer relationship is created between the State and the appointees. The same applies to the appointment of employees in other executive bodies, such as municipalities and local councils. The same law applies, of course, to the appointment of employees by private employers (corporations and individuals). In all these situations there is a candidate who is accepted (or not accepted) for employment, and an action arising from improprieties that occurred in accepting a person for employment or not accepting him is tried by the Labour Court. When the jurisdiction of the Labour Court was extended, there was a corresponding narrowing of the jurisdiction of the District Court. Its jurisdiction is residual ('any matter that is not in the exclusive jurisdiction of another court…': s. 40(2) of the Courts Law [Consolidated Version], 5744-1984). When exclusive jurisdiction was given to the Labour Court to try actions arising from accepting someone for employment, the jurisdiction of the District Court was automatically reduced at the same time (unlike the jurisdiction of the High Court of Justice).

3. The key question is, what impact does the extension of the exclusive jurisdiction of the Labour Court have on the jurisdiction of the High Court of Justice? When the jurisdiction of the Labour Court was extended, was there a corresponding narrowing of the jurisdiction of the High Court of Justice? Indeed, were the High Court of Justice a court of residual jurisdiction, its status would then be — for the purpose of the narrowing of jurisdiction — like that of the District Court. But in matters where it has jurisdiction, the High Court of Justice does not have residual jurisdiction. It follows that the

precise question is whether extending the exclusive jurisdiction of the Labour Court has the effect of reducing the jurisdiction of the High Court of Justice. In my opinion, the answer to this is no. The reason for this is three-fold: *first*, the intention of the legislator was not to affect the jurisdiction of the High Court of Justice. The intention was to extend the jurisdiction of the Labour Court's authority and to take this jurisdiction away from the civil courts (see the draft Labour Court (Amendment no. 16) Law, 5748-1988, at p. 284). *Second*, the presumption is that the jurisdiction of the High Court of Justice can only be negated in clear and unambiguous language (HCJ 264/77 *Moshe v. National Insurance Institute* [1], at p. 687; HCJ 294/89 *National Insurance Institute v. Appeals Committee for Enemy Action Victims Compensation Law* [2]). This presumption is particularly strong when the jurisdiction is taken away from the court system and conferred on a non-judicial body. This presumption is weaker when the change occurs in the framework of the jurisdiction of the regular courts between themselves. The presumption is of medium strength when the jurisdiction is taken away from the regular courts and moved to 'special' courts from which there is no appeal to the Supreme Court (such as from regular court to the Rabbinical Court, or to the Labour Court — see HCJ 3/73 *Kahanoff v. Tel-Aviv Regional Rabbinical Court* [3], at p. 453). Justice Berinson rightly pointed out that:

> 'This Court is charged with preserving the legality, propriety and reasonableness of the acts of Israeli public authorities, and this role has supreme constitutional and public importance. Any harm to this may undermine one of the foundations of the rule of law in the public life of the State and strike at the most vulnerable spot of the judiciary in Israel' (HCJ 403/71 *Alkourdi v. National Labour Court* [4], at pp. 72-73).

Third, the jurisdiction of this court under the provision of section 15(c) of the Basic Law: Administration of Justice is particularly wide. Under this provision the jurisdiction of the High Court of Justice has been recognized even where another court or tribunal has jurisdiction in a matter, provided that there are special circumstances that justify this. Justice Berinson discussed this with regard to the Labour Court in particular, pointing out that:

> '… when sitting as the High Court of Justice, we have decided several times, under s. 7(a) of the Courts Law, 5717-1957, to bring within our review a matter within the jurisdiction of another court or tribunal, when the remedy that can be expected there is not sufficiently effective or speedy (HCJ 40/74 *Barkol v. Minister of Education and Culture* [5], at p. 788).

For this reason it seems to me that the mere act of conferring jurisdiction on a special court to try matters which the High Court of Justice has jurisdiction to try does not amount to clear and unambiguous language that the jurisdiction of the High Court of Justice is negated. Such a conferral of jurisdiction is therefore interpreted as creating concurrent jurisdiction.

4. I am aware that this approach of mine constitutes a departure from several judgments made by this court in the past (mostly by majority opinion), including case-law with which I myself was associated (see HCJ 578/80 *Genaim v. Muasi* [6]). In those judgments the question posed was whether the High Court of Justice or the Labour Court had exclusive jurisdiction (see, for example, HCJ 221/69 *A v. Minister of Defence* [7]; HCJ 7/70 *Agai v. Minister of Agriculture* [8]; HCJ 344/69 *Kadouri v. Tel-Mond Local Council* [9]). If I regard myself as justified (objectively) in re-examining this question, this is merely because of the new approach prevailing in this court that the proper view is the one that recognizes the existence of concurrent jurisdiction, such that in certain cases both the High Court of Justice and another court or tribunal will have jurisdiction (see HCJ 991/91 *David Pasternak Ltd v. Minister of Building and Housing* [10]). This viewpoint creates the proper balance between the various considerations that have been examined in extensive case-law with regard to the reciprocal relationship between the High Court of Justice and other courts and tribunals in Israel. It should be noted that this judgment is restricted merely to the interpretation of section 24(a)(1a) of the Labour Court Law, and we are not adopting any position with regard to any jurisdiction arising from other provisions of the Labour Court Law.

5. Thus an action arising from accepting a person for employment is in the jurisdiction of the Labour Court. When the decision about accepting a person for employment is made by an executive authority acting under a law, the High Court of Justice also has jurisdiction with regard to the legality of the decision (*Barkol v. Minister of Education and Culture* [5]; HCJ 209/68 *Simchi v. Civil Service Commissioner* [11]). Jurisdiction with regard to the legality of accepting a person for employment is therefore concurrent. Nonetheless, the decision on the question of venue is not dependent on the choice of the plaintiff or petitioner. It is true that we do have jurisdiction to hear a petition arising from accepting someone for employment. However, our jurisdiction is 'discretionary' (in the language of Justice Sussman's in HCJ 10/59 *Levy v. Tel-Aviv Regional Rabbinical Court* [12], at p. 1194 {173}). In accordance with this discretion ('discretionary jurisdiction': HCJ 453/84 *Iturit Communication Services Ltd v. Minister of Communications*

[13]), we will not hear a petition as long as the petitioner has an alternative remedy (see CA 436/62 *Ramat-Gan Municipality v. Tik* [14], at p. 1266). Therefore we have referred petitioners, who complain of invalid decisions of executive authorities within the framework of proceedings in a tender, to the civil court, for that is where alternative relief can usually be found (*David Pasternak Ltd v. Minister of Building and Housing* [10]). Note that:

> 'The question of the alternative remedy does not raise the question of jurisdiction. Instead, it raises the question of judicial discretion. Where an alternative remedy exists, the High Court of Justice is likely to exercise its discretion to refrain from considering the petition.' (*ibid*., [10], at p. 60).

6. How should we exercise our judicial discretion in this case? As in similar cases, we must find a balance between conflicting considerations. In principle, disputes arising from accepting a person for employment — just like the other matters listed in section 24(a)(1a) of the Labour Court Law — should be tried by the Labour Court, which is properly equipped for deciding the dispute. It will do this on the basis of both labour law and the rules of administrative law. Indeed, when considering an action arising from acceptance of a person for employment, based on a decision of an executive authority, the Labour Court will examine the legality of the act of the executive authority according to the same criteria that the High Court of Justice would adopt if it were to consider the matter. This is the 'normative duality', which characterises the proceedings of any judicial forum in the country with regard to any matter with an executive aspect (see HCJ 341/80 *Dueck v. Bechar*, *Director of Postal Services (Jerusalem District)* [15]; HCJ 840/79 *Israeli Contractors and Builders Centre v. Government of Israel* [16]; HCJ 688/81 *Migdah Ltd v. Minister of Health* [17]). Notwithstanding, we are always prepared to exercise our authority in exceptional cases that justify this. In a similar case we determined the following standard for exercising our discretion:

> 'The case is exceptional if it raises a problem that, because of its nature, ought to be tried in the highest administrative court as a court of first instance. This will certainly be a petition that does not raise a need to decide a real dispute of factual matters, but which raises a difficult and important legal problem. Such a question may arise either in the absence of case-law in the matter under discussion or because of conflicting decisions in the civil courts in this matter or because of conflicting decisions in the Supreme Court itself. Similarly, a case will be deemed

> special if it raises an especially urgent issue that the civil court is unable — despite the temporary remedies available to it — to deal with effectively. Finally, we will treat a case as exceptional if the context in which it arises is "an expression of a struggle between powerful forces and the citizen, and it is desirable that it should be heard by the court which is recognized by the public and the Government as the highest judicial authority" …' (*David Pasternak Ltd v. Minister of Building and Housing* [10], at p. 64).

It need not be said that this list is not closed 'and it is merely an expression of the legal policy considerations underlying the alternative remedy itself' (*ibid.*, see also *Barkol v. Minister of Education and Culture* [5], at p. 788).

7. On the basis of these criteria, we think that this petition should be heard by us, and that we should not refer the petitioners to the Labour Court. It is sufficient to point out that the case before us, on the one hand, does not raise any factual dispute and, on the other, it raises a legal problem that has not yet been decided in Israeli law. Moreover, we are dealing with a significant and central issue, which has profound ramifications on the rule of law (both formal and substantive) and the public's confidence in the actions of Government authorities in general and of the supreme executive organ of State (the Government) in particular. For these reasons we have decided to consider the petition on its merits.

8. The result, therefore, is that both the High Court of Justice and the Regional Labour Court have jurisdiction to try a certain petition. The High Court of Justice has discretion to decide when it will exercise its jurisdiction and when it will refrain from hearing a petition and refer it to the Labour Court. In the case before us, we have decided — for the reasons given — to consider the petition on its merits. We will begin by presenting the normative framework; then we will review the chain of events before and after the appointment. Finally, we will consider the essence of the petition, which is whether the Government's discretion in appointing the respondent was lawful.

The general normative framework: the authority and procedure for making appointments

9. The Appointments Law addresses the Government's authority to appoint a director-general of a Government ministry. The Appointments Law does not include any provision about the qualifications of a candidate for the

office of director-general. It has no provision about his criminal past and the effect thereof on the appointment. However, it does have a provision about the appointment procedure. Section 12 of the Appointments Law stipulates:

> 'Subject to the provisions of this law and conditions that it may determine, the Government shall appoint a director-general for each ministry, on the recommendation of the minister responsible for that ministry, and the appointment shall not be subject to a compulsory tender under section 19.'

By virtue of its authority under s. 12 of the Appointments Law, the Government determined conditions for appointing directors-general. These conditions stipulate, *inter alia*, that the Prime Minister shall appoint the Civil Service Commissioner and five persons who are not civil servants, who will form an appointments committee that will express an opinion about all the candidates for the office of director-general. The appointments committee shall have three members: the Civil Service Commissioner, who is the chairman, and two members selected by him for each case from the list of five in rotation, in alphabetical order of their surnames. A recommendation to appoint someone to the office of director-general shall be submitted to the Government by the minister responsible for the ministry having the relevant position, together with the opinion of the appointments committee.

The chain of events before and after the appointment

10. The Minister of Building and Housing (the first respondent) referred the appointment of the respondent to the position of director-general of the Ministry of Building and Housing with the appointments committee. The members of the committee were the Civil Service Commissioner (Mr M. Gabbay), Dr Moshe Mandelbaum and Adv M. Wagner. The committee interviewed the candidate. It considered his professional qualifications and experience. The respondent's involvement in the '300 bus' affair as a member of the Zorea Commission was neither presented to the appointments committee nor was it discussed. Similarly the respondent's involvement in the 'Nafso affair' was not presented to the appointments committee nor was it discussed. In any case, no questions were asked at the appointments committee about these matters. When it ended its deliberations, the appointments committee unanimously recommended appointing the respondent to the proposed position.

11. At this stage — before the Government considered the appointment — the petition in HCJ 6163/92 was filed. The Minister of Building and Housing was asked to explain why he should not retract his recommendation to the

Government to appoint the respondent as director-general in his ministry. The appointments committee was asked to retract its recommendation. The Government was asked to refrain from appointing the respondent to the proposed position. At the same time, an interim order prohibiting the Israeli Government from considering the respondent's appointment was sought. The petition was referred to a panel of three judges. All the parties were summoned to the hearing. It was determined that the application for an interim order would be heard by the panel. At the beginning of the hearing on the interim order before the panel, counsel for the petitioner restated his application that an interim order should be made to stop the appointment process. On the other side, counsel for the respondents argued that the petition was premature. The Government should be allowed to discuss and decide the matter. The Government's decision is reversible and it is unable to change the petitioner's legal status. At the end of the parties' arguments about the interim order, we made (on 27 December 1992) the following decision:

> 'After hearing the arguments of the parties, we are satisfied that the decision regarding the interim order should be given by the panel that will hear the petition. We have noted for the record the statement of counsel for respondents 1-4 that an appointment will not constitute a change in the legal position, and that the petitioner will subsequently be able to raise all the arguments that he may raise today.'

The hearing about issuing a show cause order was postponed to another date, after the Government made a decision. Meanwhile an additional petition (HCJ 6177/92) was filed, with the same contents.

12. Since no interim order was made, the Government held a discussion, on the very same day, about the proposal of the Minister of Building and Housing to appoint the respondent to the position of Director-General of the Ministry of Building and Housing. The Government held a long and thorough discussion about the questions relating to the acts of the respondent in the past. At the end of this discussion, a decision was made to appoint the respondent to the proposed position. After the Government made its decision, the hearing before us was set down for continuation (on 31 January 1993).

13. At the beginning of the hearing on the question of issuing a show cause order — but before the various problems arising were examined — we raised the following question: the appointments committee dealt only with the respondent's personal qualifications for carrying out the position. Unlike the Government, the appointments committee did not hold any discussion

about the effect of the respondent's past on his appointment. Is not this omission sufficient to render the decision of the appointments committee and the Government defective? In the petitioners' opinion, the decision of the appointments committee was indeed defective as stated. As we have seen, this was the main complaint of the petitioners in their petition. In their opinion, the appointments committee ought to reconsider the matter anew, with a different panel. In contrast, counsel for the respondents thought that the defect that occurred did not influence the Government's decision. In her opinion, the appointments committee is not a statutory committee, but an internal committee that was appointed by virtue of a Government decision. In these circumstances, the comprehensive discussion that took place in the Government was sufficient. Counsel for the respondent agreed with this view. He pointed out in addition that the information about the respondent's past is public knowledge, and was doubtless considered by the appointments committee as well. In view of this disagreement — and in order to resolve it — we asked the parties whether they were prepared to regard the petition as though a show cause order had been issued. The respondents and the respondent rejected the proposal. We set down the continuation of the hearing with regard to the show cause order for an early date (2 February 1993).

14. On 2 February 1993, we held a hearing with regard to issuing a show cause order. We heard the arguments of the parties about the jurisdiction of the High Court of Justice and about the merits of the case. We immediately decided to grant a show cause order as requested. We allowed seven days for a reply. We then considered the application of the petitioners to grant an interim order, suspending the activity of the respondent as director-general until the petition was decided. We reached the decision that the interim order should be granted as requested. We ordered the suspension of the respondent's activity as director-general of the Ministry of Building and Housing pending judgment in the petition. Several days later (on 8 February 1993), before hearing the case on its merits, we were asked by the respondents to cancel the interim order. We dismissed the application. On 10 February 1993 we decided that the question of revoking the interim order ought to be considered within the framework of the hearing of the petition itself. This hearing was set down for 16 February 1993.

15. At the beginning of the hearing of the petition (on 16 February 1993), we were told that in view of our comments during the case, and in order to remove all doubt about the validity of the appointment, the Minister of Building and Housing decided (on 1 February 1993), with the approval of the

Prime Minister and the Attorney-General, to return the matter to the appointments committee for reconsideration, so that it might give its opinion about the candidate after considering all of the relevant aspects. The Government appointed an appointments committee with a different panel (D. Vinshal, H. Koversky and Prof. Z. Lev). The appointments committee convened (on 3 February 1993) and interviewed the candidate. It considered his qualifications and experience for filling the position. It was presented, by the legal adviser of the Prime Minister's office, with factual and legal material relating to the respondent's service in the General Security Service, and the candidate was asked questions about this matter. The committee heard arguments from the respondent's attorney. After examining the various aspects, the committee unanimously reached a decision to recommend that the Government appoint the respondent. The committee's position was presented to the Government, and it decided once again to appoint the respondent.

16. The new decision of the appointments committee makes it unnecessary to make a decision about the propriety of the original proceedings before the appointments committee and the effect of that impropriety on the decision of the Government. Notwithstanding, in view of the respondents' position in principle that even if there was a defect in the decision of the appointment's committee, this was insufficient to make the Government's decision defective, we ought to take a position on this matter. The premise is that the appointments committee was not established by the Appointments Law. Nonetheless, it was established by virtue of a decision of the Government, acting under s. 12 of the Appointments Law. The Government may, of course, change its decision without needing to change the law, if it thinks that the arrangement with regard to the appointments committee needs to be amended. However, as long as the Government has not decided otherwise, the decision — enshrined in s. 12 of the Appointments Law — that the procedure for making a decision about the appointment of a director-general of a ministry has three stages, remains in force. These stages are: the proposal of the responsible Minister; the opinion of the appointments committee; the decision of the Government. Each of these stages is essential for making the final decision about the appointment. Admittedly, the Government is not bound to accept the recommendation of the appointments committee. But it must consider this opinion 'with an open mind' (HCJ 653/79 *Azriel v. Director of Licensing Department*, *Ministry of Transport* [18], at p. 96). The opinion of the appointments committee is an important factor in the Government's decision-making process. It is not a mere 'formality'. My colleague, Justice Mazza, rightly pointed out that:

> '… it is insufficient to hold a consultation, as though it were a religious ritual, merely in order to satisfy the formal requirement of the law that requires it to be held. A 'consultation' that is an empty shell does not discharge the competent authority of its duty' (CrimA 22/89 *Azva v. State of Israel* [19], at p. 597).

From this we can also see that it is important for the appointments committee to consider the matter properly, since the Government relies on its opinion. It is possible that as a result of a proper consideration — during which the whole picture would have been presented to the first appointments committee — its opinion would have been different. A different opinion of the appointments committee would possibly have led to a different decision of the Government. But the consideration that was made by the appointments committee was not a proper one. It was not shown the whole picture. It was not presented with all the facts. The recommendation focused on the respondent's qualifications, and did not take into account at all his part in the '300 bus' affair or the 'Nafso' affair. In these circumstances, had this recommendation and the Government's decision that followed it remained as they were, there would have been no alternative but to invalidate the recommendation (of the appointments committee) and the decision (of the Government). However, as stated, the defect was repaired. A new appointments committee reconsidered the matter. Its opinion was considered anew by the Government. Now we must examine the legality of the decision of the Government itself.

The respondent and the Nafso affair

17. Nafso was an IDF officer, holding the rank of lieutenant. He was arrested (in 1980) on suspicion of treason, grave espionage, assisting the enemy and assisting the enemy during wartime. He was interrogated by a team of the General Security Service. The respondent headed the team. At the end of the interrogation, he made a handwritten confession. On the basis of this confession, together with 'something extra', Nafso was convicted by the Special Court Martial. He was sentenced to eighteen years imprisonment, was discharged from the army and was stripped of his military rank. His claim that his confessions were inadmissible, because they were elicited from him by improper means, was rejected by the trial court. His interrogators (including the respondent) testified in the Special Court Martial that the confession had been made freely and voluntarily, without any means of pressure being exerted on him. His appeal to the Appeals Court Martial was denied. An appeal by leave was heard in the Supreme Court (CrimA 124/87 *Nafso v. Chief Military Prosecutor* [20]). At the beginning of the appeal

hearing, the Chief Military Attorney notified the court that before the appeal hearing, the GSS had conducted an investigation of the claims that Nafso had raised in his trial about improper means used against him during his interrogation. The Military Attorney himself conducted his own investigation. According to the results of the investigation, there was truth in most of Nafso's claims about pressures that had been exerted on him with regard to his confessions, and which he alleged had affected his free will. According to Nafso, acts of violence had been perpetrated against him, which included pulling his hair, shakings, throwing him on the ground, kicks, slaps and humiliations. He had been ordered to undress and was sent to have cold showers. He was deprived of sleep for long periods during the day and especially at night. He was forced to stand in the prison yard for many hours, even when he was not being interrogated. He was also threatened with the arrest of his mother and wife and with the publication of intimate information about him that was in the possession of his interrogators. According to the Military Attorney's notice to the court, apart from the claim that he was hit or slapped, the truth of most of Nafso's claims about the method of his interrogation was confirmed. In view of these findings, the Military Attorney agreed that Nasfo's conviction should be overturned. Within the framework of an agreement between Nafso and the Chief Military Attorney, Nafso confessed to a crime of overstepping his authority to a degree endangering State security (an offence under s. 73 (first part) of the Military Jurisdiction Law, 5715-1955). The Supreme Court allowed the appeal, overturned the conviction and the sentence imposed by the Special Court Martial and it convicted Nafso of an offence under section 73 (first part) of the Military Jurisdiction Law. He was sentenced to twenty-four months imprisonment from the date of his arrest and was relegated to the rank of sergeant-major.

18. In his opinion, President Shamgar said: 'It became clear to us from the statement of the learned counsel for the State that, in his opinion, the General Security Service interrogators exceeded, in view of the cumulative effect of their acts, what was permitted and went from bad to worse when, in testifying before the Special Court Martial about the interrogation of the appellant, they lied by denying the main claims of the appellant about the interrogation methods' (*ibid.*, at p. 636). In assessing this behaviour, President Shamgar noted:

> 'We should not minimize the seriousness of this conclusion, which shows the indifference of the aforesaid witnesses to the duty to tell the truth when testifying before a court. These acts involve extreme damage to the integrity of the agents of the said

> branch of Government. In this way, the court was prevented from deciding the appellant's case on the basis of true facts, and the standing and authority of the court that was led astray by the statements of the interrogators were damaged.
>
> The grave act discovered in this case, which led the court to base its findings on confessions after incorrect facts were given to the court about how they were obtained, requires decisive measures be taken in order to uproot this kind of phenomenon, and we therefore draw the attention of the Attorney-General to it' (*ibid.*).

19. In the wake of the 'Nafso' affair, the Government decided (on 31 May 1987) 'that the issue of the interrogation methods of the General Security Service regarding hostile terrorist activity is a matter of critical public importance at this time, and it requires investigation.' On this basis it was decided to establish a commission of enquiry, under s. 1 of the Commissions of Enquiry Law, 5729-1968, 'about the interrogation methods and procedures of the GSS with regard to hostile terrorist activity and testifying in court about these interrogations.' The president of the Supreme Court appointed a Commission of Enquiry (Justice (ret.) Moshe Landau, chairman of the Commission, Yaakov Malz (then State Comptroller) and General (res.) Yitzchak Hofi) (hereafter — 'the Landau Commission'). The Landau Commission submitted a report to the Government (*The Commission of Enquiry regarding interrogation methods of the General Security Service regarding hostile terrorist activity — Report*, *Part 1*). One of the chapters of this report was devoted to the Nafso affair. The Commission reiterated the determinations of the Supreme Court. Furthermore it pointed out that in the internal investigation conducted in the Security Service before the hearing of Nafso's appeal, Nafso's interrogators claimed that 'in using means of pressure they did not deviate from what they were permitted in the guidelines of the Service that existed at that time, and what was worse, they claimed that when they perjured themselves in the trial court, where they denied using these means of pressure, they had not deviated from what was accepted practice in the Service, and this was done with the knowledge of their superiors' (p. 7). The Commission determined that 'to our great regret and shame, we must find that these claims about the permission to use pressure, and the "norm" of committing perjury in court in this respect, have been proved to us to be correct' (*ibid.*).

20. Later on in the report, the Landau Commission noted that the General Security Service takes great care:

> 'not to accept from persons being interrogated false confessions based on untrue facts. The aim is to obtain true confessions, even if with psychological pressure, and sometime even with physical pressure, as was used against Nafso. Any false confession mistakenly thought to be true obviously undermines the Service's efforts to frustrate hostile terrorist activity. For this reason, a thorough comparison is made between information obtained in a confession and information received from other persons being interrogated and information received by the Service from confidential sources that cannot be disclosed in court' (*ibid*.).

This background emphasizes the difference between the Service's normal interrogations and the interrogation of Nafso:

> 'Fundamental differences of opinion emerged between the eight interrogators who participated in the interrogation at various stages: two of them believed that Nafso was entirely innocent, and there was one who held that he committed all the offences of which he was accused, whereas the head of the team himself had doubts about Nafso's guilt in the most serious indictment, about the smuggling of the weapons into Israel' (*ibid*., at p. 8).

In summing up the Nafso affair, the Commission of Enquiry pointed out:

> 'This affair should shock and terrify us, not merely because of the miscarriage of justice towards Nafso personally, but no less because of the corruption of values in committing perjury, which was brought out into the open and which must now be completely eliminated' (*ibid*., at p. 9).

At the end of the report several recommendations were made. We will address these below. Now we will turn to the '300 bus' affair and the respondent's involvement in that matter.

The respondent and the '300 bus' affair

21. The Landau Commission mentioned the '300 bus' affair. But its mandate did not relate to this affair, and the Commission's report does not contain detailed findings about this matter. We will base our findings mainly on the judgment of this Court in HCJ 428/86 *Barzilai v. Government of Israel* [21] and the 'Opinion about the Investigation of the 300 Bus Terrorist Incident'; this opinion was prepared by a team (Y. Karp, E. Arbel, and Y. Elisof) appointed by the Attorney-General, Mr Y. Harish. The opinion was submitted to us by the petitioner (in HCJ 6163/92), and no claim was raised

by the respondents in this respect. We are not analysing all aspects of the '300 bus' affair; we are limiting ourselves merely to the respondent's part in this affair.

22. On 12 April 1984, a group of four terrorists hijacked an Egged bus on line 300 and threatened the lives of its passengers. The bus was stopped by the security forces. At dawn the next day, military personnel stormed the bus. In the first burst of fire, two of the terrorists were killed. The remaining two terrorists were beaten by soldiers immediately after they stormed the bus in order to stun them, because of a fear that they might detonate an explosive device in their possession. The two were removed from the bus alive. Later it was reported that they had died. It was not reported that the two were shot dead by General Security Service agents, who acted on the orders of the Head of the Service. A demand arose to investigate the circumstances of the two terrorists' deaths. The Minister of Defence at that time, Moshe Arens, established a commission of enquiry (under s. 537 of the Military Jurisdiction Law). The members of the Commission were General (Res.) M. Zorea, chairman, and the respondent, who was at that time a senior employee in the General Security Service. The Zorea Commission's mandate was 'to determine the facts relating to the cause of death of the terrorists, to draw conclusions and make recommendations, including conclusions and recommendations on a personal level.' The Head of the Service initiated activity to prevent a leak of information about the circumstances of the case and for this activity he recruited a number of secret partners. Among the secret partners was the respondent, who was appointed a member of the Zorea Commission. Upon the appointment of the respondent as a member of the Zorea Commission, he was ordered by the Head of the Service to find out the circumstances of the killing of the terrorists. Members of the Service gave him full details about what actually happened at the time of the event. They agreed on a cover story for the Zorea Commission and on a briefing of the witnesses. The Head of the Service issued a directive not to speak about the killing before the Commission. The respondent knew of the directive. Throughout all the deliberations of the Commission, the Security Service personnel denied the role of the Security Service in the killing of the terrorists. Throughout the whole period of the activity of the Zorea Commission (26 April 1984 – 18 May 1984), meetings took place each night between Security Service personnel involved in the affair. The respondent also participated in those meetings. He apprised the participants of the Commission's deliberations, and the versions of the events to be testified by the Service personnel before the Commission were formulated and coordinated, all for the purpose of distancing the investigation from the issue

of the killing. According to the understanding reached in these meetings, the various witnesses who testified before the Zorea Commission received briefings. When the Zorea Commission finished its work, it submitted a report (on 20 May 1984). The report of the Zorea Commission was not made public. From a note written by Prof. Zamir, the Attorney-General at the time, we learn that the Zorea Commission —

> 'reached the conclusion that no-one gave an order to kill the two terrorists, but they were beaten to death by enraged soldiers during their interrogation. Only one suspect was identified by the Commission — the Chief Paratroopers Officer' (I. Zamir, 'The Attorney-General at a Time of Crisis: The General Security Service (GSS) Affair' *Sefer Uri Yadin*, Boursi, vol. 2, A. Barak and T. Shapnitz eds., 1990, 47, 50).

On the basis of the Zorea Commission's report it was decided to conduct an investigation in order to clarify the suspicion about the commission of offences with regard to the death of the two terrorists. It was decided to establish a team, headed by State-Attorney, Mr Blatman. The team (appointed on 4 June 1984) took statements and collected evidence. Here too, instructions were given to conceal the role of the Security Service in the killing of the terrorists. According to the affidavit of the respondent before this Court, he had no connection with the Blatman team. The team focussed on a suspicion against Brigadier-General Mordechai, since there was no evidence against Security Service personnel with regard to their part in the killing of the terrorists. In July 1985, the Blatman team submitted a report to the Attorney-General. As a result of the report, disciplinary proceedings were initiated against military personnel and members of the General Security Service (who were acquitted on 6 September 1985).

23. After these events, the Attorney-General, Prof. Zamir, received information that the facts, in so far as they related to the role of the Security Service personnel with regard to the death of the two terrorists, were entirely different from the statements and testimonies given by the General Security Service personnel before the Zorea Commission, the Blatman team and the disciplinary tribunal of the General Security Service. After examining the matter, the Attorney-General (on 18 May 1986) filed a complaint with the Commissioner-General of the police, to the effect that information had been brought to his attention that there were grounds for suspecting that criminal offences had been committed by persons who held offices in the General Security Service. At this stage, the President of the State (on 25 June 1986) granted a pardon to the head of the General Security Service and to ten of its

employees, for all of the offences involved in the so-called '300 bus' affair. The respondent was also included among those who received a pardon. In the pardon document, the President said: 'By virtue of my authority under s. 11(b) of the Basic Law: President of the State, I pardon Yossi Ginosar for all of his offences involved in the so-called '300 bus' affair, from the time of the incident on the night between the 12th and 13th of April 1984 until my signing this document.' In wording the pardon to the head of the General Security Service and to its ten interrogators, the President wrote:

> 'My decision was made as a result of a profound recognition that the public interest and the State's interest require protecting our security and saving the General Security Service from the damage that will ensue if the affair continues…
>
> As President of the State, I feel obliged to stand by the GSS agents, knowing as I do the devoted, strenuous and secret efforts they make day by day and hour by hour, and to prevent demoralization in the intelligence community and in the security and anti-terror establishment.
>
> The State of Israel's special circumstances do not allow us, nor may we allow ourselves, to undermine or hinder the security establishment and the good people who protect the nation' (from *Barzilai v. Government of Israel* [21], at pp. 517-518 {6}).

In his affidavit of reply, the respondent wrote that he had initially opposed submitting an application for a pardon. He thought 'that he had acted in the affair in accordance with clear instructions and principles identical to those practised by the Service in other cases, both before the affair and after it.' In the end, the respondent agreed to submit the application for a pardon, because of the pressure exerted by Government representatives, who explained this pressure in light of the desire 'to prevent an investigation during which important state secrets would be disclosed' (affidavit of reply, at p. 6). The validity of the pardon was confirmed in the judgment of this court in *Barzilai v. Government of Israel* [21]. The police investigation continued and the investigation material was submitted (on 18 September 1986) to the Attorney-General, Mr. Charish. After receiving the opinion of the Karp Commission, the Attorney-General decided (on 29 December 1986) that with regard to the liability for the killing of the terrorists the pardon prevented any indictment. With regard to the obstruction of the investigation and justice, the Attorney-General pointed out that 'the persons in the GSS personnel who orchestrated, directed and perpetrated the obstruction were also pardoned by the President of the State, and for this reason they cannot be put on trial for

those offences.' The Attorney-General also decided not to put on trial the GSS agents who were suborned to give improper evidence before the investigation authorities, since 'as those who had suborned them were pardoned, it is not just that only they should be punished by being brought to a criminal trial.'

24. Additional details about the respondent's share in the '300 bus' affair may be obtained from the affidavit that he submitted within the framework of the proceeding regarding the legality of the President's pardon. Details of the affidavit were included in the petition (and they also appear as an appendix to the article of M. Kremenitzer: 'The GSS Pardon – Did the High Court of Justice Pass the Test?' 12 *Iyunei Mishpat*, 595, 620), and they state the following:

> 'I, the undersigned (—), after being warned that I must tell the truth and that I shall be liable to the penalties provided by law if I do not do so, hereby declare in writing as follows:
>
> 1. I am the head of a department in the General Security Service.
>
> 2. After the affair known as the '300 bus' affair occurred, I was appointed, on 26 April 1984, as a member of a Commission of Enquiry into the circumstances of the deaths of two of the terrorists who took control of the bus.
>
> 3. As a member of the Commission, I acted to conceal the part of General Security Service agents in the killing of the terrorists; thus I committed an offence or offences under the laws of the State of Israel (hereafter — 'the offences').
>
> 4. I committed the offences for the purpose of carrying out my job.
>
> 5. On 24 June 1986, the head of the General Security Service told me that he had approached the President of the State and told the President about the details of the '300 bus' affair and the interrogation proceedings thereafter, including the offences that had been committed — by myself and others — in the process.
>
> The head of the General Security Service suggested that I submit an application to the President for a pardon.
>
> 6. As a result, on 25 June 1986 I submitted an application for a pardon to the President of the State of Israel (hereafter — 'the application'); in signing the application and submitting it to the

> President, I intended to confess — and I even did confess — to committing those offences and I asked the President to pardon me for them.
>
> 7. I argued in my application that all of my actions had been done on the instructions and with the approval of my superiors, for the sake of State security and protecting its secrets; in saying this I did not intend to claim before the President any defences that nullified those offences.
>
> 8. I said this — as the reason for the pardon application and in order that the President and anyone else who might see my application would know — because all my actions and deeds were done in order to carry out my job and in full confidence that they were intended to serve the interests and security of the State of Israel.
>
> 9. I hereby declare that this is my name, this is my signature and everything stated in this affidavit is true and accurate.
>
> (—).'

25. As we have seen, the '300 bus' affair was not the focus of the deliberations of the Landau Commission. Nonetheless, the Commission did note that there was a link between the '300 bus' affair and the Nafso affair:

> '… their most serious failure, with respect to the criminal conspiracy that they made to pervert the deliberations and mislead the Commissions which investigated that case — was what laid the foundation for the revelations that accompanied the Nafso affair: after trust was so severely undermined in the first case, it was impossible any longer to cover up the phenomena that were exposed in the Nafso appeal' (*ibid.*, at p. 3).

In discussing the '300 bus' affair, the Landau Commission stated:

> 'The second affair, known as the '300 bus' affair, differs significantly from the practice of giving false testimony in trials within a trial. It is different, and in our opinion, far more serious. Here, in addition to the commission of perjury, there was a deliberate and intentional perversion of an investigation of a Commission by a member of the Service who was appointed as a member of that Commission. Suffice it to say that it is almost certain that an act of unparalleled gravity such as this could not

> have happened, and could not even have been conceived by anyone, had there not been a background of a long-standing policy of giving false testimony in the courts, which succeeded in misleading the courts in so many cases' (*ibid.*, at p. 30).

The Landau Commission briefly considered the respondent's part in the '300 bus' affair, stating:

> 'A short time before judgment was given in the Appeals Court Martial, a criminal conspiracy was exposed between several senior members of the Service, for perverting the proceedings of Commissions that investigated the bus affair, which occurred on 12 April 1984. In the course of this conspiracy, a senior member of the Service, Mr Yossi Ginosar, acted as a "Trojan horse" on the Zorea Commission, as a member of the Commission alongside General (res.) Zorea' (*ibid.*, at p. 6).

26. On 30 October 1987, the Landau Commission submitted a report to the Government. On 8 November 1987, the Government decided to accept the report and all of its recommendations. The Commission's recommendations were many and far-reaching. They deal with the proper methods of interrogation, which were intended —

> 'to comply with the credo of the State, as a State governed by law and based on the foundations of morality. Any harm to these basic concepts, even against those seeking to destroy the State, is liable to repay us by corrupting internal morals' (*ibid*., at p. 71).

The Commission points out that —

> 'An interrogator who is summoned to testify before a court or a tribunal or any other authority that is authorized to collect evidence, shall tell only the truth and only the whole truth. This is a basic principle and in no way may it be compromised' (*ibid*., at p. 75).

There are also many other recommendations. Within the framework of the petition before us, we will only consider the recommendations of the Commission about legal proceedings because of the behaviour of the Service's interrogators in the past. With regard to all aspects of physical or psychological pressure that interrogators used against persons suspected of hostile terrorist activity, the Commission thought that as long as the acts did not deviate from the guidelines prevailing in the Service at the time of the interrogation, the interrogator who carried out the acts would have a defence

of justification (under s. 24(a)(1) of the Penal Law, 5737-1977) and a defence of necessity (under s. 22 of the Penal Law). This was not the case with regard to the perjury committed by interrogators of the Service before courts or tribunals. Here the investigator would not have a defence of necessity or of obeying the orders of superiors, since 'committing perjury is a serious criminal offence and a manifestly illegal act, over which there flies a black flag saying that it is forbidden' (*ibid*., at p. 82). In this matter the Landau Commission considered the matter at some length before making a recommendation that 'the criminal indictment of interrogators for perjury should be avoided'. The reasons of the Landau Commission for this were two: *first*, 'the motive of the investigators was not a selfish one of procuring a benefit for themselves, but the thought — even if a totally improper thought — that even in this behaviour they were serving the public' (*ibid*.); *second* — and this was the decisive reason for the position of the Landau Commission —

> 'Indicting interrogators, even in some of these cases, may cause deep shock among interrogators, and moreover in the whole Service, and cause serious damage to the ability of the Service to function effectively in frustrating hostile terrorist activity. It must be taken into account that most of the interrogators liable to have criminal complaints filed against them are still members of the Service, and some of them currently hold senior positions. This is a small and close-knit group of people, who have considerable expertise that they have acquired over the years. Replacements for these persons will neither be found easily nor overnight. But the activity of the interrogation unit must continue day by day, without respite... we believe that today these interrogators, at all levels, are strongly motivated to learn the lessons of the past. It is better to allow them to concentrate on providing their essential service to the public. Perhaps this is needed less for their own interest than for the public interest. Also on the personal level, therefore, we should take a path of healing wounds rather than amputating the body of the Service, for who knows what consequences that will bring. We could not reconcile ourselves to the thought that if we were to recommend a response along the lines of "let justice run its course", this could paralyse the interrogation work of the Service, and it is almost certain that innocent victims would die in acts of terror that the Service is capable of frustrating' (*ibid*., at pp. 82-83).

In order to implement this approach, the Landau Commission made a recommendation to the Attorney-General that he should instruct 'the police that any complaint against an interrogator of the Service for perjury in a trial with regard to the methods of interrogation that the Service used against someone interrogated by them (and also with regard to exerting improper pressure in an interrogation) should be transferred *ab initio* to the Attorney-General, so that he can decide whether there is a public interest in holding a trial about this matter' (*ibid*., at pp. 84-85). The Landau Commission further pointed out that:

> 'For the reasons we have given, we think that not only is there no public interest in holding such a trial (and the police investigation that might lead to initiating such a trial), but, on the contrary, holding such a trial would harm the public by weakening its protection from acts of terror, as a result of damage to the functioning of the Service in frustrating such acts' (*ibid.*, at p. 85).

This recommendation extends both to members of the Service who continue to be employed in the Service and to those whose have stopped working for it. The Commission pointed out that 'for the same reasons of public interest, we are refraining from making a recommendation that disciplinary measures should be initiated personally against employees who continue to work for the Service' (*ibid.*, at p. 85).

27. As stated, the Government accepted the recommendations of the Landau Commission. The Attorney-General also accepted the report in so far as it related to his spheres of authority. During the deliberations of the Government about the conclusions of the Commission, the Attorney-General expressed his position to the Government —

> 'that measures would not be taken against members of the General Security Service, who in the past were involved in improper activities committed in the course of investigating hostile terrorist activity. He also expressed his position that the police investigation, which at that time was pending against interrogators of the General Security Service with regard to the petitioner's case should be stopped. This position was acceptable to the Government' (from my judgment in HCJ 88/88 *Nafso v. Attorney-General* [22], at p. 427).

The end of the investigation with regard to the respondent and the petition relating thereto

28. As we have seen, the Attorney-General accepted the recommendations of the Landau Commission. As a result, the investigation against Nafso's interrogators was stopped. Nafso petitioned this court against this decision of the Attorney-General (*Nafso v. Attorney-General* [22]). His claim was that the recommendations of the Landau Commission do not expressly refer to his interrogators. His claim was that 'his case was not one of the cases with regard to which the Landau Commission made its recommendation' (*ibid.*, at p. 428). This claim was rejected by the Supreme Court. It was held that —

> 'The petitioner's case was known to the Commission, and it did not distinguish in its recommendations between his interrogators and other interrogators. The logic in the Commission's recommendations also applies to the petitioner's case. Thus, for example, it was not argued before us that the petitioner's interrogators acted out of a selfish motive of obtaining a benefit for themselves. Consequently, it is clear from examining the Commission's report that its recommendations relate to all of the Service's interrogators, including the interrogators of the petitioner. The Commission wanted to distinguish between the past and the future, but it did not want to distinguish between different interrogators in the past' (*ibid.*, at p. 429).

Developments until the appointment of the respondent by the Government

29. As a result of the recommendations of the Landau Commission, no legal proceedings were initiated against interrogators of the Service who were involved in the Nafso affair, the '300 bus' affair or any other cases whatsoever. The head of the Security Service at that time resigned from the Service. The other interrogators included in the President's pardon, including the respondent, remained in the Service. From the respondent's affidavit — which was not contradicted — we learned that some of these interrogators received promotions in the course of their employment. Most of them work in the Service in top security positions. In the affidavit in reply, the respondent pointed out that —

> 'In the deliberations that preceded the granting of the pardon and which took place in the presence of the Attorney-General and the Minister of Justice at that time, Mr Yitzchak Modai, in the office of Advocate Yaakov Neeman in Jerusalem, those requesting a pardon were promised that they could remain in the

> employment of the GSS without any loss of rank and without any "stain on their future". During that meeting, the Minister of Justice at the time told those requesting a pardon that the matter had already been discussed at the President's residence and in discussions with the Prime Minister, at which the Deputy Prime Minister, the Foreign Minister, the Minister of Defence, the Minister of Justice and additional ministers participated' (*ibid.*, at p. 7).

30. In November 1986, the respondent left the Service. He left on his own initiative. He received a letter wishing him success from the Prime Minister and the head of the Service. The Prime Minister said that he was sorry to hear —

> 'of your decision to leave your work in the Service, but this does not of course prevent me from conveying my best wishes and wishing you success in your new position, which is very important and requires a high degree of responsibility. I hope that after many years of strenuous and dedicated work for the security of the State, you will be successful and find satisfaction in everything you do' (letter of 30 December 1986, appendix 'C' of the respondent's affidavit).

The respondent was appointed, on the recommendations of the Minister of Industry and Trade, as director-general of the Israel Export Institute. He held that position for two and a half years. Recently he was appointed chairman of the board of directors of Amidar.

Proceedings of the Government with regard to the appointment

31. After receiving the (first) opinion of the appointments committee, the appointment of the respondent was submitted for Government approval. The Government discussed the respondent's appointment at length. The Attorney-General informed the Government of the respondent's involvement in the '300 bus' affair and the granting of the pardon by the President of the State. The recommendations of the Landau Commission were also brought to the attention of the members of the Government. It was emphasized that the Commission held that what was done by the interrogators of the General Security Service in the Nafso affair was part of a practice prevailing in the Service. The Attorney-General read out to the members of the Government parts of the judgment of the Supreme Court in Nafso's criminal appeal. The Attorney-General reported on Nafso's petition about proceedings not being initiated against the respondent and his other interrogators. With respect to

the ‘300 bus’ affair, the Attorney-General made it clear that the respondent was not involved in the incident itself, but as a member of the Zorea Commission he acted to conceal the role of GSS personnel in the affair, and with regard to this he received, at his request, a pardon from the President.

32. The Government held a thorough discussion of the issues relating to the past actions of the respondent. The Government was asked to examine whether the fact that the respondent did what he did in the past as a result of an erroneous outlook that prevailed at that time among persons who held office in the GSS, should be held against him in the long term, whereas in his favour was his work as a civil servant and his lengthy and devoted service to the Security establishment. The Attorney-General pointed out that the respondent had not acted for his own advantage, nor out of a desire for money or prestige. The Government was advised that it should weigh up the points in favour and against the respondent. A long and profound discussion took place. The respondent’s qualifications, suitability, personality and past were considered. The various considerations were balanced against one another. At the end of the deliberation, a decision was made to appoint the respondent to the position of Director-General of the Ministry of Building and Housing. The Government reached the same decision after receiving the recommendations of the second appointment committee. The petitions before us are directed against these decisions.

The arguments of the parties

33. The main argument of the petitioners is that in view of the respondent’s involvement in the Nafso affair and the ‘300 bus’ affair, he is unfit to be appointed as director-general of a Government Ministry. He lacks those moral and ethical qualities required of a civil servant at such a senior level. The petitioners emphasize that the director-general has disciplinary powers over employees of the Ministry. According to them, giving these powers to someone who was involved in acts involving moral turpitude was ‘outrageous and absurd’. The appointment of the respondent was inconsistent with the norms of behaviour required of civil servants, and a director-general ought to set an example in observing these. It sends the wrong message to the security establishment involved in interrogations, for it is likely to be interpreted as legitimizing improper interrogation methods and perverting judicial proceedings. The respondent showed contempt for the rule of law, and his appointment was inconsistent with the goal of ensuring the subservience of the civil administration to the law. The appointment of the respondent would set a precedent for appointments of candidates with doubtful pasts to senior positions in the Civil Service, something that would

impair the service's moral calibre and the public's confidence in it. The Government's use of its discretion in appointing a person who committed offences involving moral turpitude to the position of director-general of a Government ministry was improper. The use of this discretion was unreasonable in the extreme. With regard to the recommendations of the Landau Commission, the petitioners emphasize that these recommendations related only to a (criminal or disciplinary) indictment and they were intended to prevent damage to the General Security Service. The recommendations are totally irrelevant to the respondent's appointment to a senior administrative position in the Civil Service. When the respondent chose to leave the General Security Service and enter public life, he must comply with the accepted behavioural norms of the Civil Service.

34. The premise of the respondents is that the Government's power of appointment, with regard to senior positions in the Civil Service, encompasses wide discretion in matters of public ethics, which the representatives of the people are charged to protect. In view of the status of the authority making the decision (namely the Government) and the nature of its powers, the scope within which the Government may act is broad. The appointment of the respondent does not step beyond the limits of reasonableness. The Government made its decision after being apprised of all the facts, and all the relevant considerations were considered. The Government considered the question whether the fact that the respondent did what he did as a result of a very mistaken belief that prevailed in the past among persons holding positions in the Security Service should be held against him in the long term. The Government took into account the respondent's work as a civil servant and that he served the security establishment for many devoted years and that he acted not for his own advantage nor out of a desire for money or prestige. The Government considered the points in favour and against the respondent. The respondents argue that the Government was permitted to take into account those actions for which he received a pardon, but in addition it was also bound to take into account the fact that the pardon was granted and its circumstances. The respondents emphasize that there is no prohibition in law against the appointment of a person with a criminal past to the position of director-general in a Government Ministry and that the Government's decision did not step beyond the limits of reasonableness.

35. The respondent's argument is that the Government's decision is reasonable. With regard to the '300 bus' affair the respondent received a pardon. The purpose of the pardon was to prevent an investigation and

exposing secrets critical to State Security. In deliberations prior to the granting of the pardon, the Attorney-General and Government representatives promised those receiving pardons that their rank would not be affected and their future would not be stained. Because the pardon was given, the respondent was denied the possibility of facing the charges against him. This position is now working against him. The respondent points out that many of those who received pardons continued to serve in the Service, including those directly responsible for the killing of the terrorists, and they were promoted in the course of their employment and they serve today in top security positions. With regard to the Nafso affair, the respondent refers to the findings of the Landau Commission, that the interrogation methods of the respondent were part of the norms that had become accepted in the Service for many years and which were known and accepted at the executive and political levels. Acting according to these norms did not disqualify any of those involved in this affair from serving in the General Security Service nor did it prevent their promotion. Against this background, the respondent claims that the appointment is not unreasonable in the extreme. The contrary is true: setting the appointment aside would be unreasonable in the extreme and would be contrary to basic legal principles. Setting the appointment aside would amount to adopting a double standard in comparison with other appointments in the Civil Service, which do not receive the publicity caused by exposing the identity of the respondent. The disqualification would amount to a reopening of a debate that was closed and sealed and would prejudice the respondent's right to the finality of proceedings. Since the respondent was not given his day in court with respect to the affairs in which he was involved, his disqualification would contradict the basic principle that a person is innocent until proven guilty. Disqualification of the respondent would amount to discrimination against him as compared with the other members of the Service who were anonymous and who held many positions in the Civil Service, just as in the General Security Service. For this reason, disqualification of the respondent amounts to prejudice and arbitrariness. From a viewpoint that encompasses all the details and the facts, disqualifying the respondent would place the responsibility for the failings of the whole establishment on a single individual who had left it, and even taint him personally. The enquiries made in both cases were on the level of the establishment; using them for drastic measures on a personal level is not only unjust but is even erroneous from a legal viewpoint.

36. At the beginning of the proceedings in the petition, the seventh respondent (Tarek Abed Al Chai) and the eighth respondent (Zeidan Muhammed) applied to join the petition as respondents. We granted the

application. These respondents presented themselves as leaders of the Arab community in Israel. They pointed out that the Arab population is necessarily more sensitive than any other community in the State to the interrogations and activities of the General Security Service. Against this background the request of these respondents is not to disqualify the appointment on grounds of extreme unreasonableness. Within the framework of the faith that the Arab community has for the Government establishment, and knowing the positions of the respondent, which are in favour of a relationship of absolute equality and preventing differences between the Jewish and Arab citizens of the State, it is the opinion of the seventh and eighth respondents that reasonableness demands the approval of the appointment of the respondent as director-general in the Ministry of Building and Housing.

The general normative framework: Government discretion

37. The power of the Government to appoint a director-general of a ministry is enshrined in s. 12 of the Appointments Law. This law does not include provisions about the appointment of an employee with a criminal past. It does not contain any provision restricting the Government's power of appointment, or disqualifying a person from being appointed as a civil servant if he has a criminal past. Provisions disqualifying candidates for public office because of a criminal past (in general) or offences involving moral turpitude (specifically) exist in many countries (see: 63A *Am. Jur. 2d*, Rochester and San Francisco, 1984, 690; 67 C.J.S., St. Paul, 1978, 253; and also 'The Collateral Consequences of a Criminal Conviction,' 23 *Vand. L. Rev.*, 1969-1970, 929). In Israel too there are provisions of this kind in various laws (see s. 7(6) of the Local Authorities (Elections) Law, 5725-1965); a provision in this vein was also included in the draft Civil Service Law, 5713-1953, which stipulated, *inter alia*, that 'anyone convicted of an offence which in the opinion of the Civil Service Commissioner involved moral turpitude…' would not be appointed as a civil servant (section 14(a)). This provision does not appear in the Appointments Law. It follows that the existence of a criminal past does not, in itself, negate the Government's authority to make an appointment or the fitness of the candidate. The courts should also not create a restriction of (the Government's) power or a restriction of (the candidate's) fitness: 'in the absence of statutory conditions of competency, we should not stipulate conditions of fitness in case-law…' (HCJ 727/88 *Awad v. Minister of Religious Affairs* [23], at p. 491).

38. Notwithstanding, we must distinguish between questions of competence (or authority) and questions of discretion. The absence of an express statutory provision regarding the disqualification of someone with a

criminal past establishes the candidate's *competence*, but it does not preclude the possibility of considering his past within the framework of exercising the administrative discretion given to the authority making the appointment. Indeed, the criminal past of a candidate for public office is a relevant consideration, which the authority making the appointment is entitled and obliged to take into account before making the appointment. I discussed this with regard to the appointment of a candidate with a criminal past as a member of a religious council, where statute did not provide any disqualifying provisions, pointing out:

> '...even someone convicted of an offence involving moral turpitude is competent to be appointed as a member of a religious council… Nonetheless, the competency of the candidate is distinct from the administrative discretion of the person making the appointment. Therefore, even if a person convicted of an offence involving moral turpitude is competent to be appointed as a member of a religious council, this does not legitimize the use of administrative discretion to appoint a person who committed an offence involving moral turpitude as a member of a religious council. It is true that the absence of any provision about the competence of someone convicted of an offence involving moral turpitude implies the absence of an absolute bar to the appointment of such a person as a member of a religious council. Nonetheless, the appointment of a person as a member of a religious council must be made after weighing up all the relevant considerations, and only these considerations.
>
> A conviction for an offence involving moral turpitude is, without doubt, a relevant consideration that any authority making an appointment is permitted and obliged to take into account before making the appointment' (*Awad v. Minister of Religious Affairs* [23], at p. 491).

Indeed, no-one has a natural or constitutional right to be appointed to a public office. A person's right is that he is able to present his candidacy for a public office, and that in his appointment only lawful considerations will be considered. Among the lawful considerations that the public authority must take into account is also the consideration relating to the past of the candidate, including his criminal past. The legal basis for this determination is twofold:

39. *First*, there is a presumption with regard to all legislation granting an executive authority a power to make an appointment that the power shall be

exercised after considering the criminal past of the candidate. One should not assume that the legislator — when empowering the executive authority to exercise the power of appointment — allowed this power to be exercised without taking into account the fact that a candidate has a criminal past. Indeed, all legislation is made within the framework of a 'normative environment'. 'An expression in a statute is an entity that lives in its environment' (Justice Sussman in HCJ 58/68 *Shalit v. Minister of Interior* [24], at p. 513). The environment of the statute is not merely other laws relating to the same issue. The environment of the statute is a whole range of attitudes, values, principles and interests that a legal norm in that legal system is intended to realize (see CA 165/82 *Kibbutz Hatzor v. Assessing Officer, Rehovot* [25], at p. 75). This environment influences the interpretation of every piece of legislation. It is a kind of 'normative umbrella' that extends over all legislation (see HCJ 14/86 *Laor v. Film and Play Review Board* [26], at p. 433). This 'normative umbrella' includes, *inter alia,* the democratic nature of the State (CA 752/78 *Authority under the Victims of Nazi Persecution Law, 5717-1957 v. Frisch Estate* [27], at p. 208), the need to maintain law and order and the belief that every executive authority must act reasonably and fairly (*Israel Contractors and Builders Centre v. Government of Israel* [16]). From these principles we derive the principle that a public authority is the trustee of the public, and its every action and decision must be made while taking this duty of trust into account.

40. Indeed, the duty of the public authority to take into account among its considerations the criminal past of the candidate when it is appointing a person to public office derives from the status of the public authority. The public authority is a trustee of the public. It has nothing whatsoever of its own. All that it has, it has for the public (see HCJ 1635/90 *Jerezhevski v. Prime Minister* [28], at p. 840). Justice H. Cohn discussed this and pointed out:

> '… the private domain is not like the public domain, for the one acts with regard to its own property; if it wishes, it may give, and if it wishes, it may refuse. The other was entirely created merely to serve the common good, and it has nothing of its own: everything that it has is deposited with it as a trustee, and as for itself, it has no rights or duties that are in addition to, or different and distinct from, those that derive from this trust or that were conferred on it or imposed on it by virtue of statutory provisions (HCJ 142/70 *Shapira v. Bar Association District Committee, Jerusalem* [29], at p. 331).

Indeed, 'the public figure is a trustee of the public; he does not act for himself but he acts for the public interest' (HCJ 669/86 *Rubin v. Berger* [30], at p. 78). This status of trust imposes special duties on the executive authority. It is not free in its considerations. The duty of trust gives rise to a duty to exercise executive discretion fairly, honestly, reasonably and without discrimination. I discussed this in one case, pointing out:

> 'Through those acting on its behalf, the State is the trustee of the public, and the public interest and public property have been entrusted to it to be used for the common good…
>
> This special status is what subjects the State to the duty to act reasonably, fairly, in good conscience and in good faith. It is forbidden for the State to discriminate, act arbitrarily or without good faith or to be in a position of a conflict of interests. It must comply with the rules of natural justice. In short, it must act fairly' (*Israel Contractors and Builders Centre v. Government of Israel* [16]).

In a similar vein, Vice-President Justice Elon said:

> 'A public authority that appoints an employee of the Civil Service, acts as a *trustee of the public*. It is one of our greatest principles that this duty of trust must be exercised fairly, honestly, without improper considerations and for the public good, for the appointing authority is given its power of appointment by the public and for the public' (HCJ 4566/90 *Dekel v. Minister of Finance* [31] at p. 33).

41. From the status of the public authority as trustee this court has derived a series of specific obligations that bind the authority. Thus, for example, because the public authority is the trustee of the public it must make information in its possession available to the public (*Shapira v. Bar Association District Committee, Jerusalem* [29]); it is forbidden to be in a situation of a conflict of interests (HCJ 531/79 *Petah-Tikvah Municipality Likud Faction v. Petah-Tikvah Municipal Council* [32], at p. 570; CrimA 884/80 *State of Israel v. Grossman* [33], at p. 416); it must honour promises and agreements that it made (*Jerezhevski v. Prime Minister* [28]). From the duty of trust imposed on the executive authority we derive its obligation not to make an appointment merely because of the political affiliation of the candidate (HCJ 313/67 *Axelrod v. Minister of Religious Affairs* [34], at p. 84). 'When a public figure appoints an employee of the Civil Service in accordance with improper considerations of party-political interests, such an

appointment is improper, and it involves a breach of trust against the public who empowered the authority making the appointment' (Vice-President Justice Elon in *Dekel v. Minister of Finance* [31], at p. 35). Similarly, 'the duty of trust gives rise also to a duty of disclosure' (HCJ 1601/90 *Shalit v. Peres* [35], at p. 365 {221}), such as the duty to disclose political agreements. The duty of trust gives rise to the duty of the executive authority 'to act in accordance with professional ethics' (*Shalit v. Peres* [35], citing I. Zamir, 'Political Ethics', 17 *Mishpatim*, 1987-1988, 250, 261. See also Y. Eliasof, 'The Ethics of Civil Servants in Israel', 2 *Labour Law Annual*, 1991, 47). In summarizing this issue I said:

> 'Indeed, the duty of trust requires fairness, and fairness requires honesty, objectivity, equality and reasonableness. This list of principles deriving from the status of trust is not exhaustive, nor is this list of values deriving from the duty of fairness frozen. It is the nature of principles and values that they are both stable and evolving. They are rooted in the soul of the nation and do not bend in temporary, passing trends. They are full of vitality and evolve in order to provide fitting solutions to new problems…' (*Jerezhevski v. Prime Minister* [28], at p. 841).

42. From the trustee status of the public authority we derive its duty to consider the criminal past of a candidate before making the appointment. An appointment of a civil servant with a criminal past affects the functioning of the public authority and the attitude of the public to it. It has (direct and indirect) ramifications on the public's confidence in the public authority. The authority making the appointment must take these considerations into account. An individual running his own business who has no duty of trust to another may employ any worker, whatever his criminal past. He may even decide that he wishes to rehabilitate criminals and that in doing so he is even making an important contribution to the society. A public authority does not run its own business, and it has a duty of trust to the public. It too may employ workers with a criminal past, and the consideration of rehabilitating the criminal is also a consideration that should be taken into account. Nonetheless, it is not the only consideration that must be taken into account. The public authority must consider an intricate and complex array of considerations, including the consideration relating to the effect of the appointment on the Civil Service and the public's confidence in it. That is why we said that the duty of trust that binds the public authority imposes on it the duty to include among its considerations the criminal past of the candidate. An indication of this can be found in the Criminal Register and

Rehabilitation Law, 5741-1981. Under this law, the police maintain a criminal register, containing records of convictions and sentences (ss. 1 and 2). The register is secret and information can only be transferred from it in accordance with the Register Law itself (s. 3). The register is obviously available for police activity (s. 4(a)(1)), and the police may transfer information from it to the Government 'for the purpose of the appointment of office-holders whom it is obliged to appoint…' (s. 5(a) of the Criminal Register and Rehabilitation Law, and s (c) of the First Schedule to that law). The police may also transfer information to the Civil Service Commissioner, with regard to State employees, and to additional public authorities stipulated in the First Schedule for the purpose of appointments that they make.

43. Until now I have examined the first legal basis from which we derive the duty of an executive authority — every executive authority — as trustee of the public, to include among its considerations, when appointing a civil servant, the criminal past of the candidate. This is a general legal basis, from which derives the duty of every executive authority. This duty is of course also imposed on the Government as one of the executive authorities. It is imposed on it especially, since it is 'the executive authority of the State' (s. 1 of Basic Law: The Government), which has a duty of trust to the entire public in Israel. It seems to me that the Government's duty to take the candidate's criminal past into account derives also from an additional source. Indeed, there is a *second*, specific legal basis, from which it can be inferred that in making an appointment of a director-general the Government must take the criminal past of the candidate into account. This specific obligation derives (indirectly) from the provision of s. 46(a) of the Appointments Law. This provision stipulates:

> 'Notwithstanding anything stated in this law, the Civil Service Commissioner may refrain from appointing a person as an employee of the State in each of the following cases:
>
> (1) The person committed an offence against this Law in order to obtain the appointment or has a criminal past;
>
> (2) The person was dismissed by virtue of a decision in a disciplinary proceeding held in accordance with statute; and if he appointed such a person, he may revoke the appointment.'

Section 46 of the Appointments Law empowers the Civil Service Commissioner to prevent certain appointments, including the appointment of a person with a criminal past. It seems to me that this provision applies to the appointment of any person as an employee of the State. In this respect, it is

irrelevant to ask whether the appointment was made by appointing the successful candidate in a tender, or without a tender by virtue of a Government decision or with the Government's approval. In every appointment, the substantive decision is not within the jurisdiction of the Civil Service Commissioner, but that of various bodies on whom the law confers the power to make the substantive decision. Nonetheless, 'the appointment of an employee of the State shall be made in writing, signed by the Civil Service Commissioner, and he shall also sign the letters of appointment of those appointed by the Government under this law…' (s. 17), and before the Civil Service Commission does so — as a final barrier before the appointment — he may, and he is obliged, to examine whether the appointment was obtained by means of an offence, and whether the candidate was not dismissed by virtue of a decision in a disciplinary proceeding or 'has a criminal past', and if the Civil Service Commissioner appointed such a person, 'he may revoke the appointment'. This is an important power — a kind of objective brake before an appointment — that the law confers on the Civil Service Commissioner.

44. According to its wording, the provision of s. 46(a) of the Appointments Law does not apply to the Government. Nor does it apply to the various tender committees that select State employees. The provision of s. 46(a) applies directly to the Civil Service Commissioner, and to him alone. Nonetheless, the provision of s. 46(a) of the Appointments Law applies indirectly also to the other executive authorities that make appointments within the framework of the Appointments Law. Indeed, if the Civil Service Commissioner may refrain from appointing a person as a State employee if he has a criminal past, it is fitting that the other authorities making appointments or approving them under the Appointments Law should also consider this factor. It seems to me that in accordance with the substance of the text, we should regard the Service Commissioner as a kind of a last filter, considering factors that should have been considered in the past, but which were forgotten or not given the proper weight. One should not assume, in view of the nature of the considerations, that we are dealing with a consideration that is exclusive to the Civil Service Commissioner and which only he — because of his special status — may consider. Indeed, the power of the Service Commissioner to prevent an appointment of a person with a criminal past reflects on the range of considerations for authorities that make decisions about appointments and it gives them the right and the duty to take this consideration into account.

The weight of the factor of a criminal past in the appointment decision

45. We have seen that the criminal past of a candidate for public office is a relevant consideration, which the executive authority making the appointment must take into account among its considerations. Against this background — and assuming that the candidate is found suitable in all other respects — what weight should be attached to the consideration of the criminal past? In order to answer this question, we must ascertain the reasons why the criminal past of a candidate is a factor that should be taken into account. On the one hand, there are considerations relating to the need to rehabilitate offenders and to help them integrate into society. Neither the conviction nor the sentence is death, and at the end of the criminal proceeding the offender should be allowed to find his place in the community and society. The principle of 'repentance' is one of the principles of our legal system, which we have received from the tradition of our past (see BAA 18/84 *Carmi v. State Attorney* [36], at p. 375). The Civil Service must make its contribution to a person's rehabilitation and his rebuilding as a loyal citizen. Indeed, 'a person should not be reminded of his sin all his life, and we should allow him to turn over a new leaf in his life and encourage his rehabilitation and full reintegration into society' (draft Criminal Register and Rehabilitation Law, 5741-1981, at p. 218). He should be allowed to 'integrate into society as one among equals' (Vice-President Justice Elon in *Carmi v. State Attorney* [36], at p. 375). 'We should not lock the door against sincere and genuine penitents; on the contrary, in the absence of a serious reason, they should be allowed to return to their normal lives, professions and even to their jobs' (Justice Kister in BAA 1/68 *A v. Attorney-General* [37], at p. 679). 'Yesterday this person was hated by the All-present, detested, distant and an abomination, and today he is beloved, pleasant, nearby and a friend' (Maimonides, *Mishneh Torah*, Laws of Repentance 7 6 [61]). Indeed, a civilized society does not pursue its criminals to destruction but extends to them a hand, for their benefit and its own benefit (see S.Z. Feller 'Rehabilitation: A Special and Necessary Legal Institution' 1 *Mishpatim*, 1968, 497). The Civil Service must make its contribution to this mission.

46. The rehabilitation of the offender is not the only consideration to be taken into account. It is opposed by important considerations relating to the Civil Service. The Civil Service is, as we have seen, a trustee of the public. It must 'maintain and safeguard the interests of the public as a whole' (Justice Agranat in CA 254/64 *Hassin v. Dalyat al Carmel Local Council* [38], at p. 25). Entrusting a public office to a civil servant with a criminal past may affect the proper discharge of the office. But beyond this, it is the public interest that there should be a 'Civil Service that is orderly, responsible and has a fitting public standing…' (*Petah-Tikvah Municipality Likud Faction v.*

Petah-Tikvah Municipal Council [32], at p. 571); the civil servant must be of proper moral standing, and a State employee who has a criminal past is likely to harm these goals of the Civil Service. This 'requires the public's faith in the fact that the decisions of civil servants are objective, and are made honestly and fairly' (*ibid.*). Indeed, the key to the existence of a Civil Service worthy of the name is the public's faith in the integrity of the Civil Service. The prestige of public administration and the public's faith in it are a public interest of great importance (cf. CrimA 521/87 *State of Israel v. Einav* [39], at p. 434). We must 'protect the Civil Service from corruption, ensure its proper activity on the one hand and the public's respect for the Civil Service and trust in the propriety of its activities on the other…' (Vice-President Justice Elon, in CrimA 121/88 *State of Israel v. Darwish* [40], at p. 682). Indeed, there is a continuing public interest in the rectitude of the Civil Service and the need to ensure public trust in the organs of Government (*Awad v. Minister of Religious Affairs* [23], at p. 492). In fact, I discussed this in one case, and pointed out that:

> 'Without public trust Government authorities cannot function. This is the case with regard to public trust in the courts… this is also the case with regard to public trust in other Government authorities' (*Barzilai v. Government of Israel* [21], at p. 622 {104}).

Indeed, without public trust in public authorities, the authorities will be an empty vessel. Public trust is the foundation of public authorities, and it enables them to carry out their function. The appointment of someone with a criminal past — especially a serious criminal past like someone who committed an offence involving moral turpitude — harms the essential interests of the Civil Service. It undermines the proper performance of its function. It undermines the moral and personal authority of the office holder and his ability to convince and lead. It undermines the trust that the general public has for the organs of Government. In the language of Prime Minister David Ben-Gurion, when presenting the draft Civil Service Law in the Knesset at the first reading, the Civil Service must be —

> 'a haven for every citizen, a stronghold for the State and a credit to itself' (Knesset Proceedings 14 (1953) 1425).

The weight attaching to a criminal past

47. The criminal past of a candidate for public office must be taken into account among the considerations of the authority making the appointment. The weight attaching to this consideration varies in accordance with its effect

on the reasons which require it to be taken into account. Someone who committed an offence in his childhood cannot be compared with someone who committed an offence as an adult; someone who committed one offence cannot be compared with someone who committed many offences; someone who committed a minor offence cannot be compared with someone who committed a serious offence; someone who committed an offence in mitigating circumstances cannot be compared with someone who committed an offence in aggravated circumstances; someone who committed an offence and expressed regret cannot be compared with someone who committed an offence and did not express any regret for it; someone who committed a 'technical' offence cannot be compared with someone who committed an offence involving moral turpitude; someone who committed an offence many years ago cannot be compared with someone who committed an offence only recently; someone who committed an offence in order to further his own agenda cannot be compared with someone who committed an offence in the service of the State.

48. Moreover, the type of office that the civil servant is supposed to hold also affects the weight of the criminal past in the holding of that office. A minor position cannot be compared with a senior position; a position in which one has no contact with the public cannot be compared with one where there is contact with the public; a position not involving the control, supervision, guidance and training of others cannot be compared with one involving authority over others and responsibility for discipline. Someone who holds the office of a follower cannot be compared with someone who holds the office of a leader; an office that in essence does not make special ethical demands on its holder and on others cannot be compared with an office that is entirely devoted to encouraging a high ethical standard.

49. Finally, the question to what degree is it essential that the candidate for a public office holds that office must be taken into account. A candidate who is one of many cannot be compared with a candidate who is unique, such that only he can, in certain unusual circumstances, carry out the office. One must also consider the question whether there exists a real situation of emergency that requires recruiting everyone, including those with a criminal past, or whether we are dealing with the ordinary activity of public administration, which must derive its strength from upright employees.

Balancing the conflicting interests

50. Sometimes the legislator stipulates that a person with a criminal past cannot hold a certain office. In such a case, the legislator has balanced the various considerations that must be taken into account with regard to the

appointment of a person with a criminal past to a public office. In such a balance the legislator determines that the considerations of the integrity of the Civil Service shall prevail. A person with a criminal past cannot be appointed to that office. The court, when required to interpret such a provision, may not determine a balance which is different to the one determined by the legislator. All that remains for the court to do is to determine whether the candidate has 'a criminal past'. The court deals with the process of sorting and categorization (see K.M. Sullivan, 'Post-Liberal Judging: The Roles of Categorization and Balancing' 63 *U. Colo. L. Rev.*, 1992, 293). Note that in order to determine the existence of a category ('a criminal past') an act of balancing may be required. This will be a balance between the various aims that make up the purpose underlying the expression 'criminal past' in a particular context. This will not be a balance between the various aims that prevail in determining the law with respect to the appointment of someone with a criminal past to a public office.

51. In the petition before us there is no legislative norm establishing statutory rules of competence. There is no legislative norm providing that a person with a criminal past cannot be appointed director-general of a Government ministry. The normative framework merely provides that in making the appointment of director-general, the Government must take into account, *inter alia*, also the consideration that the candidate has a criminal past. This is not the only consideration. Alongside it there are considerations relating to the personal qualifications of the candidate and his ability to carry out the office in the best possible way. The Government must take all the considerations into account. Since some of the considerations tend to favour the appointment (the suitability of the candidate, the need to rehabilitate him) and others tend to oppose it (the undermining of the fulfilment of the office because of the criminal past, the harm to the public's confidence in the executive authority), the executive authority must balance the conflicting considerations. This balancing must be done reasonably and it may not be extremely or manifestly unreasonable. Indeed, a basic principle of administrative law is the one that requires an executive authority to act reasonably (see HCJ 389/80 *Golden Pages Ltd v. Broadcasting Authority* [41], at p. 445). The meaning of reasonableness is that the executive authority must balance the different interests in accordance with the proper weight of each of these. 'A balance may be deemed reasonable if the competent authority accords the proper weight, i.e., the weight required by interpreting the legislative norm which the administrative authority is carrying out, to the various interests that are taken into account' (*Golden Pages Ltd v. Broadcasting Authority* [41], at p. 445). 'Reasonableness means considering

all of the relevant considerations, and attaching the proper weight to these considerations' (HCJ 935/89 *Ganor v. Attorney-General* [42], at p. 513). Indeed, reasonableness is neither a physical nor a metaphysical concept. Reasonableness is a normative concept. Reasonableness is a process of evaluation. It is not a theoretical process. It is not a concept encompassed only by deductive logic. It is not merely rational. Reasonableness means identifying the relevant considerations and balancing them in accordance with their weight (see HCJ 156/75 *Daka v. Minister of Transport* [43], at p. 105; HCJ 127/80 *Odem v. Mayor of Tel-Aviv-Jaffa* [44], at p. 121). Professor MacCormick discussed this concept, pointing out:

> 'What justifies resort to the requirement of reasonableness is the existence of a *plurality* of factors required to be *evaluated* in respect of their *relevance* to a common *focus* of concern. Unreasonableness consists in ignoring some relevant factor or factors, in treating as relevant what ought to be ignored. Alternatively, it may involve some *gross* distortion of the relative values of different factors, even though different people can come to different evaluations each of which falls within the range of reasonable opinions in the matter at hand' (MacCormick, 'On Reasonableness', *Les Notions A Cantenu Variable En Droit* (H. Perelman and Vander Lest ed., 1984, 131, 136).

The decision is reasonable if it is made by giving the proper weight to the various values that must be taken into account. The decision to appoint a candidate with a criminal past to the position of director-general of a Government ministry is reasonable if it gave the proper weight to the various considerations that should be taken into account, and it balanced the various considerations in accordance with their weight.

52. What is the weight that should be attached to the criminal past of a candidate, when a decision is being made about his employment in a public office? As we have seen, the answer is that this weight is determined by the weight of the considerations that underlie the requirement to take the criminal past of a candidate into account before he is appointed to public office. As we have seen, these considerations relate, on one hand, to the principle of 'repentance' and the candidate's aptitude for the office, and on the other, to ensuring the proper functioning of the Civil Service and the public's confidence in it. But what is the weight of these considerations? The answer to this question is determined by the relative social importance that Israeli society gives to the values, principles and interests that make up the various

considerations. Of course we speak of 'weight' and 'balancing' metaphorically. The act of 'weighing' is not a physical act but a normative one, which is designed to give the various considerations their place in the legal system and their social value within the whole spectrum of social values. Justice Shamgar rightly pointed out that:

> '... the process of placing competing values on the scales describes the starting point for interpretation, but it does not establish a criterion or ethical weights with which the work of interpretation can be done' (FH 9/77 *Israel Electricity Co. Ltd v. HaAretz Newspaper Publishing Ltd* [45], at p. 361).

In a similar vein I pointed out in another case:

> 'These expressions — "balancing" and "weight" — are only metaphors. Behind them lies the belief that not all principles are of identical importance in society's opinion, and that in the absence of legislative guidance, the court must evaluate the relative social importance of the various principles. Just as there is no person without a shadow, similarly there is no principle without weight. Determining the balance on the basis of weight means making a social assessment as to the relative importance of the various principles' (*Laor v. Film and Play Review Board* [26], at p. 434).

In determining 'the relative social importance', the court is a 'faithful interpreter of the accepted attitudes of the enlightened public, in whose midst it dwells' (Justice Landau in CA 461/62 *Zim Israeli Shipping Co. Ltd v. Maziar* [46], at p. 1335 {135}). These are the attitudes enshrined in basic values and basic conceptions, and not in temporary, passing trends. They reflect the 'social awareness of the people in whose midst the judges dwell' (Justice Landau in 'Law and Discretion in Administering Justice' 1 *Mishpatim* (1969) 292, 306). They are an expression of 'the national way of life' (Justice Agranat in HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of the Interior* [47], at p. 884 {105}). They reflect 'the nation's vision and its basic credo...' (President Smoira in HCJ 10/48 *Zeev v. Acting Director of Tel-Aviv Municipal Area* [48], at p. 89 {72}). They are not the product of judicial subjectivity. In attaching weight to the various considerations, the judge aims, to the best of his ability, for judicial objectivity. He does not reflect either his subjective values or his personal considerations. The judge reflects 'the values of the State of Israel as a Jewish and democratic State' (s. 1 of the Basic Law: Human Dignity and Liberty). In this context, he will take into account the weight given to the various considerations in similar situations,

for similar situations justify a similar solution. He will also take into account legislative and judicial arrangements, from which he may learn the proper weight that should be given to the various considerations in the case before him.

53. The need to rehabilitate offenders is an important consideration in the legal system. An offender who was tried and punished should be allowed to reintegrate into society (see *Carmi v. State Attorney* [36], at p. 375). Notwithstanding, the strength of this consideration decreases if the offence is serious in its circumstances or if the position that the candidate seeks to fill is a position that requires an aura of confidence towards him and an aura of confidence to the system in which he seeks to be appointed a leader. It is one thing to rehabilitate a criminal who has served his sentence. It is another thing to place him at the top of the administrative pyramid.

54. The public's confidence in the system of Government is a central consideration in our legal system. Without this confidence, a democratic society cannot function. In discussing the public's confidence in the judicial authority, I pointed out:

> 'The public's confidence in the judicial authority is the most valuable asset that this authority has. It is also one of the most valuable assets of the nation. De Block's saying that a lack of confidence in the administration of justice is the beginning of the end of society is well-known' (HCJ 732/84 *Tzaban v. Minister of Religious Affairs* [49], at p. 148).

These remarks apply, albeit to a lesser degree, to all executive authorities. Public confidence in government organs is one of the most precious assets of the executive authority and the State. When the public loses its confidence in the organs of Government, it loses its belief in the social contract forming the basis of communal life. Significant importance should be given to considerations that are designed to maintain, preserve and promote a feeling among the public that its servants are not its masters and that they do their work for the public, honestly and without corruption. Indeed, the integrity of the service and of its members is the foundation of the Civil Service and the basis of our social structure. I discussed this in a certain context, where I said:

> '... in an enlightened democratic society, a public figure, who is chosen by the people and needs the trust of the people, must maintain a proper moral standard in his behaviour — both private and public — so that he may continue to serve in his

office' (HCJ 251/88 *Oda v. Head of Jaljulia Local Council* [50], at p. 839).

This is a central consideration, and it should be accorded significant weight in the overall balancing process which is the basis of a reasonable decision regarding the appointment of a candidate with a criminal past to public office.

55. The conclusion arising from the various considerations is the following: as a rule, it is unreasonable to appoint a candidate who has committed offences in grave circumstances to a senior office in the Civil Service. For this purpose, the gravity of the offence is determined not by its 'position' in the Penal Law, but by its implications on considerations that underlie the appointment. Consequently, an offence should be regarded as serious where its very essence and the circumstances of its commission not only undermine law and order in general (e.g., murder, robbery, rape) but also the foundations of Government structure (e.g., bribery, fraud and breach of trust, perjury, fabricating evidence, obstructing the course of justice). A candidate who has committed these offences and holds a senior office in the Civil Service undermines the public trust in the executive authority and the Civil Service. He will have difficulty in serving as an example and a model for his subordinates. He will have difficulty requiring of them what is required of every civil servant but he himself has profaned. He will have difficulty in radiating fairness, trust, prestige, honesty and integrity to the general public. All of these will affect, to a large degree of certainty, the status, functioning and position of the Civil Service in a democratic society. Indeed, an offence is serious if 'from the circumstances in which it was committed it can be concluded that the public figure displayed in his behaviour a moral standard so low that he is no longer worthy of holding his public office' (*ibid*.). This is the same offence that in the circumstances in which it was committed involves 'moral turpitude that testifies to the fact that its owner is unworthy of being counted amongst honest people and at any rate is unfit to have public responsibility for decisions and acts on which the affairs of the community and public harmony are dependent' (Justice H. Cohn in HCJ 436/63 *Ben-Aharon v. Head of Pardessia Local Council* [51], at p. 564). This last ruling explained the term 'offence involving moral turpitude' which appears in a number of laws. In our case, the seriousness of the offence in its circumstances should not be identified with an offence involving moral turpitude, for in our case there is no express statutory arrangement to this effect. Notwithstanding, it seems to me that the two are not far apart. Indeed, the term 'involving moral turpitude' is vague and

connecting it with the reasonableness of a decision of a public authority making an appointment will not help to clarify the criteria. Nevertheless, connecting the two can indicate the type of factors to be taken into account. In both cases, we are dealing with a criminal past where 'the crux of the decision is not based on the formal aspects of the offence, but in the circumstances in which the offence was committed…' (*Oda v. Head of Jaljulia Local Council* [50], at p. 839). In both cases, we are dealing with a criminal offence, the weight of which is determined in accordance with 'the outlooks and ethical criteria prevailing in society at that time, in order to protect those interests that the law is designed to protect…' (BAA 2579/90 *Bar Association District Committee, Tel-Aviv v. A* [52], at pp. 732-733). Nonetheless, the two should not be considered identical. 'An offence involving moral turpitude' emphasizes the immoral element in committing the offence (see R. Gavison, 'An Offence involving Moral Turpitude as Disqualification for Public Office,' 1 *Mishpatim*, 1969, 176). A criminal offence, which may negate the reasonableness of appointing its perpetrator to a high public office, does not need to be specifically of an immoral nature.

56. In principle, the seriousness of the offence is determined by its circumstances (cf. *Ben-Aharon v. Head of Pardessia Local Council* [51]). Thus, for instance, someone who committed an offence, before the State was established, that undermined the Government of the British Mandate but which was intended to further the establishment of the State, may reasonably be appointed to a senior Government office in the State. The effect of the commission of the offence on the public's confidence in the executive authorities depends on the circumstances in which it was committed, and not on its elements in the statute book (see Gavison's article, *supra*, at p. 180). Therefore someone who committed an offence for financial gain and a desire to enrich himself cannot be compared with someone who committed the same offence out of a (mistaken) desire to further the interests of the State. The offence is identical, but the circumstances in which it was committed are different. The difference in circumstances affects the weight of the criminal past and the reasonableness of the decision to appoint someone with a criminal past to a Government office. Furthermore, the more senior the position, the more weight ought to be attached to the factor of a criminal past. The position's seniority is determined not only in accordance with formal criteria of seniority and position, but also in accordance with the degree to which the public identifies the holder with the Civil Service itself and the degree of damage inflicted on the public confidence in the Civil Service if the appointment is implemented. Finally, the time that passed from the commission of the offence until the proposed appointment is an important

factor. The longer the passage of time, the weaker the link between the person and the criminal offence, and his appointment to the public office will not affect his carrying it out and the public's confidence in him and the Civil Service. Indeed, a criminal past, even with regard to a serious offence, is not an absolute bar to an appointment to a public office, even a senior one. Time has its effect. Wounds are healed. The candidate is rehabilitated. The 'enlightened public' will no longer regard his appointment as an act that harms the integrity of the service and its capacity to function, but rather as vindictiveness and excessive punishment. In such circumstances, there will be no basis for regarding an appointment of such a candidate to a public office as an unreasonable act. The period of time that should pass between committing the crime and serving the sentence and the appointment varies according to the circumstances. Certainly it is not measured in a few years. But decades also should not be required. The pendulum of time will swing between these two extremes, and it will stop in accordance with the circumstances of time and place.

A Criminal Past and a Criminal Conviction

57. Hitherto I have assumed that a candidate has a criminal past because he was convicted in a trial and served his sentence. This is certainly the usual case. However, a criminal past for the purpose of making an appointment is not to be regarded as identical with a criminal conviction. We are dealing with an administrative decision of the Government to appoint someone to a public office, and we are not dealing with a decision to impose on someone penalties prescribed by law. There is no criminal punishment before a criminal conviction. The same is not the case with regard to an appointment. Here it is relevant to examine all the facts that were before the authority making the decision. If from all these facts a reasonable authority could have concluded that a criminal offence was committed, this is sufficient to establish a 'criminal past' for the purpose of deciding whether the appointment is reasonable. Indeed, for the purpose of the reasonableness of the decision of the executive authority making the appointment, the decisive factor is the commission of the criminal acts attributed to the candidate. A criminal conviction naturally constitutes a desirable 'proof', but other methods of proof may be possible, such as an admission before a competent authority. Justice H. Cohn rightly pointed out that:

> '...the said rule presuming a person to be innocent of a crime, in the absence of rebutting evidence, does not provide — nor do I know of any other legal rule that does provide — that an administrative authority that needs to be convinced of

> someone's past is only competent to determine that he has a criminal past when he has been convicted in a trial.
>
> ……
>
> Shall we disqualify the refusal of the Commissioner to appoint a candidate as a civil servant when the refusal was based on evidence proving, to a reasonable degree, his criminal past, for the reason that these proofs are defective in that they lack a guilty verdict? Let us assume that this candidate wishes to be accepted into the Civil Service and the Commissioner refuses to admit him for that reason; would we compel the Commissioner to accept him, and disqualify the refusal because of the absence of a criminal conviction?
>
> ……
>
> …if the authority to make a decision regarding a person's past is given to an administrative authority which is not competent to swear witnesses and take evidence in the way that evidence is given in Court, the administrative authority need only base its decision on evidence that would be sufficient to convince a reasonable person about the applicant's past, even if that evidence would not have been admissible in court and even if it would have been of insufficient weight in a judicial proceeding' (HCJ 94/62 *Gold v. Minister of Interior* [53], at pp. 1856-1857 {186-187}).

Indeed, the rule applicable in our case is the 'rule of administrative evidence'. A Government authority may base a finding on evidence, if the evidence is such, in view of the circumstances, 'that any reasonable person would regard it as having probative value and would rely on it' (President Agranat in HCJ 442/71 *Lansky v. Minister of Interior* [54], at p. 357). An administrative finding can be based on 'material whose probative value is such that reasonable people would regard it as sufficient for reaching conclusions about the nature and occupation of the persons concerned...' (President Shamgar in EA 2/84 *Neiman v. Chairman of Central Elections Committee for Eleventh Knesset* [55], at p. 249 {100}).

A Criminal Past and a Pardon

58. How does the granting of a Presidential pardon affect the appointment of a candidate who committed an offence (whether convicted in a trial or not)? This question raises serious problems. The 'institution' of the pardon is a complex one and its implications have not yet been examined

comprehensively in the rulings of this court. With regard to the petition before us, we do not need to examine this issue in depth. The reason for this is that, whatever the general effect of a pardon, it cannot prevent the Government, in making an appointment under the law, from considering the criminal past of someone who has been pardoned for the purpose of that appointment. This is directly implied by the provisions of the Criminal Register and Rehabilitation Law. Under this law, when the President gives a pardon to someone convicted in a trial, the pardon is equivalent to a conviction that was deleted (s. 16(c)). When a conviction has been deleted, information about it may only be given to a limited number of bodies (s. 16(a)). One of these bodies is the 'Government — for the purpose of appointing holders of offices whom it is obliged to appoint…' (First Schedule, s. (c)). Thus, even after the deletion of a criminal conviction, the Government can still obtain information about the criminal past, for the purpose of making statutory appointments. This information is not provided for academic purposes, but so that it may be included among the considerations of the Government in making the appointment. In the explanatory notes to the draft Criminal Register and Rehabilitation Law, it was stated (at p. 217):

> 'The draft sets out several limitations on the right of an offender that his crimes should not be remembered — because of the gravity of the offence, because of an office the holder of which must set a personal example to the public, or because of a position that requires trust of its holder and the trust required is prejudiced as a result of the offence.'

This conclusion can be seen also from the rulings of this court. With regard to the term 'someone with a criminal past' in the Law of Return, 5710-1950, Justice Sussman pointed out:

> 'The State of Israel was established, as the Declaration of Independence says, so that it would be open to Jewish immigration and the ingathering of exiles. It was not established to be a centre of attraction and to establish a community of persons who have broken the law in the countries where they live, and for this reason wish to escape justice, even if they are Jews. What difference is there — for the purpose of immigrating to and settling in Israel — between someone who committed a crime and was convicted of it and someone who committed a crime but was not convicted of it, because, for example, the act was too long ago or an amnesty law was issued where it was

> committed, or because the legal proceeding against him ended or was not begun for another reason of the kind that does not absolve him of his past?' (*Gold v. Minister of Interior* [53], at p. 1855 {185}).

Indeed, in this case, as in other cases, the determining factor is the purpose underlying the normative arrangement. When the normative arrangement deals with Government appointments to an executive office, a pardon does not prevent the Government from having the right and the duty to consider the acts which are the subject of the pardon. The need to ensure the public's confidence in the authorities overrides the need to delete the candidate's criminal past. This is also the law in other countries (see: *May v. Edwards* (1975) [59]; *State ex. rel. Wier v. Peterson* (1976) [60]; 67 C.J.S. *supra*, at p. 268; G.L. Hall, 'Pardon as Restoring Public Office or License or Eligibility Therefor,' 58 *A.L.R.* 3d., 1974, 1191).

From the general to the specific

59. The respondent committed a number of offences. He gave false evidence in court (in the Nafso affair). He obstructed legal proceedings (in the '300 bus' affair). These are particularly severe crimes in their circumstances. Particular serious was the behaviour of the respondent in the '300 bus' affair and the cumulative effect of all of his behaviour. All of these undermine the administration of justice and so harm the foundations of society and the legal system. They damage the public's confidence in the legal system and the law enforcement system. It is fitting to recall the remarks of President Shamgar in describing the behaviour of the interrogators in the Nafso affair (of whom the respondent was the chief investigator):

> 'These actions involve far-reaching harm to the trustworthiness of the agents of the said branch of State. In this way the tribunal was prevented from deciding the case of the appellant on the basis of true facts, and the standing and power of the tribunal that was misled by the statements of the interrogators were impaired.
>
> The serious act… makes it necessary to take decisive measures in order to uproot this phenomenon…'(*Nafso v. Chief Military Prosecutor* [20], at p. 636 {267}).

With regard to the same case, the Landau Commission noted:

> 'This affair is frightening and shocking, not merely because of the miscarriage of justice towards Nafso personally, but no less because of the corruption of values in giving false testimony,

> which has been exposed in broad daylight and which must now be totally uprooted' (*ibid*., at p. 9).

The same applies to the '300 bus' affair. The Landau Commission pointed out the special gravity of this affair in general, and of the behaviour of the respondent ('the Trojan horse') which was described as 'an incomparably serious act' (*ibid.*, at p. 30). The Landau Commission emphasized time and time again the need to prevent any harm to the State as a State governed by law, based on the foundations of morality — harm that 'is liable to repay us by corrupting internal morals' (*ibid.*, at p. 71).

60. The appointment of the respondent to the office of director-general of a Government ministry seriously harms the Civil Service. It is almost certain that it will adversely affect the functioning of the service. But most of all, it seriously undermines the public's confidence in the public authority and the Civil Service. How can someone who gave false testimony and perverted the course of justice, and by so doing prejudiced the freedom of the individual, head a Government ministry? What is the personal example that he is likely to show to his subordinates? What requirements of honesty and integrity can he demand of them? How can a criminal who gave false testimony and perverted the course of justice and prejudiced the freedom of the individual, maintain the confidence of the public as a whole in the fairness, honesty and dignity of civil servants? What example does the Civil Service give to each individual when such a person is one of the heads of the Civil Service? Is it possible to maintain a relationship of trust between the citizen and the Government when the Government speaks to the citizen through the respondent? What social and moral message does the Government thereby send to the citizen, and will the citizen return to the Government? Indeed, an appointment to a senior position in the Civil Service of someone who by his offences undermined the foundations of the social structure and the ability of judicial or quasi-judicial institutions to do justice is an unreasonable act in the extreme. Furthermore, twelve years have passed since the Nafso affair. Eleven years have passed since the '300 bus' affair. The wound has not yet healed. The events are still a part of the public consciousness. Considerations of rehabilitating the respondent, which are normally relevant to the appointment of a person with a criminal past to a public office, are not significant in this case. The respondent was rehabilitated before his appointment to the Civil Service. The office to which the respondent was appointed is prestigious and considerations of rehabilitation with regard to it are of minor weight. Notwithstanding all of the respondent's qualifications — which no-one has disputed — it was not argued before us

that he is the only person capable of fulfilling the office of director-general in a way that no-one else can. Against this background, the question of the weight that should be attributed to the effect of the respondent's criminal past on the Civil Service and the public's confidence therein remains a most compelling one.

61. In their pleadings before us, counsel for the respondent and counsel for the respondents raised three main arguments, which in their opinion justify the appointment of the respondent. The *first* argument is that the respondent did not commit his offences for pecuniary gain or to promote his own interests, but for the security of the State. Indeed, the respondent did not act for himself, but for the general public. He took into account the needs of the State and its security. His outlook was erroneous and damaging, but it cannot be ignored that he did not act for his own interests but for the security interests of the residents of the State. This consideration must be taken into account. It is not a minor matter. From the viewpoint of the elements of an offence it is not usually relevant. But from the viewpoint of the considerations at the basis of the reasonableness of the appointment it is very relevant. Nonetheless, this consideration is insufficient — both on its own and together with other considerations — to turn the scales. The Landau Commission rightly pointed out that we must at all costs protect the State as a State governed by law based on basic concepts of morality. 'Any deviation from these basic concepts, even towards those who wish to destroy the State, is likely to repay us by corrupting internal morals' (*ibid*., at p. 71). Whatever the motive, nothing can justify perjury, perverting the course of justice and prejudicing the freedom of the individual. Security is valuable, but it is security which operates within the framework of the law. When those who maintain security break the law, law and security are both prejudiced. Security without law is anarchy. Without law, there is no purpose to security. These are first principles. They are simple and elementary. This is the first lesson of national democratic life. The offences of the respondent harmed all of these. The offences which the respondent committed were so grave in their other circumstances, and the injury to the social fabric is so serious, that the motive of the respondent in committing the acts cannot sufficiently alleviate the damaging effect of his actions on the functioning of the Civil Service and the public's confidence in it.

62. The *second* argument raised before us — by counsel for the respondent — is the claim of discrimination. The respondent's colleagues, who committed crimes as he did and who remained in the service, were promoted. Their criminal past did not hurt them. Why should a different rule

apply to the respondent, who left the General Security Service? The answer to this argument can be found in the report of the Landau Commission. This Commission recommended that the members of the General Security Service (including the respondent) who committed various offences in the course of their duties should not be put on (criminal or disciplinary) trial. The main reason underlying this recommendation was the need to prevent a 'deep shock to the ranks of the interrogators, and in addition to the Service as a whole, and to cause severe damage to the ability of the service to operate effectively in order to frustrate hostile terrorist activities' (*ibid.*, at p. 82). The Commission emphasized that 'we could not reconcile ourselves to the thought that if we were to recommend a response along the lines of "let justice run its course", this could paralyse the interrogation work of the Service, and it is almost certain that innocent victims would die in acts of terror that the Service is capable of frustrating' (*ibid*., at p. 83). The Commission pointed out that in its opinion the holding of (criminal or disciplinary) trials against those agents who had committed crimes would cause 'damage to the public by weakening the protection given to it against terrorist acts, as a result of harm to the ability of the Service to frustrate such acts' (*ibid.*, at p. 85). It is therefore clear that had the respondent continued his activity with the Service, he would not have suffered. The reason for this is not related to the respondent, but to the Service, whose proper functioning is in the interest of the whole State. But when the respondent left the Service, that reason can no longer help him. Now he stands on his own merits. The proper comparison is no longer between him and his colleagues in the Service who are being promoted. He is not a victim of discrimination in comparison with them, for they are not equal in their relevant characteristics. The proper comparison is between him and any other candidate with a similar criminal past. The appointment of the respondent to the office of director-general would be an act of discrimination against all of the many candidates who are rejected by the Civil Service Commission because of their criminal past.

63. The *third* argument raised before us relates to the pardon that the respondent received from the President of the State. This pardon, as the respondent's counsel argued, deletes his criminal past, and it may not be taken into account again for the purpose of the appointment. Moreover, because of the pardon the respondent was not indicted, and his guilt was not determined by the court. Therefore we must presume that he is innocent of every crime. Even the circumstances in which the respondent committed his offences were not determined judicially, and therefore we must make presumptions in his favour. As we have seen, the Government is entitled to

take account of a candidate's criminal past, if that criminal past is proven to it under 'the rules of administrative evidence'. In the case before us, such evidence exists. Admittedly, the respondent was not convicted in a trial, but there is evidence on which a reasonable executive authority could base a finding. Indeed, the respondent did not deny the facts in principle and did not contest his involvement in criminal acts. Moreover, one can learn about the criminal past of the respondent from the judgment in the Nasfo affair, and from the extensive material that was accumulated with regard to the '300 bus' affair, including the respondent's application to the President of the State for a pardon, which includes a confession of the facts that constitute the offences for which he was pardoned by the President. The President's pardon cannot prevent the Government from taking the criminal past into account, and in any event this pardon does not apply to the Nafso affair. Notwithstanding, the Government ought to take into account the fact that the President of the State, who is 'the Head of State' (s. 1 of Basic Law: the President of the State), saw fit to grant a pardon to the respondent. The President's considerations in granting the pardon should also be taken into account, in so far as these relate to the interests of the respondent. The President based his decision on the need 'to prevent additional serious harm to the General Security Service' (quoted in *Barzilai v. Government of Israel* [21], at p. 517 {6). His decision was given:

> 'as a result of a profound recognition that the public interest and the State's interest require protecting our security and saving the General Security Service from the damage that will ensue if the affair continues… the Israeli public is totally unaware of the debt that we owe all of those anonymous fighters, members of the General Security Service, and how many Israeli lives have been saved because of them' (*ibid*.).

The President concluded his decision by noting that:

> 'As President of the State, I feel obliged to stand by the GSS agents, knowing as I do the devoted, strenuous and secret efforts they make day by day and hour by hour, and to prevent demoralization in the intelligence community and in the security and anti-terror establishment.
>
> The State of Israel's special circumstances do not allow us, nor may we allow ourselves, to undermine or hinder the security establishment and the good people who protect the nation' (*ibid*., at pp. 517-518).

This reasoning focuses mainly on the Security Service and on the need to ensure the continuation of its proper functioning. This reasoning does not have any real implication for the appointment for someone who received a pardon to a senior public position outside the Security Service itself. In any event, the weight of such a consideration cannot be compared to the damage to the Civil Service and the confidence that the public will have in it if the appointment is carried out.

Government Discretion and Judicial Review

64. The appointment of the respondent as director-general of the Ministry of Building and Housing is within the authority of the Government. In the absence of a statutory provision negating the competence of the respondent, he is competent to be appointed to the senior position. The Government considered all the relevant factors. It was not argued before us that it had any irrelevant consideration, nor have we found any. Nonetheless, the Government's decision is invalid. It is manifestly and extremely unreasonable. The Government did not properly balance the various relevant considerations. It did not attach the proper weight to the damage that would be suffered by the Civil Service as a result of the respondent's appointment. It did not make a proper balance between the considerations supporting the respondent's appointment (mainly his qualifications and capabilities) and those opposing this appointment (primarily the damage to the public's confidence in the executive authority).

65. It was argued before us that once the Government decided to make the appointment, there is no basis for judicial intervention. The Government balanced the various considerations, and once it decided that in the overall balance the respondent should be appointed, the court should not replace the Government's discretion with its own discretion. Indeed, had the balance made by the Government fallen within the scope of reasonableness, there would have been no room for our intervention. The case before us falls into the category of those cases where a decision of the executive authority deviates in the extreme and substantially from the scope of reasonableness. In such instances, the court is not at liberty to refrain from setting the administrative authority's decision aside (see HCJ 31/81 *Moshav Beth Oved Workers Commune for Cooperative Agricultural Settlement Ltd v. Traffic Supervisor* [56], at p. 354). In such situations, the question is not whether the decision of the executive authority is wise or not, but whether the decision of the executive authority is lawful or not. Since we have reached the conclusion that the decision deviates in the extreme from the scope of reasonableness and is tainted with illegality, there is no alternative but to

declare it void. The exalted position of the Government' as the State's executive authority (s. 1 of the Basic Law: The Government) cannot give it powers that the law does not confer upon it. Every executive authority may make an unreasonable decision that will be disqualified by the court, and the Government is no exception to this rule (see CA 492/73 *Schpeizer v. Council for Regulating Sports Gambling* [57], at p. 26; HCJ 5684/91 *Barzilai v. Government of Israel* [58]). Indeed, this is the strength of a democracy that respects the rule of law. This is the rule of law in its formal sense, whereby all executive authorities, including the Government itself, are subject to the law. No authority is above the law; no authority may act unreasonably. This is also the substantive rule of law, according to which a balance must be made between the values, principles and interests of the democratic society, while empowering the Government to exercise discretion that balances between the proper considerations (see *Barzilai v. Government of Israel* [21], at p. 621 {103}).

The result is that we are making the show cause order absolute, in the sense that the appointment of the respondent as director-general of the Ministry of Building and Housing is void as of today. The State will pay the petitioners' costs in a total amount of NIS 7,500 to each petitioner.

Justice E. Goldberg: I agree.

Justice E. Mazza: I agree.

Petition granted.

23 March 1992