HCJ 8035/07
HCJ 8146/07

Petitioners in HCJ 8035/07:

1. **Ronen Eliahu**
2. **Erez Hindi**
3. **Lemon Grass Tel Mond**
4. **City Thai Ltd.**
5. **Patai Lemon Grass Ramat Aviv Restaurant Ltd.**
6. **Romy Ron Ltd.**
7. **Honey and Cinnamon Lemon Grass Ltd.**
8. **Ginger – Lemon Grass Ltd.**
9. **Sheli veShel Michal Ltd.**
10. **Rafi Michaeli**
11. **Dror Kakon**
12. **I.S.R. Lemon Grass**
13. **Dov Swirsky**
14. **Glatt Peking Ltd.**
15. **Rafi levy**
16. **The Red Asian Restaurant (2003) Ltd.**

Petitioners in HCJ 8146/07:

1. **Israeli Ethnic Restaurant Association**
2. **Peking Restaurant, Lahak Debi Dining and Events Ltd.**
3. **Yakuza Sushi Roll Restaurant Ltd.**
4. **Korusin (Malha) Restaurant, Ginossar Ethnic Ltd.**
5. **Lychee – We Are Different Food Restaurant Ltd.**

v.

Respondents in HCJ 8035/07:

1. **Government of Israel**
2. **Ministry of Industry, Trade and Employment**
3. **Director of the Support Unit in the Ministry of Industry, Trade and Employment**

Respondents in HCJ 8146/07:

1. **Government of Israel**
2. **Minister of Industry, Trade and Employment**
3. **Minister of the Interior**

The Supreme Court sitting as the High Court of Justice

[23 January 2008]

Before Justices E.E. Levy, S. Joubran, Y. Elon

Petition for an *Order Nisi*

Israel Supreme Court cases cited:

[1] HCJ 5626/97 *Lerner v. Director General of the Employment Service* (1997) (unreported).

[2] HCJ 2836/98 *Lerner v. Director General of the Employment Service. Minister of Labour and Welfare* (1998) (unreported).

[3] HCJ 9647/02 *Ben David v. Minister of the Interior* (2003) (unreported).

[4] HCJ 3445/05 *SushiMai Ltd. v. Ministry of Industry, Trade and Employment* (2005) (unreported).

[5] CJ 5936/97 *Lam v. Director General of the Ministry of Education, Culture and Sport* [1999] IsrSC 53(4) 673.

[6] HCJ 9722/04 *Polgat Jeans Ltd. v. Government of Israel* (2006) (not yet reported).

[7] HCJ 3872/93 *Mitral Ltd. v. Prime Minister* [1993] IsrSC 57(5) 485.

[8] HCJ 9723/01 *Levy v. Director of the Department of Industry and Services for Issuing Permits to Foreign Workers* [2003] IsrSC 57(2) 87.

[9] CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [1995] IsrSc 49(4) 221.

[10] HCJ 4562/92 *Zandberg v. Broadcasting Authority* [1996] IsrSC 50(2) 793.

[11] HCJ 4947/03 *Beer Sheba Municipality v. Government of Israel* (2006) (not yet reported).

[12] HCJ 4593/05 *United Mizrahi Bank v. Prime Minister* (2006) (not yet reported).

[13] HCJ 956/06 *Association of Banks in Israel v. Minister of Communications* (2007) (not yet reported).

[14] HCJ 5496/97 *Mardi v. Minister of Agriculture* [2001] IsrSC 55(4) 540.

[15] CA 4912/91 *Talmi v. State of Israel* [1993] IsrSC 48(1) 581.

[16] LCA 7678/98 *Benefits Officer v. Doctori* (2005) (not yet reported).

[15] HCJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49(4) 94.

[16] HCJ 3648/97 *Stamka v. Minister of the Interior* [1999] IsrSC 53(2) 728.

[17] CA 10078/03 *Shatil v. State of Israel* (2007) (not yet reported).

[18] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1.

[19] HCJ 4638/07 *Al-Aqsa Al-Mubarak Co. Ltd. v. Israel Electrical Corp.* (2007) (not yet reported).

[20] CA *Angel v. Bodesky* [1992] IsrSC 46(4) 434.

[21] CA 1639/01 *Kibbutz Ma'ayan Zvi v. Krishov* [2004] IsrSC 58(5) 215.

[22] HCJ 366/03 *Commitment to Peace and Social Justice Association v. Minister of Finance* (2005) (not yet reported).

[23] HCJ 4769/90 *Zidane v. Minister of Employment and Welfare* [1993] IsrSC 47(2) 147.

[24] CA 524/98 *State of Israel v. Zion Insurance Co. Ltd.* [1998] IsrSC 52(2) 145.

[25] HCJ 6962/03 *Media Most Co. Ltd. v. Cable and Satellite Broadcasting Council* [2004] IsrSC 59(3) 14.

[26] HCJ 4542/02 *"Kav La'Oved" Association v. State of Israel* (2006) (not yet reported).

[27] AAA 1347/07 *Gorong v. Minister of the Interior* (2007) (not yet reported).

[28] HCJ 10843/04 *Helpline for Foreign Workers v. State of Israel* (2007) (not yet reported).

For the petitioners in HCJ 8035/07 – D. Holz-Leczner

For the petitioners in HCJ 8146/07 – R. Jarac; S. Luria Hai-Am

For the respondents – M. Zuk

JUDGMENT

Justice E.E. Levy

1. The petitions before us concern the decision in principle of the Government to reduce the number of non-Israeli employees in the ethnic restaurant branch (various types of Asian restaurants). This policy was formulated more than a decade ago, and it has been the issue in several petitions filed in this Court (HCJ 5626/97 *Lerner v. Director General of the Employment Service* [1]; HCJ 2836/98 *Lerner v. Director General of the Employment Service, Minister of Labor and Welfare* [2]; HCJ 9647/02 *Ben David v. Minister of the Interior* [3]; HCJ 3445/05 *SushiMai Ltd. v. Ministry of Industry, Trade and Employment* [4]). At present, when the Government is taking concrete steps to implement the policy, it has once again been laid on the doorstep of this Court.

2. The petitioners, the owners of dining establishments, object to a string of decisions that were made between the years 2004-2007 in which, at the first stage, the number of permits for employing foreign chefs in ethnic and mixed restaurants was reduced, and later, the granting of a permit became conditional upon payment of a high wage to the worker, reflecting the expertise for which the restaurant sought to employ him. In 2009, it was decided that in this branch, it will be permitted to employ only foreign experts, i.e. workers with special skills, whose monthly wage will not be less than twice the national average wage – a sum which today is equal to 15,000 NIS (Government decision no. 2445 of 15 August 2004; no. 3021 of 6 January 2005; no. 4099 of 9 August 2005; no. 4617 of 29 December 2005; no. 446 of 12 September 2006 and no. 1205 of 15 February 2007).

Needless to say, this wage rate is several times the rate currently paid to migrant workers in this branch. It is no wonder, therefore, that these government decisions outraged the restaurateurs, and they were joined in their protest by others, including the Minister of Tourism and senior officials in his office, the Mayor of Jerusalem, the Chairman of the Knesset Finance Committee, members of the Knesset Economic Committee and other public officials. They all explained how much damage these decisions would cause, not only to the ethnic restaurant branch but to the entire Israeli economy. When their efforts failed and the Government persisted in its position, the petitioners sought the intervention of this Court, asking that we direct that the previously prevailing situation be restored, at least until they are able to recruit Israeli workers to replace those who are presently employed.

The Petitions

3. The petitioners estimate that the number of migrant workers required for the approximately 250 oriental restaurants operating in Israel today is 1,400. Without these workers, so it is claimed, these restaurants cannot exist: these workers are at the heart of the restaurants and they alone have the necessary expertise, as it were from the womb, in the preparation of the food that is served. The petitioners add that the government decisions inflict a mortal wound on the restaurateurs' freedom of occupation, and that although all agree that increasing the rate of employment of Israelis is a worthy cause, the measures that have been adopted to advance this cause are not proportionate. First, there is no connection between the cessation of

employment of migrant workers and opening up of the branch to Israelis. Significant efforts have been invested by the Ethnic Restaurant Association, in conjunction with the Ministry of Industry, Trade and Employment, to train Israeli workers in the art of oriental cooking, but they have all been in vain. Israelis, even those who are involved in the culinary field, refuse to touch this work. The petitioners do, it is true, mention that in recent months, the Ministry of Industry – which is responsible for the training of replacement personnel – has been running a trial program to train some one hundred Israelis to work in the branch, but it will be many months before this program bears fruit, if at all.

The petitioners further argue that the ethnic restaurants in Israel provide a livelihood for thousands of local workers, including suppliers, service providers, agricultural workers and food manufacturers, and they make a real contribution to the tourism sector, which provides employment for many more Israelis. According to an expert opinion written by financial consultants and attached to petition HCJ 8146/07, in recent years the number of Israelis employed in the ethnic restaurant branch has increased at a significantly higher rate than the average rate of growth in other branches of the economy (P/26). Collapse of the branch as a result of government decisions will therefore entail damage that greatly outweighs the benefit gained by reducing the number of migrant workers. This is even more the case in view of the fact that the non-Israeli workers in the branch constitute only a minute proportion – no more than one percent – of all the foreign workers in the economy; moreover, in other branches the Government – surprisingly – has increased the numbers due to a shortage of workers. Even if the branch is not destroyed, the petitioners are concerned that the financial burden on their businesses will lead to a price increase and harm the population at large, and particularly the weak sectors, who will no longer be able to afford to eat in those restaurants. Furthermore, they argue, the ability of the public to enjoy the varied food culture available at present, in which the oriental restaurants play an ever-growing part, will be diminished.

The third argument of the petitioners is that it is possible to achieve the same objective by less harmful means, for example, by requiring them to employ a given number of Israelis for every foreign worker. In concrete terms, it was argued that the government edicts are arbitrary with respect

both to the number of permits allocated and to the rate of pay that was fixed, and they were not preceded by consultations or discussions with people in the restaurant business. Why a non-Israeli chef should earn twice the average national wage is a puzzle to the petitioners. In fixing this wage, they complain, the Government did not draw a distinction between experts in the different branches of industry and services. The result, devoid of logic in their view, is that a foreign expert in the culinary field will earn an identical wage to that of his counterparts in the fields of medicine or engineering for example, in a manner that deviates significantly from the norm in the restaurant business.

The petitioners supported their petitions with the reports of several investigative committees that were set up by governments over the past decade; these committees recognized the special nature of the branch of ethnic restaurants and the importance of distinguishing it from other branches in which foreign workers are employed (Yankowitz Committee Report of 10 March 1996; Ben-Zvi Committee Report of 14 January 1998; Buchris Committee Report of 16 July 2001; Tal Committee Report of October 2002). Their position is also supported by the expert opinion of chef Israel Aharoni, which was attached to the petition in HCJ 8146/07, and which explained the complexity of the training required in oriental cookery and the importance of the continued employment of foreign chefs, even if Israelis learn the trade, due to the special nature of the ethnic kitchen and the working methods employed therein. Finally, the petitioners attached expert opinions from accountants who wrote that setting the wage of expert workers at a rate that is twice the average national wage will cause financial losses to a number of restaurants (P/24, P/25).

Discussion

4. "Freedom of occupation is the freedom to employ or not to employ", stated Justice D. Dorner in CJ 5936/97 *Lam v. Director General of the Ministry of Education, Culture and Sport* [5] (at p. 682), following Aharon Barak, who wrote at greater length: "A law that imposes an obligation to employ violates freedom of occupation. A law that requires not to employ violates freedom of occupation" (*Interpretation of Law* 3, 597 (1994). See also Ran Hirschl, "Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal

Economic Order", 46 *Am. J. Comp. L.* 427, 440 (1998)). Nevertheless, in HCJ 9722/04 *Polgat Jeans Ltd. v. Government of Israel* [6], this Court chose not to decide on the question of violation of the freedom of occupation of an employer who is restricted in the employment of foreign workers (*per* Justice A. Procaccia, para. 21).

This is the basic issue in the case at hand, and in providing a normative answer to it, two aspects of restriction of employment must be considered. The first is that aspect within the parameters of which the employment of foreign workers whose knowledge or skills are vital for the operation of the businesses in Israel is prohibited – whether absolutely or by a substantial reduction of the number of permits issued. These workers, as such, are not different from any other resource that is vital for the business, and the restriction of which threatens to negate the employer's ability to operate it (cf. HCJ 3872/93 *Mitral Ltd.. v. Prime Minister* [7], at p. 505). And what is the restriction of a businessman's ability to obtain the resources necessary for operating his business, if not a violation of his freedom of occupation?

> 'The policy of employment of foreign workers, with all the restrictions that apply by virtue thereof, must take into consideration, *inter alia*, the basic right of a person to freedom of occupation, and the possible violation of this right where his business requires the employment of foreign workers for whom it is difficult, or impossible, to find replacements amongst local workers …. In the implementation of its general policy, the competent authority ought to consider, *inter alia*, the occupational requirement of the individual, [and] the extent to which his business is liable to suffer if he is not permitted to employ a foreign worker' (*per* Justice A. Procaccia in HCJ 9723/01 *Levy v. Director of the Department of Industry and Services for Issuing Permits to Foreign Workers* [8], at pp. 93, 95).

Another dimension of the restriction of employment draws upon the economic aspect of the right to freedom of employment. This right, where it involves a commercial enterprise in which a person wishes to engage, also relates to the ability to engage in it under conditions of economic profitability. A person who proves that he is no longer able to run a

profitable business due to a governmental restriction has lifted the burden of proving that his freedom of occupation has been violated. The criterion ought to be objective, and it should examine whether a reasonable business owner could continue operating a business of a particular type at an acceptable level, despite the additional costs incurred as a result of the legal restriction. Relevant here are rules that restrict the employer's freedom of occupation in that they fix the wage conditions applicable to his workers, including those wages that raise his wage bill in a manner that forces him to reduce the number of workers. Indeed, "the question of whether the decision of the authority constitutes a violation of freedom of occupation must be examined materially and not formally. Freedom of occupation is [also] violated when the decision of the authorities indirectly affects the realization of freedom of occupation in practice" (*Lam v. Director General of the Ministry of Education, Culture and Sport* [5], at pp. 681, 693). At the same time, however, we will recall that the State is not under an obligation to create conditions of economic profitability, but only to refrain from actions that counteract such conditions.

Harming the Economic Interest of the Entrepreneur

5. The economic aspect of freedom of occupation extends even beyond the bounds of this right, for it involves financial interests of the person who claims to have been injured. The owner of a business, even if he is unable to prove that his freedom of occupation has been denied, may be harmed by the very fact that his business has become more expensive. What shall we call such harm? Does it amount to the restriction of a constitutional right to property, or is it positioned at a lower normative level? Does this additional cost, which in some aspects resembles costs that are incurred by virtue of the tax laws, bite into the property of the businessman? In the overall accounting, does it take something away from him? And to whom does this additional sum that must be paid "belong"? These are difficult and complicated questions. They involve different conceptions of the right to property. They confront a nuclear concept of the term "property" with a wider understanding of it. They raise the question of whether regulatory aspects of the actions of an administrative authority, upon the existence of which the ability of the businessman to realize his economic interest is largely dependent, violate his constitutional right. They deal with the

relationship between the owner of a business and his environment (Charles A. Reich, "The New Property", 73 *Yale L.J.* 733, 772 (1964)); Yoseph M. Edrey, "Constitutional and Normative Obstacles for the New Tax Legislation" 8 *Taxes* vol. 6 (1994) a20, 25; Joshua Weisman, "Constitutional Protection of Property: 42 *Hapraklit* 258, 267 (1995); Aharon Yoran, "The Extent of Constitutional Protection of Property and Judicial Intervention in Economic Legislation" 28 *Mishpatim* 443, 447 (1997); Eyal Gross, "Property Rights as Constitutional Rights and Basic Law: Human Dignity and Liberty" 21 *Iyunei Mishpat* 405, 410, 438 (1998); Gregory S. Alexander, "The Social-Obligation Norm in American Property Law", 94(4) *Cornell L. Rev.* 745 (May, 2009) and refs. therein).

Not for nothing did this Court refrain from ruling on issues such as these, when they arose in the past. "Does protection of property", asked Justice I. Zamir rhetorically, "also extend to restrictions on employment contracts, such as a provision concerning the minimum wage?" (CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [9], at p. 470. See also President A. Barak, *ibid.* at p. 431; HCJ 4562/92 *Zandberg v. Broadcasting Authority* [10], at p. 816; HCJ 4947/03 *Beer Sheba Municipality v. Government of Israel* [11], *per* Justice D. Beinisch, at paras. 7-8; HCJ 4593/05 *United Mizrahi Bank v. Prime Minister* [12], *per* President A. Barak, at para. 9); HCJ 956/06 *Association of Banks in Israel v. Minister of Communications* [13], *per* Justice E. Hayut, at para. 7). Indeed, the question of the damage to property and the extent of its protection requires extensive examination, and necessitates in-depth consideration of legal questions, both theoretical and practical, that are not simple.

However, even if the allegedly injured party did not succeed in lifting the burden of proof, the matter will not be at an end if he showed, instead, that a protected legal interest of his – even one of lesser import than a constitutional basic right – was violated. When I say "protected interest" I am referring to an interest that would justify the transfer of the burden of proof onto the shoulders of the State to show that the violation was lawful. An anchoring link is required, which would change a "regular" interest into one that gives rise to a claim *vis-à-vis* the authority. This link could lie, *inter alia*, in a statutory act that confers a right – one that does not enjoy constitutional status – by means of an administrative action in which the

person's interest is guaranteed, or through a person's reliance on existing government policy or legitimate expectations in light thereof. In the words of Justice Zamir:

> 'Protection is generally granted to vested rights. In certain circumstances, however, the interest of reliance or the need to fulfill legitimate expectations also justify the granting of protection to an interest that does not amount to a right in the accepted sense or to an interest that has not yet crystallized into such a right' (HCJ 5496/97 *Mardi v. Minister of Agriculture* [14], at p. 552. See also CA 4912/91 *Talmi v. State of Israel* [15], at p. 625; LCA 7678/98 *Benefits Officer v. Doctori* [16], *per* Justice A. Procaccia, at para. 20).

Judicial Review

6. When a governmental action violates a right or a protected interest, recourse to administrative law to examine the constitutionality of that action is justified. This involves an examination of the purpose of the action and the extent of the harm that it causes, and use is made of tools that originate in the criteria of the limitation clause in the Basic Laws (HCJ 4541/94 *Miller v. Minister of Defense* [15], at p. 138). These tools render the review of administrative actions more precise, and facilitate the judicial decision-making process (HCJ 3648/97 *Stamka v. Minister of the Interior* [16], at p. 777; CA 10078/03 *Shatil v. State of Israel* [17], at para. 22 of my judgment). Their efficacy, as well as the need to invest the process of judicial review in all its aspects of the administrative enterprise with a systematic and consistent character, justify their application both when a constitutional right is affected, and when a right or a protected interest which have a lesser normative status are affected (HCJ 5016/96 *Horev v. Minister of Transport* [18], at p. 43; HCJ 4638/07 *Al-Aqsa Al-Mubarak Co. Ltd. v. Israel Electrical Corp.* [19], *per* Justice U. Fogelman, at para. 8).

Even though identical tools are used for the examination, the distinction between violating a constitutional right and a value of a lower status finds expression in the contents that are revealed by application of these tools. I am referring mainly to the third criterion of proportionality, i.e. the "narrow" criterion, that places on one side of the scales the benefit of the administrative action and on the other, the damage, in all its aspects.

Clearly, where the right that has been violated is a constitutional right, the other side – counterbalancing the violation – must be more heavily weighted.

Assessment of the harm and determination of constitutionality require both a factual and a normative basis. We refer to the facts particularly at the stage of identifying the violation, in determining its magnitude and in examining proportionality. Most of the factual issues can only be resolved on the basis of information submitted by the parties to the court and proved in their evidence, since the judicial body is generally lacking independent tools with which to establish facts (CA *Angel v. Bodesky* [20], at p. 437; CA 1639/01 *Kibbutz Ma'ayan Zvi v. Krishov* [21], at p. 273; Barak *supra,* at p. 479). At first, the burden of submitting the information is borne by the petitioner, who is claiming a violation of a right. If he is successful, the burden moves onto the shoulders of the administrative authority, which must show that the violation is lawful (*United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [9], at p. 428, *per* President Barak; HCJ 366/03 *Commitment to Peace and Social Justice Association v. Minister of Finance* [22], paras. 10, 18 of my judgment). The factual examination need not necessarily reflect hindsight. A well-founded expectation that a factual development will eventuate is sufficient. However, the person making a claim about a situation that has not yet occurred bears the burden, which at times is not light, of showing a real chance that his expectations will be realized.

7. The normative aspect expresses itself primarily in the requirement of a proper purpose for the administrative act and in the test of "narrow proportionality" mentioned above. In investigating this aspect we must follow the dictates of logic and morality and the public consensus; we must identify the fundamental elements of the regime and of the prevailing social order; and we must locate and develop concepts of the good on which they are based. The advantage of the High Court of Justice here lies in the fact that it is an external body that is not involved in the administrative act; in its freedom from the political partisanship which is dominated primarily by passing trends; in the analytical tools which the law makes available to it, and in the special role reserved for it in advancing the basic principles of justice and morality, mandated by its name and by the judicial tradition that developed in the court from the early days of the State. At the same time, as

a body that is scrupulous in maintaining the separation of powers in the substantive sense, the Court will take care not to put itself in the shoes of the administrative authority in determining appropriate policy and implementing it, even if it believes that it would be better to adopt a different policy. "The application of powers vested in the court", wrote President M. Shamgar, "should be properly exercised in a way that refrains from turning the Court into a body that actively shapes the economic policy that **it** deems to be correct or preferable" (*United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [9], at p. 331 [emphasis in original]; see also HCJ 4769/90 *Zidane v. Minister of Employment and Welfare* [23], at p. 172; CA 524/98 *State of Israel v. Zion Insurance Co. Ltd.* [24], at p. 151; HCJ 6962/03 *Media Most Co. Ltd. v. Cable and Satellite Broadcasting Council* [25], at p. 30). Indeed, the court does not, and does not purport to engage in determining practical policy. The point of departure for judicial review is that insofar as the court is asked to deal with questions of policy, it will refrain from doing so. As stated in the specific context of the issue with which we are concerned:

> 'Tackling the issue of foreign workers is complex. It involves taking into consideration a wide range of interests. It involves taking into consideration the foreign workers themselves, their employers, and the needs of the Israeli economy and Israeli society as a whole. It gives rise to difficult professional, economic and social questions that require responses on different planes. In these circumstances, the intervention of the court in the selection of measures by the administrative authority for dealing with the issue confronting it will be narrow and limited' (*Polgat Jeans Ltd. v. Government of Israel* [6], at para. 14).

Armed with all the above, I am now able to examine the arrangement that is the subject of this case.

Employment of Chefs from Overseas in the Field of Ethnic Restaurants

8. The phenomenon of migrant workers has a significant impact on the Israeli economy and on the employment market in general. Even those who support the phenomenon cannot deny the complex problems to which it gives rise, some of which are interconnected. Several of them have been dealt with in past judgments of this court (HCJ 4542/02 *"Kav La'Oved"*

Association v. State of Israel [26]; AAA 1347/07 *Gorong v. Minister of the Interior* [27]; HCJ 10843/04 *Helpline for Foreign Workers v. State of Israel* [28]), and it will suffice to mention the detriment to the employment of Israeli workers, the rate of pay that is dragged downwards due to the effect of cheap labor, the negative treatment of the "foreign" worker – the few legal protections result in consistently decreasing his marketability – and the problems of the existence of a large sector that is not perceived to be an integral part of Israeli society, although it has lived and functioned within the society for many years. After a long period in which governments in Israel ignored these problems, a policy for dealing with them began to take shape. There will be those who argue with the degree of success of this policy, with the suitability of the measures that are adopted within its framework or with the conceptions on which it is based. But it would seem that it is no longer possible to avoid the conclusion that without regulatory intervention, no response will be found for the whole set of problems as described, in that market forces alone are inadequate to provide a solution, as reality has proved time after time. In order for this policy to succeed, it must take a comprehensive view of the issue. This is no simple task that has been laid on the shoulders of the State, in view of the complexity of the problems, the myriad interests and interested parties that are involved, and the direct and indirect effects of any policy that will be adopted on the economy, on society and on the individual.

9. Do the decisions that are the subject of this proceeding have an inordinately damaging effect on the protected interests of the individual, i.e. of the restaurateur who wishes to employ foreign chefs? We are concerned, first and foremost, with the factual question. The petitioners laid on our doorstep – as I mentioned above – evidence of a violation of their freedom of employment – a violation which according to them has already occurred and will become even more severe in future. In my view, however, the material that was submitted does not constitute sufficient grounds for the existence of a violation of this constitutional right, in any of the aspects presented above.

First, it is clear that the government decisions do not prevent the restaurateurs from employing foreign workers. Permits will be issued, even if their number will be lower than in the past and even if the cost involved in

obtaining them is higher. I have not found in the petitions, nor even in the oral pleadings, a claim that the number of permits for the employment of foreign experts in each restaurant is not in keeping with the required number of workers. The petitioners do not argue that even were they prepared to accept the pecuniary decree, the number of permits offered to them would not meet their employment needs. Indeed, the Government does not wish to deny the restaurateurs the ability to benefit from the particular characteristics of those workers – which give them, at least at present, an advantage over the employment of Israelis, and I am referring to the knowledge, the skills, the work ethic and even to appearance and language. On the contrary, in acknowledging that these workers have special characteristics that render them sought after in the local restaurant sector, the Government seeks to entrench their position such that on the one hand, a person who does not meet these special criteria will not be employed, and on the other, those who are employed will be suitably recompensed. This policy, so it has already been ruled, attributes suitable weight to the interest of the employer in allocating permits for the employment of foreign workers (*Polgat Jeans Ltd. v. Government of Israel* [6], at para. 15).

The crux of the matter is, therefore, the economic profitability of employing those workers under the new conditions, and in practice - the relationship between the commercial advantages inherent in their employment and the cost to the employer. There is no doubt that setting a wage rate at twice the national average greatly increases the latter component. But will the effect on the benefit that the employment of those workers brings to the business be so drastic as to negate the profitability of the enterprise? I cannot deduce this from the information that was submitted by the petitioners. The expert opinions relating specifically to a limited number of restaurants – four out of two hundred and fifty (P/24) – which, it was argued, would face financial loss, do not suffice, nor does the general statement that this would be the fate of "many other restaurants" (P/25). What is required is specific data on the effect of the new policy on this branch, and the petitioners did not provide this. More importantly, the expert opinions that were submitted relate to the existing system of management of the restaurants. Nothing in the data that was presented indicates that it is not possible to operate an ethnic restaurant successfully, in a reasonable manner, even with the new rates of pay.

At the present time it is difficult to say whether implementation of the new policy will deprive the ethnic restaurants in Israel of their ability to exist as profitable enterprises or affect their special cultural character, or whether the petitioners will succeed in finding a solution for the problems that have arisen, particularly if the State provides some support. The unknowns are numerous. Is the wage that is currently paid to non-Israeli chefs reflective of their true market power? Is the price level at the ethnic restaurants, and their number, in keeping with the demand for the service that they offer? Will the new policy, along with the effort that is being invested in the training of Israelis in the art of ethnic cookery, lead to an opening up of the branch to Israeli labor? Will the owners succeed in adapting themselves to the new regulatory policy? These and other questions require solutions in real life. I have not been offered even the beginning of a satisfactory answer to them, and therefore I cannot establish that the petitioners laid the grounds for a conclusion concerning a violation of their freedom of employment. The same applies with respect to the question of a violation of a property right, which was not even mentioned in the petitioners' pleadings. They did not base their petitions on this issue, and did not submit evidence to prove it. What they omitted, the court will not complete in their stead.

10. The foundation has not, therefore, been laid for determining that any of the constitutional rights of the petitioners has been violated. Things are different with respect to the question of damage to a protected economic interest, the status of which is inferior to that of a constitutional right. There is no doubt that even if the petitioners succeed in keeping their businesses operating under the new conditions, the direct effect of the new policy – the need to pay a wage that is higher than the norm and an increase in costs – will worsen their financial situation. Indeed, the petitioners have no vested right to be permitted to employ workers at low wages, but a change in the policy that prevailed for many years, in the framework of which the wages of foreign workers were not dealt with, provides the required opening for putting the decisions to the tests of proper purpose and proportionality.

I have already discussed the proper nature of the purpose, and we are therefore left with the question of proportionality. In my view, the State succeeded in showing that its decisions were compatible with the requirements of all three tests of proportionality. First, at the present time

and as long as reality has not proved otherwise, there is no basis for challenging the assumption concerning the existence of a rational connection between the policy that is implemented and the purpose that the government wishes to achieve. Support for the State position can be found not only in the dictates of common sense, but also in the data that was submitted by learned Counsel for the State, Adv. M. Zuk, which relates to what is happening in other branches in which foreign workers are employed. The data indicates a clear connection between the change in the rate of employment of non-Israeli workers, and the change in the number of Israeli workers employed in the agricultural sector (para. 56 in the State's response) and in the construction sector (para. 55). In the latter sector, the results of the government policy to limit the dimensions of employment migration, which led to a significant increase in the number of Israelis who were employed, was demonstrated (*ibid*.). The argument of the petitioners concerning the exclusive characteristics of the restaurant business is not devoid of logic, but they will have to back it up with factual data, which at present they do not have.

11. On the matter of the alternative measure, I will mention again the combined aims of the government policy: to increase the number of Israelis employed; to narrow the gap between the value of labor of the employee – Israeli and non-Israeli – and between the rate of pay he receives, and to reduce the number of foreign workers who are not essential to the employer. I find it difficult to envisage any alternative to the solution adopted by the State that could achieve these aims. The petitioners' proposal to employ a certain number of Israelis per each foreign worker does not meet the requirement, since it would appear that a fundamental element in achieving those aims is raising the status of the said field of employment. In these circumstances, the foreign workers would continue to be employed at low rates of pay, similarly low pay would be offered to Israelis, and the latter will continue to shun this field of employment. As for the rate of pay that was set, it would appear that any rate that was set would have been arbitrary to some extent, for in the nature of such things it is difficult to quantify precisely the value of the employment of foreign experts in each of the restaurants, as it is in relation to each of the other branches of labor. The main thing, in my view, is that the rate which is set is acceptable and not obviously excessive. Finally, I will say that the new arrangement has been

implemented gradually, and it has not struck the petitioners like a thunderbolt out of the blue. In this way, undoubtedly, the detrimental effect on them has been reduced in a manner befitting the rationale underlying the second criterion of proportionality.

12. As for the balance of benefit: here, too, the petitioners are hindered by the absence of factual data which could indicate the extent of anticipated damage in all the areas that they claim. At present, the basis has not been established for the claim whereby the policy that has been adopted will reduce the number of Israelis employed, because it will affect the leisure culture of the public, harm the tourist industry or widen the gap between the different classes in Israel. All that has been placed on the side of the drawbacks is the added costs to the restaurateurs – an economic interest which *prima facie*, and from a normative aspect, does not counterbalance the potential benefit in realizing the government aims. The balance that was struck is not without foundation. It is not unreasonable. Its source does not lie in some governmental caprice, but rather, in policy that was formulated after extensive investigation of the subject, and which is compatible with the economic and social agenda of the Government. It does not, therefore, warrant judicial intervention. How the balance of benefit will appear with the passage of time and as the results of the selected process become clear, only time will tell. At the present point in time, the State has succeeded, in my opinion, in showing that this balance tilts in favor of its decisions, and with this it has fulfilled its obligation to demonstrate that the harm caused by these decisions does not exceed that which is required.

Damage to Other Protected Values

13. I also find the claim of discrimination between employers, which is based on the different rules governing each of the branches requiring foreign workers, to be unsubstantiated at present. This is a dual-pronged argument: first, that the policy of reducing the number of permits was not implemented in relation to other occupations, i.e. a similar norm should have been instituted not only in relation to restaurants but in all the branches that avail themselves of foreign workers; secondly, the determination in relation to the wage that must be paid is not sufficiently sensitive to the special characteristics of the branch of ethnic restaurants, which is to say that the branches should have been differentiated. The reason for dismissing the

claim of discrimination, in both its aspects, does not lie in this apparent contradiction, but in arguments touching upon the substance of the matter.

First, in relation to the number of permits: It has already been ruled that each branch in the economy has its own needs, and each branch has a policy befitting its own context.

> 'Policy relating to branches is directly influenced by the needs of the branch for personnel of different types, and it changes from branch to branch in accordance with the structure, the requirements and the particular problems of each. This is a matter of different arrangements that are engendered by different requirements, and this does not give rise to a claim of discrimination' (*Polgat Jeans Ltd. v. Government of Israel* [6], at para. 17).

Accordingly, it is possible to adopt a policy that distinguishes between the different branches on the basis of the degree of necessity of employing non-Israeli workers. In the case before us, the Government decided that in the industrial and services sectors, insofar as there is a need for employing non-Israelis, it is experts that are required. These, as I have already ruled, are available to the restaurateurs, as long as they fulfill the wage requirements.

As for the rate of pay: the argument of the petitioners is that "it is not possible to compare an expert oceanographer with an expert heart surgeon, architect, builder or expert ethnic chef" (para. 32 in HCJ 8035/07), which *prima facie* seems to be a seductive argument, but which in effect is worthless. It must be recalled that the government decisions are not aimed at fixing a unified wage rate for immigrant workers. Rather, they seek to set a minimum level below which employment of a non-Israeli will not be permitted, thus realizing the principle that requires that there be an advantage to hiring a foreign worker, other than his willingness to work for a low wage. In order for the argument concerning discrimination to succeed, the petitioners would have had to show that in other branches, such as those specified above, the wage rate that was fixed was not effective in the realization of this principle. Not only did the petitioners not do so – once again the factual aspect of their petition was deficient – but it seems that in most of the occupations to which the argument relates, that principle is

anyway realized by virtue of the special skills of the workers, to the extent that there is no longer a need to guarantee it by setting a particular wage rate. Justice Procaccia discussed this as well, writing as follows:

> 'In the industrial sector, the arrangement for issuing permits for the employment of foreign workers with special expertise is built on high wages. In the fields of agriculture and construction, the arrangement is built on the employment of workers with regular skills. This difference reflects on the level of wages paid to the workers' (*Polgat Jeans Ltd. v. Government of Israel* [6], at para. 17).

At the same time, I will emphasize what seems to me to be obvious, i.e. that the declarations of the State concerning the common normative basis for its policy in each of the branches that have recourse to migrant workers, cannot remain on paper alone. Wherever the State encounters difficulty in standing by its word and realizing the aims that served as its beacon in this matter – and I need only mention the discussion in the abovementioned case of *Helpline for Foreign Workers v. State of Israel* [28] – it will have difficulty in remaining convincing about its proper management of the whole issue.

14. If I saw fit to dwell further on any of the arguments of the petitioners, it would be on the matter of the right of pleading, or what they call the "duty to consult" prior to the said decisions being taken. As the petitioners themselves demonstrated, the formation of the present policy was preceded by a long process of investigation throughout which – as transpires from the appendices to the petitions – the petitioners expressed their position openly, by means of a serious lobby of public figures, with appearances in committees charged with the subject and in letters that were sent to the competent bodies. In these circumstances, there is no doubt that their position did not remain unheard, and it is as well-known as it need be to the decision-makers. Thus the purpose underlying the right to plead has been realized.

I do not make light of the petitioners' concerns. It is natural that a person looks out for his own interests. It is also natural that the owner of a business strives to maximize his profits. But the Government – with a wide perspective – sought to provide a response to problems that extend beyond

the particular concern of the petitioners, and the latter have not, as yet, succeeded in showing that they cannot adapt themselves to this policy, or that its disadvantages, overall, outweigh its advantages. The burden of proof required for establishing grounds for judicial intervention has therefore not been lifted.

For this reason, I propose to my colleagues that we deny the petitions and cancel the interim order that was issued. I further propose that we obligate the petitioners, in each of the petitions, to pay the respondents costs in the amount of 20,000 NIS.

Justice S. Joubran

I agree.

Justice Y. Elon

I agree.

Decided as per the judgment of Justice E. E. Levy.

16 Iyyar 5768

21 May 2008