HCJ 5853/07

Emunah — National Religious Women's Organization

v.

1. Prime Minister, Mr Ehud Olmert

2. Government of Israel

3. Knesset

4. Haim Ramon

HCJ 5891/07

1. Tmura — the Legal Struggle against Discrimination Centre

2. Ahoti for Women in Israel

v.

1. Prime Minister, Mr Ehud Olmert

2. Haim Ramon

HCJ 5914/07

Legal Forum for the Land of Israel

v.

1. Prime Minister, Mr Ehud Olmert

2. Government of Israel

3. Attorney General

4. Knesset

5. Haim Ramon

The Supreme Court sitting as the High Court of Justice

[6 December 2007]

Before Justices A. Procaccia, A. Grunis, E. Arbel

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

Facts: MK Ramon was convicted of committing an indecent act. According to statute, a person is barred from being a member of the Knesset or a cabinet minister only if he has been convicted of an offence involving moral turpitude *and* is given a custodial

sentence. The court that sentenced MK Ramon did not give him a custodial sentence and it held that the offence did not involve moral turpitude.

Shortly after serving the sentence of community service, MK Ramon was appointed a member of the government with the position of Deputy Prime Minister. The appointment was approved by the Knesset. The petitioners challenged the appointment on the ground that, in view of the conviction, the appointment was unreasonable in the extreme.

Held: (Majority opinion — Justice Procaccia) There is no legal basis for cancelling the appointment on the ground of extreme unreasonableness. Since the court that sentenced MK Ramon held that the offence did not warrant a custodial sentence and did not involve moral turpitude, the government considered the question of MK Ramon's conviction before making the appointment and the Knesset approved the appointment, the decision to appoint MK Ramon falls within the margin of reasonableness and judicial intervention is not warranted.

(Majority opinion — Justice Grunis) The ground of unreasonableness in judicial review is highly problematic, especially with regard to a decision of a collective body where it is difficult to know the reasons for the decision. It would appear that sometimes, when the court intervenes in a decision because of unreasonableness, it is actually replacing the discretion of the authority with its own discretion. Consequently, the use of relatively narrower and more concrete grounds, such as irrelevant reasons, irrelevant purposes or discrimination, should be preferred to the use of the ground of unreasonableness. In the specific circumstances, the court is no better placed than any citizen of the state to determine whether the decision is unreasonable. Therefore the court should refrain from intervening in the decision.

(Minority opinion — Justice Arbel) The decision to appoint MK Ramon at this time gives rise to a difficulty in the ethical sphere because it inherently undermines the values of the rule of law, and a difficulty in the public sphere because it undermines public confidence in those persons in the highest echelons of power — the government and its members. *Prima facie* the decision to make the appointment is tainted in a manner that goes to the heart of the administrative discretion. The rapid promotion to a very senior position so soon after the conviction and the serving of the sentence, after the court said what it had to say on the subject of MK Ramon's conduct and credibility, sends a negative message to persons in positions of authority, public figures, government officials, potential complainants and the public as a whole. The appointment should therefore be set aside as unreasonable in the extreme.

Petition denied by majority opinion (Justices Procaccia and Grunis, Justice Arbel dissenting).

Legislation cited:

Basic Law: The Government , 5761-2001, ss. 1, 6, 6(c), 13(d), 15, 23(b), 28(a).

Basic Law: the Knesset, ss. 1, 6(a), 42, 42A(a).

Civil Service (Appointments) Law, 5719-1959, s. 46(a)(1).

Criminal Register and Rehabilitation of Offenders Law, 5741-1981.

Municipalities Ordinance, s. 120(8).

Penal Law, 5737-1977, s. 348(c).

State Comptroller Law [Consolidated Version], 5718-1958

Israeli Supreme Court cases cited:

[1] HCJ 6163/92 *Eisenberg v. Minister of Housing* [1993] IsrSC 47(2) 229; **[1992-4] IsrLR 19**.

[2] HCJ 652/81 *Sarid v. Knesset Speaker* [1982] IsrSC 36(2) 197; **IsrSJ 8 52**.

[3] BAA 11744/04 *Ziv v. District Committee of the Bar Association* (unreported decision of 8 August 2005).

[4] CSA 4123/95 *Or v. State of Israel* [1995] IsrSC 49(5) 184.

[5] HCJ 4523/03 *Bonfil v. The Honourable Justice Dorner* [2003] IsrSC 57(4) 849.

[6] HCJ 436/66 *Ben-Aharon v. Head of Pardessia Local Council* [1967] IsrSC 21(1) 561.

[7] HCJ 5757/04 *Hass v. Deputy Chief of Staff, General Dan Halutz* [2005] IsrSC 59(6) 97.

[8] HCJ 5562/07 *Schussheim v. Minister of Public Security* (unreported decision of 23 July 2007).

[9] HCJ 3094/93 *Movement for Quality in Government in Israel v. Government of Israel* [1993] IsrSC 47(5) 404; **IsrSJ 10 258**.

[10] HCJ 4267/93 *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [1993] IsrSC 47(5) 441.

[11] HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister* [2003] IsrSC 57(6) 817; **[2002-3] IsrLR 311**.

[12] HCJ 2533/97 *Movement for Quality Government in Israel v. Government of Israel* [1997] IsrSC 51(3) 46.

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

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

[15] LFA 5082/05 *Attorney General v. A* (unreported decision of 26 October 2005).

[16] CA 3398/06 *Antitrust Authority v. Dor Elon Energy in Israel (1988) Ltd* (unreported decision of 15 June 2006).

[17] HCJ 5261/04 *Fuchs v. Prime Minister of Israel* [2005] IsrSC 59(2) 446; [2004] IsrLR 466.

[18] HCJ 1400/06 *Movement for Quality Government in Israel v. Deputy Prime Minister* (unreported decision of 6 March 2006).

[19] HCJ 971/99 *Movement for Quality Government in Israel v. Knesset Committee* [2002] IsrSC 56(6) 117.

[20] HCJ 325/85 *Miari v. Knesset Speaker* [1985] IsrSC 39(3) 122.

[21] HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [2001] IsrSC 55(4) 800.

[22] HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [1981] IsrSC 35(4) 118.

[23] HCJ 1843/93 *Pinchasi v. Knesset* [1994] IsrSC 48(4) 492.

[24] HCJ 1139/06 *Arden v. Chairman of the Finance Committee* (unreported).

[25] HCJ 9156/06 *Pollak v. Members of the Seventeenth Knesset* (unreported).

[26] HCJ 12002/04 *Makhoul v. Knesset* (unreported decision of 13 September 2005).

[27] HCJ 11298/03 *Movement for Quality Government in Israel v. Knesset Committee* [2005] IsrSC 59(5) 865.

[28] HCJ 4668/01 *Sarid v. Prime Minister* [2002] IsrSC 56(2) 265.

[29] HCJ 1284/99 *A v. Chief of General Staff* [1999] IsrSC 53(2) 62.

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

[31] HCJ 194/93 *Segev v. Minister of Foreign Affairs* [1995] IsrSC 49(5) 57.

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

[33] HCJ 7074/93 *Suissa v. Attorney General* [1994] IsrSC 48(2) 748.

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

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

[36] HCJ 11243/02 *Feiglin v. Chairman of Election Committee* [2003] IsrSC 57(4) 145.

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

[38] HCJ 103/96 *Cohen v. Attorney General* [1996] IsrSC 50(4) 309.

[39] CrimA 115/00 *Taiev v. State of Israel* [2000] IsrSC 54(3) 289.

[40] HCJ 7367/97 *Movement for Quality Government in Israel v. Attorney General* [1998] IsrSC 52(4) 547.

[41] HCJ 8192/04 *Movement for Quality Government in Israel v. Prime Minister* [2005] IsrSC 59(3) 145.

[42] HCJ 5364/94 *Welner v. Chairman of Israeli Labour Party* [1995] IsrSC 49(1) 758.

[43] HCJ 73/85 *Kach Faction v. Knesset Speaker* [1985] IsrSC 39(3) 141.

[44] HCJ 1956/91 *Shammai v. Knesset Speaker* [1991] IsrSC 45(4) 313.

[45] HCJ 108/70 *Manor v. Minister of Finance* [1970] IsrSC 24(2) 442.

[46] HCJ 491/86 *Tel-Aviv-Jaffa Municipality v. Minister of Interior* [1987] IsrSC 41(1) 757.

[47] HCJ 4769/90 *Zidan v. Minister of Labour and Social Affairs* [1993] IsrSC 47(2) 147.

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

[49] HCJ 5131/03 *Litzman v. Knesset Speaker* [2005] IsrSC 59(1) 577; **[2004] IsrLR 363**.

[50] CA 311/57 *Attorney General v. M. Diezengoff & Co. [Navigation] Ltd* [1959] IsrSC 13 1026; **IsrSJ 3 53**.

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

[52] HCJ 3379/03 *Mustaki v. State Attorney's Office* [2004] IsrSC 58(3) 865.

[53] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.

[54] HCJ 89/64 *Greenblatt v. Israel Bar Association* [1964] IsrSC 18(3) 402.

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

[56] HCJ 4140/95 *Superpharm (Israel) Ltd v. Director of Customs and VAT* [2000] IsrSC 54(1) 49.

[57] HCJ 10934/02 *Kefar Gaza Kibbutz Agricultural Settlement Cooperative Society v. Israel Land Administration* [2004] IsrSC 58(5) 108.

[58] HCJ 4585/06 *Families of the October 2000 Victims Committee v. Minister of Public Security* (unreported decision of 24 October 2006).

For the petitioner in HCJ 5853/07 — P. Maoz, M. Hoffman.

For the petitioners in HCJ 5891/07 — Y. Bitton, E. Moreno.

For the petitioner in HCJ 5914/07 — J. Fuchs.

For the prime minister, the government and the Attorney General — D. Briskman.

For the Knesset — N. Elstein.

JUDGMENT

Justice A. Procaccia

We have before us three petitions that seek to prevent the appointment of MK Ramon as a minister in the Israeli government. In the meanwhile, MK Ramon joined the Government and was appointed a minister with the title of Deputy Prime Minister. The reliefs sought in the petitions, in view of the circumstances, are therefore that we declare the appointment of MK Ramon as a cabinet minister unreasonable in the extreme, with the result that he is disqualified from holding office in the Government, and that we order the appointment to be cancelled (the alternative reliefs stated in HCJ 5914/07 and HCJ 5853/07).

Background and proceedings

2. On 23 August 2006 an indictment was filed in the Tel-Aviv Magistrates Court against MK Ramon for an offence of an indecent act without consent, in contravention of s. 348(c) of the Penal Law, 5737-1977. The indictment alleged that while he was a member of the Knesset and Minister of Justice, on 12 July 2006, in the Prime Minister's office, MK Ramon kissed and stuck his tongue into the mouth of the complainant, without her consent. The complainant is an IDF officer who was working at that time in the office of the Prime Minister's military attaché.

On 20 August 2006 MK Ramon gave notice of his resignation from the government, and this resignation came into effect on 22 August 2006. While the criminal proceedings were pending, MK Ramon did not hold office as a minister in the government.

On 31 January 2007 the Tel-Aviv–Jaffa Court convicted MK Ramon of the offence with which he was charged.

3. At the sentencing stage, MK Ramon asked the court to cancel his conviction, relying on a report of the probation service that was submitted in his case. The report recommended that community service be imposed upon him without a conviction. The position of the defence and the probation service with regard to cancellation of the conviction was based on a classification of the offence as one of the most minor of sex offences, MK Ramon's lack of prior convictions, his many years of public service and his contribution to public life in Israel. Emphasis was also placed on the significant damage that would result from the conviction of MK Ramon as an elected official, and the serious harm that he and his family would suffer should the conviction be upheld. The prosecution opposed the cancellation of

the conviction and emphasized the nature of the offence and the fact that it was committed by a member of the Knesset and a government minister against an army officer serving in the Prime Minister's office. It also discussed the injury caused to the complainant by the act, and the manner in which the defence had conducted the case, which, it argued, had caused her particular harm. The prosecution also opposed the cancellation of the conviction on the ground that MK Ramon did not express sincere regret during the trial, which is a basic requirement for cancelling a conviction - but only at the sentencing stage. It particularly emphasized the need to send a message to the public that would deter similar offences. The prosecution asked the court to hold that the offence committed by MK Ramon was one that involved moral turpitude.

4. After considering the question of cancelling the conviction and examining all of the relevant considerations, the Magistrates Court arrived at the conclusion that the conviction should be upheld. In so doing, it preferred the public interest over the interest of MK Ramon. It held that cancelling the conviction might obscure the public message required in the circumstances and minimize the criminal aspect of the act, and it therefore denied the defence's request in this regard.

Notwithstanding, when it considered the actual sentence, the court addressed the question of the moral turpitude involved in the offence, in view of the prosecution's request during its arguments that the sentence should determine that the circumstances in which the offence was committed by the defendant involved moral turpitude. The defence opposed this request. The court rejected the prosecution's request, and it explained its position as follows (para. 16e of the sentence):

'In the defendant's case, we have reached the conclusion that the overall circumstances in which the offence was committed do not justify a determination that the offence involved moral turpitude. The isolated and unplanned act was committed by the defendant following a meaningless conversation, in a mental state of indifference. The act lasted two to three seconds and ended immediately. Allowing the conviction to stand contrary to the recommendation of the probation service and the finding that the defendant's acts did not involve moral turpitude constitutes a proper balance between the different interests and a fair expression of the different factors that have arisen in this case, including considerations of proper legal policy.'

The court sentenced MK Ramon to 120 hours of community service, and ordered him to compensate the complainant in a sum of NIS 15,000. It

rejected the prosecution's request that it should give MK Ramon a suspended prison sentence. It said in the sentence, *inter alia* (paras. 17 to 20):

'In his final remarks, counsel for the defendant asked the court to show his client justice and mercy; we are receptive to this and will do so in sentencing.

The defendant's punishment is his conviction. We are aware of the mitigating circumstances set out above, and they have led us to think that the defendant's sentence should be minimal, so that the future harm that he will suffer will be in proportion to the nature of the offence and the circumstances in which it was committed.

Here we should point out that in the sentence we have taken into account s. 42A(a) of the Basic Law: The Knesset, and we have adjusted the sentence to its provisions.

We therefore order the defendant to perform 120 hours of community service, in accordance with a programme that will be drawn up by the probation service.

We order the defendant to compensate the complainant in a sum of NIS 15,000.'

5. The judgment of the Magistrates Court became absolute when no appeal was filed by either of the parties. Even though the Attorney General was of the opinion that the circumstances of the offence of which MK Ramon was convicted do involve moral turpitude, he decided not to file an appeal on this issue, but his position on the question of moral turpitude remains unchanged (letter of the senior assistant to the Attorney General of 14 May 2007 (respondent's exhibit 3)).

6. After the sentence was passed, MK Ramon performed the community service that was imposed on him. Following changes in the composition of the Government, and especially as a result of the resignation of the Minister of Finance, the Prime Minister decided to reshuffle the Cabinet. On 4 July 2007 the Government decided unanimously to accept a proposal of the Prime Minister and, within the framework of its authority under s. 15 of the Basic Law: The Government, to appoint MK Ramon as a cabinet minister without portfolio, with the title of Deputy Prime Minister.

7. On the same day, 4 July 2007, Minister Meir Sheetrit, on behalf of the Government, notified the Knesset that the Government had decided to appoint MK Ramon a member of the cabinet, and he requested the Knesset's approval of this decision under s. 15 of the Basic Law: The Government. In Minister Sheetrit's notice to the Knesset, he said, *inter alia*, the following:

'I respectfully notify the Knesset that at its meeting today the Government decided as follows: Appointing ministers to the cabinet in accordance with section 15 of the Basic Law: The Government… I would like to say… before I give the notice, that the Prime Minister in his remarks at the cabinet meeting at which these changes to the cabinet were approved, said the following:

"MK Ramon was convicted in court. It should be pointed out that the court, when it considered the sentence, expressly determined the sentence in such a way that would not prevent him from engaging in public activity in the Knesset and the Government, even though the prosecution requested that it rule that his case involved moral turpitude, and also sought a sentence that would prevent him from returning to the Knesset and the Government. I have considered the appointment of Haim Ramon and all the factors relevant to this — on the one hand, the judgment, the sentence and everything related thereto; on the other hand, the contribution that the appointment of Haim Ramon will make to the Government, the Knesset and his (*sic*) work as Deputy Prime Minister. After I considered the matter, I decided that in the balance between the considerations, those supporting his appointment override those that oppose it, and therefore I made the decision after I studied the court's decision on the matter."

On the basis of these remarks of the Minister Sheetrit the Prime Minister proposed, and the Government decided, to appoint MK Haim Ramon as an additional member of the cabinet.'

8. Following Minister Sheetrit's notice, a debate took place in the plenum of the Knesset with regard to the Knesset's approval of the Government's decision to appoint MK Ramon to the cabinet. Ultimately the Government's decision was approved by a majority of the Knesset, with 46 members of Knesset for, 24 members of Knesset against, and no abstentions. After the Knesset decision, MK Ramon made the declaration of allegiance and his appointment as cabinet minister came into effect.

The foregoing is the factual background underlying the petitions.

The petitioners' arguments

9. Two of the petitions were filed by women's organizations, and one petition was filed by the Legal Forum for the Land of Israel, which is a group of lawyers that is active, *inter alia*, with regard to issues concerning proper Government in the State of Israel.

The petitioner in HCJ 5853/07, *Emunah — the National Religious Women's Organization*, claims that the appointment of MK Ramon as a cabinet member and as Deputy Prime Minister is a step that is unreasonable in

the extreme, and deals a mortal blow to the organs of government and the dignity of the cabinet. It says that this appointment attests to improper exercise of discretion by the Prime Minister, the Government and the Knesset, being in contravention of tests laid down in case law for the appointment of public officials to various public offices. It particularly emphasizes in its arguments the criteria laid down by this Court in HCJ 6163/92 *Eisenberg v. Minister of Housing* [1] and it claims that Ramon's appointment as a cabinet minister is inconsistent with the tests laid down in that case with regard to the appointment of a person with a criminal record to public office. It goes on to argue that the rule in *Eisenberg v. Minister of Housing* [1] was later developed and extended to various situations in which a candidate for public office has been disqualified even when he has not been convicted in a criminal trial but certain circumstances in his past and his conduct indicate that he is unsuited to the position from the viewpoint of his moral standards and integrity. According to the petitioner, MK Ramon's conviction for a sex offence, even though it was held that it did not involve moral turpitude, is inconsistent with his appointment as a cabinet member in view of the circumstances in which the offence was committed and in view of the short period of time that has passed since he was convicted and served his sentence.

The petitioners in HCJ 5891/07 emphasize what they view as the serious harm to women occasioned by the appointment of MK Ramon as a cabinet minister. They say that the appointment is inconsistent with the need to protect the status, safety, liberty and dignity of women. It conflicts with their right to protection in their lives. According to their approach, appointing a person as a cabinet minister a short time after he has been convicted of a sex offence not only injures the victim of the offence but also all women in Israel, and seriously undermines public confidence in its elected officials. The finding of the Court that the offence does not involve moral turpitude does not exempt the Prime Minister, the Cabinet and the Knesset from exercising reasonable discretion with regard to the appointment. In the circumstances of this case, they are of the opinion that the discretion was exercised in an extremely unreasonable manner, and therefore the decision to make the appointment should be cancelled.

The petitioner in HCJ 5914/07 also claims that the decision to appoint MK Ramon as a cabinet minister is unreasonable in the extreme, and it involves a serious injury to Israeli women in general and victims of sex offences in particular. According to case law, a cabinet member should resign when an indictment is filed against him, and from a normative viewpoint this rule should be used as a basis for determining the proper normative standard for

returning to public office after a conviction. It follows that only if the defendant is acquitted in his trial, or at the most if a judgment is given in his case without a conviction, may he return to hold office as a cabinet member. But once MK Ramon was convicted of an indecent act, even if it was held that no moral turpitude was involved, he should not be allowed to return to the cabinet until the passage of a significant cooling-off from the time of his conviction. The petitioner goes on to argue that an analogy should be drawn in this case from the existing arrangement in the civil service, where a person would not be given a position if he was convicted of an offence of an indecent act, until the prescription period under the Criminal Register and Rehabilitation of Offenders Law, 5741-1981, has passed. It is argued that it is unreasonable that the normative standard for appointing an elected official to the cabinet should be lower than this.

The respondents' position

10. The state in its reply refers to s. 6 and s. 23(b) of the Basic Law: The Government. It claims that these provisions set out the detailed statutory arrangement concerning a person's eligibility to serve as a cabinet minister even though he has been convicted in a criminal trial, both for the purpose of an appointment to the cabinet (s. 6) and for the purpose of terminating the office of a member of the cabinet (s. 23). The law provides in s. 6 that a person who has been convicted of an offence and sentenced to imprisonment may not be appointed to the cabinet if on the date of the appointment seven years have not passed since the date on which he finished serving his sentence or judgment was given, whichever is the later. These two cumulative conditions of a criminal conviction and a custodial sentence (including a suspended sentence) create a presumption of moral turpitude if the period specified in the law has not yet passed since the sentence was completed or the judgment was given. This presumption can be rebutted by a decision of the chairman of the Central Elections Committee that the offence does not involve moral turpitude. Such a decision is possible only when the court has not determined that the offence involves moral turpitude. Regarding a member of the cabinet who is convicted of a criminal offence, the Basic Law provides in s. 23 that his office will be terminated if he is convicted of a criminal offence which has been determined by the court as involving moral turpitude.

The state claims that the law created formal tests as to whether a person convicted of a criminal offence may hold office as a cabinet minister both for the purpose of appointing someone with a conviction as a cabinet member and for the purpose of whether someone who was convicted while serving as a

cabinet member may continue to hold office. These tests were intended to create certainty and stability in applying the proper criteria for holding office as a cabinet member. It follows that since the court held that the office committed by MK Ramon does not involve moral turpitude and it refrained from imposing a custodial sentence, his appointment to the cabinet was consequently sanctioned, and there is no legal impediment to appointing him.

The state agrees that there may be exceptional situations in which a person satisfies the criteria for holding office as a cabinet minister according to the tests in the Basic Law: The Government, and yet there will still be an impediment to appointing him as a cabinet member, but this is not one of those cases. In this case, the balance struck by the court in the criminal proceeding — where, on the one hand, it determined that MK Ramon should be convicted of the offence that he committed but, on the other hand, it went on to hold that the offence did not involve moral turpitude — should be upheld. The law provides that the trial court in a criminal case is the competent forum for determining whether the offence committed by the defendant involves moral turpitude, and the High Court of Justice should not act as a court of appeal regarding the trial court's decision in this respect, since this would undermine certainty and stability in this matter.

Moreover, the state claims that the discretion of the Prime Minister and the government when appointing cabinet ministers is very broad, and the court should only intervene in such matters on rare occasions. The Knesset's approval of the Government's decision to make the appointment adds a dimension of parliamentary involvement in the appointment process, and this reduces the margin for judicial intervention in the appointment process even further.

11. The Knesset's position is that the petitions should be dismissed *in limine*, since there was no defect in the appointment process. The plenum of the Knesset held a debate on the matter and approved the appointment in accordance with s. 15 of the Basic Law: The Government . The Knesset acted in this regard by virtue of its constitutional power as the organ that supervises the government's work. The Knesset's power to approve the addition of a minister to the cabinet under s. 15 of the Basic Law is a sovereign power, which is exercised in the course of the internal proceedings of the Knesset. This is a political act that allows very little scope for judicial intervention, especially when it concerns the relationship between the Knesset and the government, with its special political complexities.

The Knesset also argued that it approved the appointment of MK Ramon as a minister after holding a debate on the merits of the appointment and a vote in the plenum of the Knesset. The Knesset was informed of the background and all the factors relevant to the appointment, and it was told of the considerations that the Prime Minister and the Government took into account before deciding on the appointment. The Knesset therefore made its decision with a full knowledge of all the background facts and considerations relevant to the appointment. The exercise of judicial review with regard to acts of the Knesset in this context is very narrow and it is limited to very extreme and rare cases in which the fundamental principles of the system are significantly undermined. The petitioners did not indicate any such ground for intervention in the circumstances of this case. Since the fundamental principles of the system have not been significantly undermined, there is no basis for exercising judicial review of the Knesset's decision to approve the Government's notice concerning the appointment of MK Ramon as a cabinet minister. In view of all this, the petitions should, in the Knesset's opinion, be denied.

Decision

The significance of the judgment in the criminal trial and its ramifications on the legitimacy of the appointment

12. MK Ramon was convicted of an offence of an indecent act. The court's sentence in the criminal trial did not include a custodial or a suspended sentence. It also determined that the offence did not involve moral turpitude, and it said in this respect that the sentence took into account s. 42A(a) of the Basic Law: the Knesset and tailored the sentence to its provisions. This section provides that if a member of the Knesset is convicted of a criminal offence and it is determined that it involves moral turpitude, his membership of the Knesset will cease when the judgment becomes final. The significance of this provision is that the court in the criminal trial passed sentence with the express intention of not terminating Ramon's membership of the Knesset in accordance with that provision of the law. When judgment was given in the criminal trial, MK Ramon was not a member of the cabinet. Therefore the court's judgment did not expressly address the provisions of s. 6 of the Basic Law: The Government , which concern the conditions that govern whether a candidate convicted in a criminal trial is competent to be appointed a minister. Notwithstanding, it may be assumed, albeit implicitly, that when the court passed sentence and considered the question of whether the offence involved moral turpitude, it intended to effect an outcome in which, on the one hand, Ramon's conviction for an offence of an indecent act would stand rather than

being cancelled and that he would also serve a sentence, but by which, on the other hand, after serving his sentence, MK Ramon would be able to return to public activity in the Knesset, the Government or any other sphere of public life. In taking this approach the court sought to distinguish the criminal proceeding and its consequences in the criminal sphere from MK Ramon's activity in public life. It saw fit, in the circumstances of this case, to exhaust the criminal trial, but at the same time it sought not to terminate Ramon's activity in the public sphere, which it regarded as the proper balance between the aggravating and mitigating factors that coexist in this case. In doing so, the court intended, *inter alia*, to ensure that Ramon satisfied the statutory conditions for continuing to serve as a member of Knesset that are laid down in s. 42A of the Basic Law: the Knesset. It also implicitly sought to ensure that he satisfied the conditions for being appointed a cabinet minister as laid down in s. 6 of the Basic Law: The Government , even though it did not expressly address this issue, since Ramon's appointment to the cabinet was not a relevant matter at that time.

The court's judgment in the criminal trial paved the way for MK Ramon to satisfy the statutory conditions that would allow him to be appointed to the cabinet. The court was mindful of the statutory restrictions in s. 42A of the Basic Law: the Knesset and s. 6 of the Basic Law: The Government when it couched its sentence in terms that excluded Ramon's case from the scope of the statutory restrictions that would otherwise have prevented him from continuing to serve as a member of Knesset and from being appointed a cabinet minister.

And so, after he was convicted and served his sentence, MK Ramon was appointed a cabinet minister with the title of Deputy Prime Minister. The appointment was proposed by the Prime Minister, adopted and subsequently approved by the Knesset. The Knesset approved the appointment after holding a debate and a vote, following which MK Ramon took the declaration of allegiance to the state and entered into office.

'Competence, as distinct from discretion'

13. Compliance with the minimal qualifications provided by law for the purpose of an appointment to public office or the inapplicability of statutory restrictions on such an appointment still leave the authority making the appointment with a duty to exercise discretion with regard to the propriety of the appointment. Compliance with formal qualifications for holding a position does not necessarily mean that a candidate is suited to a public office in various respects, including in terms of his personal and moral level and in

terms of his basic decency. The authority making the appointment should exercise its discretion with regard to the appointment in accordance with the established criteria of public law; its considerations should be relevant, fair and made in good faith, and they should fall within the margin of reasonableness.

In our case, according to the proper construction of the judgment in the criminal trial, Ramon satisfies the requirements for being appointed a cabinet minister in the sense that the statutory restrictions upon his continuing to hold office as a Knesset member and his being appointed a minister under s. 42A of the Basic Law: the Knesset and s. 6 of the Basic Law: The Government do not apply. Thus the 'minimum requirements' for the appointment are satisfied. But this does not exempt the authority making the appointment from the duty to exercise its discretion with regard to the suitability of the appointment from the viewpoint of the nature of the office, the character of the candidate, and the circumstances of time and place according to criteria that comply with the rules of public law.

The petitions before us focused on the validity of the discretion exercised by the authority making the appointment from the viewpoint of its reasonableness. It was argued that appointing MK Ramon as a cabinet minister was unreasonable in the extreme in view of the nature and circumstances of the offence of which he was convicted and in view of the short time that has passed since the judgment was given and Ramon finished serving his sentence.

We should therefore address the *reasonableness* of the *appointment,* against the background of all the circumstances of the case. In this context it is necessary, *inter alia*, to define the margin of discretion of the authority making the appointment, which casts light on the margin of reasonableness. This margin in turn influences and casts light on the scope of judicial review that should be exercised with regard to the reasonable of the discretion exercised by the authority making the appointment.

The appointment — the margin of reasonableness and the scope of judicial review

Competence for public office

14. The competence of a candidate for public office is examined in two main respects:

The *first* respect concerns the ethical quality and moral virtues of the candidate, alongside his professional and practical abilities. The ability of a candidate to take on responsibility for holding public office depends not only on his talents and abilities, but also on his moral character, his integrity and his

incorruptibility. When an ethical or moral impropriety is discovered in a person's actions before his appointment or while he is holding public office, a concern may arise as to his suitability for the office from the viewpoint of his integrity and ethical conduct, which may impair his ability to carry out his duties.

The *second* respect concerns the fact that public confidence in civil servants and elected officials is an essential condition for the proper functioning of the civil service and the organs of government. All branches of public service rely on public confidence not only in the practical abilities of civil servants and elected officials, but also, and especially, on their standards of morality and humanity, their integrity and incorruptibility. Without this confidence, the civil service cannot, in the long term, properly discharge its functions at the required level for any length of time.

When persons who have been morally compromised are appointed to public office or left in office after they have gone astray, the ethical basis on which the organs of state and government in Israel are founded may be undermined. The fundamental ethical principles on which Israeli society and government are based may be seriously compromised. Public confidence in the organs of government, whose rank and standards are supposed to reflect the basic ethical principles on which social life in Israel is based, may be weakened.

The appointment process for public office always requires the appointing body to exercise discretion. It should consider all of the factors that are relevant to the appointment, including the competence of the candidate. This competence is measured not only according to the professional abilities of the candidate but also according to his moral and ethical standards. Examining suitability for office from a moral viewpoint requires the consideration of a wide spectrum of factors, including the nature of the acts attributed to the candidate, whether they involved any impropriety, how serious they were, and to what extent they affect his moral and ethical standing; whether he was convicted in a criminal trial, whether he is suspected of committing offences, and whether any criminal investigations are pending against him; whether the acts attributed to him have been proved, or whether they are merely suspicions, and what is the strength of such suspicions; what is the period of time that has passed since the acts were committed; did he commit a single act or was the act a continuous one(*Eisenberg v. Minister of Housing* [1], at p. 262 {64-65}; HCJ 652/81 *Sarid v. Knesset Speaker* [2], at p. 197 {52}); and, finally, whether the acts involved ‘moral turpitude.’ The concept of ‘moral

turpitude' in the law reflects an ethical-moral assessment which indicates that under the circumstances a particular act was tainted by a grave moral defect (BAA 11744/04 *Ziv v. District Committee of the Bar Association* [3]; CSA 4123/95 *Or v. State of Israel* [4], at p. 189; R. Gavison, 'An Offence Involving Moral Turpitude as Disqualification for Public Office,' 1 *Hebrew Univ. L. Rev. (Mishpatim)* 176 (1968), at p. 180).

Conditions of Competence and Statutory Restrictions upon holding office

15. The process of appointing a person to public office is often subject to conditions of competence and statutory restrictions that may disqualify a candidate from being appointed. When the restrictions disqualify a candidate from being appointed, the authority making the appointment is left with no discretion. There are a host of statutory restrictions that negate the competence of a person convicted of an offence involving moral turpitude from holding office. This is the case with regard to a person's competence to be appointed a cabinet member (s. 6 of the Basic Law: The Government), the right to be elected to the Knesset (s. 6(a) of the Basic Law: the Knesset), and being appointed to the civil service or a local authority (s. 46(a)(1) of the Civil Service (Appointments) Law, 5719-1959; s. 120(8) of the Municipalities Ordinance). The criterion of 'moral turpitude' that justifies restricting a person's competence to hold public office is a moral defect that taints his action, thereby impairing his ability to bear the responsibility required for discharging the job both because of the damage to his ethical standing and because of the anticipated harm to public confidence in the office and the person holding it, and even in public system as a whole (*Or v. State of Israel* [4], at p. 189; HCJ 4523/03 *Bonfil v. The Honourable Justice Dorner* [5], at p. 854; HCJ 436/66 *Ben-Aharon v. Head of Pardessia Local Council* [6], at p. 564).

The statutory restrictions that negate a candidate's competence for holding public office close the gates upon his appointment and prevent him from being appointed. It does not follow that where the statutory restrictions do not apply to a candidate, his appointment is necessarily permissible from the viewpoint of the lawfulness of the discretion that the authority should exercise when making the appointment. The authority making the appointment should act reasonably in exercising its discretion with regard to the appointment. Its responsibility in this process comes under scrutiny even when the candidate satisfies the formal qualifications and is not excluded by the statutory restrictions laid down for an appointment to public office. Notwithstanding, it is important to point out that the competence of a candidate according to the

criteria laid down in statute may affect the scope of discretion that the authority may exercise in the appointment process.

The balances required when exercising discretion in the appointment process

16. Exercising reasonable discretion in the process of appointing someone to a public office requires the authority making the appointment to contemplate a very wide range of considerations. It should consider whether the candidate is suited to the position from the viewpoint of his professional qualifications, and from the viewpoint of his personal qualities and moral standards; it should evaluate the degree of public confidence that the appointment under consideration will foster; it should consider the wider needs of the administration, and the ability of the candidate to contribute to it and further the public interest in discharging his duties.

When the proposed candidate has a criminal record or his actions are tainted in some other way, the authority should examine the effect that this factor has on his competence for the position. It should take into account the nature of the act attributed to the candidate, its seriousness, the nature of the impropriety that taints it, and its effect on his ability to carry out his duties; it should examine whether the nature of the candidate's acts indicates an inherent ethical flaw in his conduct, which affects his ability to function properly in the proposed position and has an impact on the ethical image of public service. On the other hand, it is possible that the act was an isolated lapse, which even if it has an aggravating aspect, does not indicate a fundamental flaw in the candidate's character (HCJ 5757/04 *Hass v. Deputy Chief of Staff, General Dan Halutz* [7]; HCJ 5562/07 *Schussheim v. Minister of Public Security* [8]). Against this background, it should consider the effect of the appointment on public confidence in the system of government (*Eisenberg v. Minister of Housing* [1], at para. 40). It should consider the fact that the candidate has a criminal conviction in its proper context or any other impropriety in his conduct in their proper context, and weigh them against the other considerations that support the appointment, and strike a balance between them. The main criterion when striking this balance lies in the question whether in the circumstances of the case the appointment may cause serious and pervasive harm to the image of the government in Israel and significantly undermine the respect that the citizen has for the organs of government.

17. The unreasonableness of appointing someone who has been convicted of a criminal offence to public office does not necessarily depend upon the

offence involving an element of immorality or a finding that it involves moral turpitude (*Eisenberg v. Minister of Housing* [1], at para. 55). Similarly, the very existence of a criminal conviction is not a prerequisite for disqualification from public office. Indeed, by virtue of the discretion of the authority making an appointment, not only have persons who have been convicted in a criminal trial been disqualified for public office, but so too have persons who have confessed to committing a criminal offence, even though they were not brought to trial (for example, the persons involved in the 300 bus affair, Yosef Ginosar and Ehud Yatom). In other cases, the court has recognized the possibility of disqualifying persons from public office when a decision has been made to bring them to trial, even before their guilt has been proved. This occurred in the case of Minister of the Interior Aryeh Deri and Deputy Minister of Religious Affairs Raphael Pinchasi (HCJ 3094/93 *Movement for Quality in Government in Israel v. Government of Israel* [9], at p. 422 {284}; HCJ 4267/93 *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 467). A similar outlook has been adopted with regard to public figures against whom a criminal investigation was started, even though it was later decided not to bring them to trial. This occurred with regard to the criminal investigations relating to Minister Tzachi Hanegbi that did not lead to the filing of an indictment (HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister* [11], at p. 851 {353}).

The need to consider the ethical and moral aspects of appointing someone to public office has also been extended to situations in which a decision was made not to open a criminal or disciplinary investigation against a candidate for conduct giving rise to a suspicion of an illegal act (*Hass v. Deputy Chief of Staff, General Dan Halutz* [7], at para. 10 of the opinion of Justice Levy; HCJ 2533/97 *Movement for Quality Government in Israel v. Government of Israel* [12], at p. 65). Indeed, one should not rule out the possibility that the improper conduct of a candidate, even if does not amount to a criminal offence, is sufficiently serious that it would be unreasonable in the extreme to appoint him to public office or to allow him to continue to hold public office.

18. Considerations regarding a candidate's competence for public office from an ethical viewpoint are of great weight. In very serious cases, the ethical stain on a person's character may make his appointment to the position completely inappropriate, even when from the viewpoint of his professional abilities he is likely to make a contribution towards the issue that lies at the focus of the public system. In such a case, even the needs of the public system will defer to the stain on the person's character. But in other situations, alongside an examination of the ethical aspect of the candidate's character, the

authority should consider the broader needs of the public administration and the ability of the candidate to contribute to it, and a proper balance should be struck between all of the relevant considerations and factors. With regard to a cabinet appointment, one should consider, *inter alia*, the potential contribution of the candidate to the office, the importance of bringing him into the government for the purpose of preserving the coalition and the effective functioning of the government. On a matter relating to parliamentary political life, one cannot rule out a proportionate consideration of factors relating to political circumstances (*Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at para. 30). The authority should take into account the requirements of the position, the special abilities of the candidate and the benefit that his holding office would engender in furthering the general public interest. The authority making the appointment should weigh up all of the aforesaid factors and strike a proper balance between them, within the margin of reasonable discretion that is given to it. A candidate's criminal record or any stain on his character should be considered in accordance with their circumstances and seriousness against other relevant general considerations: the professional qualities, when taken together with the proven or alleged impropriety of his actions, should be considered against the nature of the office, its status within the administration, and how uniquely qualified the candidate is for the office. A balance is required between all the various conflicting considerations (HCJ 389/80 *Golden Pages Ltd v. Broadcasting Authority* [13], at p. 445; HCJ 935/89 *Ganor v. Attorney General* [14], at p. 513). An appointment is a reasonable decision if it is made as a result of a balance that gives proper weight to the different values that are relevant to the case. Assessing the weight that is given to the different considerations is a normative act that is made in accordance with accepted social values, which in turn cast light on the relative importance that should be attributed to the various conflicting factors (LFA 5082/05 *Attorney General v. A* [15], at para. 19 of the opinion of President Barak; *Eisenberg v. Minister of Housing* [1], at pp. 263-264 {65-66}; CA 3398/06 *Antitrust Authority v. Dor Elon Energy in Israel (1988) Ltd* [16]). Within the margin of reasonable discretion, depending upon how broad it is, there may be different possible balancing points between the conflicting considerations, all of which may pass the test of reasonableness. The broader the margin of administration discretion when making an appointment, the broader the margin of reasonableness, and this extends the range of legitimate possibilities for finding different balancing points between the conflicting values in the appointment process. The margin of discretion in the appointment process is determined by various factors: the

identity of the authority making the appointment, statutory provisions and judicial decisions regarding the competence of the candidate for the appointment, parliamentary involvement in the appointment and the other circumstances of the case.

19. The limits of judicial review and the scope of its application when examining the reasonableness of the discretion of the authority making the appointment are affected by the authority's margin of discretion in this regard. The scope of judicial review of the authority's decision is inversely proportional to the scope of the margin of discretion given to the authority making the appointment. The broader the margin of the administrative discretion, the narrower the scope for judicial intervention in the administrative act.

The authority's margin of discretion when appointing a minister who has a criminal conviction

20. For the purposes of this case, we should examine the margin of discretion given to an authority when appointing someone with a criminal conviction as a member of the cabinet. This margin of discretion will cast light on the scope of judicial review regarding the appointment. We should examine whether in the circumstances of this case the decision to appoint MK Ramon as a member of the cabinet falls within the margin of reasonableness or whether it falls outside this margin in such a way that we need to intervene and amend it.

The margin of discretion given to the government when appointing a cabinet minister who has been convicted of a criminal offence is influenced by conflicting considerations that pull in opposite directions: on the one hand, such an appointment gives rise to the question of the weight of the criterion of integrity and ethical conduct in the appointment of elected officials to the most senior positions in state institutions. The image of public service and government institutions is closely related to the moral character of its employees and elected representatives. The standing of government institutions and the effectiveness of their functioning depend largely upon maintaining public confidence in them, not merely from the viewpoint of their professional standards but first and foremost from the viewpoint of their ethical standards. Without this confidence, state institutions will find it difficult to operate. The integrity and moral status of civil servants and elected officials affect the degree of confidence that the public has in state institutions. Appointing someone as a cabinet minister after he has been convicted of a

criminal offence of an indecent act just a short time before the appointment, directly concerns the question of integrity and moral character in the appointment of elected representatives, and this factor has considerable weight in limiting the margin of discretion of the authority making the appointment.

21. But this consideration does not stand alone. There are additional conflicting considerations that operate in concert to broaden the margin of discretion given to the authority making the appointment and to limit the scope of judicial review regarding the appointment. The conflicting considerations are the following: *first*, the prime minister and the government have broad powers when forming the government and appointing cabinet ministers, which is a part of the political process that characterizes the structure of democracy; *second*, the fact that the statutory qualifications for appointing a minister with a criminal conviction are satisfied has certain ramifications upon the margin of administrative discretion given to the authority making the appointment; *third*, the parliamentary approval given to the government's decision to make the appointment, which embodies the consent of the state's elected body to the appointment and the identity of the person chosen for the office, affects the margin of discretion in making the appointment; and *fourth*, an absolute judicial decision of a national court, which held in the criminal trial that a distinction should be made between the criminal sanction imposed upon the public figure and the effect of the conviction on the defendant's public activity, so that the former would not preclude the latter, also contributes to a broader margin of discretion when the competent authority makes the appointment. Each of these factors individually, and certainly when taken together, extends the authority's margin of discretion in making the appointment, and the scope of judicial review is correspondingly limited.

We will now consider these matters in detail.

The scope of discretion in forming a government and appointing ministers

22. As a rule, the scope of the prime minister's discretion in forming a government and the government's discretion in appointing new ministers has two aspects: on the one hand, the discretion given to the prime minister in forming his government and in deciding upon its members is broad. So too is the government's discretion in its decision to appoint a new member of the cabinet. On the other hand, this discretion is subject to judicial review and is not completely immune from it, since —

'The prime minister is a part of the administrative authority and the principles that apply to the administrative authority and its employees apply also to the prime minister. It follows that, like any public official, his

discretion is not absolute. He must act reasonably and proportionately; he must consider only relevant considerations; he must act without partiality and without arbitrariness; he must act in good faith and with equality' (HCJ 5261/04 *Fuchs v. Prime Minister of Israel* [17], at pp. 463-464 {483}).

The discretion given to the prime minister and the government with regard to forming a government, appointing and replacing ministers, and adding a new member to the government is broad, because of the special nature of the power of appointment, which is 'of a unique kind, both because of the position of the prime minister with regard to the formation of the government and because of the political nature of the government. It includes a large number of considerations and encompasses a wide margin of reasonableness' (*per* Justice Zamir in *Movement for Quality Government in Israel v. Government of Israel* [12], at p. 58). The prime minister's special power with regard to the appointment of cabinet ministers and the termination of their office is intended to ensure the government's ability to function and operate, and it is an integral part of the political process at the heart of the democratic system, which the court rarely subjects to the test of judicial review (HCJ 1400/06 *Movement for Quality Government in Israel v. Deputy Prime Minister* [18]; *Movement for Quality Government in Israel v. Prime Minister* [11]). The margin of reasonableness that characterizes the scope of the prime minister's discretion when determining the composition of his government and the appointment of cabinet members is very broad, and his criteria include parliamentary, political and party considerations. This broad margin is intended to facilitate the government's ability to function properly as the executive branch of the state, and to realize the policy goals that it espouses (*Fuchs v. Prime Minister of Israel* [17], at para. 29 of the opinion of President Barak). This broad discretion is founded on the public interest of ensuring the stability of the government and its ability to achieve its goals. Indeed —

'When we address the discretion of the prime minister in a decision to appoint a minister, the margin of reasonableness for his decision, in which the court will refrain from intervening, is very broad, both because of the status of the prime minister as an elected representative and the head of the executive branch, and because of the nature of this power' (*Movement for Quality Government in Israel v. Prime Minister* [11], *per* Vice-President Or).

The scope of the discretion of the prime minister and the government when appointing cabinet ministers, no matter how inherently broad it may be, varies according to the nature of the conflicting factors that they should consider during the appointment process. Discretion that is entirely based on

professional qualifications for the position or on purely political or public considerations of various kinds cannot be compared to discretion that is exercised as a result of a duty to contend with the ethical-normative considerations that arise from a candidate's criminal past or from another stain on his character, which affects his social and public standing and is relevant to his competence to hold office. The ethical-normative aspect of administrative discretion may affect its scope in this special context, and result in the discretion being narrower, and judicial review being correspondingly more rigorous.

23. The consideration concerning the ethical background of a candidate for appointment as a cabinet minister should be taken into account by the prime minister when determining the composition of his government, even when the candidate satisfies the statutory qualifications that are required for the appointment. The weight given to this consideration should be determined in accordance with the special circumstances of the case and with a view to the relative weight that should be given to other important considerations that are relevant to the appointment process.The broad discretionary authority given to the prime minister in the realm of appointments compels him to address a broad variety of considerations. The prime minister should examine, *inter alia*, the importance of appointing the candidate with reference to the field of activity for which he will be responsible and his skills and abilities as can be seen from his record in the past; he should assess the effect of the appointment on the composition of the government and its ability to function. Public, political and other considerations should also be included among the complex set of criteria that are a part of the appointment process. It is the task of the prime minister and the government to assess the relative weight of all the relevant factors in a reasonable manner, and to strike a proper balance when deciding upon the appointment.

It is the task of the authority making the appointment to strike a balance between the conflicting considerations when appointing a person to the cabinet who has been convicted in a criminal trial. Its discretion is broad, but not unlimited. The law will intervene and have its say when the appointment reflects an improper balance between all of the relevant considerations and it involves a real violation of the ethical principles accepted by society. The law will intervene where such an appointment is likely to harm the status of government institutions and public confidence in them in such a serious way that the appointment is unreasonable in the extreme.

Statutory qualifications and restrictions relating to appointments

24. As we explained above, ss. 6 and 23 of the Basic Law: The Government lay down the statutory qualifications and restrictions that prevent a person who has been convicted in a criminal trial from being appointed as a cabinet member or that require the termination of his office as a cabinet member.

Section 6(c), which is relevant to this case, provides:

'Qualification of ministers

> 6. …
>
> (c) (1) A person shall not be appointed a minister if he has been convicted of an offence and sentenced to imprisonment, and on the date of the appointment seven years have not yet passed since the day on which he finished serving the sentence of imprisonment, or from the date of the judgment, whichever is the later, unless the chairman of the Central Elections Committee determined that the offence of which he was convicted does not, in the circumstances of the case, involve moral turpitude.
>
> (2) The chairman of the Central Elections Committee shall not make a determination as stated in paragraph (1) if the court has held according to law that the offence of which he was convicted does involve moral turpitude.'

The conditions that disqualify a person from holding office as a cabinet member, as stated in s. 6(c), are 'minimum requirements' that, when they apply, disqualify a person for the appointment. Where the restrictions upon the appointment do not exist, it does not mean that we are dealing with a 'negative arrangement' regarding the exercise of discretion by the authority making the appointment, whereby any appointment whatsoever will be valid. Even when there is no statutory restriction upon holding office, the authority should exercise discretion in making an appointment and strike a proper balance between the relevant considerations, according to their proper relative weight (*Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 457). The statutory qualification test for a person convicted in a criminal trial to hold office as a minister is closely linked to the question of the moral turpitude involved in the offence. Where there is moral turpitude, he is disqualified from holding office; this however, does not mean that the absence

of moral turpitude necessarily legitimizes the appointment. The reasonableness of the discretion of the party making the appointment is examined on its merits, according to all the circumstances of the case.

Notwithstanding, the existence of statutory restrictions upon the appointment of a cabinet minister does influence the scope of discretion of the person making the appointment when exercising the power of appointment granted to him. The stipulation of the legislature regarding the conditions that disqualify a candidate who has been convicted of a criminal offence for being appointed a minister has ramifications on the scope of the power of the person making the appointment and the margin of discretion regarding a candidate whose appointment is not ruled out by the minimum requirements. The statutory restrictions reflect the criteria that the legislature regarded as the proper ones for ensuring the minimum ethical standard for someone joining the government. Admittedly, meeting the qualifications that derive from compliance with these restrictions does not amount to an automatic ethical certificate of approval for the appointment, and the authority should examine in depth whether the candidate is suitable for the position, first and foremost from the viewpoint of his ethical qualities (*Eisenberg v. Minister of Housing* [1], at pp. 256-257). However, the statutory restrictions upon an appointment do cast light on the ethical criteria required by the legislature for the purpose of the appointment, and the effect of this is to increase the margin of discretion of the person making an appointment where the candidate satisfies the statutory minimum requirements for the appointment.

As the court held in *Movement for Quality Government in Israel v. Prime Minister* [11] (at para. 8 of the opinion of Justice Rivlin):

'… the criteria for eligibility laid down by the legislature are not irrelevant when examining the discretion of the prime minister. The further we depart from the statutory criteria, the more difficult it will be to find a reason and justification for intervening in the prime minister's discretion within the scope of his authority. Indeed, if the legislature has determined that the conviction of a minister of an offence involving moral turpitude necessitates his removal from office, the court will not lightly say that even when the minister has been acquitted of the offence, or a decision was made not to bring him to trial at all, the minister should be removed from office.'

The Knesset's approval of the appointment

25. Under s. 15 of the Basic Law: The Government , the addition of a minister to the cabinet requires giving notice to the Knesset and receiving the Knesset's approval. This process subjects the decision of the prime minister

and the cabinet to add a minister to the cabinet and the identity of the minister who was appointed to a public, political and parliamentary test. The Knesset's decision is made after a debate, and it is made by virtue of the Knesset's position as the supervisor of the government's actions. The Knesset's approval for the government's decision to add a minister to the cabinet reflects parliamentary approval of the elected house of representatives for the appointment that was made by the executive branch (*Sarid v. Knesset Speaker* [2], at para. 5 of the opinion of Justice Barak).

All organs of government are subject to judicial review, and the Knesset is no exception (HCJ 971/99 *Movement for Quality Government in Israel v. Knesset Committee* [19]). But the status of the Knesset as the legislative branch, as enshrined in the Basic Law and as determined by the structure of our democracy, requires the court to exercise its judicial review of Knesset decisions with caution and restraint. As a rule, the court will refrain from intervening in Knesset decisions, and the basic criterion by which the scope of the court's intervention is determined depends upon the nature of the decision from the viewpoint of the amount of harm that it inflicts upon the principles of the constitutional system and the basic notions that lie at its heart (*per* President Shamgar in HCJ 325/85 *Miari v. Knesset Speaker* [20], at p. 195; *Movement for Quality Government in Israel v. Knesset Committee* [19]). The scope of judicial review of Knesset decisions is determined, *inter alia*, in accordance with the nature and characteristics of the specific decision. Intervention in a decision relating to legislation cannot be compared to intervention in a quasi-judicial decision or a decision concerning the Knesset's scrutiny of the Government's actions (HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [21]).

26. The Knesset's approval of the Government decision to appoint someone who was convicted of a criminal offence as a new minister has two aspects. One aspect relates to its nature as an act of scrutiny of the Knesset as the body that supervises the actions of the Government. The other aspect is of a normative-ethical nature, with quasi-judicial overtones; it reflects the ethical outlook of the Knesset as to the competence of someone who has been convicted of a criminal offence to hold office as a minister in the government. The first aspect concerns the relationship between the Knesset and the Government, and it involves 'a significant political component in which the judicial branch should not interfere, in order to prevent, in so far as possible, the "politicization of the judiciary"' (*Sarid v. Knesset Speaker* [2], at para. 7). The other aspect involves the Knesset in making an ethical and principled decision regarding the competence of a candidate to serve as a cabinet minister

from the viewpoint of his ethics and character. This determination has a normative significance that concerns the determination and application of proper ethical and moral criteria to the holding of a very high office in the Government of Israel. This aspect of the Knesset's decision with its ethical dimension opens the Knesset's decision to more rigorous judicial review, since where the Knesset's decision leaves the purely political sphere and addresses a question relating to considerations of public ethics as applicable to the office of elected representatives in government institutions, the scope of judicial intervention may become broader in so far as the ethical dimension is concerned (HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [22]; *Miari v. Knesset Speaker* [20], at p. 127; HCJ 1843/93 *Pinchasi v. Knesset* [23], at p. 496; *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10]; HCJ 1139/06 *Arden v. Chairman of the Finance Committee* [24], at para. 5 of the opinion of President Emeritus Barak; *Sarid v. Knesset Speaker* [2], at p. 202 {56-57}; HCJ 9156/06 *Pollak v. Members of the Seventeenth Knesset* [25]; HCJ 12002/04 *Makhoul v. Knesset* [26]; HCJ 11298/03 *Movement for Quality Government in Israel v. Knesset Committee* [27], at pp. 899-900).

The limits of judicial review of a decision of the Knesset to bring a minister into the government, who has been convicted of a criminal offence, are therefore influenced by the dual aspect of such a decision, which features both a manifestly political dimension and an ethical-normative one. The nature of the Knesset's decision requires, on the one hand, the accepted degree of judicial restraint with regard to Knesset decisions, and, on the other hand, it may require a judicial examination of the ethical determination contained in it. This balance means that when a decision of the Knesset to approve the appointment of a minister to the cabinet amounts to an extreme and unusual departure from proper ethical criteria, it is likely to justify judicial intervention.

A judicial determination in a criminal trial

27. The court in which MK Ramon's criminal trial took place directly addressed the question of the appropriate consequence of his Ramon's criminal conviction with respect to the continuation of his path in public and political life. In the balance that the court struck when passing sentence, it held that a distinction should be made between the question of sentencing, in which MK Ramon should be held accountable, and the question of his public activity. According to its express and implied determination, Ramon's act, despite the wrongdoing and impropriety inherent in it, is not supposed to impair the continuation of his public activity, either as a member of the

Knesset or as a cabinet minister. As I have said, the court's approach in the criminal trial does not mean that the body making the appointment is exempt from exercising independent and rigorous discretion with regard to the propriety of the appointment, even when the court has held that the offence should not be regarded as involving moral turpitude and the candidate should not be prevented from complying with the minimum requirements for the appointment. But it would appear that the court's position has weight and significance within the context of the balances that the body making the appointment should strike when making a decision concerning the appointment. The position expressed by the court when it left the door open for MK Ramon to continue his public activity affects and influences the margin of discretion of the person making the appointment, and consequently also the scope of judicial review as to the reasonableness of that discretion.

The court in which the criminal trial was held was aware of all of the legal, moral and public aspects of the case that it tried. By virtue of its authority, the Magistrates Court is trained in striking the proper balance between the various considerations and conflicting interests in the complex case being heard before it. A final judgment that a criminal offence committed by a public figure neither warrants a custodial sentence nor involves moral turpitude, and in which the court clearly states its intention not to curtail the defendant's public activity, has considerable significance and weight in guiding the discretion of the body making the appointment and it affects the limits of judicial review exercised with regard to his decision.

28. Regarding the margin of discretion given to the Prime Minister and the Government when appointing MK Ramon as a cabinet minister and the nature of the Knesset's approval of this appointment, it is possible to summarize as follows:

In determining the margin of discretion, there are two forces that pull in opposite directions. On the one hand, the identity of the person making the appointment, the criteria determined by the statutory qualifications and restrictions and the existence of a judicial decision that the criminal act did not involve moral turpitude pull in the direction of broadening the power and discretion of the person making the appointment. On the other hand, the substantive-normative nature of the appointment decision and its connection to the appropriate proper set of values that should be applied when appointing someone to a high public office expose it in this particular aspect to rigorous judicial review within the broad margin of reasonableness granted to the authority making the appointment. An extreme departure from the proper

ethical weight that should be given to the normative-ethical considerations relating to the appointment decision, relative to the other considerations relevant to the appointment, will justify judicial intervention.

From general principles to the specific case

29. The reasonableness of the decision to appoint MK Ramon as a member of the cabinet is subject to judicial review. In this regard, the court should examine whether the authority making the appointment considered all the factors relevant to the matter, and whether it gave them their proper relative weight. At the end of the process, does the decision to make the appointment strike a proper balance between the conflicting considerations that lies within the margin of reasonableness, when taking into account the scope of this margin in the special circumstances of the case?

30. In the case of MK Ramon, the authority making the appointment considered all of the factors relevant to the matter. On the one hand, it considered the importance of his expected contribution to the Government, in view of his abilities, his considerable experience and his knowledge of the matters required by the position. On the other hand, as can be seen from the statement made by Minister Sheetrit to the plenum of the Knesset, it considered his criminal conviction relating to an offence of an indecent act, with its circumstances and implications. It may be assumed that it also took into account the fact that the criminal trial ended only a very short time earlier. In its decision, the Government balanced the weight of the criminal conviction, its character and circumstances, as determined in the criminal trial, against the considerations relating to the importance of bringing MK Ramon into the Government at this time. In this balance, the scales were tipped in favour of approving the appointment, while having consideration for the weight and significance given to the conviction and its circumstances, and the short period of time that passed since the judgment was given.

In the circumstances of the case, it cannot be said that the Government decision to appoint Ramon as a cabinet member suffers from a manifest lack of reasonableness that justifies judicial intervention by setting it aside.

31. The Government's approach in making the appointment, which was approved by the Knesset, is characterized by the distinction made, in the special circumstances of this case, between the criminal, penal and moral aspect of the offence committed by Ramon and its consequences on a public level for an active public figure, whose horizons of activity have yet to be exhausted. Alongside this consideration, the authority making the appointment took into account the needs of the governmental system from a functional and

political viewpoint. This approach of the Government is consistent with the outlook of the court that considered the matter in Ramon's criminal trial. It does not conflict with the approach of the Attorney General, who, even though he still believes that the offence does involve moral turpitude, did not file an appeal against the judgment in the criminal trial and accepted the decision of the trial court in this regard.

32. Ramon's act for which he was convicted in the criminal trial has complex legal, public and moral aspects. His act was particularly serious and opprobrious not merely because of its actual character, but also because of the special context in which it was committed and his high public office (Minister of Justice), the fact that the complainant was an officer in uniform, and the fact that it occurred in the Prime Minister's office, the headquarters of the executive branch, where the vital issues affecting Israeli society are decided.

Notwithstanding, the appointment process should consider, *inter alia*, whether the characteristics of the offence necessarily show the perpetrator as having a fundamental moral defect, which because of its nature should disqualify him from public office, or whether the incident was an isolated one, which, irrespective of its impropriety, does not necessarily indicate incompetence to hold public office.

This examination is bound up with the question whether public confidence in the person holding office and the government may be significantly impaired by the appointment. An improper act always depends upon the circumstances, and it should be assessed and evaluated against a background of the conditions in which it was committed and in view of an overall examination of the qualities of the candidate, his personal and professional record, and the needs of the governmental network in which he is being asked to serve (*Schussheim v. Minister of Public Security,* para. 20 [8]; *Hass v. Deputy Chief of Staff, General Dan Halutz* [7]).

Despite the impropriety of the offence committed by MK Ramon, it was regarded both by the court in the criminal trial and by the authority making the appointment as an isolated incident that does not reflect any fundamental moral defect requiring his disqualification from public office. It was regarded as a momentary expression of human weakness, the result of special isolated circumstances, and did not indicate an innate aberration of conduct and character or a misguided set of values, which might indicate a fundamental incompetence to holding public office. On the other hand, the Prime minister and the Government thought that despite the difficulties inherent in the appointment because of the criminal conviction, the systemic needs of the

Government justified bringing MK Ramon into the cabinet. His personal and professional contribution was required, in their opinion, to strengthen and promote the Government's ability to carry out its various tasks.

As can be seen from Minister Sheetrit's statement to the Knesset, in making the appointment the Prime minister and the Government assessed the special abilities of MK Ramon against the wrongdoing in the improper act of which he was convicted. In the balance that was made between the facts of the criminal conviction and the human weakness that it revealed, as well as the brief period of time that had passed since the sentence was completed, on the one hand, and the abilities and professional skills of the candidate, his expected contribution to public life and the importance of bringing him into the Government for various general reasons, on the other, decisive weight was given to the latter. In the circumstances of the case, the balance that was struck did not involve any defect that indicates extreme unreasonableness in the discretion exercised by the authority making the appointment. In striking the balance, there was definitely consideration of the question of whether the appointment was likely to substantively damage public confidence; in the special circumstances of this case, this question was mainly answered in the negative, since public confidence also recognizes the concepts of rectification and repentence in appropriate cases (*Schussheim v. Minister of Public Security* [8], at para. 29; *Sarid v. Knesset Speaker* [2]).

It follows, therefore, that within the margin of reasonableness given to the Government and the Knesset in the circumstances of the case under consideration, there are no ground for judicial intervention in the appointment of MK Ramon as a cabinet member.

Before concluding

33. Before concluding, I have read the remarks written by my colleague Justice Grunis with regard to the place and status of the ground of reasonableness among the grounds for judicial review of decisions of a public authority. I do not see eye to eye with my colleague on the question of the current and ideal scope of the ground of reasonableness in administrative law. It seems to me that we should leave this ground within the limits outlined by case law in recent decades. I do not intend to set out a wide-ranging response to the legal thesis set out in my colleague's opinion, if only for the reason that it seems to me that addressing this complex issue is not essential for deciding the issue in the specific circumstances of the present case. I will content myself with discussing the very crux of the difference of opinion between us.

According to the approach of administrative law in recent generations, the ground of reasonableness acts as a main and essential instrument of judicial review of the administration, and it stands at the forefront of the protection of the individual and the public against arbitrary government. This ground is used to examine the rationality of government decisions as a normative concept, and the court has laid down criteria that it should consider when examining this. First, did the administrative authority consider all the relevant issues, and no irrelevant ones, or did it perhaps consider irrelevant and extraneous matters? Second, did the authority give each of the relevant considerations its proper relative weight, and did it thereby strike a balance that lies within the margin of reasonableness given to it? This margin of reasonableness may vary from case to case, according to the circumstances and characteristics of the specific case. Without any safeguard that the administrative decision is reasonable and rational, the individual and the public may be seriously harmed. It is insufficient for the administrative decision to be made with authority and in good faith. The decision should be rational and sensible within the margin of discretion given to the competent authority.

Limiting this tool of judicial review that is intended to examine the rationality of the administrative decision, which is what my colleague proposes, may lead to a revolution in the understanding of the principle of the legality of administrative action and limit the legal tools available to the court for examining the action of a public authority within the scope of the judicial protection given to the individual against executive arbitrariness. Restricting the ground of reasonableness may create a vacuum in judicial review that may not be filled by other grounds of review and may seriously curtail the willingness of the court to intervene in cases where the administrative authority in its decision did not consider all and only the relevant considerations, or considered them but did not give them their proper relative weight, or also considered irrelevant considerations. It is easy to imagine the damage that such a process can be expected to cause to the concept of the legality of administrative action and the purpose of protecting the citizen in his relationship with the government, which lies at the heart of the definition of the grounds of judicial review of administrative action.

Needless to say, the existence of the ground of reasonableness, like the other grounds of judicial review of public authorities, requires great care when applying it in practice. It is true that because this ground is wide-ranging and has a high degree of abstraction, there is a concern that its application in the specific case, if done without proper restraint and sufficient care, may result in the court encroaching upon areas that lie beyond the scope of the law,

where it ought not to tread. The concern that the court will replace the 'unreasonable' discretion of the administrative authority with its own 'reasonable' discretion and thereby appropriate the authority for itself is no empty concern, and should not be ignored. My colleague addresses this in his characteristically analytical way. At the same time, this concern in itself should not, in my opinion, affect the existence of this important tool of judicial review or the scope of its application. This concern should guide the administrative judge day by day and hour by hour when exercising the tool of judicial review, upon being required to decide in a specific case whether the act of the administrative authority satisfies the test of reasonableness. The judge should examine with care whether all the relevant considerations were considered, and no others; he should consider whether the authority arrived at a proper balance as a result of the relative weight given by it to each relevant consideration. There may be more than one balancing point. It may be placed at any point within the 'margin of reasonableness' given to the authority, and the breadth of this margin should be determined according to the case and its circumstances, in view of the specific issue under consideration.

The principle that examining the reasonableness of an administrative decision does not mean that judicial discretion replaces administrative discretion is a basic rule in administrative law, and it constitutes an essential element of the judicial review of administrative authorities. It coexists harmoniously with the other criteria for examining the reasonableness of administrative decisions.

Certain types of issue, according to their content, and the character of certain public authorities, according to their status and the nature of their responsibility in the government, may also affect the scope of the judicial discretion that should be exercised within the context of the judicial review of administrative authorities.

The correct and appropriate application of the aforesaid principles within the context of the ground of reasonableness does not create a real danger that the court will usurp the place of the administrative authority and do its work in a particular case. An unbalanced application of the aforesaid principles may lead to an undesirable result of this kind. Therefore the emphasis should be placed neither on the elimination of this tool of judicial review, nor on restricting its scope of application, as my colleague proposes. The emphasis should be placed on the proper methods of *implementing* and *applying* the long-established principles of administrative law — methods of implementation and application based on proper assessments and balances that

are intended to ensure the rationality of administrative decisions, for the protection of both the individual and the public.

My response to my colleague — with regard to the crux of the difference of opinion between us — is therefore that we should not undermine an essential tool of judicial oversight of administrative authorities because of an inherent concern that it may be applied wrongly. The tool should be left as it is, with its full scope, and it should be protected. At the same time, care should be taken, day by day and hour by hour, to apply the principles on which it is founded correctly and properly. This will maintain the full protection currently given to the citizen in his relationship with the government, protect the status of the administrative authority against incursions into its sphere of activity, and coexist harmoniously with the whole constitutional system whose principles form the basis of Israeli democracy.

Conclusion

34. This court's judicial intervention is restricted to examining the legal-normative reasonableness of the administrative action under examination. In this field, "the field of law", no ground was found for intervening in the appointment. This does not necessarily preclude a different approach to the issue under consideration from the extra-legal perspective of morality and public ethics, in which the considerations and the methods of striking a balance between them are not necessarily the same as the balance required by the law. Naturally, the individual and the public as a whole have the right to form their own ethical judgment regarding these matters, according to their own standards and moral principles.

35. I therefore propose that we deny the appeals.

Justice E. Arbel

The petitions before us concern '… imposing the rule of law on the government,' inasmuch as they concern 'public confidence in the actions of government authorities in general and of the supreme executive organ of state (the government) in particular' (in the words of Justice Barak in HCJ 6163/92 *Eisenberg v. Minister of Housing* [1], at pp. 238, 242 {24, 30}; see also Justice H.H. Cohn, 'The Qualifications of Public Officials,' 2 *Mishpat uMimshal (Law and Government)* 265 (1994), where he discusses these remarks).

1. The Prime Minister sought to appoint MK Haim Ramon as a minister in his government, in the capacity of Deputy Prime Minister. The petitions in this case were filed with the purpose of torpedoing the appointment. In the interim, MK Ramon was appointed to the post, after the Government, pursuant to s. 15 of the Basic Law: The Government (hereafter, also: 'the law' or 'the

Basic Law') notified the Knesset of the appointment and the Knesset approved it. The petitions therefore are concerned with cancelling the appointment of MK Ramon as a cabinet member.

I agree with the legal analysis and principles set out by my colleague Justice Proccaccia in her opinion. We all agree to the premise that under the Basic Law the Prime Minister has broad discretion in appointing ministers in his government, and that judicial review of this power of the prime minister should be exercised sparingly, carefully and with great restraint. In addition, I agree that there are several obstacles that stand in our way when we consider whether we should intervene in this decision of the prime minister: the limited scope of intervention in decisions of the prime minister relating to the formation of the government; the fact that, as required by law, the Knesset gave its approval to the Government notice regarding the appointment of MK Ramon as a minister; and the finding of the Magistrates Court that the act did not involve moral turpitude, when read together with s. 6(c) of the Basic Law. Notwithstanding, unlike my colleague, I am of the opinion that these three obstacles are countered by significant considerations that were not properly taken into account at the time the decision was made to appoint MK Ramon as a minister. These mainly concern the significance of the criminal conviction and the findings of the Magistrates Court in his case, the short period of time that has passed since the conviction and the nature and lofty status of the position to which he was appointed.

2. The discretion given to the prime minister in decisions concerning the formation of the government is very broad and encompasses a wide range of considerations (HCJ 3094/93 *Movement for Quality of Government in Israel v. Government of Israel* [9], at pp. 423, 427 {284, 290-291}; HCJ 2533/97 *Movement for Quality Government in Israel v. Government of Israel* [12], at pp. 58-59; HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister* [11], at pp. 846-847 {345-348}, and the references cited there). Notwithstanding, these decisions should satisfy the criteria of judicial review, like all administrative decisions: they should satisfy the requirements of reasonableness, fairness, proportionality and good faith, and they should contain no arbitrariness or irrelevant considerations (*Movement for Quality Government in Israel v. Prime Minister* [11], at pp. 840, 846-847 {336-337, 345-348; *Movement for Quality Government in Israel v. Government of Israel* [12], at p. 54, although there the question under discussion was the power to remove a minister from office; HCJ 4668/01 *Sarid v. Prime Minister* [28], at p. 281). The relevant considerations should be taken into account when making decisions. Ignoring a relevant consideration, giving inappropriate

weight to a relevant consideration or striking an unreasonable balance between the various considerations may lead to the decision being found to lie outside the limits of the margin of reasonableness, with the result that it is unlawful (HCJ 1284/99 *A v. Chief of General Staff* [29], at pp. 68-69).

On appointing a person with a criminal conviction to be a cabinet member and public confidence

3. The decision under review — a decision to appoint a cabinet member — is governed by s. 6 of the Basic Law, which provides in subsection (c):

> 'Qualification of ministers
>
> 6. …
>
> (c) (1) A person shall not be appointed a minister if he has been convicted of an offence and sentenced to imprisonment, and on the date of the appointment seven years have not yet passed since the day on which he finished serving the sentence of imprisonment, or from the date of the judgment, whichever is the later, unless the chairman of the Central Elections Committee determined that the offence of which he was convicted does not, in the circumstances of the case, involve moral turpitude.'
>
> (2) The chairman of the Central Elections Committee shall not make a determination as stated in paragraph (1) if the court has held according to law that the offence of which he was convicted does involve moral turpitude.'

According to the 'minimum requirement' provided in s. 6(c)(1) of the Basic Law, a conviction in itself is insufficient to prevent someone becoming a member of the government. It is also essential that a custodial sentence was handed down and that the period of time stipulated in the section, which is a kind of purification period, has not passed since the candidate finished serving the sentence or the judgment was given. Indeed, case law has held that the existence of a criminal record in itself does not preclude the appointment of a person to public office, nor does it rule out his competence for the position. It has also been held that 'in the absence of statutory qualifications, case law qualifications should not be laid down…' (HCJ 727/88 *Awad v. Minister of Religious Affairs* [30], at p. 491). This is certainly the case where the

legislature has provided statutory qualifications, as was done with regard to the appointment of a minister. Notwithstanding, as my colleague also emphasized, the fact that the law has determined statutory qualifications does not mean that it is possible to appoint as a government minister anyone who is not disqualified by the 'minimum requirement.' The arrangement in s. 6(c) of the Basic Law does not exhaust the grounds for disqualifying a person from holding office as a cabinet member, and even when the basic disqualification does not apply, the authority making the appointment should decide the question of the appointment after exercising discretion that includes an examination of all the relevant considerations and striking a balance between them (*Movement for Quality Government in Israel v. Prime Minister* [11], at p. 867 {374 }; HCJ 4267/93 *Amitai, Citizens for Efficient Government v. Prime Minister* [10], at pp. 457-458). In other words, a distinction should be made between the question of whether the minimum requirements laid down by the legislature are satisfied and an examination of the discretion that was exercised in the decision to make an appointment.

This is also relevant to our case. The petitions before us do not concern the question of the power of the prime minister to appoint a minister to his government, since this power exists as long as the candidate satisfies the statutory minimum requirements, and there is no dispute that no statutory disqualification exists in the case of MK Ramon, since he was not given a custodial sentence at all. The petitions address the question of the discretion exercised by the Prime Minister as the person who had the authority to decide to appoint MK Ramon to the Government in the capacity of Deputy Prime Minister. We are not dealing with a question of authority but with a question of the reasonableness of discretion.

4. My colleague discussed the principles laid down by case law with regard to the discretion that should be exercised when considering the appointment of someone who has been convicted in a criminal trial to a senior public office and the weight that should be attached to this consideration, and I shall therefore refrain from discussing this matter fully except where I need to do so in order to state my opinion.

The fact that a person is a competent candidate for holding office as a cabinet member according to the statutory requirements does not rule out the possibility — and in my opinion the duty — to take into account his criminal record, together with other relevant considerations, when exercising discretion in making the decision with regard to the appointment (*Eisenberg v. Minister of Housing* [1], at pp. 256-257 {54-56}; *Amitai, Citizens for Efficient*

Government v. Prime Minister [10], at p. 459; HCJ 194/93 *Segev v. Minister of Foreign Affairs* [31], at p. 60; *Movement for Quality Government in Israel v. Prime Minister* [11], at pp. 843 {340-341}). A criminal conviction may not disqualify someone from being appointed to public office, but it is always a relevant consideration of paramount importance, since an appointment to public office of a person who has a criminal record has an effect on the functioning of the public authority, and the public's attitude to it and confidence in it (*Eisenberg v. Minister of Housing* [1], at pp. 258 {57-58}; *Segev v. Minister of Foreign Affairs* [31], at p. 61).

This approach is based on the fundamental principle that the public authority is a public trustee (*Eisenberg v. Minister of Housing* [1], at pp. 256-257 { 54-56}; *Movement for Quality Government in Israel v. Prime Minister* [11], at pp. 843 {340-341}). The Government, the Prime Minister and the members of the Cabinet are public trustees. 'They have nothing of their own, and everything that they have, they hold for the public' (HCJ 1635/90 *Jerezhevski v. Prime Minister* [32], at pp. 839. 840; *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 461; regarding the duty of trust, see also HCJ 7074/93 *Suissa v. Attorney General* [33], at pp. 774-776). Trust is the cornerstone of the government's ability to function. It plays an important role in forming the conceptual and practical outlook regarding the duties that the government owes to its citizens. The duty of trust that the government and each of its members owes to the public is an absolute condition for public confidence in the government, even though it alone is insufficient. Without public confidence in the government and its organs, a democracy cannot survive. A public figure is charged with the duty of trust in all his actions:

'The duty of trust imposed on the prime minister and the members of the government is closely related to public confidence in the government. This is self-evident: a trustee who conducts himself like a trustee wins confidence, whereas a trustee who does not conduct himself like a trustee does not win confidence. The government needs confidence, not merely the confidence of the Knesset but also the confidence of the entire public. If a government conducts itself like trustees, the public will have confidence in the organs of state. If the government breaches that trust, the public will lose confidence in the organs of state, and in such a case the court will have its say' (*Movement for Quality Government in Israel v. Prime Minister* [11], at p. 902 {420).).

The duty of trust is not discharged merely by means of decisions on questions of policy, initiatives, planning and action, but also by preserving a

proper and unsullied image of public office and those who hold the highest offices.

5. As I have said, when making a decision regarding the formation of the government, the prime minister is obliged to consider all of the relevant considerations, including the candidate's criminal record, to give each of them its proper weight in the circumstances of the case and to strike a balance between them that is consistent with the fundamental principles of our legal system and their relative importance from the viewpoint of the values of society (*Segev v. Minister of Foreign Affairs* [31], at p. 61; *Eisenberg v. Minister of Housing* [1], at p. 263; HCJ 5562/07 *Schussheim v. Minister of Public Security* [8]).

A decision to appoint someone who has a criminal record to public office requires a balance between two sets of considerations: the *first* set of considerations concerns the principle of repentance. As a rule, a criminal conviction should not become a mark of Cain that the convicted person carries eternally on his forehead; he should not be punished for his crime after he has 'paid his debt to society' and amended his ways (see the remarks of Justice Dorner in *Sarid v. Prime Minister* [28], at p. 286). It is in the interest of both the individual and the public to allow even someone who has been convicted to start afresh. The *second* set of considerations concerns the major public interest in having an untarnished civil service, which enjoys the confidence of the public. The concept of 'public confidence' has become a widely-used expression, but it is precisely for this reason that we need to understand that it is not a theoretical concept, or even worse, merely a cliché. 'Without trust the State authorities cannot function' (HCJ 428/86 *Barzilai v. Government of Israel* [34], at p. 622 {104}). Public confidence is essential if the government is to be able to govern in practice. It is the cornerstone of the proper functioning of the civil service and the existence of a healthy society:

'… without public confidence in public authorities, the authorities will be an empty vessel. Public confidence 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 confidence that the general public has in the organs of government' (*Eisenberg v. Minister of Housing* [1], at p. 261 {64}).

Moreover —

'The way in which the public regards the civil service, the confidence that the public has in the propriety of its actions and the integrity of its employees are prerequisites for the existence of a proper government…' (CrimA 121/88 *State of Israel v. Darwish* [35], at p. 692).

The public's confidence in the government and its members is derived to a large degree from their conduct and the integrity that can be seen in that conduct. For all of the reasons that I have discussed above, public confidence in its leaders should not be taken lightly. Public leaders are the standard-bearers who lead the nation; they are expected to act as an example and a role-model for the whole public. Public confidence cannot exist when someone who has recently been tainted is found in the rank and file of the civil service and government — and especially in senior positions. Moreover, civil servants who serve under members of the government and under the most senior public officials take their example from them; their conduct contributes to and affects the shaping of basic outlooks and accepted modes of conduct in the civil service, as well as the ethos of the whole civil service (*Suissa v. Attorney General* [33], at p. 781).

The disqualification in s. 6(c) of the Basic Law also reflects the balance between the two sets of considerations that we mentioned — between the principle of repentance, on the one hand, and the interest of preserving the integrity of the civil service and its officials, and public confidence in them, on the other (*Sarid v. Prime Minister* [28], at p. 287). But, as has been made clear, this balance does not exempt the person in authority from exercising discretion in each case, even when the disqualification does not apply to the candidate.

6. The weight of the consideration concerning a candidate's criminal record for holding office in public service vis-à-vis the other relevant considerations is not fixed or static. It varies from case to case according to the circumstances, *inter alia* in view of the nature of the criminal record and the character of the office under discussion:

'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' (*Eisenberg v. Minister of Housing* [1], at p. 261 {64-65}).

It has also been said:

'… 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' (*Eisenberg v. Minister of Housing* [1], at p. 262 {65}; see also *Segev v. Minister of Foreign Affairs* [31], at p. 61; HCJ 5562/07 *Schussheim v. Minister of Public Security* [8]).

Another consideration that has weight when appointing someone with a criminal record to public office is the degree to which the candidate is uniquely qualified for holding that public office. Thus it is customary to distinguish between a candidate who is one of many and a candidate who is unique and may in certain exceptional circumstances be the only person for the job. A distinction should also be made between an emergency, which requires the recruitment even of someone with a criminal record, and an everyday act of the civil administration that as a rule should be done by upright workers (*Eisenberg v. Minister of Housing* [1], at p. 262 {65}).

I should re-emphasize that although my opinion focuses on the consideration relating to a candidate's criminal conviction and the findings of the court in his case — since these were not, in my opinion, given proper weight in this case — this is not the only consideration, and the review of the reasonableness of the decision should assume that the person making the appointment balanced this consideration against other considerations, such as

the special abilities of the candidate, how suitable he is for the position, the tasks faced by the organization to which he is being appointed, etc. (*Movement for Quality Government in Israel v. Prime Minister* [11], at pp. 870-871 {379}.

7. Summing up this point, according to the principles laid down in *Eisenberg v. Minister of Housing* [1], usually the appointment of someone who committed a serious criminal offence in the past to a senior position in public service is unreasonable. Notwithstanding, this is not a sweeping rule of disqualification from every possible senior position in the public service. Like every administrative decision, this decision should also be based on a proper balance between the various relevant considerations, which should each be given the proper relative weight in the circumstances of the case (*Sarid v. Prime Minister* [28], at p. 280). But I should make it clear that in the case before us we are not dealing with a conviction for one of the most serious offences. I shall discuss the significance of this below.

The criminal trial that is the background to this case

8. Was proper weight given to the criminal trial and the judgment relating to MK Ramon when the decision was made to appoint him a cabinet minister and Deputy Prime Minister? In order to answer this question, let us first consider the details of the conviction under discussion, since the petitioners' claim is that it is because of these that the appointment is unreasonable.

MK Ramon was brought to trial and convicted of an offence of an indecent act without consent, under s. 348(c) of the Penal Law, 5737-1977 (hereafter: the Penal Law), in that, when he was Minister of Justice, he kissed and stuck his tongue into the mouth of the complainant, an IDF officer, who was working for the military attaché in the Prime Minister's office. The event took place only a short time before MK Ramon went into a cabinet meeting that discussed the kidnapping of two IDF soldiers in the north and at the end of that meeting a decision was taken to go to war (the Second Lebanese War).

In the criminal trial, MK Ramon admitted that the kiss did indeed take place, but he claimed that the complainant was the one who initiated it and that he only responded to her. The Tel-Aviv – Jaffa Magistrates Court (the honourable Judges Kochan, Beeri and Shirizli) convicted him after it held that it regarded the complainant's credibility as unimpeachable. The court held that MK Ramon's version of events was mostly consistent and it discussed the emotion he displayed when he testified in the witness box, when he came close to tears because of the occasion and the circumstances. Notwithstanding,

the court found that his version of events did not pass the test of logic and reasonableness, since it '… did not have a strong foundation, in some parts it was not supported by other testimonies and in other parts it was even in conflict with the evidence…' (para. 26 of the verdict).

The findings of the Magistrates Court regarding MK Ramon are not flattering ones. Thus, for example, it was held that 'in our opinion, the defendant's testimony under cross-examination was a clear and characteristic example of how he tried to distance himself from anything that might implicate him, at the cost of not telling the truth, while at the same time he had no hesitation in besmirching the complainant' (para. 26(c) of the verdict). His testimony was defined by 'a distortion and misrepresentation of the truth,' and the court also found that MK Ramon '… was not precise with regard to the facts, to say the least' (paras. 28-29 of the verdict). In summary the court held:

'… After reviewing and examining all the evidence, we found that the complainant's statements are completely true. By contrast, we found that the defendant did not stick to the truth, tried to divert the blame from himself and direct it elsewhere, minimized his actions and his responsibility, and at the same time exaggerated the complainant's role, distorted and misrepresented the facts in a sophisticated and insincere manner' (para. 94 of the verdict).

Hardly a flattering description!

9. In the sentence, the Magistrates Court considered the application made by MK Ramon's counsel to cancel his conviction. The court discussed MK Ramon's public standing, his extensive public activity, the distress and pain he suffered 'as a result of the loss of the public career that was interrupted,' as well as the considerable price that he paid because of the incident and the personal and professional damage that he was likely to suffer if the conviction stood. The court took into account the fact that this was an isolated incident, 'which did not show that we are dealing with a sex offender or someone who has developed a criminal way of conducting himself,' as well as the fact that the act was not one of the more serious sex offences, and it would appear that the lesson had been learnt. Notwithstanding, it was held that the higher the public standing of the defendant, the higher the standards and norms of behaviour that were expected of him. The court also took into account the injury to the complainant, the circumstances in which it was caused and the fact that the regret expressed by MK Ramon for the act at a late stage of the trial was inconsistent with the manner in which he conducted his defence. All of the considerations led the court to the conclusion that the public interest should be preferred to MK Ramon's personal interest, since 'cancelling the

conviction in this case would obscure the message and blur the criminal nature of the act.'

The court also considered the prosecution's application to determine that the circumstances in which the offence was committed involved moral turpitude, but it denied it and held that:

'… the overall circumstances in which the offence was committed do not justify a determination that the offence involved moral turpitude. The isolated and unplanned act was committed by the defendant following a meaningless conversation, in an emotional state of indifference. The act lasted two to three seconds and ended immediately.'

The court pointed out that 'The defendant's conviction is a punishment in itself' and went on to say:

'We are aware of the mitigating circumstances… and these have led us to the opinion that the defendant's sentence should be minimal, so that the future harm that he will suffer will stand in due proportion to the nature of the offence and the circumstances in which it was committed.'

The court therefore sentenced the defendant to 120 hours of community service and ordered him to pay compensation to the complainant, while stating expressly that in passing sentence it had taken into account the provisions of s. 42A(a) of the Basic Law: the Knesset and had tailored the sentence to what is stated in that section. It should be explained that this section concerns the disqualification from the Knesset of any member who has been convicted in a final judgment of a criminal offence that has been held to involve moral turpitude.

Sentencing considerations, judicial review considerations and the issue of moral turpitude

10. As I have said, no one disputes the fact that MK Ramon satisfies the minimum requirements in s. 6(c) of the Basic Law, since he was not given a custodial sentence. He is therefore competent to hold office as a minister in the Israeli government. As I have explained, the question in this case is a different one, namely, did the decision to appoint him as a cabinet member — and in this case as Deputy Prime Minister — at the present time, fall within the scope of the margin of reasonableness?

MK Ramon was convicted of an offence that is one of the less serious sex offences. It was an act that does indeed appear to be an isolated incident that only lasted for several seconds. In view of all the circumstances, even though the conviction relates to a sex offence, I too share the opinion of the Magistrates Court that he should not be regarded as a sex offender. These

considerations had a major effect on the sentence that the court handed down to MK Ramon and on the finding that the act did not involve moral turpitude.

Notwithstanding, these sentencing considerations, and even those that determine whether an act involves moral turpitude, are not identical to the considerations that should be taken into account when examining the reasonableness of appointing someone who has been convicted in a criminal trial to public office. The sentence is dictated by penal considerations, such as retribution, rehabilitation and deterrence of the individual and the public. The balance between these, when it is made against the background of the personal circumstances of the defendant and the circumstances in which the offence was committed, determines the sentence. Even if the sentence takes the interests of society into account, even if the court considers the message that may be conveyed by handing down a particular sentence to a convicted defendant, the principle of individual justice still lies at the heart of the sentencing decision. The individual who has been convicted is the focus of the decision, not the public or the public interest. Regarding the issue of moral turpitude, it has been held many times that the expression 'offence involving moral turpitude' does not address the elements of the offence of which the defendant was convicted but a serious moral flaw that was involved in its commission in view of the purpose of the legislation that speaks of that 'offence involving moral turpitude' (HCJ 11243/02 *Feiglin v. Chairman of Election Committee* [36], at p. 160; HCJ 251/88 *Oda v. Head of Jaljulia Local Council* [37], at p. 839; HCJ 103/96 *Cohen v. Attorney General* [38], at p. 326; R. Gavison, 'An Offence Involving Moral Turpitude as Disqualification for Public Office,' 1 *Hebrew Univ. L. Rev. (Mishpatim)* 176 (1968)). Our concern is with an ethical evaluation of the nature of the act:

'"Moral turpitude" accompanying an offence gives it a negative aspect that goes beyond the mere dimension of breaking the law. This is a concept that contains a negative moral-ethical judgment, a kind of moral stigma, which derives from ethical outlooks and moral criteria that are accepted by society.

This is a multi-faceted concept that takes on different forms when it is applied to the character of a specific offence and its circumstances, and the special context in which it is being considered…' (*per* Justice Procaccia in *Feiglin v. Chairman of Election Committee* [36], at p. 162).

A decision as to whether an offence involves moral turpitude is made with reference to whether the public regards the offence as one that carries with it a stigma, which affects the ability of the person who was convicted to serve the public. The court deciding the question of moral turpitude is aware that from

the viewpoint of the defendant its decision is likely to act as an exclusion from, or a readmission into, public life and public service. The focus of the consideration is the nature of the act against the background of the circumstances in which it was committed and against the background of society's values and outlooks.

Whereas an offence involving moral turpitude emphasizes the immoral element in its commission, a criminal offence that may make it unreasonable to appoint its perpetrator to public office does not necessarily need to have an immoral aspect (*Eisenberg v. Minister of Housing* [1], at p. 266 {71}). Moreover, unlike the discretion exercised when sentencing someone and determining whether the offence involves moral turpitude, examining the reasonableness of discretion in a decision to appoint someone to office is different for the reason that it concerns judicial review of administrative discretion. Judicial review is carried out '… from the perspective of the fundamental principles of the legal system, as they are reflected in legislation and case law, and from the perspective of the fundamental values and norms of society' (*A v. Chief of General Staff* [29], at p. 69). The offence and the circumstances in which it was committed are only one of many considerations that the person making an appointment should consider and that judicial review should take into account. Moreover, as I have said, in order to determine that an appointment to public office of someone convicted in a criminal trial is unreasonable, it is not essential that the act shows the person who committed it to be tainted by a moral stigma or moral turpitude. Sometimes it is sufficient that the nature of the position and the need to preserve public confidence in it do not allow someone convicted of a particular offence to hold that office. It follows that the fact that the court held that an act does not involve moral turpitude cannot rule out a finding that an appointment is unreasonable because of the conviction.

Everything said hitherto was merely intended to say that the mitigating circumstances discussed by the Magistrates Court in the sentence, as well as the finding that the act did not involve moral turpitude, cannot in themselves decide the issue in this case.

11. Admittedly, the act was one of the less serious sex offences and of short duration. It was an isolated event and the lesson has been learned. But all this cannot obscure and blur the fact that MK Ramon was convicted in a criminal trial. He no longer enjoys the presumption of innocence. He is not one of those persons who fell under the shadow of a criminal investigation that was opened against them but were never charged. At the end of a trial, he was

found guilty (see and cf. *Movement for Quality Government in Israel v. Government of Israel* [12], at p. 57). As a rule, in such circumstances, when we are dealing with someone who has been convicted or has made a confession, the proper weight that should be attached to the question of public confidence is greater than the weight that it would be, were we speaking of someone who has merely been indicted and who protests his innocence (*Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at pp. 462, 467-468). The premise, therefore, is that when exercising discretion, the consideration of public confidence should be given considerable weight in the circumstances of the case. Was it indeed given the proper weight?

The time factor

12. Only a short period — several months — passed between the time when MK was convicted and served his sentence and his appointment to the position of Deputy Prime Minister. The time that passes from the conviction and serving the sentence until the appointment is relevant when considering the reasonableness of a decision to appoint someone to public office. The more time that has passed since the conviction and serving the sentence, the greater the tendency to prefer the considerations of repentance and rehabilitation and to think that the appointment will not undermine public confidence in public officials, and *vice versa*. The period of time that should pass from the time when the offence was committed and the sentence was served until 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' (*Eisenberg v. Minister of Housing* [1], at p. 266 {72}; *A v. Chief of General Staff* [29], at pp. 73-74). In our case, only a few months passed from the time that sentence was passed on MK Ramon until he was appointed a minister in the Israeli Government. The relative lack of seriousness of the offence of which he was convicted cannot instantly efface the stigma inherent in the conviction. The appointment to the position of cabinet minister in the circumstances of the case, before the ink has even dried on the verdict and the sentence, and before the air has cleared, reflects an internalization, or at least an acceptance, of improper norms of conduct that should not be regarded as deserving of public forgiveness, as if they were mere acts of youthful impudence. I accept that the nature of the offence and the circumstances in which it was committed, as well as the fact that it is not one of the most serious offences, do not mean that decades should pass before MK Ramon's appointment to a senior public office

will be appropriate. But it is not right that only a few months pass before he returns to a senior position in public service.

The seniority of the position and the rule of law

13. The criminal conviction and the fact that the appointment decision was made a very short time after MK Ramon completed serving his sentence represent in my opinion the main difficulty in the discretion that was exercised in the appointment decision. Insufficient weight was given to the harm that the appointment would cause to public confidence in the Government and its members. An additional consideration that in my opinion was not given proper weight concerns the seniority of the position to which MK Ramon was appointed.

As I have said, in this case, where the conviction is a very recent one, considerable weight should attach to the question of public confidence. What is the picture that is conveyed to the public? Let us return to the beginning of the affair. When the police investigation against him began, MK Ramon suspended himself from the position of Minister of Justice. In doing so, it should be said, he acted properly. MK Ramon's job was 'kept for him' and two ministers held office in his stead as Ministers of Justice on a temporary basis until it was known how his trial would end. A short time after MK Ramon finished serving his sentence, he returned to the cabinet, this time in a more senior position of Deputy Prime Minister. It should be remembered that the importance of the position requires considerable weight to be given to the consideration of preserving public confidence (*Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 471).

As I have said, the more important the office, the greater the weight of the consideration concerning the criminal record of the candidate. It has been held in the past that the importance of the position is not determined merely on the basis of formal tests such as seniority and job description, but also in accordance with the extent to which the public identifies the office holder with public service and the damage that will be caused to public confidence in public service if the appointment takes place (*Eisenberg v. Minister of Housing* [1], at p. 267 {72}). The importance of the position to which MK Ramon was appointed, namely Deputy Prime Minister, requires us to consider that this is a position that involves representation of the whole government. The role of Deputy Prime Minister, even though it is not defined in legislation, is a very senior position. Whoever holds this position represents the government and the state, and therefore very careful consideration should be given to the question of public confidence in view of his appointment to hold

the post and to represent the whole government. This is a position that requires a special degree of confidence that the public will feel towards the person holding the position and towards the whole institution to which he belongs and which he represents. In such circumstances, a distinction should be made between the possibility of allowing someone who has been convicted to rehabilitate himself and to return to live a normal life after he has completed his sentence, and between placing him '… at the top of the administrative pyramid' (*Eisenberg v. Minister of Housing* [1], at p. 266 {69}).

The short period of time and the appointment to such a senior position both convey a message to the public that the criminal trial is unimportant, and that a criminal conviction has no significance in the public sphere.

14. The findings of the Magistrates Court in MK Ramon's case are serious, and as stated they include findings with regard to distortion and misrepresentation of the truth, not telling the truth and conduct intended to besmirch the complainant. Indeed, not only are the conviction and the judicial findings regarding the offence important, but so too is the defendant's conduct during the trial. The fact that someone who was convicted after such serious findings were reached in his case nonetheless returned to public office immediately after he finished serving his sentence and was even given a more senior and more prestigious office is unreasonable. It reflects a normative approach that it is hard to accept. *Prima facie*, it does not take into account the need to maintain public confidence in public service and its integrity. A decision of an authority to appoint someone to public office while treating a criminal conviction, *de facto*, as insignificant, as if it had never happened or was carried away by a gust of wind, cannot be regarded as a decision that gave proper weight to the interest of maintaining public confidence in public office. The requirement that the more senior the office of a public figure, the stricter the standard of conduct that he is expected to follow, was drained of all significance in the case before us. Such a decision cannot be regarded as a decision based on a commitment to the rule of law. The following remarks should be taken to heart by the general public, and by authorities and persons in charge of them:

'… The rule of law is not created *ex nihilo*, nor is it something intangible. It should be reflected in a tangible and daily observance of binding normative arrangements and in their *de facto* application to everyone, in the realization of basic freedoms, in guaranteeing equality and in creating a general atmosphere of trust and security. The rule of law, public welfare and the national interest

are not contradictory or conflicting concepts. They are intertwined, interrelated and interdependent.

The court is specially charged with the practical realization of these expectations, but every state authority has the duty to act to realize these goals.

A sound administration is inconceivable without care being taken to uphold the rule of law, for it is this that protects us against anarchy and guarantees the stability of the system of government. This order is the basis for the existence of political and social frameworks and the safeguarding of human rights, none of which can exist in an atmosphere of lawlessness' (*Barzilai v. Government of Israel* [34], at p. 554-555 {53}).

The message that the appointment conveys is that even if a criminal trial takes place, and even if it ends in a conviction, it may be said, possibly by way of hyperbole, that no one is accountable. The criminal stain that MK Ramon carries at this time is capable of tarnishing the whole Government, and this was not given proper weight. The quick appointment to a senior position, only a short time after the criminal trial ended and the sentence was served, sends a message to the public that there are no values, that one organ of Government has no respect for the work of the others, nor does it act in concert with them, even though all of these are essential for the existence of a democracy.

The nature of the offence and the effect it has on the public

15. Moreover, an additional consideration that should have been considered concerns the nature of the offence of which MK Ramon was convicted. The offence of an indecent act is relatively low on the scale of sexual offences, in view of all the circumstances. Notwithstanding, this does not diminish the seriousness of the act. As the Magistrates Court said: '… An offence was committed which, in other circumstances, might have been considered an offence that was not especially serious, but in view of all of the circumstances in which the offence was committed, it becomes more serious and acquires a dimension that has considerable public significance' (para. 91 of the verdict).

An offence of an indecent act involves not only an injury to the person but also to the dignity of the victim of the offence as a human being, and to the victim's autonomy as an individual, two things that are interrelated and closely intertwined. The existence of more serious sex offences in the statute books does not diminish the injury to dignity, nor to the autonomy of the individual:

'Every woman and man is entitled to write his or her life's story as he or she wishes and chooses, as long as no one encroaches upon the domain of another. This is the autonomy of free will. When a person is compelled to follow a path that he did not choose to follow, the autonomy of free will is

undermined. Indeed, it is our fate — the fate of every man — that we constantly act or refrain from acting for reasons other than that it is our own free will, and in this way the autonomy of our will is found wanting. But when the injury to the autonomy of free will is a major one, then the law will intervene and have its say' (*per* Justice Cheshin in CrimA 115/00 *Taiev v. State of Israel* [39], at pp. 329-330, even though that case concerned more serious offences).

The protection of the dignity and person of women is a social interest. No civilized society exists in which the dignity of women — or the dignity of any other person — is trampled without a murmur or without any proper response. The protection of society's values, of which the value of human dignity is one, is not effected merely by prosecuting criminal trials and holding defendants accountable. It should be expressed wherever such expression is required by the nature of the matter. In our case, what is the message sent to the whole public — men, women and children — when they see that a cabinet minister was convicted of a sex offence that he committed against a young woman officer and then, within a short time, albeit after serving a sentence, he returns to a position that is at least equal to the one he held before his conviction, if not a more important one? It is a message that not only makes the criminal trial and the judicial ruling meaningless, but also erodes the values of respecting the person, dignity and wishes of women, especially in situations involving a disparity of forces (see also in this regard the remarks of Justice Strasberg-Cohen in *A v. Chief of General Staff* [29], at p. 76). It is a message that elected public officials do not need to be held to the high standard of ethics and the high standard of conduct that might be expected of them as persons who are supposed to serve as examples and models for the whole public (*Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 470; *Cohen v. Attorney General* [38], at p. 326). How can the appointment be reconciled with the need to uproot norms that have no place in a civilized society? What message is sent to potential complainants that see the trials and tribulations endured by the complainant, who suffered denials and slanders, who underwent cross-examination 'in a manner deserving of our respect' (para. 10(a) of the verdict), who is found by the court to be a witness whose veracity is undoubted, and yet after her testimony is accepted, the conviction is reduced to nothingness?

16. I have not overlooked the fact that in sentencing MK Ramon the Magistrates Court expressly left open the possibility of his returning to the Knesset. But the Government went much further. It did not merely re-establish the *status quo ante* but it completely disregarded the explicit verdict and

promoted someone who was recently convicted. The sentence handed down in the Magistrates Court sought to balance between the seriousness of the acts and the conduct of MK Ramon during the trial, as described above, and between the nature of the act and the circumstances in which it was committed. The Magistrates Court sought to achieve this balance by leaving the conviction as it stood, while imposing a light sentence and rejecting the proposition that the offence involved moral turpitude. The court expressly stated in its verdict that this balance was based on a premise that the MK Ramon suffered considerably as a result of the criminal trial and was likely to continue to do so as a result of the court refusing to cancel the conviction. Notwithstanding, the balance that the court struck does not, as I have said, make the exercise of discretion redundant when considering the appointment of MK Ramon to the cabinet.

I should emphasize that the decision in the petitions before us does not concern the competence of MK Ramon to serve as a member of the Knesset, which would give rise to the difficulty of undermining the will of the electorate. Intervening in a decision to appoint someone to the position of cabinet minister does not give rise to a similar difficulty, since it concerns a decision of the person in charge of the executive branch of government, in judicial review of his discretion, and it does not undermine the will of the electorate. Indeed, in the past when this court has considered petitions that sought to cancel the appointment of MK Raphael Pinchasi as chairman of one of the Knesset committees, it was held: 'A distinction should therefore be made between the competence of a member of the Knesset to carry out his duties as a member of the Knesset and his competent to act in contexts outside the Knesset, such as in the context of the executive branch' (HCJ 7367/97 *Movement for Quality Government in Israel v. Attorney General* [40], at p. 557; see also H. Cohn, 'The Competence of Public Servants,' *Selected Writings* (2001), at pp. 391, 402). This is also the position in this case.

I should clarify that I do not belittle the damage and mental anguish that MK Ramon certainly suffered as a result of being prosecuted in the criminal trial. Nor do I ignore the fact that the sentence was served in full or that the offence of which he was convicted was a relatively light one. But it is inconceivable that in the case of a public figure, who is expected '… to serve as an example to the people, to be loyal to the people and deserving of the trust that the people place in him' (*Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 470), where the damage that he suffered to his standing was a mitigating factor in his sentence, the outcome should be as it is in this case.

17. It should be emphasized that nothing in the aforesaid casts even the smallest doubt on the professional experience and abilities of MK Ramon to carry out the role given to him by the Prime Minister. In this respect, the offence of which he was convicted does not, in my opinion, have any effect or ramification on his ability to carry out this office. I am not questioning at all the additional considerations that were taken into account, and my assumption is that the Prime Minister, as the person who made the appointment, made the decision regarding the appointment after considering the tasks that confronted the Government and understanding the talents required of the ministers serving in the Government for the purpose of carrying out those tasks (see also *Schussheim v. Minister of Public Security* [8], at p. 846). I am prepared to accept that MK Ramon has the appropriate and proper qualifications and experience for the position. Nonetheless, it is well-known that disqualifying a candidate from holding public office does not depend only upon a connection between his criminal record and its effect on his professional ability to carry out the job for which he is a candidate, but also on his ethical and moral capacity to carry it out, unless a 'real and urgent' state of emergency makes it essential to appoint him as the only candidate (*Sarid v. Prime Minister* [28], at p. 280). In our case no such argument was made, and that is sufficient to prevent the conviction from being denied its proper weight.

A determination that a government decision to appoint a minister suffers from unreasonableness that goes to the heart of the matter creates a tension between the world of law and the world of politics, between two separate worlds that are governed by different sets of laws and different game rules. 'The law is based, to a large extent, on ethics; democracy is based, first and foremost, on representation' (*per* Justice Zamir in *Movement for Quality Government in Israel v. Government of Israel* [12], at p. 63). When deciding petitions concerning the formation of the government, the court has the task of carefully balancing, with an approach of maximum restraint, the need to allow the public to be represented as it wishes by someone who was successful in an election and the need to preserve public confidence in government institutions and the proper moral standards of elected representatives (see CSA 4123/95 *Or v. State of Israel* [4], at p. 191; *Movement for Quality in Government in Israel v. Government of Israel* [9], at p. 429 {293-294}; HCJ 8192/04 *Movement for Quality Government in Israel v. Prime Minister* [41], at p. 186).

This court has already, on several occasions in the past, considered the relationship between law and ethics, and between legal norms and 'government culture' norms (*Movement for Quality Government in Israel v. Prime Minister* [11], at pp. 917-918 {440}; *Movement for Quality Government*

in Israel v. Prime Minister [41], at pp. 157-158, 176-177). Petitions concerning the formation of the government — the appointment of a minister or his removal from office — often give rise to questions concerning the location of the border between the ethical sphere and the legal sphere, which decisions are determined by government culture norms and which are also determined by legal norms. The remarks made by Justice Cheshin in another case are pertinent in this regard:

'… We should be always mindful of the fact that we are speaking of a government culture that is steeped in law — in norms from the field of criminal law — and the question we should ask ourselves is whether in this sphere that contains both government and law, the weight of law is so minimal that we will shrug it off and continue on our way without law. Surely allowing the demands of law to recede… is tantamount to giving up norms to which we, as people of law, regard ourselves as being committed, and which, moreover, we regard ourselves as obliged to disseminate and impose on those around us?' (*Movement for Quality Government in Israel v. Prime Minister* [41], at p. 176).

He also held:

'When we realize that the culture of "it simply isn't done" has been undermined and that our standards have fallen very low, should the law not make itself clearly heard? Surely its voice should not sound merely like a piccolo, "clear and pure, but drowned out by the tumult?"' (*ibid*. [41], at p. 177).

President Barak also discussed the relationship between the rules of ethics and the rules of law and the proper place of the principle of reasonableness in regard to them, when he said:

'One of the ways in which the rules of ethics become rules of law, in so far as the public authority is concerned, is through the value of reasonableness. An unethical act may, in certain conditions, be an unreasonable act. Indeed, I am of the opinion that a comprehensive application of the principle of reasonableness to all the acts of the executive branch — including acts that harm the integrity of the administration — is proper. Of course, in countries where the government exercises self-restraint, it is possible that there is no need to develop the principle of reasonableness and apply it to the field of governmental ethics. But in countries where this self-restraint is lacking — and the concept of "it simply isn't done" is not sufficiently developed — the principle of reasonableness and the concept of the margin of reasonableness

should be extended to all government acts' (A. Barak, *The Judge in a Democracy* (2004), at p. 369).

There is no statutory restriction upon the appointment of MK Ramon, but it would appear that the appointment, in the circumstances described above, undermines those principles that support the rule of law, are essential to the existence of a civilized society, and ensure that public service enjoys and deserves public confidence. In such circumstances, I am of the opinion that this court has no alternative but to intervene in the appointment decision, in order to protect the norms to which our legal system is committed.

Postscript

19. I have read the opinion of my colleague Justice A. Grunis and the remarks of my colleague Justice Procaccia in response thereto. I agree in full with her remarks concerning the place and status of the ground of reasonableness in our law, and I would like add to them a few brief remarks:

a. The premise of judicial review is the principle of the separation of powers. The separation of powers is essential for the existence of democracy. At the same time, the separation of powers does not imply that there is no connection between the branches of government. On the contrary, there is a connection between them: '… there is a reciprocal relationship between the different powers, so that each power checks and balances the other powers' (HCJ 5364/94 *Welner v. Chairman of Israeli Labour Party* [42], at p. 786; see also Barak, *The Judge in a Democracy*, at pp. 103-105). One of the expressions of the separations of powers lies in the principle, which has been mentioned innumerable times in the case law of this court, that the court will not intervene in a decision of the authority as long as it falls within the margin of reasonableness. The court does not examine whether it was possible to make a more correct, more proper, more efficient or better decision. As long as the decision that was chosen falls within the margin of reasonableness, there is no ground for the intervention of the court. Notwithstanding, it is obvious in my opinion that the principle of the separation of powers and the respect that each power shows the others — which also lie at the heart of my opinion — cannot render the function that the power has been authorized to exercise devoid of any real content. In our case, the rule of very narrow intervention in the decisions of the executive branch and the legislative branch cannot result in the decisions of those branches having a *de facto* immunity against judicial review. Moreover, where the court does not exercise its judicial review, it errs with regard to the principle of the separation of powers, the checks and balances that the powers owe to one other. In my opinion,

restricting judicial review to various forms of procedural failures and questions of authority presents a real danger to the future of Israeli society and the proper functioning of the organs of government, since it leaves the court with a function that is almost totally technical and rules out real judicial review in which the court protects and promotes the values of society. In my opinion, restricting judicial review by an almost complete rejection of the ground of reasonableness leaves the public exposed to danger, since it is the public that will pay the price of those decisions that fall outside the margin of reasonableness.

b. The difficulties raised by my colleague Justice Grunis in his opinion are indeed real ones, but as my colleague Justice Procaccia also says, the solution to them does not require complete or almost complete abandonment of the use of the ground of reasonableness, only great caution and maximum restraint that the court should adopt when exercising judicial review. Particularly in the case before us, I am of the opinion that the difficulty discussed by my colleague — the court being no better placed than any citizen of the state to assess the reasonableness of the decision — does not really arise. The reason for this is that the court has expertise with regard to assessing the weight of a criminal conviction, the time that has passed from the conviction and the serving of the sentence until the appointment, and the other considerations that I have discussed. No one can assess their weight as well the court. Moreover, even if it is true that determining the unreasonableness of the decision solely from the outcome that was reached — an outcome-based decision — gives rise to considerable difficulty, in the case before us the weight given to these considerations in making the decision can be seen not only from the outcome but also from the proceedings of the Knesset and all of the material presented to us. I should re-emphasize that ultimately I saw no reason to reconsider the approval given by the Knesset to the Government's notice of the appointment, since this has been discussed in detail in the opinion of my colleague Justice Procaccia, it is not the subject of dispute in my opinion and I only saw fit to address the issues on which my opinion is based.

My remarks above address only a very small part of my position regarding the place and status of the ground of reasonableness as a tool of judicial review. The matter will, no doubt, arise in the future, and when it does, I shall discuss it in full.

Summary

20. The government's ability to rule is based not only on the confidence expressed in it by elected representatives. The government's ability to rule also depends ultimately on public confidence in it. As such, even if we assume that political and parliamentary considerations have considerable weight in determining the composition of the government, an essential condition for its proper functioning is a proper standard of principles, values and morality. When the court is called upon to exercise judicial review with regard to a decision that concerns the composition of the government, it should be guided, not only by the principles and rules that my colleague discussed, but also by the values and principles that society cherishes. Even in such a case it needs to strike a balance, which is merely a balance between different considerations:

'When striking this balance, idealism that has no normative basis should be avoided. The judge does not aspire to the lofty and the pure that are unattainable. He does not contemplate an ideal society that has no real existence and cannot be achieved. He does not rely upon a perception of man as an angel. At the same time, the court should avoid a pragmatism that is based on market morality. The judge does not reflect the distorted views that are widespread in society. He does not direct his gaze at a sick society that is sinking into the abyss. He does not rely on a perspective that man is an animal… He takes current reality into account, but he does not regard it as the whole picture. The fact that "everyone does it" is not a criterion for the proper conduct of a civil servant. The fact that it is customary, commonplace and normal to act in a certain way does not make it the proper way to act…' (*Suissa v. Attorney General* [33], at p. 781; see also H. Cohn, 'Thoughts on Integrity,' *Selected Writings* 417 (2001), at p. 451).

These remarks that were made in a different context are also apt in our case.

I have not overlooked the public debate surrounding the appointment in the prevailing circumstances and following the differences of opinion that surrounded the decision to bring MK Ramon to trial. Notwithstanding, judicial determinations are made in accordance with legal criteria, according to the basic principles of the State of Israel as a democratic state that espouses the rule of law and a culture of law, and the court has a duty to stand guard and protect these (see also *Barzilai v. Government of Israel* [34], at p. 585-586 {68-69}).

The decision to appoint MK Ramon at this time gives rise to a difficulty in the ethical sphere because it inherently undermines the values of the rule of law, and a difficulty in the public sphere because it undermines public

confidence in those persons in the highest echelons of power — the Government and its members. As I have said, we are dealing with an issue that focuses on imposing 'the rule of law on the government,' to use Justice Barak's expression in *Eisenberg v. Minister of Housing* [1], at p. 238 {23}. *Prima facie* the decision to make the appointment is tainted in a manner that goes to the heart of the administrative discretion. The rapid promotion to a very senior position so soon after the conviction and the serving of the sentence, after the court said what it had to say on the subject of MK Ramon's conduct and credibility, sends a negative message to persons in positions of authority, public figures, government officials, potential complainants and the public as a whole. At the same time, I would emphasize that these remarks relate to the present moment, a short time after the events and the trial. Obviously, when a proper period of time has passed since the conviction and the serving of the sentence, the shadow cast by the criminal conviction and the disparaging remarks made by the Magistrates Court will fade, and it will no longer stand in the way of an appointment to a senior public office. I see no reason to consider the question of what should be the proper period of time that should pass before the appointment would be a proper one, since it has already been said in the past that '… any period of time that is determined contains an element of arbitrariness' (*Movement for Quality Government in Israel v. Prime Minister* [41], at p. 175). We are not dealing with a question of mathematics, and in any case the determination depends *inter alia* on the nature of the position, the unique abilities of the candidate and the nature of the offence of which he was convicted, and these differ from case to case. Notwithstanding, a period of a few months, as in this case, is insufficient.

For all the reasons set out above, I am therefore of the opinion that it was right to issue an order *nisi* in the petitions. However, in view of my colleagues' position, I have sought to set out my position, which, in essence, is that at the present time there is no alternative but to revoke the decision to appoint MK Ramon to the cabinet.

In conclusion I would like to refer to the remarks of Justice Türkel in *A v. Chief of General Staff* [29], where he cited remarks made originally by Justice Silberg:

'If we seek to be a model state, a society that is a light unto the nations and a chosen people, we should remember — as Justice M. Silberg put it so well — that:

"Morality is the ideological basis of the law, and the law is the external, concrete form of *some* of the principles of abstract morality… The provisions

of the law are — in the eyes of the legislature — the minimum moral standard that is required and expected of every citizen.

The desired ideal is that they will… coincide with one another to the fullest extent, as the water covers the sea' (M. Silberg, *Kach Darko Shel Talmud* (1964), at pp. 66-67; emphasis in the original)."

This ideological basis is the infrastructure that enables the court to enforce legal norms that embody moral values. In my opinion, more than any other consideration, this is the cornerstone on which our decision stands' (*A v. Chief of General Staff* [29], at pp. 77-78).

The image of society and the state is fashioned by decisions of the government in practical matters. Words are not enough. This consideration should be given a proper weight when making a decision to appoint someone to public office, and this is what should have been done in this case.

Justice A. Grunis

1. With respect to the difference of opinion between my colleagues, I agree with the opinion of Justice A. Procaccia that the petitions should be denied. However, my approach is different from that of my colleague. According to my approach, in a case of this kind, where the Knesset approves the addition of a new cabinet minister, following a proposal of the Prime Minister and a decision of the cabinet, it is doubtful whether there is any basis for intervention by the High Court of Justice. Even if the court does intervene, it will do so only in a very rare and exceptional case. The present case does not justify intervention.

2. Section 15 of the Basic Law: The Government sets out how a new minister can be brought into an existing government. The process begins with a proposal of the Prime Minister that is brought before the cabinet. The cabinet may decide to add a new minister. The Government is required to notify the Knesset of the decision and of the position that the new minister will hold. However, these steps alone are not sufficient. It is also necessary for the Knesset give its approval to the Government's notice. In other words, the process of adding a new minister to the cabinet is not complete without a decision of the Knesset. The need for the Knesset's approval is a characteristic of our parliamentary system, in which the formation of a government and its continuation in office depend upon the confidence of the Knesset. Thus, s. 13(d) of the Basic Law: The Government provides that 'The Government is constituted when the Knesset has expressed confidence in it,…', whereas s.

28(a) of the Law states that 'The Knesset may adopt an expression of no confidence in the Government.'

3. In any case of court intervention in a decision of another branch, we need to take into account the relationship between three factors: the identity of the person or body that made the decision, the nature or classification of the decision and the error tainting the decision or the ground for intervention. We shall address each of these, but we should emphasize that in this case we are not dealing merely with a challenge to a decision of an administrative authority. The addition of a minister to the government requires, as aforesaid, a decision of the Prime Minister, a decision of the Cabinet and a decision of the plenum of the Knesset. 'The Government is the executive authority of the State' (s. 1 of the Basic Law: The Government). The government is the most senior administrative authority in the state. Of course, the rules applicable to judicial review of decisions of administrative authorities also apply in principle to decisions of the government. Nonetheless, the court will exercise great caution when intervening in a government decision (see HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister* [11], especially at pp. 836-837, 840-841 {316-328, 321-323}, *per* Justice E. Rivlin, at pp. 867-868 {359-360}, *per* Justice T. Or; I. Zamir, *Administrative Authority*, vol. 1 (1996), at pp. 89-91). Bringing a new minister into the cabinet does not take effect until the Knesset has made a decision. It follows that the success of the petition to the court depends on the court setting aside not only a decision of the most senior administrative authority, but also a decision of the Knesset. Naturally there should be a difference between judicial review of a decision of an administrative authority, and even of the Government, and judicial review of a decision of the Knesset. In our case, we are speaking of a decision of the Knesset that does not take the form of statute. Statutes are also the result of Knesset decisions, but the decisions to which we are referring give rise to different and separate questions. We are speaking of decisions of various kinds. Some of them have normative effect and may be made by various bodies in the Knesset, such as the Speaker, one of the Knesset committees, or the plenum. Since the 'The Knesset is the parliament of the state.' (s. 1 of the Basic Law: The Knesset), it follows that judicial review of its decisions should not be exercised in the same fashion and in the same manner as it is with regard to an administrative authority. Decisions made by the parliament, which was elected by the whole body of citizens, should not be treated in the same way as decisions of administrative authorities, even if we are speaking of the most senior authorities (see, for example, *Movement for Quality Government in Israel v. Prime Minister* [11], especially at p. 848 {332-333},

per Justice E. Rivlin; HCJ 73/85 *Kach Faction v. Knesset Speaker* [43], at pp. 158-159). When we speak of the identity of the body making the decision, we should distinguish between a situation in which a decision is made by the Knesset, such as in the present instance, and a case in which the Knesset takes no action and for that reason the administrative decision requiring the approval of the Knesset is not valid. Let us assume that the Prime Minister decides to bring a new minister into the cabinet and also that the cabinet makes a decision approving this. Were the minister to begin to act in the ministry over which he has been given responsibility before the Knesset has given its approval, we would say that the minister is acting *ultra vires*. If a scenario of this kind occured, it is possible that the court would act, since the seriousness of the defect is so blatant that *prima facie* little weight would be attached to the fact that the most senior administrative authority — the Government — has approved the appointment. Since the law requires the approval of the Knesset, if such approval was not given, it would appear that there would be a strong basis for the intervention of the court. The court's intervention in such a case would constitute support and backing for the Knesset's role, as opposed to intervention in a decision of the Knesset.

4. In addition to examining the identity of the body that made the decision being challenged before the court, we should examine the decision in accordance with the nature of the act or decision. On this subject, it has been said in the past that the activity of the Knesset should be divided into three categories: legislation, decisions regarding internal parliamentary affairs, and quasi-judicial decisions (see, for example, HCJ 652/81 *Sarid v. Knesset Speaker* [2], at pp. 201-202 {55-56}; HCJ 1956/91 *Shammai v. Knesset Speaker* [44], at pp. 315-316; HCJ 971/99 *Movement for Quality Government in Israel v. Knesset Committee* [19], at pp. 141-142; HCJ 12002/04 *Makhoul v. Knesset* [26], and many other cases; A. Rubinstein & B. Medina, *The Constitutional Law of the State of Israel* (vol. 1, 2005), at pp. 235-259). Alongside the aforesaid three categories, there is another category of decisions — namely, decisions concerning parliamentary scrutiny of the Government. The main decision of this kind is a decision expressing confidence in the Government when it is formed. In addition to this decision, we should mention a decision of no less importance, which is the opposite decision — expressing no confidence in the Government (regarding the importance of such a decision in a parliamentary system, see *Kach Faction v. Knesset Speaker* [43]; C. Klein, 'On the Legal Definition of the Parliamentary System and Israeli Parliamentarianism,' 5 *Hebrew Univ. L. Rev. (Mishpatim)* 309 (1973), at pp. 312-313). Less significant powers given to the Knesset with regard to the

formation of the government, its structure, and its composition, are the approval of government decisions regarding a change in the division of functions between members of the government (s. 31(a) of the Basic Law: The Government); transferring a power given by law from one minister to another (s. 31(b) of the Basic Law: The Government); combining, separating or eliminating government ministries; establishing new ministries (s. 31(c) of the Basic Law: The Government); and, of course, adding a new member to the cabinet.

5. In addition to the aforementioned powers of the Knesset relating to the Government, the Knesset has additional powers of supervision. The ultimate possibility of exercising supervision is by means of primary legislation. The Knesset can pass various laws that increase or limit the powers of the executive branch. In this way, it is possible to exercise supervision of this branch. Another possible type of supervision is introducing a condition that the validity of subordinate legislation depend upon a decision of the Knesset (usually, one of the Knesset committees). The authority for such a requirement arises from an express provision in a Basic Law or an ordinary statute (for a general discussion of the Knesset's supervisory role regarding subordinate legislation, see B. Bracha, 'Towards Parliamentary Supervision of Subordinate Legislation? The Draft Basic Law: Legislation, Chapter 3,' 7 *TAU L. Rev. (Iyyunei Mishpat)* 390 (1979)). In this context we should mention that this court has held that the scope of judicial review with regard to subordinate legislation that has received the approval of the Knesset is narrower than that exercised with regard to ordinary subordinate legislation that does not require such approval (see, for example, HCJ 108/70 *Manor v. Minister of Finance* [45], at p. 445; HCJ 491/86 *Tel-Aviv-Jaffa Municipality v. Minister of Interior* [46], at p. 774; HCJ 4769/90 *Zidan v. Minister of Labour and Social Affairs* [47], at p. 172; for a general discussion of the grounds for intervening in subordinate legislation, see HCJ 156/75 *Daka v. Minister of Transport* [48]). It follows that the fact that the Knesset approved an administrative decision — in that case subordinate legislation — narrows the scope of the scrutiny. In addition to supervision that has normative force, the Knesset has additional means at its disposal. We should mention the possibility of tabling motions, debates in the plenum or in one of the Knesset committees, submitting questions, and the activity of the Knesset (and especially the State Control Committee), with regard to reports and opinions of the State Comptroller (see chapter four of the State Comptroller Law [Consolidated Version], 5718-1958; for a general discussion of the Knesset supervision of government actions, see

Rubinstein & Medina, *The Constitutional Law of the State of Israel* (vol. 2), at pp. 745-756).

6. We therefore need to ask how we should rank the various types of Knesset decisions — legislation, parliamentary supervision, internal parliamentary matters, and quasi-judicial acts — from the viewpoint of judicial review. In other words, when will judicial review be relatively broad and when will it be narrow? There is no doubt that, with regard to primary legislation, judicial review is very limited. The court does not have the power to set aside a statute, except in those cases where there is a conflict between an ordinary statute and a Basic Law. At the other extreme of the spectrum lie quasi-judicial decisions of the Knesset or of one of its committees. Between these lie the decisions on internal parliamentary matters and decisions concerning parliamentary supervision of the executive branch. It can be said that insofar as a decision concerns the essence of the parliamentary function, namely legislation and parliamentary supervision of the executive branch, the court will tend to refrain from intervention. The relatively broad scope of intervention in quasi-judicial decisions is founded, it would appear, on the idea that the parliamentary minority needs to be protected against the excessive power of the majority (regarding the protection of a parliamentary minority, even with regard to a decision that is not quasi-judicial, see *Kach Faction v. Knesset Speaker* [43]; Rubinstein & Medina, *The Constitutional Law of the State of Israel* (vol. 1), at pp. 241-242). The difference in the scope of judicial review exercised with regard to different decisions is also explained on the basis of the political element in the decision under consideration. The greater the political element in a decision, the greater the restraint that is required of the court. This can be shown by means of a comparison between intervention in subordinate legislation that has received the approval of the Knesset and exercise of judicial review with regard to a vote of confidence in a new government. Clearly the court will intervene in a decision of the latter type only in extreme cases (see *Movement for Quality Government in Israel v. Prime Minister* [11]), and in cases where forgery, fraud, or a similar voting impropriety determined the result (see and cf. HCJ 5131/03 *Litzman v. Knesset Speaker* [49]). Decisions within the framework of parliamentary supervision are often decisions in which the political element is considerable. The court ought to distance itself from intervention in decisions of this kind (see the opinion of the majority justices in *Movement for Quality Government in Israel v. Prime Minister* [11]).

7. Another factor that may affect the intervention of the court and its scope in decisions of the Knesset is the ground for the intervention or the

defect in the decision or in the decision-making process. Broadly speaking, the defects can be divided into three types: *ultra vires*, procedural impropriety, and unreasonableness. In addition to these we should mention other defects such as discrimination, conflict of interest, incorrect interpretation of the law, and disproportionality.

8. The defect of a procedural impropriety, in the context of judicial scrutiny of Knesset decisions, presents a special problem. The court has recognized expertise on the subject of procedural improprieties. Sometimes a claim is raised in the court that an administrative decision should not be allowed to stand because of an impropriety in the decision-making process. The willingness of the court to intervene in a decision because of a procedural impropriety is relatively high. One reason for this is that intervention on the ground of a procedural impropriety does not consider the question whether the decision on its merits was right, reasonable, or logical, since the court is not the competent body to make that decision. Another reason is that the court, and especially an appeals court, is responsible for correcting procedural improprieties that are found in the actions of lower courts. When the court sets aside an administrative decision because of a procedural impropriety, it compels the authority to act in accordance with the law. It tells the authority that it should comply with the provisions of the law in the process of making the decision. It follows that there is great justification for judicial intervention when a decision is not made in accordance with the proper procedure. On the other hand, insisting upon every detail of the proper procedure, no matter how minor, may make it difficult for the authority making the decision to function. Not every procedural defect is significant, nor should every impropriety in procedural matters result in judicial intervention. The problem is particularly obvious with regard to procedural improprieties in acts of the Knesset. There is a natural desire to refrain from judicial involvement in the activity of the Knesset, in view of the fact that the Knesset is the body elected by all the citizens of the state. This reluctance is highlighted in cases of internal parliamentary matters. This term often refers to procedural matters and the everyday proceedings of the Knesset. Therefore the court does not intervene with regard to the time at which a debate on a no-confidence motion in the government will be held (*Sarid v. Knesset Speaker* [2]), a petition against a decision of the Speaker of the Knesset to include a certain matter in a debate at the request of the Government when it is claimed that insufficient notice has been given (*Shammai v. Knesset Speaker* [44]), or a decision of the Speaker to postpone the holding of a vote on a draft law when the delay is a short one (HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee*

[21]). Notwithstanding, procedural defects may be very harmful, even when we are speaking of the actions of the Knesset. One example of this is the lifting of a Knesset member's immunity without giving him an opportunity to state his case (see *Pinchasi v. Knesset* [23]). The justification for judicial intervention here derives from the fact that this was a quasi-judicial proceeding in which there was a serious flaw. It is possible that even when we are not speaking of a quasi-judicial proceeding in the Knesset, the court will intervene if the procedural flaw seriously harms an opposition party in the Knesset. Case law has held, in a very broad fashion, that the court will intervene if major values of the constitutional system are undermined (as in *Sarid v. Knesset Speaker* [2], at pp. 203-204). For example, if a decision of the Speaker of the Knesset denies an opposition party the right to address the Knesset, thereby committing a flagrant and ongoing breach of the rules of the Knesset, it is possible that the court ought to intervene. If the court does not grant relief, there would be no other body that could help to enforce the law upon the parliament. Thus, in my opinion, by intervening here the court would fulfil its classic role in the field of public law — the protection of minorities — which in this case concerns a parliamentary minority.

9. The defect on which the petitioners base their petition against the decision to bring MK Ramon into the Government is unreasonableness. My colleague, Justice E. Arbel, accepts this argument and holds that the decision was unreasonable. My opinion is different. We should recall that in this case we are not speaking merely of a challenge to a decision of the Prime Minister and of the Government to appoint MK Ramon as a cabinet minister, but also of a challenge to a decision of the Knesset. The ground of unreasonableness is essentially different from the defects of *ultra vires* and procedural defect. When the court examines these two defects, the advantage and unique role of the court are self-evident. The court's expertise in general, and in the field of administrative law in particular, relates to questions of authority and procedural flaws. We should point out that questions of authority and procedural flaws arise also in the fields of criminal law and civil law. By contrast, the court has no special advantage or expertise on the subject of unreasonableness. Admittedly, the ground of unreasonableness is not new to our law and it was recognized in the early years of the state (see, for example, CA 311/57 *Attorney General v. M. Diezengoff & Co. [Navigation] Ltd* [50]). Notwithstanding, in recent decades, especially since the judgment of Justice A. Barak in HCJ 389/80 *Golden Pages Ltd v. Broadcasting Authority* [13], it has undergone a change and has almost developed into a kind of 'supreme norm' (like good faith and public policy). In the course of this development, it

has swallowed up, like a person whose appetite is insatiable, specific grounds for judicial scrutiny that were recognized in the past (for example, the grounds of irrelevant purposes and irrelevant considerations). The great disadvantage of this ground in its current scope lies in its high degree of abstraction. The high degree of abstraction expands the role of judicial discretion and thereby increases legal uncertainty. It creates a huge disparity between its exalted position in the legal universe and its application in a concrete case. The development of the law in common law countries is done by the courts, *inter alia* by means of doctrines and subtests that apply very abstract norms, whether founded on statute or case law, on a more specific level. The ground of reasonableness is different in the sense that the passage of time has not resulted in the development of norms on a lower level of abstraction, which would make it easier for us to find a concrete solution and to reduce uncertainty when a claim of unreasonableness is raised. In this it differs, for example, from the ground of disproportionality (regarding the subtests of disproportionality, see for example HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [51] (opinion of Justice A. Barak); HCJ 3379/03 *Mustaki v. State Attorney's Office* [52], at pp. 907-908; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [53], at pp. 839-840 {296-297}, and many other cases). Often use is made of the concept of weight in order to emphasize the concrete application of the ground of unreasonableness. Thus it has been said on more than one occasion that a decision will be set aside for unreasonableness even if the authority that made the decision took into account all of the relevant considerations, where it gave the wrong weight to one or more of the considerations that were taken into account (see *Daka v. Minister of Transport* [48], at pp. 105-106; HCJ 935/89 *Ganor v. Attorney General* [14], at pp. 514-516 (*per* Justice A. Barak); HCJ 3094/93 *Movement for Quality in Government in Israel v. Government of Israel* [9], at pp. 420-421 (*per* President M. Shamgar); HCJ 4267/93 *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 464, and many other cases). Admittedly metaphors, such as weight, are an accepted tool of legal language. The imagery helps the court to analyze, develop its thoughts and convey the reasoning to the reader. At the same time, the use of metaphors may sometimes make the reasoning vaguer rather than clearer. The use of the image of weight in the context of unreasonableness admittedly helps to some extent. But we cannot ignore the fact that a determination of unreasonableness is almost entirely based on an examination of the end product, i.e., the outcome of the decision. In other words, the use of the metaphor of weight with regard to considerations that the competent authority

making the decision took into account can sometimes, it would seem, be used to disguise disagreement with the result. The problem is particularly acute when the authority making the decision is a collective body.

10. The decision to approve the appointment of MK Ramon to the cabinet was approved by a majority of members of the Knesset, 46 versus 24. Where a decision is made by a body composed of a number of members, it is difficult to examine the considerations that were taken into account. Even if each of the members of the body publicly stated his reasons, it is impossible, or at least very difficult, to determine the relative weight that was given to each consideration in reaching the final result, which is a collective decision. This is the reason that the duty to give reasons, which usually applies to administrative authorities and other authorities, has not been applied, at least not in full, to authorities that are collective bodies (see, for example, HCJ 89/64 *Greenblatt v. Israel Bar Association* [54], at pp. 409-410; HCJ 142/70 *Shapira v. Bar Association District Committee, Jerusalem* [55], at pp. 329-330; HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [22], at p. 133). In the case before us, only a small number of Knesset members expressed their opinions during the debate in the plenum, and even they did not address the appointment of MK Ramon in specific terms but only in general statements (minutes of the 138th session of the seventeenth Knesset (4 July 2007). Clearly, in such circumstances it cannot be said with certainty what were the considerations that were taken into account by each of the members who voted to approve the decision. It is even harder to determine the weight given to each consideration. Therefore, what is done *de facto* by the judge who thinks that the decision is tainted by unreasonableness is to examine the outcome, i.e., the ramifications of the decision. Sometimes what is done in such cases can be referred to as 'reverse engineering.' In other words, the court examines the outcome, i.e., the decision, and in a process of hindsight it lists the considerations that it imagines were taken into account by the body that made the decision. If the final decision is unacceptable to the court, it will say that one of the considerations was given excessive weight or that a certain consideration was not taken into account at all. We therefore need to take with a grain of salt the remark that is sometimes made in this regard, that the court does not replace the discretion of the authority authorized by the law to make the decision with its own discretion (for use of this formula, see for example HCJ 4140/95 *Superpharm (Israel) Ltd v. Director of Customs and VAT* [56], at p. 69 (*per* Justice I. Zamir); HCJ 10934/02 *Kefar Gaza Kibbutz Agricultural Settlement Cooperative Society v. Israel Land Administration* [57], at p. 125; HCJ 4585/06 *Families of the October 2000 Victims Committee v. Minister of*

Public Security [58], at para. 7(c) (*per* Justice E. Rubinstein); for a case in which, despite this statement, it was decided to intervene in the authority's discretion, see *Zidan v. Minister of Labour and Social Affairs* [47]). It would therefore appear that sometimes, when the court intervenes in a decision because of unreasonableness, it is indeed replacing the discretion of the authority with its own discretion. In this case we should remember that we are dealing with a collective body of 46 members of Knesset who voted for the decision to bring MK Ramon into the Government.

From our deliberations hitherto we see that the use of the ground of unreasonableness is highly problematic, especially when a decision of a collective body is challenged on this ground.

11. I do not intend to say that we should ignore or cancel the ground of unreasonableness. In my opinion, the use of relatively narrower and more concrete grounds — such as irrelevant reasons, irrelevant purposes, or discrimination — should be preferred. These grounds or defects have a lower level of abstraction and therefore their use will reduce the scope of judicial discretion and increase legal certainty. The use of the ground of unreasonableness will be justified in extreme cases, only when all the possibilities of judicial review on the basis of more precise grounds have been exhausted, and especially when the case involves a violation of human rights. It is possible that we should return to the use of the term *extreme* unreasonableness, which it would appear has been forgotten to some extent. Of course, this verbal test also suffers from imprecision and involves a significant amount of judicial discretion. Notwithstanding, the use of the adjective 'extreme' acts as a warning to the court. The court should refrain from replacing the authority's discretion with its own discretion, not merely as a matter of rhetoric but also in practice.

12. The petition before us raises a claim of unreasonableness with regard to a decision of the plenum of the Knesset, which gave its approval to a decision of the Prime Minister and the Government to add a minister to the cabinet. The new minister is MK Ramon, who was convicted a few months ago of a sex offence. MK Ramon was sentenced. The sentence he was given and the determination of the court that the act does not involve moral turpitude lead to the result that the conditions provided in the law were not violated by the appointment (I am, of course, referring to the provisions of s. 42A of the Basic Law: The Knesset, and s. 6 of the Basic Law: The Government). Should this court determine that the decision of the Knesset, when it approved the appointment, was unreasonable? My answer to this question is no. The body

that made the ultimate decision that completed the appointment process was the parliament. The decision to approve the appointment is clearly a political one. Naturally, the members of the Knesset had a duty to take into account the fact that the new minister had been convicted of a sex offence. We cannot say how this consideration compared with other relevant considerations. The alleged defect in the decision is not one of *ultra vires*. The defect on which the petitioners rely does not concern a procedural impropriety in the process in which the Knesset reached its decision. We are not even dealing with a question of the interpretation of statute, nor with a decision that violated an existing right of an opposition minority. The claim is that the decision to bring MK Ramon into the Government is unreasonable. As stated, this ground is very amorphous, because of its high level of abstraction. In these specific circumstances, the court is no better placed than any citizen of the state to determine the question of the reasonableness of the decision. We are not dealing with a matter that requires legal expertise. On the basis of all the aforesaid, my conclusion is that the court should refrain from intervening in the decision.

13. The determination that the court will not set aside the decision to bring MK Ramon into the Government does not amount to a ratification of that decision (see and cf. *Movement for Quality Government in Israel v. Prime Minister* [11]). Non-intervention is not equivalent to giving approval or legitimizing a decision. All that the court is saying is: 'In the circumstances of the case, it is not for the court to determine whether the decision is improper.' The court leaves the question in the public domain. It may be assumed that there will be citizens who will think that the appointment of a cabinet minister who has committed a sex offence is absolutely wrong. They may think that such an appointment is a stain on the Government. Even if this is the case, the matter does not require the court to intervene. We are distinguishing between our opinion as citizens and our thinking as justices. Public opinion and judicial opinion are not necessarily the same thing, and it is right and proper that they should not be.

Petition denied by majority opinion (Justices Procaccia and Grunis, Justice Arbel dissenting).

26 Kislev 5768.

6 December 2007.