HCJ 258/07

MK Zahava Galon
v.
Government Commission of Investigation for Examining the Events of the 2006 War in Lebanon

The Supreme Court sitting as the High Court of Justice
[6 February 2007]
Before President D. Beinisch, Vice-President E. Rivlin and Justice A. Procaccia

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

Facts: The government set up a commission of investigation to examine what happened in the war in Lebanon in 2006. The commission decided to hold all of its proceedings *in camera* and not to publish any transcripts of the proceedings, on the ground that they were privileged for the reason of state security. This decision was challenged by the petitioner, who argued that the proceedings should only be held *in camera* if holding them in public would give rise to a near certainty of serious harm to state security, and that transcripts of those parts of the proceedings that did not satisfy this test should be published. The commission argued that it could not know in advance whether testimonies would contain privileged matters or not. It also argued that publishing the transcripts would require considerable work given the need to exclude matters that were privileged and proposed to do so only after presenting its final report, since to do so earlier would delay the preparation of the report.

Held: Most of the testimonies had already been heard by the commission when the petition was filed. Therefore, the question of hearing those testimonies in public was no longer relevant. The commission did not dispute that it was subject to the rule of publicity, according to which holding proceedings in public is the rule whereas holding them *in camera* is the exception. The presumption should therefore be that the commission would conduct itself accordingly, and would examine whether all or some of the testimonies that might be heard at a later stage could be heard in public. With regard to the publication of the transcripts of the commission's hearings, the court held that the commission should publish those parts of the transcripts that were not privileged within a reasonable time, before the final report was presented to the government. Subject to these guidelines, the petition was denied.

Petition denied.

Legislation cited:

Administrative Courts Law, 5752-1992, s. 25, 25(b)(1).
Basic Law: Administration of Justice, s. 3.
Courts Law [Consolidated Version], 5744-1984, ss. 68, 68(a), 68(d)(1), 68(d)(2).
Commissions of Inquiry Law, 5729-1968, ss. 1, 9-11, 14, 15, 18, 18(a), 20, 20(a), 20(c), 22, 23, 27(a), 27(b).
Freedom of Information Law, 5758-1998, ss. 1, 9(a)(1).
Government Law, 5761-2001, ss. 8A, 8A(a), 8A(c).

Israeli Supreme Court cases cited:

[1] HCJ 6728/06 *Omets v. Prime Minister* [2006] (4) TakSC 2797.
[2] HCJFH 10030/06 *Movement for Quality Government in Israel v. Prime Minister* (not yet reported).
[3] CrimA 152/51 *Tripos v. Attorney-General* [1952] IsrSC 6(1) 17.
[4] HCJ 11793/05 *Israel News Company Ltd v. State of Israel* (not yet reported).
[5] LCrimA 5877/99 *Yanos v. State of Israel* [2005] IsrSC 59(2) 97.
[6] AAA 9135/03 *Council for Higher Education v. HaAretz Newspaper Publishing* **[2006] (1) IsrLR 1**.
[7] AAA 6013/04 *Ministry of Transport v. Israel News Co. Ltd* (not yet reported).
[8] HCJ 680/88 *Schnitzer v. Chief Military Censor* [1988] IsrSC 42(4) 617; **IsrSJ 9 77**.
[9] HCJ 243/62 *Israel Film Studios Ltd v. Geri* [1962] IsrSC 16(4) 2407; **IsrSJ 4 208**.
[10] HCJ 1/81 *Shiran v. Broadcasting Authority* [1981] IsrSC 35(3) 365.
[11] HCJ 1601/90 *Shalit v. Peres* [1990] IsrSC 44(3) 353; **IsrSJ 10 204**.
[12] HCJ 14/86 *Laor v. Film and Play Review Board* [1987] IsrSC 41(1) 421.
[13] HCJ 651/03 *Association for Civil Rights in Israel v. Chairman of the Central Elections Committee for Sixteenth Knesset* [2003] IsrSC 57(2) 62.
[14] CA 2800/97 *Lipson v. Gahal* [1999] IsrSC 53(3) 714.
[15] HCJ 6005/93 *Eliash v. Israel Bar Association* [1995] IsrSC 49(1) 159.
[16] CrimApp 5153/04 *A v. Yediot Aharonot Ltd* [2004] IsrSC 58(6) 933.
[17] LCA 3614/97 *Avi-Isaac v. Israel News Co. Ltd* [1999] IsrSC 53(1) 26.
[18] CrimA 11793/05 *Israel News Co. Ltd v. State of Israel* [2006] (2) TakSC 62.
[19] LCrimA 1127/93 *State of Israel v. Klein* [1994] IsrSC 48(3) 485.
[20] CA 6926/93 *Israel Dockyards Ltd v. Israel Electric Co. Ltd* [1994] IsrSC 48(3) 749.

[21] LCA 1412/94 *Hadassah Medical Organization v. Gilad* [1995] IsrSC 49(2) 516.
[22] HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996] IsrSC 50(3) 57.
[23] EA 92/03 *Mofaz v. Chairman of the Central Elections Committee for the Sixteenth Knesset* [2003] IsrSC 57(3) 793.
[24] CA 5185/93 *Attorney-General v. Marom* [1995] IsrSC 49(1) 318.
[25] CrimA 353/88 *Vilner v. State of Israel* [1991] IsrSC 45(2) 444.
[26] LA 176/86 *A v. B* [1986] IsrSC 40(2) 497.
[27] CrimApp 2794/00 *Aloni v. State of Israel* [2000] IsrSC 54(3) 363.

For the petitioner — D. Holz-Lechner.
For the respondent — A. Helman.

JUDGMENT

President D. Beinisch

The Government Commission of Investigation for Examining the Events surrounding the 2006 Lebanon War has until now conducted its proceedings and heard all the testimonies *in camera*. The transcripts of the Commission's proceedings have not been published. The Commission's position is that only after the final report is presented to the government will it decide whether to publish those parts of the transcript that may be disclosed without harming the security of the state or other protected interests. The petition before us is directed at the commission's position.

The main facts and the sequence of events

1. On 12 July 2006, following terrorist operations carried out by the Hezbollah organization, in which eight IDF soldiers were killed and two others were kidnapped to Lebanon, fighting began in the north and this continued until 14 August 2006 when a ceasefire came into effect in accordance with decision no. 1701 of the Security Council of the United Nations (hereafter: 'the Second Lebanon War' or 'the war').

On 17 September 2006 the Government of Israel decided to authorize the Prime Minister and the Minister of Defence to appoint a government commission of investigation under s. 8A of the Government Law, 5761-2001 (hereafter: 'the Government Law'), to examine the conduct of the political and defence establishments during the war. It was decided that the president emeritus of the Tel-Aviv-Jaffa District Court, Judge E. Winograd, would chair

the commission (hereafter: 'the Winograd Commission' or 'the Commission'). In the letter of appointment the Commission was authorized to determine findings and reach conclusions as to the readiness and conduct of the political and security establishment 'with regard to all the aspects of the war in the north.' The Commission was also authorized to recommended, in so far as it saw fit, 'any improvement for the future decision-making processes of the political echelon and the heads of the security establishment, including the materials and advice given to the aforesaid authorities.' The letter of appointment further determined that the Prime Minister and members of the cabinet, civil servants, IDF and security establishment personnel would appear before the Commission at its request and would provide any information and documents that they would be asked to present. The Commission was given powers of a commission of inquiry under ss. 9 to 11 and 27(a) of the Commissions of Inquiry Law, 5729-1968 (hereafter: 'the Commissions of Inquiry Law' or 'the law'). With regard to the publicity of the Commission's work, the government determined in its decision — and an identical stipulation was also included in the commission's letter of appointment — the following:

> 'F. The commission shall present its report or reports to the prime minister and the Minister of Defence and they will bring them before the government. The report or reports of the commission shall be published; the commission may determine guidelines with regard to publication of the reports in accordance with the principles in section 20 of the Commissions of Inquiry Law, 5729-1968.
>
> G. The commission shall determine its procedure and its work schedule. The commission's sessions shall be public or closed to the public as the commission shall decide.
>
> No public proceedings shall take place when this may endanger the security of the state or its foreign relations or when there is any other lawful reason that prohibits this.'

2. On 30 November 2006 an expanded panel of this Court denied by a majority two petitions directed in principle against the Government's decision to establish a government commission of investigation rather than to order the establishment of a state commission of inquiry in order to examine the conduct of the political and security establishments during the war (HCJ 6728/06 *Omets v. Prime Minister* [1]). An application to hold a further hearing on the

subject of the aforesaid petitions was also denied (HCJFH 10030/06 *Movement for Quality Government in Israel v. Prime Minister* [2]).

The Winograd Commission began to hear testimony on 4 October 2006 and since then has heard dozens of witnesses. All the witnesses were heard *in camera*. On 29 November 2006 — approximately two months after the Commission began to hear the testimonies — the petitioner, MK Zahava Gal-On, submitted a request to Judge Winograd that the Commission should open its sessions to media coverage and publish the transcripts of the testimonies, with the exception of the parts whose publication would almost certainly cause serious harm to the security of the state. On 30 November 2006 Judge Winograd replied to the petitioner's request as follows:

> 'You are doubtless aware of the fact that most of the subjects in the commission's deliberations include state secrets. Until now, although the testimonies of the witnesses also included matters that are not classified, the vast majority was classified, and therefore the disclosure of the testimonies to the general public has not been possible.
>
> We are aware of the issue of "the public's right to know," and we consider this right in every case against the security of the state and the need to protect its secrets, which in our opinion — and I am convinced that this is your opinion also — should take precedence.
>
> In the government decision that appointed the commission it is stated that the sessions of the commission shall be public or closed to the public, as the commission shall decide. In any case where it is possible, the session will be public…'

It should be noted that on 3 December 2006 — several days after judgment was given denying the petitions against the establishment of the Winograd Commission (*Omets v. Prime Minister* [1]) — the commission made a statement to the media. This statement said, *inter alia*, that —

> 'The commission will continue its work in an attempt to examine what it had been asked to examine and to provide a quick, thorough and appropriate response to the many issues before it. Naturally most of the testimonies and sessions will be classified. In so far as it will be possible without harming the security of the state, sessions and testimonies will be held in public.'

3. On 9 January 2007 — more than five weeks after Judge Winograd's reply — the petitioner filed the petition before us. In the petition, the petitioner

requested this Court to order the Winograd Commission (1) to hold its sessions and the hearing of the testimonies before it in public and, (2) to publish the transcripts of its deliberations at the end of each session, except when 'there is a near certainty of real, serious and grave harm to the security of the state.' On 17 January 2007 this Court, *per* Justice Levy, issued an order *nisi* to the respondent to reply to the petition, and the application for an interim order was denied. Justice Levy added in his decision that —

> 'It seems to me that the commission would do well if, until this court decides the petition, it limits itself to hearing testimonies that need to be heard *in camera* for reasons of state security or that may be privileged by virtue of an order prohibiting publication, in accordance with the principles that have been laid down and explained in case law…'

When the petition was filed, the Winograd Commission was close to completing the stage of hearing the preliminary testimonies before publishing an interim report. After it finishes hearing these testimonies, the Commission intends to present an interim report to the government that will contain an open part that will be published and a privileged part that will not be. Counsel for the state told us that the Commission cannot definitively say the date on which the interim report will be presented but emphasized that we are not speaking of many months, but rather of a relatively early date.

The arguments of the parties

4. In the petition and also in her pleadings before us, counsel for the petitioner, Advocate D. Holz-Lechner, discussed the centrality of the public's right to know and the importance of this principle in the democratic process and in safeguarding basic rights. According to her, the proceedings before the Winograd Commission concerning the conduct of the political and defence establishments during the Second Lebanon War is of great public importance since the matter concerns human lives and public security. She argued that the public is entitled to as much information as possible with regard to the acts, omissions, achievements, and failures that accompanied fighting in which the public suffered injuries and losses on both the battlefront and on the home front. The petitioner further argued that the public's right to know is only overridden when there is an almost certain likelihood that a disclosure of the information will cause severe, grave, and serious damage to the security of the state. According to the petitioner, from Judge Winograd's reply on 30 November 2006 and from the statement to the media published on 3 December 2006, it can be seen that the Commission is of the opinion that the security of

the state takes precedence over the public's right to know. According to the petitioner in forming this opinion the Commission did not give proper consideration to the degree of probability that a security risk will occur and did not specifically examinethe extent of the harm involved in publishing the proceedings for each individual testimony. According to her argument, the fact that all the testimonies until now have been heard by the Commission *in camera* undermines the force of the principle of the publicity of hearings and the public's right to know, and makes this violation a sweeping, arbitrary, and disproportionate one.

According to the petitioner's approach, the Commission is not entitled to decide that its proceedings will be held *in camera* whenever there is any concern relating to state security. Rather, in each session and with respect to each testimony the Commission should examine the extent of the harm to state security while also considering the likelihood that such harm will occur. The argument is that a proper implementation of these rules will lead to the conclusion that most of the Commission's proceedings will be open to the public and that the transcripts of the Commission's sessions and of the testimonies given before it will be published as close as possible to the date on which they were given. The petitioner further argued that in matters concerning the publicity of the Commission's proceedings and the publication of the transcripts of its proceedings, the powers of the Commission that were determined in the government decision and the letter of appointment should be interpreted in the spirit of ss. 18 and 20 of the Commissions of Inquiry Law. It was also argued that the anticipated publication of the non-classified parts in the interim report and the final report of the Winograd Commission does not compensate for the disproportionate violation of the public's right to know, since the report presents a processed version of the information and the conclusions draw from it. By contrast, publication of the testimonies that are heard by the Commission before it presents its report to the government will allow the public to form its own impression, with a maximum degree of transparency, of the way in which the commission came to its conclusions. Publication as aforesaid will also encourage public debate and reveal additional information that was not brought before the Commission and that may be relevant to the matters being examined by it.

In reply, counsel for the state, Advocate A. Helman, argued that the order *nisi* should be cancelled and that the petition should be denied. In his reply, he said that 'the respondent accepts that in this case the criteria for the publicity of the respondent's proceedings are similar, in principle, to those of a state commission of inquiry.' In the hearing before us, counsel for the state agreed

that the general norm that is applicable in this matter is derived from the principle of publicity of proceedings and the public's right to know. But he argued that this norm is not absolute and should be balanced against competing interests. In this regard, counsel for the state indicated two main reasons why the proceedings of the Winograd Commission have until now been held *in camera* and the transcripts of its sessions have not been published. The main reason is the public interest of protecting the security of the state. According to this argument —

> '… the commission became aware at the beginning of its work that all the testimonies that are being heard by it also include very classified and sensitive material — to a greater or lesser degree — which is a consequence of the subject being examined by the commission, the identities of the persons and officials who are summoned to testify before it and the matters that the commission is seeking to investigate and on which it wishes to confront the witnesses. In these circumstances, the commission is of the opinion that there is no practical possibility of determining *ab initio* that a certain testimony will not include classified material, whether in the course of the witness's statement or in his reply to questions that the witness will be asked during his testimony' (para. 12 of the state's reply).

Counsel for the state confirmed in his pleadings that the testimony of witnesses who appear before the commission 'also includes matters that are not of a classified nature.' He However, he claimed that there is an inherent difficulty in distinguishing in advance between the parts whose disclosure is permitted and the parts whose disclosure is prohibited, and therefore it is necessary to hear the testimonies in their entirety *in camera*. For this reason, the Commission has until now not held a session that was open to the public.

With regard to the balancing test between the public's right to know and the security of the state, counsel for the state argued that where it concerns the question of the publicity of the Winograd Commission hearings, the strict test of 'near certainty' to which counsel for the petitioner referred in her pleadings does not apply. The proper test is one of publicity 'that may endanger the security of the state' as stated in the Commission's letter of appointment. Notwithstanding, it was argued that even if the strict test as claimed by the petitioner does apply in the matter before us, there is an almost certain danger that publication of 'the vast majority of the testimonies' will result in serious harm to the security of the state. This is because of the nature of the matters

being investigated by the Commission and the identity of the persons being interrogated by it, and because of the sensitivity inherent in the fact that the Commission is supposed to address in its recommendations the lessons that should be learned for the future. Counsel for the state emphasized in his arguments that the way in which Israel conducted the war and the lessons that should be learned for the future as a result of the manner in which the fighting was carried out, are matters that if disclosed to the public, will very seriously harm the ability of the State of Israel to fight the next war in the best possible manner, and will thus seriously endanger the security of the state.

The second reason for holding the proceedings of the Commission *in camera* concerns the public interest in having the work of the Winograd Commission carried out efficiently, quickly, and properly, so that the Commission can recommend to the government as soon as possible the lessons and improvements that should be implemented. This issue was raised by counsel for the state, as he put it, 'beyond what is strictly necessary.' According to him, the hearing of the testimonies in public will significantly prejudice the ability of the witnesses to testify freely, openly, and frankly before the Commission with regard to the conduct of their superior officers and comrades-at-arms. Moreover, hearing the testimonies in public will significantly harm the proper management of the investigation since the witnesses will be able to prepare themselves for the testimony in a manner that will make it difficult for the Commission to arrive at the truth. Counsel for the state further argued that opening the proceedings to the public would make it necessary to stop the investigation whenever the reply of a witness to a question, or the question itself, concerns a classified matter, and that this would disrupt and prolong the investigations. With regard to the publication of the transcripts of the Commission's sessions at the end of each day of the proceedings, it was argued that if the Commission needs to consider which parts of the transcript may be published on a daily basis, it would slow down the Commission's work and impair its efficiency. It was also argued that publication of the transcripts of the testimony before the Commission would require the relevant security personnel to review them, and that these people may be subordinate to some of persons being investigated by the Commission. For these reasons, it was argued that the proper time for making the security examination of the transcripts of the testimonies that the Commission is considering is only after the Commission presents its final report to the government.

In view of all the reasons set out above, counsel for the state argued that we should not intervene in the Commission's position that, as a rule, its

proceedings take place *in camera,* and that the transcripts of these sessions are not to be at this time According to counsel for the state, this position is reasonable in view of the manner in which two former state commissions of inquiry conducted themselves when they investigated events that occurred during a time of war. These were the Agranat Commission of Inquiry regarding the Yom Kippur War, where all of the proceedings were held *in camera* in accordance with a government decision, and the Kahn Commission of Inquiry regarding the Beirut Refugee Camps, where most of the sessions were also conducted *in camera*. According to the state's approach, the harm to the public's right to know in this case is proportional in view of the fact that the Commission will make parts of the interim report available to the public, and the fact that the final report will be presented to the government, and in view of the fact that after the final report is presented to the government the Commission will decide whether to publish those parts of the transcripts that do not involve any harm to the security of the state, its foreign relations, or other protected interests. Counsel for the state further stated that publication of parts of testimonies before the Commission's report is published will not significantly further the public's right to know since such testimonies alone are likely to present a partial and distorted picture. In view of all this, counsel for the state argued that the Commission's position is reasonable and the court should not intervene in it.

Deliberation

The principle of the publicity of proceedings and its application to the Winograd Commission

5. Section 8A of the Government Law, by virtue of which the Winograd Commission was appointed, determines the powers of the government commission of investigation. This section does not address the question of the publicity of the proceedings before such a commission of investigation. Notwithstanding, the issue was expressly addressed in the letter of appointment that the Winograd Commission received from the Prime Minister and the Minister of Defence in accordance with the government's decision of 17 September 2006. As I said above, paragraph G of the letter of appointment provides that:

> 'The commission's session shall be public or closed to the public as the commission shall decide. No public proceedings shall take place when this may endanger the security of the state or its foreign relations or when there is any other lawful reason that prohibits this.'

It follows from this that the Government left the question of the publicity of the Winograd Commission's proceedings to the discretion of the Commission, although it saw fit to emphasize that no public proceedings should take place when doing so might endanger the security of the state or another protected interest.

Defining the character of the Winograd Commission as a body is complex. It is a public authority that was set up by law by the executive branch and it exercises quasi-judicial powers; the Commission's character as an administrative body and its quasi-judicial powers are characteristics that affect the norms that apply to it. There is no doubt that the discretion given to the Commission on the subject of the publicity of its proceedings is not absolute. None of the parties before us disputes that the Commission as a public authority is liable to exercise its discretion reasonably, after considering all of the relevant factors and giving proper weight to each of them in accordance with the basic principles of our legal system. As we shall clarify later, since the Commission is a body that has been given quasi-judicial powers, the commission should give considerable weight to the principle of the publicity of proceedings when it decides whether to hold the sessions at which it hears evidence *in camera*. As a public authority it should also give considerable weight to the general norm of the duty of disclosing information in its possession, when there is no legal reason to prevent its disclosure.

6. This Court has on many occasions in the past discussed the elevated status and the great importance of the principle of the publicity of proceedings that take place before it. What has been said in case law with regard to the publicity of proceedings is also pertinent with regard to proceedings that are taking place before a body with quasi-judicial powers, such as the Winograd Commission. The premise is that the publicity of the proceedings contributes to improving the quality of the decision that is made at the end of the process. The assumption is that the critical eye of the public may 'eliminate any possibility that the judicial process may be influenced by bias and prejudice' (CrimA 152/51 *Tripos v. Attorney-General* [3], at p. 23). In addition, the publicity of proceedings in a judicial proceeding or a quasi-judicial proceeding contributes to a strengthening of public confidence in public authorities, in general, and in the body that is hearing the matter, in particular. By means of the publicity of the proceedings, justice is not only done but is also seen to be done, and this prevents the impression that the law is administered in secret and according to hidden criteria (see the remarks of Justice Arbel in HCJ 11793/05 *Israel News Co. Ltd v. State of Israel* [4], at paras. 13-15 of her

opinion and all of the references cited there; see also LCrimA 5877/99 *Yanos v. State of Israel* [5], at pp. 109-112).

The principle of the publicity of proceedings is also based on the public's right to know and the duty of disclosure that governs a public authority. The public's right to receive information concerning the manner in which public authorities operate allows them to be subjected to public scrutiny.— a scrutiny that is one of the cornerstones of democracy. This reasoning has found expression in the Freedom of Information Law, 5758-1998 (hereafter: 'the Freedom of Information Law'), which gives every citizen and resident a right to receive information from a public authority, subject to the exceptions and reservations listed in the law. To this, we should add that the realization of the public's right to know by disclosing to the public the manner in which the public authority operates allows the public to determine its agenda and helps individuals in society decide their positions by means of an open discussion of the problems and by a free exchange of opinions on the basis of the information that is published (on the public's right to know, see AAA 9135/03 *Council for Higher Education v. HaAretz Newspaper Publishing* [6], at paras. 8-9 of the opinion of Justice Hayut; AAA 6013/04 *Ministry of Transport v. Israel News Co. Ltd* [7], at para. 12 of the opinion of Justice Rivlin).

It has been said in the case law of this Court that the principle of the publicity of proceedings has two aspects: one is that the hearing is held in open court, so that every member of the public is entitled to be present; the other is the permission to publish the content of the proceedings as part of the public's right to know. It has also been said that today the main importance of the principle of the publicity of proceedings lies in the second aspect which concerns the possibility of publishing the fact that the proceedings are being held and the content of the proceedings, and thereby bring these to the attention of the public as a whole (see *Yanos v. State of Israel* [5], at p. 112).

7. The centrality of the principle of the publicity of proceedings in our legal system has received express recognition in legislation and has even been enshrined in a Basic Law. Section 3 of the Basic Law: Judiciary and s. 68(a) of the Courts Law [Consolidated Version], 5744-1984 (hereafter: the Courts Law) provide the rule that 'The court shall hear cases publicly.' This principle has also been determined with regard to commissions of inquiry. Thus s. 18(a) of the Commissions of Inquiry Law provides that 'A commission of inquiry shall hold public hearings…'. It should immediately be said that this is not a strict rule, and that the provisions of the aforesaid laws contain exceptions to the principle of the publicity of proceedings, which we shall address later.

As we have said, the Government Law, by virtue of which the Winograd Commission was established, is silent with regard to the publicity of the proceedings before a government commission of investigation. *Prima facie* a question may arise as to whether the rule concerning the publicity of proceedings applies to the proceedings of every commission of investigation that is appointed under the Government Law, or whether we should not speak of a strict rule since the matter requires the consideration of each individual commission in accordance with its circumstances. We do not need to decide this question in the circumstances of the case before us because the Winograd Commission is not an 'ordinary' government commission of investigation. In *Omets v. Prime Minister* [1] this court discussed how, in view of the character and scope of the issues that the Winograd Commission was authorized to examine, the government saw fit in the letter of appointment to give the commission additional mandates and powers that are not listed in the Government Law. This was done in order to allow the commission to investigate in depth an issue of national significance and importance, namely the fighting that took place in Lebanon. The commission was given, *inter alia* given some of the main powers of a state commission of inquiry under ss. 9-11 of the Commissions of Inquiry Law — the powers to summon witnesses and to compel them to testify or to produce documents. The Commission is also governed by ss. 14 and 22 of the Commissions of Inquiry Law by virtue of the provisions of s. 8A(c) of the Government Law, with regard to the status of those testimonies. In *Omets v. Prime Minister* [1] the state also agreed that the Winograd Commission should be subject to a similar arrangement to the one provided in s. 15 of the Commission of Inquiry Law that gives anyone who may be harmed by the Commission's conclusions the right to state their case. and in practice the representative of the state declared that the Commission was competent to issue 'warning letters' and to make recommendations with regard to specific persons like a state commission of inquiry. In practice, it is possible to interpret the position of the state in *Omets v. Prime Minister* [1] as that the Winograd Commission is similar in character to a state commission of inquiry, differing only in terms of the party that appointed it.

Section 18 of the Commissions of Inquiry Law, which provides the rule that the proceedings of a state commission of inquiry should be held in public, does not apply directly to the Winograd Commission. But in its pleadings before us, the government agreed that the criteria concerning the publicity of the proceedings of the Winograd Commission are essentially similar to those of a state commission of inquiry, in view of the special character and the scope of powers of commission under discussion (see para. 31 of the respondent's

reply). Indeed, the Winograd Commission is considering issues of paramount public importance and interest. All of these factors affect the weight of the principle that the proceedings should be held in public and that the public has a right to know about the commission's proceedings. Therefore, it is proper that the general principle concerning the publicity of the proceedings, which is also enshrined in s. 18 of the Commissions of Inquiry Law, should govern the Winograd Commission. It would appear that the Commission has indeed taken the aforesaid principle into account. In Judge Winograd's letter to the petitioner of 30 November 2006, he says that 'In any case where it is possible, the session will be public.' The statement to the media on 3 December 2006 also says that 'In so far as it will be possible without harming the security of the state, sessions and testimonies will be held in public.' Therefore the premise for the continuation of our deliberations is that, in so far as possible and in the absence of any impediment for reasons of the security of the state, the proceedings of the Winograd Commission should be held in public.

The principle of the publicity of proceedings versus the security of the state

8. The principle that proceedings should be held in public, like the basic rights that underlie it, is not absolute. There are cases where it needs to yield to conflicting rights and interests. Under s. 3 of the Basic Law: Judiciary, it is possible to violate the principle that judicial proceedings should be conducted in public only by virtue of an express provision of statute or by means of an order of the court that is made in accordance with statute. Section 68 of the Courts Law and ss. 18, 20 and 23 of the Commissions of Inquiry Law list the exceptions that allow all or some of the proceedings in a certain matter to be held *in camera* or subject to a prohibition against publication. *Inter alia*, it is provided that an order may be made to this effect if it is required 'in order to protect the security of the state.' It should be stated that even s. 9(a)(1) of the Freedom of Information Law provides that a public authority shall not provide information 'whose disclosure gives rise to a concern that the security of the state will be harmed…'. As we have said, these provisions of statute do not apply directly to the Winograd Commission. But even the petitioner does not dispute that the exception with regard to protecting the security of the state applies to the Commission's proceedings, and that in appropriate circumstances it is capable of justifying the holding of sessions *in camera* and of justifying the prohibition against publication of the content of the matters brought before the commission.

The two values under discussion — state security on the one hand and the publicity of proceedings and the public's right to know on the other — are

basic values in our legal system. 'Without security the state cannot survive, and the social consensus on which it is built cannot exist. Thus the freedoms of the individual which the state is supposed to uphold will cease to exist. This shows the centrality of the value of security among all the values of the legal system' (*per* Justice Barak in HCJ 680/88 *Schnitzer v. Chief Military Censor* [8], at p. 629 {92). But without holding proceedings in public and realizing the public's right to know, the character of our democratic system, which is based on a free exchange of ideas and on public confidence in the state authorities and the propriety of their actions, may be undermined (see para. 6 above). A proper balance, therefore, needs to be struck between the aforesaid two values when they clash 'head on.' The balancing formula should realize the value of state security, but at the same time minimize, as much as possible, the violation of the principle of holding proceedings in public and the freedom of information, which are important values in our legal system.

The dispute between the parties before us concerns the proper formula for balancing the values under discussion. According to the petitioner, only when there is a concern that amounts to a near certainty of serious and grave harm to state security are there grounds for violating the principle of the publicity of proceedings by holding the commission's proceedings *in camera*. By contrast, counsel for the state argued that the balancing test proposed by counsel for the petitioner is too strict. According to him, the test of 'near certainty of serious and grave harm to state security' was determined in the case law of this court in circumstances of a possible conflict between protecting the freedom of speech and safeguarding the security of the state, and that this test does not apply when we are dealing with the publicity of proceedings. The question whether the case law balancing formula between the freedom of speech and state security also applies in the context of a conflict between the publicity of proceedings and state security has not yet been decided in our case law and it has no easy answer. On the one hand, the freedom of speech is one of the reasons underlying the publicity of proceedings and the public's right to know, as discussed earlier. On the other hand, the freedom of speech is not the only reason for the principle of publicity of proceedings. There are other values that underlie it, and we should consider how these are to be balanced against state security. Moreover, there are circumstances in which holding proceedings *in camera* serves additional public interests that are not merely matters of state security but also ensure the fairness of judicial proceedings and the possibility that in them we will arrive at the truth. In such circumstances, it is possible that there is a basis for a different fundamental balance than the one indicated by counsel for the petitioner. These questions do not require a decision in the

circumstances of this case since counsel for the state was prepared to assume, for the purposes of the proceedings before us, that because of the character of the issues being examined by the Winograd Commission, the fundamental balancing formula argued by counsel for the petitioner does apply.

Whatever the balancing formula may be, there is no doubt that the outcome of the balance between the publicity of proceedings and state security cannot be decided in advance since it depends upon an assessment of the extent of the harm to security and of the likelihood that such harm will occur. Therefore, the result of the proper balancing point is determined by the circumstances and merits of each case. It should be emphasized that in view of the importance of the principle that proceedings should be held in public, a general and sweeping assessment of the danger to the security of the state based on the general nature of the issues under discussion will not suffice. In this context, a concrete and specific examination of the circumstances of the case should be made in order to decide whether there is a justification for departing from the rule that proceedings should be held in public.

From general principles to the specific case — the proceedings of the Winograd Commission

9. The petition before us was filed after a considerable delay, which influences the application of the criteria in the circumstances of this case. Originally, the petitioner applied to Judge Winograd with a request to open the proceedings of the Commission to the public and to publish the transcripts of the sessions almost two months after the testimonies began to be heard. The petition to this court was filed more than five weeks after Judge Winograd's reply was received. These delays have resulted in the vast majority of the testimonies have already been heard by the Commission. At this stage, the hearing of testimonies has ended, that is unless the committee sees fit to allow another round of testimonies before examining recommendations concerning specific individuals.

The relief that the petitioner sought in the petition was of two kinds: first, to order that the proceedings of the Winograd Commission and its hearing of the testimonies to be held in public; and second, to order the publication of the transcripts of the commission's proceedings at the end of each session. With regard to the first relief, since the petition was filed after the vast majority of the testimonies were heard by the Commission, the question of hearing them in public is no longer relevant. As we have said, it is possible that there remain additional testimonies that will be heard at the next stage of the Commission's proceedings. From Judge Winograd's letter to the petitioner of 30 November

2006, it appears that 'in every case' the Commission considers the publicity of the proceedings and the public's right to know, as opposed to state security and the need to protect its secrets. According to the position presented by the chairman of the Commission in this letter, we assume that the Commission will be mindful of the criteria set out above, and that it will make its decisions concerning the holding of proceedings *in camera* on an individual basis with regard to each of the testimonies that it may hear.

It should be noted that in his pleadings before us, counsel for the state discussed the inherent difficulty in distinguishing *ab initio* between parts of testimony that are expected to be heard by the Commission that may be disclosed and parts that must be heard *in camera.* In this context, I think it right to point out that if there are circumstances in which the vast majority of the testimony may be disclosed, there is no basis for holding the whole testimony *in camera*. In view of the great importance of the principle of holding proceedings in public, a distinction should be made *ab initio* between the part that may be disclosed, which should be heard in public, and the classified part, which is the only part that should be heard *in camera*. The more complex cases — which apparently characterize most of the testimonies being heard by the Commission — are those in which the main testimony is expected to be classified but is interspersed with parts that may be disclosed. In such circumstances, the Commission should make an effort to distinguish *ab initio* between the various parts, and to hold proceedings in public on the parts of the testimony that may be disclosed. But when the parts that may be disclosed are few and incidental to the classified parts of testimony, the advantage in separating the different parts of the testimony for the purpose of holding proceedings in public may be marginal, and the whole testimony may be heard *in camera*.

Counsel for the state went on to point out that the Winograd Commission is not prepared to allow persons who testify before it to make a 'statement to the media' at the beginning of their testimony in a hearing which then continues *in camera*. Two reasons are given for this position. First, the person testifying before the Commission has the possibility of giving interviews to the media and to say whatever they wish to say. Second, allowing the possibility of such 'statements' conflicts with the desire to conduct the proceedings of the Commission professionally and efficiently and to complete its work as quickly as possible. We see no reason to intervene in the Commission's reasoning in this matter. We assume that the Commission will be mindful of the rule concerning the publicity of the proceedings and will allow the hearing of

testimonies — or at least parts of them — in public, in circumstances where there is no legal impediment according to the criteria set out above.

It should be noted that in support of his arguments counsel for the state sought to rely on the manner in which state commissions of inquiry operated in the past when considering similar issues to those being considered by the Winograd Commission, including when the proceedings before them were alleged to be classified. In this respect, it should be stated that in the case of the Agranat Commission a blanket order prohibiting any publicity regarding its proceedings was imposed by a government decision that was originally made in accordance with s. 23 of the Commissions of Inquiry Law. By contrast, in the case before us the Winograd Commission was given complete discretion. With regard to the proceedings of the Kahn Commission, these were mostly classified, but proceedings that were open to the public, at the commission's discretion, also took place. Indeed, the manner in which the commissions operated in the past shows that an investigation of military operations that involves making recommendations naturally does not allow full disclosure of the evidence before the commission for reasons of state security. But no conclusion should be drawn from the examples in the past that the Commission is exempt from the application of the principle that proceedings should be held in public, and, as we have said, the Commission is obliged to hold proceedings in public if there is no impediment to this on grounds of state security.

10. The second relief that is sought in the petition concerns the publication of the transcripts of the Commission's hearings. In his written pleadings, and also before us, counsel for the state confirmed that the testimonies that were heard by the Winograd Commission include parts that are not classified and that may be published under the law. The essence of the dispute between the parties concerned two matters. First, he parties disagree with regard to the scope of the material that may be disclosed to the public: whereas counsel for the petitioner is of the opinion that there is no reason why most of the material heard before the commission should not be published, the state argues that most of the testimonies may not be published. *Prima facie* the state's position appears reasonable. The nature of the subjects being considered by the Winograd Commission, the identity of the persons appearing before it, and the sensitivity of the information being considered by it may lead in most cases to the existence of an almost certain danger of harm to the security of the state if the information that is revealed in the Commission's hearings is published. Notwithstanding, this does not exempt the Commission from the need to examine the transcripts in detail in order to publish those parts that may be

disclosed under the law. In this regard, a general assessment made at the outset is insufficient; it is necessary to make a detailed examination. As we have said, an examination should be made for each testimony to see whether there is a justification for prohibiting publication of what was said in it. In this context, there may be a difference between an examination made before the event and an examination made after the event. With regard to testimony before it has been heard by the Commission, there is in many cases an inherent difficulty in distinguishing between the parts that may be disclosed and the parts that are classified. When the examination is made after the event — after the testimony is given — distinguishing between the aforesaid parts may be done more easily.

The main disagreement between the parties concerns the date of publication of the parts of the Winograd Commission transcripts that may be disclosed. Section 8A of the Government Law and the letter appointing the Winograd Commission do not address this issue, apart from the statement in paragraph H of the letter of appointment, which says: 'When its work is completed, the commission shall deposit all the transcripts of its proceedings and all the material that was brought before it in the state archives.' It should be noted that paragraph F of the letter of appointment, which discusses the publication of the commission's reports, refers to 'the principles in section 20 of the Commissions of Inquiry Law.' Section 20(c) of the aforesaid law provides that 'The commission may, if it sees fit to do so, publish the transcript of its proceedings, or any other material relating to its work, in whole or in part.' From this we see that the Commission was given discretion with regard to the question of the publication of the transcripts of hearings that took place before it and also with regard to their date of publication. As we clarified above, the Commission should exercise its discretion reasonably and give proper weight to all of the relevant factors.

In the hearing before us, counsel for the petitioner requested that the transcripts should be published as soon as possible after they are made. Counsel for the state, however, argued that in the Commission's opinion the proper time for making a security examination of the testimony transcripts is only after the Commission presents its final report to the government. Two reasons were given for this. First, it was argued that if the Commission is compelled now to examine the parts of the transcript proceedings that may be publishe that this would hold up the Commission's work and undermine its efficiency. Second, it was argued that publication of the transcripts at this time would require the matter being referred to security personnel who may be subordinate to some of the persons being investigated.

We should say immediately that the aforesaid reasons raised by counsel for the state are not convincing. In our remarks above, we discussed the great importance of holding proceedings in public and of the public's right to know. We said that the flow of information is a condition without which people cannot form their opinions and that it is an essential condition for upholding democracy. 'Only in this was can he [the citizen] adopt for himself as independent an opinion as possible on those questions that are at the top of the social and political agenda, which must ultimately be decided by him, by virtue of his right to elect the organs of the state' (*per* Justice Landau in HCJ 243/62 *Israel Film Studios Ltd v. Geri* [9], at p. 2415 {217}). 'The democratic system of government is nourished by — and also depends upon — a free flow of information to and from the public with regard to the main issues that affect society and the individual' (*per* Justice Shamgar in HCJ 1/81 *Shiran v. Broadcasting Authority* [10], at p. 378). This is certainly applicable in this case given the national importance and great public interest raised by the issues being considered by the Winograd Commission. Moreover, our case law holds that the duty of an authority to make available to the public the information in its possession, when there is nothing in the law that prevents this, allows public scrutiny and that this principle derives from the status of the authority as a trustee that holds the information in trust for and on behalf of the public as a whole (see the remarks of Justice Rivlin in *Ministry of Transport v. Israel News Co. Ltd* [7], at paras. 11-13 of his opinion; see also the remarks of Justice Hayut in *Council for Higher Education v. HaAretz Newspaper Publishing* [6], at paras. 8-9 of her opinion and the references cited there). In view of all this, if the transcripts of the Winograd Commission hearings contain parts with regard to which there is no legal impediment that prevents their disclosure to the public, it is not reasonable to delay the publication of the material until the final report is presented. It may be assumed that it is possible to find reliable and experienced persons who will be made available to the Commission for the purpose of carrying out the security check required in order to identify the material that may be disclosed.

The argument of counsel for the state that publication of the material before the final report is presented will disclose to the public partial and distorted information is likewise rejected. If the transcripts contain material that may be disclosed under the law, the information should be published, and we should not say that it is better for the public that the publication should be postponed to such a remote date. In this regard we emphasize that if and when the Commission decides in the future to summon witnesses under caution, the relevant information will in any case be disclosed to them. At this stage, the

'judicial' aspect of the Commission's work takes precedence over the 'investigative' aspect. In such circumstances, there is no concern that the publication of parts of the transcripts before the Commission's final report is presented will disrupt testimonies or seriously undermine the proper work procedures of the Commission. We, therefore, assume that the Winograd Commission will exercise its discretion in accordance with what we have said above, and in accordance with its professed position in the letter of the Chairman of the Commission and its statement to the media, and that the Commission will take steps to publish the parts of the transcripts whose disclosure is permitted within a reasonable time, before the final report is presented to the government.

11. In summary, since the petition was filed after the vast majority of the testimonies had already been heard by the Commission, the question of the hearing of those testimonies in public is no longer relevant. It is possible that there are more testimonies that will be heard at a later stage of the commission's deliberations. The pleadings of counsel for the state show that the Commission does not dispute that the rule that proceedings should be held in public applies to it. The Commission can be presumed to be conducting itself in accordance with the criteria set out above and to examine the question whether all or parts of the testimonies may be given in public. With regard to the publication of the transcripts of the Commission's hearings, the Commission will take into account the principles discussed above, and it is presumed that it will take steps to publish the parts of the transcripts that may be disclosed within a reasonable time and before the final report is presented to the government.

In view of all of the aforesaid and subject to what is stated in para. 11, the order *nisi* should be cancelled.

Vice-President E. Rivlin

I agree.

Justice A. Procaccia

I agree with the opinion of my colleague President D. Beinisch. If I see a need to add some remarks, it is in order to support, strengthen and emphasize what I think needs to be emphasized and highlighted.

1. According to the constitutional outlook that prevails in the Israeli legal system the principle that proceedings should be held in public has a supreme

status. The publicity of proceedings is a part of the duty of disclosure that lies at the heart of democracy. The aim of disclosure is to guarantee a free flow of information on subjects of public importance that affect the individual and society as a whole. A free flow of information, opinions and outlooks is an essential condition for a healthy democracy. Only in this way is it possible to ensure, on the one hand, the ability of the individual to influence the government's actions by means of data and information that are required for this, and only in this way is the public given a means of scrutiny whereby he may examine the propriety of the actions of government bodies (HCJ 1601/90 *Shalit v. Peres* [11], at p. 364 {219-220}). A free flow of information on matters that concern the public is one aspect of the value of freedom of speech that lies at the heart of a free society, which includes not only the right to express oneself and make oneself heard and seen, but also the right to know, hear and see (HCJ 14/86 *Laor v. Film and Play Review Board* [12], at p. 433; HCJ 651/03 *Association for Civil Rights in Israel v. Chairman of the Central Elections Committee for Sixteenth Knesset* [13], at pp. 71-72). Alongside the freedom to express oneself and utter opinions, beliefs and ideas there is the right of the public to know about the complex actions of the government and the activity of public authorities; this is the other facet of freedom of speech, without which we cannot have a proper constitutional system that protects human rights and ensures the propriety of the activities of the government. The exposure and disclosure of information that is important to the public are prerequisites for the existence of public scrutiny and examination, whereas concealing and covering up such information screens and obscures deviations from public norms and makes it difficult to expose them and to recommend corrections where they are needed. The principle that proceedings should be held in public derives its force from the public's right to know about the actions of the government and its agencies; holding discussions and judicial proceedings in the public eye also guarantees the fairness of the investigation and the quality, standard and seriousness of the decision made at the end of the proceeding. Openness increases public confidence in government authorities and the bodies who examine and scrutinize their actions. The principle that proceedings are held in public achieved statutory constitutional status in s. 3 of the Basic Law: The Judiciary (see CA 2800/97 *Lipson v. Gahal* [14], at p. 718; HCJ 6005/93 *Eliash v. Israel Bar Association* [15], at p. 161; CrimApp 5153/04 *A v. Yediot Aharonot Ltd* [16], at p. 938; LCA 3614/97 *Avi-Isaac v. Israel News Co. Ltd* [17], at pp. 45-47; and recently CrimA 11793/05 *Israel News Co. Ltd v. State of Israel* [18], at paras. 13-16 (*per* Justice E. Arbel)). The principle that proceedings should be held in public is a basis element of

judicial activity in the Israeli courts. It is an established principle in the Administrative Courts that try disputes in which a public authority is involved (s. 25 of the Administrative Courts Law, 5752-1992). The principle that proceedings should be held in public also applies as a basic principle of the legal system to quasi-judicial bodies. The principle of administrative disclosure and publicity also applies in general to the activity of government authorities that have an executive function, even though the principle of disclosure in the executive and administrative spheres may take a different form to the one that is found in the judicial or quasi-judicial sphere; 'Indeed, administrative publicity is a basic principle in a democracy. It allows the public not only to plan its course of action, but also to develop a dialogue with the administration, which includes the scrutiny of its actions' (I. Zamir, *Administrative Power* (1996), at p. 924). Indeed —

> 'Proper government acts in the light of day, in the open, and thus it exposes itself to constant scrutiny and therefore also to the correction of corrupt courses of action' (LCrimA 1127/93 *State of Israel v. Klein* [19], at p. 516 (*per* Justice M. Cheshin)).

An expression of the outlook of administrative publicity and the duty of disclosure that governs public authorities can be found in the Freedom of Information Law, 5758-1998, which gives every Israeli citizen or resident a right to receive information from a public authority in accordance with the provisions of the law (s. 1). Even before the Freedom of Information Law there existed a principle that documents of public authorities are available to anyone who has an interest in the matter. A refusal to disclose them imposed on the public authority a burden of explaining and justifying its refusal (CA 6926/93 *Israel Dockyards Ltd v. Israel Electric Co. Ltd* [20], at p. 796). The principle of disclosure was extended in the past, before the enactment of the law, to administrative bodies such as internal professional audit bodies; even though their deliberations are usually not open to the public, their conclusions are likely to be subject to disclosure (LCA 1412/94 *Hadassah Medical Organization v. Gilad* [21]).

2. The principle of disclosure and publicity is not absolute. Like every constitutional norm, the degree of protection afforded to it is not unlimited. Thus there may be restrictions upon the realization of the norm and the scope of the ability to realize it. The scope of protection given to the constitutional norm is limited by the principles that determine the proper balance between it and important conflicting interests to which the law gives a special status. The principle of the publicity of proceedings, as a part of the value of the freedom

of speech, is subject to restrictions in the spirit of the limitations clause in s. 8 of the Basic Law: Human Dignity and Liberty (HCJ 3434/96 *Hoffnung v. Knesset Speaker* [22]; EA 92/03 *Mofaz v. Chairman of the Central Elections Committee for the Sixteenth Knesset* [23]). The principles of the limitations clause demand that in order for a violation of a constitutional norm to be recognized as legitimate, it should originate in a statute that befits the values of the state, it should be intended for a proper purpose and it should satisfy the requirement of proportionality.

3. Case law has held that where there is a clash between the principle of publicity and conflicting interests, 'the principle of the publicity of proceedings retains a preferential status of a supreme right' (*Lipson v. Gahal* [14], at p. 719). A clear and unambiguous provision of statute is required in order to restrict or qualify the publicity of proceedings rule (*Eliash v. Israel Bar Association* [15], at pp. 168-169, 170; CA 5185/93 *Attorney-General v. Marom* [24], at p. 342; *Lipson v. Gahal* [14], at p. 719). Even when there is such a provision of statute, it should be interpreted in accordance with the principles of the limitations clause, and especially in accordance with the principle of proportionality therein. This means that the principle of publicity will prevail unless the restriction of publicity satisfies the limitations tests, and especially that it should be of an extent no greater than what is required, (CrimA 353/88 *Vilner v. State of Israel* [25], at pp. 450, 451; *Lipson v. Gahal* [14], at p. 719; *Avi-Isaac v. Israel News Co. Ltd* [17], at p. 66). The restrictions upon the publicity of proceedings are always interpreted narrowly (LA 176/86 *A v. B* [26], at p. 499; CrimApp 2794/00 *Aloni v. State of Israel* [27], at p. 369).

Publicity and disclosure are therefore the rule. Privilege and secrecy are the exception. Since the exception constitutes a restriction upon a constitutional norm, its application in a manner that violates the norm is conditional upon preconditions that mainly concern a proper purpose and proportionality.

4. In various contexts legislation contains restrictions upon the publicity of proceedings. These qualifications include the protection of the security and foreign affairs of the state (s. 68(d)(1) and (2) of the Courts Law [Consolidated Version], 5744-1984; s. 25(b)(1) of the Administrative Courts Law, 5752-1992).

5. A state commission of enquiry that acts by virtue of the Commissions of Inquiry Law, 5729-1968, is required to hold its proceedings in public and to publish its report (ss. 18(a) and 20(a) of the law). Alongside the publicity of proceedings principle and the duty of disclosure that govern the commission,

the law lists exceptions to the publicity and disclosure rule, which include matters of state security. But according to the principles of the legal system, since the principle of publicity is the rule and secrecy is the exception, the commission of inquiry is required to make its proceedings open to the public and to publish the details of its activities unless, for weighty reasons that satisfy the constitutional requirement of proportionality, one of the exceptions listed in the law should be applied. The principle of publicity in a state commission of inquiry is particularly important, because a state commission of inquiry is charged with inquiring into a matter 'of essential public importance' that requires investigation (s. 1 of the Commissions of Inquiry Law). Such a commission is usually established where there is a crucial public need to investigate a matter of particular importance that is subject to disagreement, which not infrequently gives rise to deep public emotion and distress. The purpose of a commission of inquiry is to restore public confidence in the government and the persons running it. Re-establishing public confidence in society — which is one of the main purposes of a state commission — depends upon there being openness, disclosure and publicity in the proceedings of the commission to the greatest extent possible. Openness helps the public trust the fairness of the proceedings of the commission and accept its conclusions out of a belief in the integrity of its criteria and the objectivity of its motives. Publicity in the work of a commission of inquiry removes any concern of political bias or favouritism in the commission's work and leads to greater public confidence in its activity (A. Klagsbald, *State Commissions of Inquiry* (2001), at pp. 23, 213; A. Rubinstein and B. Medina, *The Constitutional Law of the State of Israel* (vol.2, 'Government Authorities and Citizenship,' 2005), at pp. 1028, 1040-1041).

6. Naturally commissions of inquiry are sometimes appointed to examine particularly sensitive security matters t or special matters of state, and these require secrecy. In circumstances such as these, when we are speaking of an essential public need of great significance that satisfies the proper purpose and the requirement of proportionality, a commission of inquiry is authorized to decide to apply the exception to the rule of publicity and to restrict opening the proceedings of the commission to the public and disclosing the information and the material submitted to it and the transcripts prepared by it *where necessary* and *to the required degree*.

7. It is important to emphasize that even where there may be an exception to the publicity of the proceedings of a commission of inquiry, whether for security or other reasons, the balance between applying the principle of publicity and the need for resorting to the exception thereto should

be made very carefully, and its implementation is required with regard to each element and each stage of the commission's proceedings: the guiding principle is publicity, disclosure and exposure, and the exception is confidentiality and secrecy, which will apply only where it is necessary — where it is a 'necessary evil.' A sweeping preliminary decision that all the proceedings of the commission will be secret and that all the material that arises in its sessions will be classified seriously undermines the principle of publicity and is inconsistent with the requirements of the law. The commission should therefore examine, in so far as it can before the event, every testimony and every procedural stage that takes place before it on an independent basis, in order to decide whether it may be disclosed to the public or whether there is no alternative to making it privileged. Only in this way will the principle of publicity be properly realized, while upholding the proper balance between it and other essential public interests (Klagsbald, *State Commissions of Inquiry*, *supra*, at p. 215).

8. The commission of investigation under s. 8A of the Government Law, 5761-2001, namely the Winograd Commission, was appointed to investigate the events of the war in the north with regard to a very broad range of issues, as can be seen from government decision no. 525. The letter of appointment that defines its powers authorized it to examine the conduct of the political echelon with regard to the war from political, military and civilian perspectives; it also requested an examination of the preparations of the defence establishment, including questions of readiness for war, preparation of intelligence, conduct of the war, activation of forces, etc.. The commission was given interrogation powers under ss. 9 to 11 and 27(b) of the Commissions of Inquiry Law, which concern powers to interrogate witnesses. These powers were given to the commission by virtue of s. 8A(a) of the Government Law. In view of the breadth and depth required when examining the subject of the war, the government supplemented what was lacking in the powers of the commission of investigation under s. 8A of the Government Law by giving the commission additional powers and authority, which it set out in the letter of appointment; thus, for example, it ordered the publication of the commission's reports (para. F of the letter of appointment), it authorized persons to collect material (para. J of the letter of appointment) and following an opinion of the attorney-general it adopted the mechanism of sending warnings under s. 15 of the Commissions of Inquiry Law, which constitutes a condition for making personal recommendations. This opinion was given against a background of the similarity between a state commission of inquiry and a commission of investigation, and according to the state —

> 'As a rule, in the absence of a special reason to deviate from this, a similar arrangement to the one set out in section 15 of the Commissions of Inquiry Law should be adopted in this case, with the scope of the right to state one's case in each specific instance being determined by the commission, according to the circumstances of the case' (para. 49 of the state's reply in HCJ 6728/06 *Omets v. Prime Minister* [1].

With regard to the aspect of the publicity of proceedings, the letter of appointment determined that 'The commission's sessions shall be public or closed to the public as the commission shall decide.' It was also determined that 'No public proceedings will take place when this may endanger the security of the state or its foreign relations or when there is any other lawful reason that prohibits this.'

9. In the wording of the letter of appointment, the government therefore regarded the commission of investigation as a body of a similar nature to a state commission of inquiry, and it acted to make the powers and authority of the commission of investigation as similar as possible to those given to a commission of inquiry acting in accordance with the Commissions of Inquiry Law. This purpose of equating the two types of commission is not surprising in view of the fact that the commission of investigation for examining the war in the north was set up to examine a matter 'of essential public importance' that requires clarification, in the sense that this expression is used in s. 1 of the Commissions of Inquiry Law, and it is only natural that the government sought to equip such a commission with the powers given to a commission of inquiry in order to enable it to carry out the complex task with which it was charged. The similarity between the powers of the Winograd Commission and the powers of a commission of inquiry is what was used by the state as its main justification in reply to the argument raised against it in *Omets v. Prime Minister* [1], according to which the government erred when it appointed a commission of investigation to examine the war in the north, when it had the power to appoint a commission of inquiry, with the characteristics and powers given to it in the law.

10. The close similarity between the Winograd Commission and a state commission of inquiry from the viewpoint of the character and scope of the matters requiring examination and their public significance and from the viewpoint of the scope of investigative powers given to it leads to the conclusion that even though the publicity of proceedings provision in the Commissions of Inquiry Law does not apply directly to the Winograd

Commission, the publicity of proceedings principle applies to its proceedings to a similar degree as it applies to a state commission of inquiry. This is the necessary conclusion from the general application of the principle of publicity to quasi-judicial bodies as one of the basic principles of the legal system, and in view of the subject of the investigation and its broad public significance, together with the broad scope of the powers given to the commission of investigation and its status as a quasi-judicial body. The nature of the matters being considered by the commission of inquiry and their broad public scope, as well as the need to ensure public confidence in the way in which the commission conducts its investigations and reached its decisions, make it necessary to apply the rule of publicity, with its exceptions, to its proceedings in the usual manner that this is done with regard to a state commission of inquiry. Any other result would be inconsistent with the basic principles of the legal system and might even frustrate the main purpose for which the commission was set up — restoring public confidence in the army, the defence establishment and the government. Once the rule of publicity applies to the commission of investigation, the exceptions to the rule will also apply, in the same vein as those set out in the Commissions of Inquiry Law.

11. I should also point out that the application of the principle of publicity to the commission of investigation does not conflict, in my opinion, with the wording of paragraph G of the letter of appointment, according to which:

> 'The commission's sessions shall be public or closed to the public as the commission shall decide. No public proceedings shall take place when this may endanger the security of the state or its foreign relations or when there is any other lawful reason that prohibits this.'

Against the background of the principle of publicity which is one of the foundations of the legal system, it is possible to interpret what is stated in the letter of appointment as giving the commission of investigation discretion as to when to depart from the principle of publicity in its proceedings and to order them to held *in camera*, but this discretion is supposed to be exercised subject to the accepted principles of the legal system. There is no inherent contradiction between the wording of the letter of appointment in this regard and general principles, and the aforesaid provision should be interpreted in a way that is consistent with basic concepts as aforesaid.

12. The conclusion that arises from the aforesaid is that the Winograd Commission is subject to the principle of publicity, with its exceptions, and everything that derives from them, in the same way as the principle applies to

a state commission of inquiry. In a commission of investigation publicity is therefore the rule; state security, or any other recognized reason for secrecy that reflects a weighty public interest is the exception. The principle of publicity has broad application. The exception only applies when circumstances require, it is for a proper purpose and it is not excessive.

13. The practical application of these principles leads to the conclusion that the Winograd Commission has a duty to allow the content of its proceedings and the material presented to it to be disclosed to the maximum degree possible without harming the security purpose or any other national interest of the highest importance. Only a real concern of harm to a public interest of special importance will justify a departure from publicity and the duty of disclosure and will allow proceedings *in camera* or a prohibition against publishing material and reports that were brought before the commission or will be issued by it.

14. Investigating matters concerning the War may naturally make it necessary to make some or even most of the proceedings and the material before the commission privileged for security reasons. But the commission has a duty to examine the need for making its proceedings classified for each testimony and for each hearing that is going to take place before it. The commission is not supposed to decide in advance that its proceedings will be subject to a blanket prohibition against disclosure. When determining the framework of the prohibition against disclosure, it should act on the basis of a premise of disclosure and publicity, and regard a prohibition against holding proceedings in public or disclosing information as an exception that should be applied narrowly and sparingly, and only in cases where it is necessary.

15. As the President of the court explained in her opinion, upholding the principle of publicity in the proceedings of the commission will realize the principle of the freedom of information and disclosure in the proceedings of the commission within the framework of the permitted limits. Applying the aforesaid principle will expose the proceedings of the commission to important public scrutiny and will ensure public confidence in its proceedings, as well as its decisions and conclusions. This is consistent with the nature of the subject that the commission was asked to examine as a matter of paramount public importance. It is also consistent with the broad scope of the powers given to the commission, which makes it very similar in this respect to a state commission of inquiry.

16. Since the state agreed, in principle, with the aforesaid analysis, I agree with the president's conclusion that it is not required to make the order

absolute in the current circumstances, since it can be presumed that the commission of investigation will act in accordance with the principles set out in this judgment, and that it will exercise its discretion in accordance with the criteria set out herein, which are based on the fundamental principles of our legal system.

Petition denied.

18 Shevat 5767.

6 February 2007.