HCJ 4542/02

Kav LaOved Worker's Hotline
and others

v.

1. **Government of Israel**
2. **Minister of the Interior**
3. **Minister of Labour and Social Affairs**
4. **Association of Contractors and Builders in Israel**
5. **Association of Flower Growers Agricultural Cooperative Society Ltd**

The Supreme Court sitting as the High Court of Justice
[30 March 2006]
Before President A. Barak, Vice-President Emeritus M. Cheshin and Justice E.E. Levy

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

Facts: The government of Israel adopted a policy of allowing foreign workers to come to work in Israel. The residence permits given to the foreign workers are conditional upon the foreign workers working for a specific employer ('the restrictive employment arrangement'). Consequently, if the worker leaves his employer, he automatically becomes an illegal alien, and is liable to be arrested and deported. The petitioners attacked this policy, on the grounds that it violates the dignity and liberty of the foreign workers. It also undermines the bargaining power of the foreign workers in the employment market. The respondents replied that the restrictive employment arrangement is needed in order to ensure supervision of foreign workers in Israel and to make sure they leave Israel when their period of work ends. The respondents also argued that they have introduced a procedure for changing employers, but the petitioners claimed that this does not amount to a real change in the system.

Held: The restrictive employment arrangement violates the dignity and liberty of the foreign workers. This violation does not satisfy the requirement of proportionality in the limitations clause in the Basic Law: Human Dignity and Liberty. There is no rational connection between the restrictive employment arrangement and its declared purpose of supervising the foreign workers in Israel, as can be seen from the ever increasing number of foreign workers that remain illegally in Israel. The restrictive

employment arrangement is not the least harmful measure that can be adopted. It is also disproportionate in the narrow sense, because the sweeping violation of the rights of the foreign workers is not proportionate in any degree to the benefit that is derived from the restrictive employment arrangement.

Petition granted.

Legislation cited:

Basic Law: Freedom of Occupation.
Basic Law: Human Dignity and Liberty, ss. 1, 2, 6(b).
Contracts (Remedies for Breach of Contract) Law, 5731-1970, s. 3(2).
Entry into Israel Law, 5712-1952, ss. 1, 2, 6, 6(1), 6(2), 15(a).
Entry into Israel Regulations, 5734-1974, rr. 5(e), 10(a)(4), 11(a)(4).
Foreign Workers Law, 5751-1991, ss. 1K, 1M(a), 1M(b).

Israeli Supreme Court cases cited:

[1] LCrimA 10255/05 *Hanana v. State of Israel* (not yet reported).
[2] HCJ 5688/92 *Wechselbaum v. Minister of Defence* [1993] IsrSC 47(2) 812.
[3] CrimA 115/00 *Taiev v. State of Israel* [2000] IsrSC 54(3) 289.
[4] CA 2781/93 *Daaka v. Carmel Hospital* [1999] IsrSC 53(4) 526; **[1998-9] IsrLR 409**.
[5] HCJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* [2004] IsrSC 58(6) 481.
[6] HCJ 2587/04 *Bucharis v. Hadera Assessment Officer* (not yet reported).
[7] HCJ 785/87 *Afu v. IDF Commander in Gaza Strip* [1988] IsrSC 42(2) 4.
[8] CrimA 131/67 *Kamiar v. State of Israel* [1968] IsrSC 22(2) 85.
[9] CrimFH 7048/97 *A v. Minister of Defence* [2000] IsrSC 54(1) 721.
[10] HCJ 2599/00 *Yated, Children with Down Syndrome Parents Society v. Ministry of Education* [2002] IsrSC 56(5) 834.
[11] CrimFH 6008/93 *State of Israel v. A* [1994] IsrSC 48(5) 845.
[12] HCJ 1/49 *Bajerno v. Minister of Police* [1948] IsrSC 2 80.
[13] HCJ 337/81 *Miterani v. Minister of Transport* [1983] IsrSC 37(3) 337.
[14] HCJ 3267/97 *Rubinstein v. Minister of Defence* [1998] IsrSC 52(5) 481; **[1998-9] IsrLR 139**.
[15] HCJ 758/88 *Kendall v. Minister of Interior* [1992] IsrSC 46(4) 505.
[16] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [1995] IsrSC 49(5) 1.
[17] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

[18] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.
[19] HCJ 3648/97 *Stamka v. Minister of Interior* [1999] IsrSC 53(2) 728.
[20] HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**.
[21] HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* **[2005] (2) IsrLR 335**.
[22] HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel* [1996] IsrSC 50(2) 769.
[23] HCJ 6845/00 *Niv v. National Labour Court* [2002] IsrSC 56(3) 663.

Israel District Court cases cited:
[24] AP (TA) 2036/04 *Quijan v. Minister of Interior* (unreported).

Israel National Labour Court cases cited:
[25] LabC 1064/00 *Kinianjoi v. Olitziki Earth Works* [2004] IsrLC 35 625.

Israel Regional Labour Court cases cited:
[26] LabC (Hf) 1565/05 *Rosner v. Ministry of Industry, Trade and Employment* (not yet reported).
[27] CrimC (Jer) 106/03 *State of Israel v. Mordechai Aviv Construction Enterprises Ltd* (not yet reported).
[28] LabC (BS) 1347/03 *Atzova v. Sansara Health Club Management Ltd* (not yet reported).

American cases cited:
[29] *Lochner v. New York*, 25 S.Ct. 539 (1905).

Jewish law sources cited:
[30] Leviticus 19, 33-34.
[31] Exodus 23, 9.
[32] Exodus 22, 20.
[33] Rabbi Shelomo Yitzhaki (Rashi) on Exodus 22, 20.
[34] Rabbi Shelomo Yitzhaki (Rashi) on Exodus 23, 9.

For the petitioners — E. Albin.
For respondent 1-3 — A. Helman, O. Koren.
For the fourth respondent — G. Seligson.
For the fifth respondent — Mr D. Avraham.

JUDGMENT

Justice E.E. Levy

An Israeli employer who wishes to employ in his business workers who are not Israeli citizens or residents is required to obtain a permit for this from the Foreign Workers Department at the Ministry of Industry, Trade and Employment. The workers that come to Israel, pursuant to a permit that is given to the employer, receive a permit to live here. The Minister of the Interior, by virtue of the power given to him under the Entry into Israel Law, 5712-1952, usually makes the residence permit given to foreign workers conditional upon the worker who comes to Israel being employed by the specific employer who applied to employ him. The employer also undertakes, for his part, to ensure that the worker leaves Israel when the employment relations are terminated. The name of the employer is stamped in the passport of the worker, and he is prohibited from working for another employer or from doing additional work. A breach of these conditions in the permit results in its expiry and consequently the foreign worker because an illegal alien (hereafter — 'the restrictive employment arrangement'). Is this arrangement lawful? That is the main question that we are required to decide within the framework of this petition.

The petition

1. The petitioners are human rights organizations. Their petition was brought before this court in 2002. The background to filing it was government decision no. 1458 of 17 February 2002, in which it allowed six thousand foreign workers from Thailand to be brought to Israel to be employed in the agricultural industry, notwithstanding the 'closed skies' policy that had been decided upon by the government, in which it determined that no more foreign workers would be allowed to enter Israel. The petitioners asked us to order the respondents in an interim order to refrain from bringing in additional workers as long as the restrictive employment arrangement remained in force, on the ground that this arrangement seriously violates the rights of foreign workers.

In his decision of 29 May 2002, Justice Rivlin held that there was no basis for making such an interim order, and the petition was heard before a panel. On 22 May 2003 an order *nisi* was made in the petition. From the filing of the petition until the present, when the time to decide it has arrived, the

respondents made various changes to the restrictive employment arrangement. These changes were contained in internal guidelines of the Ministry of the Interior, and subsequently in government decisions. According to the petitioners, these changes are not satisfactory. The changes that they purport to make to the restrictive employment arrangement are not real changes, and they leave unchanged many of the problems that arise from it. We will therefore turn to examine the petitioners' arguments and the respondents' position on them, and then go on to examine the changes that were made to the restrictive employment arrangement.

The petitioners' arguments

2. According to the petitioners, the policy adopted by the respondents with regard to the employment of foreign workers in Israel is unreasonable in the extreme. It leads to a serious violation of the human rights of foreign workers — their dignity, liberty and their rights under employment law — and it makes them the property of their employers. It negates the right to freedom of occupation in its most basic and fundamental sense. It leads to the creation of a class of inferior workers, which is tantamount to a form of modern slavery. It is based on the outlook that the worker is merely the property of his employer and not an autonomous entity with an inherent right to human dignity.

A preliminary argument raised by the petitioners is that the restrictive employment arrangement is *ultra vires*. This is because s. 6 of the Entry into Israel Law, which provides that the Minister of the Interior is entitled 'to make conditions for giving a visa or a residence permit' and also 'to stipulate in a visa or a residence permit conditions that should be observed in order that the visa or the residence permit will be valid,' does not allow the Minister of the Interior to make entry visas and residence permits given to foreign workers in Israel conditional upon working for a specific employer only. The serious violation of the basic rights of foreign workers caused by the restrictive employment arrangement leads, according to the petitioners, to the conclusion that express and unambiguous statutory authorization is required in order to implement it, and the general authorization given to the Minister of the Interior in the Entry into Israel Law is insufficient.

3. As we have said, the main argument of the petitioners concerns the violation caused by the restrictive employment arrangement to the dignity and liberty of the foreign worker, and its serious consequences concerning the weakening of his bargaining power in the Israeli employment market. The creation of a connection between the legality of the residence of the foreign

worker in Israel and his working for a specific employer, according to the petitioners, gives the employer the ability — by means of the simple act of dismissing the worker — to make the residence permit that he holds expire, and to turn him into an illegal alien who is liable to be arrested and deported from Israel. This makes the dependence of the foreign worker on his employer absolute, and the disparity of forces that in any event characterizes employment contracts to which foreign workers and Israeli employers are the parties is increased.

Foreign workers who come to Israel in search of work, according to the petitioners, are usually normative persons who are in serious economic distress. They are able to come, in the vast majority of cases, by virtue of the assistance provided by manpower companies and other agents. Within the framework of this assistance, the worker is frequently required to pay large sums of money, which he undertakes to repay from his work in Israel, and this sometimes requires the mortgaging of his property in his country of origin. Against this background, it is clear that to lose the permit to reside in Israel — a consequence that can easily be brought about by any employer — has very serious consequences. It can cause the foreign worker complete economic destruction. It can result in the loss of his property and a life in the shadow of a huge debt that he will never be able to repay.

According to the petitioners, this excessive power wielded by the employer provides fertile ground for grave phenomena such as taking passports away from workers, imprisonment, non-payment of wages, violence, exploitation and treating workers inhumanely — phenomena to which many foreign workers are compelled to become accustomed, since they cannot object because of their desire not to lose the permit to reside in Israel. On the other hand, workers who choose to leave their employers against a background of these grave phenomena find themselves imprisoned and deported. This creates an unreasonable situation, in which workers who seek to realize their inherent freedom to be released from an employment contract — especially in circumstances of exploitation and abuse on the part of the employer — become criminals who are liable to be arrested at any time. In this way the basic right to be released from an employment contract — a right given to every worker — is violated. The petitioners claim that this serious employment reality also has a significant effect on the conditions of work of Israeli employees in those industries where foreign workers are employed.

The petitioners further argue that the restrictive employment arrangement violates the freedom to enter into contracts — a right that applies particularly with regard to an employment contract, which guarantees the basic social rights of the worker. It negates the economic bargaining power of the foreign worker in the Israeli employment market, which is in any case weak, and therefore the employment contracts made in view of this are clearly contrary to public policy and involve prohibited economic duress.

4. The petitioners also argue that in many cases the worker does not know that by working for a specific employer he can be in breach of the terms of his permit. This mainly occurs in situations where the worker (particularly in the construction industry) is 'moved' from one project to another on the instructions of his employer or the manpower company — sometimes to an employer who never received a permit to employ foreign workers. In this manner the foreign worker becomes a criminal without his knowledge and without doing any voluntary act.

It is also alleged that the restrictive employment arrangement violates the right of the foreign worker to medical insurance, a violation that is caused as a result of the termination of the employment for the employer, whether voluntarily or under duress, which means the loss of medical insurance that the employer is liable to pay for the worker; the worker's right of access to the courts is also violated, since it is reasonable to assume that a worker who wishes to sue his employer will do so only after he has resigned from working for that employer. The significance of leaving his work for that employer is that he loses his permit to reside in Israel, so the restrictive employment arrangement should be regarded as depriving foreign workers of any real possibility of bringing their cases before the courts.

5. According to the petitioners, the employment of foreign workers in Israel should be effected by means of employment permits for a whole industry, so that the residence permit will be given to the foreign worker (and not to the employer) and it will be conditional upon him working in a specific *industry* and not for a specific *employer*. In consequence, the employers in that industry will be compelled to offer the workers wages and social benefits that will compete with other employers. This will allow market competition, and the workers will be given a basic bargaining power. At the same time, this arrangement will allow employers to employ other workers in place of those who have left, whereas the state's interest in supervising and monitoring the employment of foreign workers in Israel will be realized by means of setting up a registry to which the foreign workers will report their

place of work. This arrangement, according to the petitioners, properly balances the various considerations and interests, and is similar to the arrangements practised in many countries.

The position of respondents 1-3

6. The position of respondents 1-3, who are the government, the Minister of the Interior and the Minister of Industry, Trade and Employment[1] (hereafter — 'the respondents') is that the policy adopted by them with regard to the manner in which Israeli employers employ foreign workers is reasonable and reveals no ground for intervention.

In their reply, the respondents described the constraints facing the state in its attempt to contend with the phenomenon of illegal migration into Israel. In recent years, it is alleged, many foreign nationals who were allowed to enter Israel for a limited period, and for the purposes of certain work only, settled here without a permit, while leaving the work for which they were originally given a residence permit. Against this background, the respondents argue, the need to supervise the entry of foreign workers into Israel and their residence in Israel becomes acute.

Even the very employment of foreign workers in Israel, according to the respondents, irrespective of the question of the legality of their residence, is a policy that involves a heavy price. Employment of this kind admittedly involves immediate economic advantages for employers and the economy, but from a broad and long-term perspective it is argued that it has negative and harmful ramifications. Thus, for example, the employment of foreign workers is likely to result in a change in the structure of employment and wages, harm to the weaker sectors of the population that compete with foreign workers for places of work, the loss of foreign currency, the creation of a dependence on 'importing' cheap manpower and various social problems. In view of these negative ramifications and in view of the dimensions of the phenomenon of illegal residence in Israel, the respondents argue that it is clear that restrictions and supervision are required both for the actual permits for foreign workers to enter Israel and also for the specific work with particular employers. In addition the respondents argue that

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[1] Note: The original third respondent, when the petition was filed in 2002, was the Minister of Labour and Social Affairs, as stated in the title of the judgment. In 2003 the powers of this ministry with regard to employment matters were transferred to the Ministry of Industry and Trade, which was renamed the Ministry of Industry, Trade and Employment.

measures need to be adopted in order to ensure that the workers leave Israel when their residence permit expires.

7. The respondents reject the petitioners' claim that making the residence permit given to the foreign worker conditional upon working for a specific employer frustrates the possibility of leaving the employer. In the initial reply to the petition, which was filed on 28 November 2002, they told us that the Population Director at the Ministry of the Interior issued a new procedure that regulates the change of employer by foreign workers. It was argued that this procedure — the 'change of employer procedure' — does indeed allow workers to leave the employer whose name is mentioned in their permit and to look for another employer, subject to the conditions and requirements stated therein. In their reply, the respondents also said that the aforesaid procedure was distributed to the Population Administration offices around Israel, and that it is going to be translated into the languages spoken by foreign workers. They say that when the translation work is completed, the procedure will also be distributed to the foreign workers themselves. The respondents further argued that the state is taking steps to find an alternative arrangement in the field of employing foreign workers in Israel that will not be based on restricting the workers to their direct employers. Notwithstanding, until this alternative arrangement is formulated — a professional committee set up by a government decision is working on this — there is no possibility of changing the existing arrangement, in view of the necessity of supervising the residence and work of foreign workers in Israel.

The respondents claim that the change of employer procedure undermines the argument that foreign workers are prevented from changing employers and that as a result their rights to dignity and liberty are violated. With regard to the violation of the freedom of occupation of foreign workers, it is argued that this right is only given to citizens and residents of the State of Israel. However the respondents emphasize that even if it is found that restricting the change of employer violates basic rights of the foreign worker to dignity and liberty, this violation is constitutional. It is done pursuant to statute, since the duty to obtain the approval of the Ministry of the Interior to change an employer is duly enshrined in the Entry into Israel Law; its purpose — supervision of the employment of the foreign workers — is a proper one; similarly, the change of employer procedure sufficiently takes into account the 'human and public interest' not to restrict a person to his employer and it reflects a proper balance between this and between competing interests. The respondents also emphasize, in this respect, the conflicting interest of the

employers in 'restricting' their workers to them, since frequently — especially in the nursing industry — they too are numbered among the weaker sectors of society, in a manner that justifies preventing their foreign workers from 'leaving them arbitrarily.'

8. The respondents reject the argument of the petitioners that the restrictive employment arrangement was enacted *ultra vires*. The clear language of s. 6 of the Entry into Israel Law, it is argued, does not leave room for doubt that the Minister of the Interior is entitled, on the face of the matter, to make conditions for giving a visa or a permit. In any case, the respondents argue, it is well-known that the discretion of the Minister of the Interior under the Entry into Israel Law is very broad, and this is inconsistent with the restrictive interpretation argued by the petitioners.

The change of employer procedure and the positions of the parties with regard thereto

9. In the decision of this court on 1 December 2002, it was held that in view of the introduction of the change of employer procedure, which was formulated, as aforesaid, after the petition was filed before us, it was desirable to ascertain how it was being implemented *de facto*. The hearing of the petition was postponed by four months, and the parties were asked to file supplementary statements with regard to the manner in which the aforesaid procedure was being implemented.

In a very general manner it can be said that the procedure enshrines the possibility of changing an employer, and it directs the officials of the Population Administration office with regard to the manner of handling requests of this kind. The procedure makes the granting of a request of a worker to move from one employer to another conditional upon various requirements, and it imposes certain exceptions. The following are the main conditions, which are enshrined in paras. 2 and 3 of this procedure:

> 'b. *Conditions and requirements*
>
> b.1 The person filing the request should file a request before he leaves the current employer.
>
> b.2 If a worker is dismissed or his former employer has died or he has been compelled to leave his former employer, without a possibility of applying before he left to the Population Administration office, his request may be accepted provided that he comes to the office immediately after leaving the former employer.

It should be emphasized that this procedure does not apply to a worker who is caught when he is not working for his registered employer and/or as an illegal alien and only after he is arrested does he request to move to another employer.

b.3 The person filing the request should file a request for a residence permit of the b/2 type. If the worker already has a new employer, who satisfies all the conditions required in order to employ workers and the office sees fit to approve the move immediately, the worker can directly file a request for a residence permit of the b/1 type.

…

b.5 The person filing the request should present a foreign passport that is in force for six months more than the required period of the permit (assuming that a b/2 type permit is given).

…

b.7 The worker should be asked for an explanation of why he is interested in stopping his work for the current employer…

…

b.8 If the worker also has a letter from the employer, it should be received. If the worker does not have such a letter, the information should be received directly from the worker and where necessary a telephone call may be made to the manpower company through which the worker was employed and/or to the former employer.

…

c. *A worker who satisfies all of the aforesaid conditions shall receive a residence permit of the b/2 type for a month, unless one or more of the following exceptions applies to him:*

c.1 His residence is capable of endangering public safety or public health.

c.2 He has committed an offence against the laws of the State of Israel and for this reason the application should not be approved.

c.3 The case is one of a worker who has worked in Israel with a permit for a period of four years or more and therefore his request for a change should not be approved (it is possible to allow him to complete the period of his employment with his current employer).

c.4 The case is one of a worker who has changed employers several times and therefore there is no basis for approving his request for a further change, all of which while exercising discretion and subject to the circumstances of each case.

c.5 There is a certain restriction on providing the service in the Aviv (foreign worker) system.

c.6 His first degree family members — a spouse, mother, father, son, daughter — are present in Israel.

c.7 Another reason because of which the worker's request to extend his residence permit for his current employer should be refused.'

In a supplementary statement of 4 May 2003, the petitioners argued that the implementation of the change of employer procedure had encountered substantial difficulties. This statement was supported by the affidavits of seventeen foreign nationals who worked in Israel in the nursing, manufacturing and construction industries. According to what was argued in the supplementary statement, the change of employer procedure was not published, translated or distributed among the various Population Administration offices, and consequently it is not being implemented by them *de facto*.

10. On the merits the petitioners argue that even if the change of employer procedure were to be implemented *de facto*, it still would not be capable of remedying the defects that lie at the heart of the restrictive employment arrangement. According to their approach, the rule that applies to the employment of foreign workers is still that they are attached to a specific employer, and the change of employer procedure is no more than a narrow and ineffective escape channel. The procedure burdens the workers with bureaucratic difficulties and insurmountable obstacles, and in practice there is no possibility of the worker changing employer by means of his own efforts, but only with the help of outside parties and human rights organizations; the process of 'freeing' the worker from the employer involves the employer himself and the manpower companies, and these are parties who have no

interest in helping the worker to change his employer; it is not designed to deal with the phenomenon of the 'moving' of foreign workers by their employers and manpower companies, which means that the worker becomes an illegal alien against his will and without his knowledge. The arrangement still leave the employer with an incentive to confiscate the passports of the workers employed by him, since he is obliged to ensure that they leave Israel as a condition for employing new workers in their stead, in a manner that prevents them from acting on their own in order to arrange the change of employer legally. The procedure cannot therefore solve the problem of turning the foreign workers into illegal aliens against their will. In addition, the procedure increases the dependence, which in any case is considerable, of the foreign workers on the manpower companies with whom they are connected in so far as finding an alternative place of work is concerned, especially in the nursing industry. But the problem is that the manpower company — which has already been paid the agent's fee with regard to the foreign worker coming to Israel and receiving an entry visa and residence permit — has no interest in finding alternative employment for the worker or in improving his conditions of work, and it may, for various reasons, even refer workers to work in places in which they are not allowed to work according to the permit in their possession, and thus these workers become illegal aliens without their knowledge, sometimes even from their first day in Israel. It is not surprising therefore that the manpower companies do not inform the workers of the procedure nor do they act in accordance with it. Moreover, the arrangement still leaves the employer with considerable power, since the initial linkage between the legality of the residence of the worker in Israel and the identity of the employer remains unchanged. It is argued that this linkage is exploited by many employers. Thus, for example, from the affidavits that were attached to the supplementary notice of the petitioners it transpires that in certain cases workers who came to Israel were asked to pay their employer a large sum in order to be employed by him, so that the employer could repay the amount that he paid to the manpower company.

11. The respondents reject these arguments of the petitioners. According to them, most of the difficulties of which the petitioners complain derive from the relationship between the foreign workers and the manpower companies, and they do not indicate any inherent problem as alleged in the change of employer procedure. The respondents are aware of the complex nature of the relationship between the foreign workers and the manpower companies, and they confirm the claims of the petitioners with regard to their charging the workers large amounts of money for coming to Israel. But

according to the respondents, the linkage that is created *de facto* between the foreign worker on the one hand and the manpower company and the employer on the other as a result of those financial arrangements is of greater strength than the linkage created between the parties as a result of the change of employer procedure. Finally the respondents argue that the mere fact that the manpower companies do not act lawfully — such as when they refer a worker to an employer who does not have a permit to employ a foreign worker — has no relevance to the reasonableness of the procedure itself.

With regard to the question of the foreign workers' knowledge of the existence and content of the procedure, the respondents claim that the procedure was distributed in February 2003 and although there might have been some 'teething problems' in implementing it, it is now properly implemented — with great flexibility — by the officials of the Population Administration offices.

Additional respondents

12. Additional respondents in the petition are the Association of Contractors and Builders in Israel and the Association of Flower Growers Agricultural Cooperative Society Ltd, which are organizations that incorporate employers in industries where foreign workers are employed. The position of the Association of Contractors and Builders with regard to the restrictive employment arrangement is that there is no inherent fault in it, and that most of the harm caused to the rights of the foreign workers derives from the relationship between the workers and the manpower companies. According to the Association of Contractors and Builders, the fact there are a few employers who violate the rights of their workers — and these should be brought to trial and subjected to the norms prescribed in the protective legislation — does not imply anything with regard to employers as a whole. A changeover to a restrictive industry arrangement will not, according to the Association of Contractors and Builders, result in an improvement of the employment conditions of the foreign workers, and it will upset the delicate balance between the needs of the economy, the needs of the employers and the needs of the workers in such a way that it will caused serious harm to the construction industry. According to the Association of Contractors and Builders, there is a deliberate shortage of foreign workers in the construction industry, a shortage that is intended to encourage Israeli workers to work in this industry, and therefore the introduction of competition between employers for the employment of foreign workers will harm employers who cannot offer conditions that are as good as the conditions offered by other

employers. Admittedly, they explain that it may lead to an improvement in the status and conditions of work of the foreign workers, but the government's decision to allow foreign workers to come to Israel was not intended, according to its purpose, to benefit these workers, but rather to prevent the collapse of the construction industry. Moreover, the restrictive industry arrangement will not provide a solution for employers whose workers 'abandon' them, and therefore a proper solution to the problems raised in the petition is to ensure the enforcement of the protective legislation against employers who act in violation thereof.

13. The Association of Flower Growers also presented its position on the questions raised by the petition, and especially with regard to the arrangement of employing foreign workers through corporations, an arrangement that was recently adopted in a government decision with regard to the building industry. When we consider this procedure below, we will also comment on the position of the Association of Flower Growers concerning it.

The restrictive employment arrangement — the normative framework

14. The question of the entry of foreign workers into Israel for the purpose of employment is governed by the Foreign Workers Law, 5751-1991, and the Entry into Israel Law. Section 1M(a) of the Foreign Workers Law provides that the employment of a foreign worker requires a written permit from the supervisor (a civil servant who is appointed as the manager of the government department that was formed pursuant to government decision no. 2327 on 30 July 2002, which is the Foreign Workers Department at the Ministry of Industry, Trade and Employment), and s. 1M(b) provides that permits for employment as aforesaid should be given after taking into account factors concerning the work market in the various work sectors and employment areas.

15. Under the Entry into Israel Law, the entry into Israel of someone who is not an Israeli citizen is effected by means of a visa, and his residence in Israel is in accordance with a residence visa (s. 1 of the Entry into Israel Law). The Minister of the Interior, who is the minister responsible for implementing the Entry into Israel Law (s. 15(a) of the Entry into Israel Law), is competent to give visas and permits as aforesaid (s. 2 of the Entry into Israel Law). The minister is also competent to make these conditional. Section 6 of the Entry into Israel Law, which is the main provision of statute around which this case revolves, provides the following:

'Determining conditions

> 6. The Minister of the Interior may —
>
> (1) determine conditions for giving a

> visa or a residence permit and for extending or replacing a residence permit, including stipulating that a money deposit, a bank guarantee or another appropriate surety is given for ensuring compliance with such conditions, and the means of realizing and forfeiting the surety;
>
> (2) determine, in a visa or a residence permit, conditions that are to be fulfilled as a condition for the validity of the visa or of the residence permit.'

As stated, by virtue of the general power to make visas and residence permits conditional, the Minister of the Interior is accustomed to making the visas and the permits (hereafter, for short — 'the permit') that are given to foreign workers conditional upon working for a specific employer whose name is stamped in the permit, so that the worker who receives a permit may work for this employer only. The worker is not entitled to take on any additional work, and if he wishes to leave his employer, he must turn to the Population Administration Office and apply to change his employer and amend the licence accordingly. The employer is required, for his part, to sign a written undertaking in which he undertakes, *inter alia*, that the foreign worker will be employed only in the work for which he received the permit and that he will not be employed by another employer without the approval of the Minister of the Interior. The employer is also liable to ensure the worker leaves Israel when he finishing working for him (r. 5(e) of the Entry into Israel Regulations, 5734-1974). A breach of the condition with regard to working for the employer whose name is stated in the permit — such as by resigning or going to work for another employer — results in the expiry of the validity of the residence permit (rr. 10(a)(4), 11(a)(4) of the Entry into Israel Regulations).

16. Applications of workers to change employer and amend the permit are governed by the 'change of employer procedure,' which has been formulated by the Ministry of the Interior as discussed above. For the purpose of completing the picture, it should be noted that the change of employer procedure is supplemented by another procedure, which is the 'closed skies procedure,' which was determined as a result of the government decision not

to allow any more foreign workers to come to Israel. The closed skies procedure allows, in certain cases, workers who have been arrested for unlawful residence to be released from arrest and to obtain work with another employer, provided that they have been in Israel since no earlier than 1 January 2001, and provided that they have not 'absconded' from their former employers (i.e., left their work without giving prior notice of this or obtaining the approval of the Ministry of the Interior for this), which has the purpose of providing a 'solution for employers that have a shortage of workers because of the new policy.'

The arrangement of employing foreign workers through licensed manpower corporations and the positions of the parties with regard thereto

17. On 30 April 2002 the Minister of Finance appointed an inter-ministerial team whose task was to determine principles for a new arrangement in the sphere of employing foreign workers in Israel. The inter-ministerial team submitted its recommendations on 15 August 2004 (hereafter — 'the recommendations of the inter-ministerial team'), and they were adopted by government decision no. 2446 that was adopted on the same day, with regard to the construction industry only.

The recommendations of the inter-ministerial team are that the method of employing foreign workers in Israel should be based on a new employment model through licensed manpower corporations. According to this model — which it was recommended to implement with regard to the construction and agricultural industries only — permits to employ foreign workers would no longer be given to employers on an individual basis. Instead, the foreign workers that would be allowed to work in Israel would be employed by corporations that are licensed to employ foreign workers in a specific industry. The number of these corporations would be limited, and they would be licensed to employ a defined number of foreign workers, which would vary between 500 and 2,000. Giving the licence to the corporation would be made conditional upon the payment of a licensing fee to the state treasury, in an amount that will reflect the difference between the cost of employing a foreign worker and the cost of employing an Israeli worker. The licensed corporations will be the party liable to pay the workers their wages and to give them the social benefits to which they are entitled under the law. With regard to the latter issue, it was proposed that a duty should be imposed to pay a minimum wage to the foreign worker on a scale of 236 hours of work per month (which includes 50 hours overtime according to a calculation of a minimum wage). At the same time, it was decided that the employer should

have the obligation of keeping records of the hours worked by the worker, and to the extent that the worker actually works more hours, the employer should be obliged to pay him wages that are not less than the minimum wage for the actual amount of work.

18. It was also recommended that the corporation should be liable to make a provision each month in an amount equal to the maximum amount that can be deposited in a fund for foreign workers, under the provisions of s. 1K of the Foreign Workers Law, while allowing the corporation to deduct a part of that amount from the worker's wages. The amount that would be accumulated in this fund would be given to the worker when he leaves Israel at the end of the period of his lawful work here, and this would serve as an incentive for foreign workers to leave Israel. It was also recommended that the workers would be given the right to change the actual employer and also to change the licensed corporations, as long as the work is in the industry in which the worker was permitted to work, in such a manner that would cancel the restriction of the worker to his employer. The committee further said that after debate it did not see fit to recommend the absolute cancellation of the restrictive employment arrangement:

> 'The committee held a thorough debate on the possibility of cancelling the "restrictive" arrangement entirely and allowing the workers to work directly for the actual employers and not for licensed corporations. The committee was of the opinion that giving absolute freedom to the foreign workers would not result in a sufficient increase in the cost of employing the foreign workers and a reduction in their exploitation, since the foreign worker, as a worker that is not organized and that is operating in an environment that is not his natural environment, cannot demand a high price in return for his work potential. It is also clear that it will not be possible to maintain effective supervision so that the rights of foreign workers are maintained, as well as supervision of the number of workers and the payments of fees and charges for them, when there will be thousands of employers of foreign workers in Israel and there will be an unceasing movement of workers from one employer to another. The free movement of foreign workers between employers will also prevent any practical possibility of accumulating for the foreign worker amounts that will be given to him only when he is about to leave Israel, and this will prevent the use of one of the effective incentives for removing foreign workers from

Israel (p. 36 of the recommendations of the inter-ministerial team).

It should be noted in this context that with regard to the licensing of manpower corporations the inter-ministerial team also recommended that the licence that would be given to the corporation would be made conditional upon the following:

'1. The corporation shall allow free movement of every foreign worker registered with it between actual employers in the industry for which the licence was given, as the foreign worker wishes, provided that the actual employer whom the worker wishes to move to is indeed actually prepared to employ the worker.

2. The corporation shall not prevent movement of a foreign worker whom it employs to another licensed corporation in the same industry, if the worker wishes this and the other corporation agrees to it…

3. The corporation shall pay each of the workers his wages and every ancillary payment on time…

4. The corporation shall pay each of the workers the benefits that it is obliged to provide under any law…

5. The corporation shall provide every new worker who is employed by it with information concerning the rights of the worker, in a language that the worker understands.

6. The corporation shall undertake not to take any unlawful measures against foreign workers, such as violence, false imprisonment or holding back a passport, nor to ask the actual employer to adopt any such measures or to cause the actual employer to do this in any other way.

7. The corporation will locate for the foreign worker places of work that it wishes to offer him; the corporation will offer the worker the places of work that were located, including information on the identity of the actual employer, the place of the work, the type of the work, the worker's wages, the work conditions, the period of the work and the place where he will live; after the worker is presented with the places of work as stated, the worker shall choose where he is actually interested in working and he will be referred to that place of

work…' (p. 39 of the recommendations of the inter-ministerial team).

Notwithstanding, the inter-ministerial committee saw fit to decide — with regard to a worker changing his employer — that since such a change involves an accounting with regard to the licence fee and additional bureaucratic procedures, a change of employer 'cannot be done with unlimited frequency, but a reasonable time shall be determined, in coordination with the attorney-general, from the date of the foreign worker starting to work for that licensed corporation, and only at the end of that time will the worker be able to change over to work for another licensed corporation' (p. 47 of the recommendations of the inter-ministerial team). Later it was decided, within the framework of the agreement reached between the Ministry of Industry, Trade and Employment and the Ministry of Finance on the one hand and the Association of Contractors and Builders in Israel on the other, that a change of licensed corporations would be possible once every three months (revised statement of respondents 1-3 of 21 February 2005).

19. With regard to the obligations for which the actual employer is liable to the worker, the inter-ministerial committee recommended the adoption of the model provided in the Minimum Wage Law, 5747-1987, which imposed on the actual employer of the worker an obligation to give the worker the employment conditions to which he is entitled. It was also recommended that the government policy with regard to the prohibition of bringing additional foreign workers to work in Israel (the 'closed skies' policy) would be left unchanged, and that the department at the Ministry of Industry, Trade and Employment would appoint a complaints commissioner for foreign workers, to whom foreign workers could turn with complaints concerning a violation of their rights.

20. The petitioners are not happy with the employment arrangement through manpower corporations (hereafter — 'the corporations arrangement'). According to them, this arrangement will create a new form of restriction, whose ramifications may be worse than those of its predecessor. First, the petitioners argue, the corporations arrangement does not apply to workers in the nursing industry, who will continue to be employed in accordance with the previous arrangement, whereas its success depends on the continuation of the 'closed skies' policy, since the bargaining power of the foreign worker will decrease significantly if the entry of additional foreign workers into Israel is allowed. On the merits, the petitioners argue

that the corporations arrangement purports to create an artificial work market for workers of the manpower corporations, according to which the foreign worker will be bound to the manpower company instead of being bound to the actual employer. Since the manpower companies are companies whose purpose is to make a profit, the petitioners argue, it can be expected that they will make it difficult for workers to move from one corporation to another by means such as refusing to provide information of this possibility, taking the worker's passport, and the like. In addition, in view of the fact that the wages of the workers are paid by the corporation and not by the actual employer, there is no meaning to offers of higher wages from actual employers, and it can be expected that any additional wages that may be offered will not find their way into the worker's pocket. In addition, licensing a limited number of manpower companies raises a concern that a cartel will be created, with the result that manpower companies will coordinate among themselves the amount of the workers' wages and their conditions of employment. Coordination of this kind will make the possibility of changing manpower companies a meaningless fiction, and the same is true of the rationale behind increasing competition in the foreign worker employment market.

The petitioners complain also of the high amount of the licensing fees that the corporation is required to pay for employing each worker. This high amount, it is argued, creates an incentive for the workers and the actual employers to enter into a contract outside the corporations arrangement, in such a way that it will be difficult to enforce compliance with the protective legislation by employers of foreign workers in an effective manner. In addition, the amount of the licensing fees raises a concern that these will be 'passed on' to the workers and the actual employers.

21. The Association of Flower Growers, which is the fifth respondent in the petition, also sought to present its position with regard to this new arrangement. According to the position of the Association of Flower Growers, as it was presented in an affidavit that was filed in this court on 29 January 2004, the corporations arrangement cannot solve the problems raised by the petition. The Association of Flower Growers said that it supports the petitioners' position that there should only be a restriction to a particular industry, so that the worker will not be restricted to his specific employer and workers will be able to change employers. Adopting the corporations arrangement, according to the Association of Flower Growers, will make the workers dependent on the corporations — instead of cancelling their dependence on the employers — in a manner that is likely to make the position of the foreign workers worse in comparison to their current position.

It argues that a permit should not be given exclusively to several corporations, while preventing the employers from receiving one, since this will force the agency of the manpower companies upon the work market. This arrangement gives the manpower companies great power, which is likely to be abused; it increases the dependence of the foreign workers on the corporations and reduces even further their bargaining power; it distorts the employment relationship by creating an artificial distance between the worker and his direct employer.

22. The respondents reject these arguments. With regard to the petitioners' arguments concerning the nursing industry, the consistent position of the respondents is that the nursing industry is different from the other industries in which foreign workers are employed. First, it is argued, there is no possibility of having a 'free market' in the nursing industry, because of the need to examine the specific entitlement of each patient that requires nursing. Second, as aforesaid, the position of the respondents is that there is great difficulty in cancelling the connection between the worker and the employer in the nursing industry, in view of the fact that the result of this will be that certain persons who require nursing services will not be able to employ a foreign worker. On the merits of the corporations arrangement the respondents make it clear that the department that deals with foreign workers will be very careful to ensure that workers can move freely from one licensed corporation to another, and that corporations that do not allow their workers to move as aforesaid will be liable to major sanctions, including the loss of their licence. The respondents also say that they do not entirely agree with the petitioners' assessment that the proposed arrangement does not create an incentive for transferring the profits of the manpower corporation to the foreign worker, since it can be expected that the free movement between the licensed corporations will result in an increase in the wages of the worker. In any case, the respondents emphasize that the purpose of the arrangement is not to enrich the foreign worker but to increase the cost of his work.

With regard to the petitioners' concern that a cartel of corporations will be created, the respondents say that in their estimation approximately thirty licensed corporations will operate initially. This number reduces the concern that a cartel will be created. In addition the General Director of the Israel Antitrust Authority has been asked to monitor the activity of the manpower corporations in order to prevent the creation of a cartel. The respondents also say that the licensing fees that were originally fixed have been reduced, and that in view of the risks facing the workers and the corporations that wish to

enter into enter into contracts outside the corporations arrangement, there is no major concern of employment outside the arrangement.

Immigration for work purposes around the world and in Israel

23. We shall not understand the petition properly unless we discuss the complex nature of the circumstances underlying it. We will therefore say a few words about these, after which we will turn to examine the case before us.

The migration of people for work purposes is a worldwide phenomenon that is continually increasing. It is estimated that each year millions of men and women migrate to another country in search of employment and personal and economic security (see International Labour Organization (ILO), 'Towards a Fair Deal for Migrant Workers in the Global Economy,' *International Labour Conference, 92nd Session*, 2004, at p. 3; R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (1997), at p. 17). The factors that cause the migration of people from country to country for work purposes are many and complex. They included circumstances such as widespread poverty, civil wars, natural disasters, differences between countries in wages and standards of living, increasing industrialization, the reduction in the costs of transport and communications, etc. (ILO, 'Towards a Fair Deal for Migrant Workers in the Global Economy,' *supra*, at pp. 3, 8; Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, *supra*, at pp. 13-14, 18-21). A significant part of this movement of work migration is made up by non-professional and semi-professional workers, who are invited to work in developed countries in areas where local unemployed persons refuse to work (R. Ben-Israel, 'Social Justice in the Post-Work Age: Distributive Justice in Distributing Work in the Twenty-First Century,' *Distributive Justice in Israel* (M. Mautner ed., 2000), at p. 322; Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, *supra*, at p. 19). The economic necessity that is the impetus for the migration of these workers, who usually originate in developing countries where the standard of life is very low, has led several scholars to argue for a relaxation of the category of 'refugee' in international law, so that it is adapted to the changing international reality (see P.H. Schuck, 'Citizens, Strangers and In-Between: Essays on Immigration and Citizenship' (1998), at p. 287; Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, *supra*, at p. 14 and the text referred to by footnote

3; S. Sivakumaran, 'The Rights of Migrant Workers One Year On: Transformation or Consolidation?' 36 *Geo. J. Int'l L.* 113, at p. 114).

24. When they reach the destination country, work migrants tend to congregate at the bottom of the work scale, and they are employed mainly in jobs that are considered very difficult and dangerous, jobs that are known as the '3D jobs' — Dirty, Dangerous and Difficult. Once these become the jobs for migrants, they tend to remain as such (ILO, 'Towards a Fair Deal for Migrant Workers in the Global Economy,' *supra*, at p. 10). A large number of the migrants suffer from low living and work conditions, which are frequently considerably lower than the usual work conditions in the destination country, and sometimes also from negative labelling and social hostility (see Schuck, 'Citizens, Strangers and In-Between: Essays on Immigration and Citizenship,' *supra*, at p. 4).

25. Israel has also played its part in the world map of work-related migration. For more than two decades workers from foreign countries have been employed in Israel in various sectors of the economy, and particularly in agriculture, construction, nursing and manufacturing. Until the beginning of the 1990s, these workers (without taking into account Palestinian workers from Judaea, Samaria and the Gaza Strip) were a marginal factor in the Israeli work force. By contrast, since the early 1990s — in view of the growing pressure from various interested parties to increase the quotas of foreign workers in the construction and agricultural industries — the government, in a series of decisions, has increase the quotas for giving permits to employ foreign workers in these industries (see State Comptroller, *Annual Report no. 46 for 1995 and Accounts for the 1994 Fiscal Year* (hereafter — State Comptroller's Annual Report for 1995), at pp. 478-479; H. Fisher, 'Foreign Workers: Overview, Formal Framework and Government Policy,' *The New Workers — Employees from Foreign Countries in Israel* (R. Nathanson, L. Achdut eds., 1999), at p. 15).

26. Beginning in 1996, the government decided to take action to reduce the number of foreign workers in Israel. In a government decision of 16 June 1997, it was decided that 'the number of foreign workers in the economy will be reduced by means of a multi-year plan, with the overall strategic approach that regards the large number of foreign workers as undesirable from social, economic and security viewpoints' (State Comptroller, *Annual Report no. 49 for 1998 and Accounts for the 1997 Fiscal Year* (hereafter — State Comptroller's Annual Report for 1998), at p. 273), and in a later series of decisions several operational policies were adopted in order to achieve this

goal. Thus, for example, it was decided to reduce the number of work permits that would be given for employing foreign workers. Finally, it was decided not to allow the entry into Israel for work purposes of anyone who is not a 'foreign expert,' which is the 'closed skies' policy (government decision no. 2328 of 30 July 2002). In addition, it was decided to adopt economic measures that increase the cost of employing a foreign worker, and to extend the scope of the enforcement activity against persons employing foreign workers unlawfully (government decision no. 2327; government decision no. 1784 of 4 April 2004). The decisions of the inter-ministerial committee on the question of foreign workers and the immigration authority were adopted. These included the recommendation that an immigration authority should be established to focus all the powers of government ministries with regard to all aspects of immigration, as well as a department for dealing with foreign workers at the Ministry of Industry, Trade and Employment (government decision no. 642 of 2 September 2001; government decision no. 2327; see also State Comptroller, *Annual Report no. 55b for 2004 and Accounts for the 2003 Fiscal Year* (hereafter — State Comptroller's Annual Report for 2004), at p. 376). A decision was also made to set up a temporary immigration administration that would act to arrest and deport foreign workers who were in Israel unlawfully, according to target quotas.

27. A consideration of the reality of employing foreign workers in Israel during these years reveals a problematic and troublesome picture. It transpires that workers from foreign countries are able to come to Israel *ab initio* only after paying large amounts of money — sometimes involving the mortgaging of their property and taking out loans — to manpower providers and agencies. These amounts of money are shared between the manpower company in the country of origin and the manpower providers in Israel (State Comptroller, *Annual Report no. 53b for 2002*, at pp. 655-656; LabC (Hf) 1565/05 *Rosner v. Ministry of Industry, Trade and Employment* [26]). In this manner:

> 'The profit involved in actually bringing the foreign workers from abroad (which arises from payments that the foreign workers are prepared to pay in their country of origin in return for the right to work in Israel) induces various manpower providers to bring foreign workers to Israel in as large a number as possible, whether there is work for them in Israel… or not' (Recommendations of the Inter-ministerial Committee, at p. 11).

The wages paid to foreign workers are in most cases low, and frequently even lower than the minimum wage. The State Comptroller's Annual Report for 1999 found that:

> 'The main economic incentive for employing foreign workers is that they cost less than the Israeli worker, and that they are prepared to work without social benefits and on terms that are unacceptable to the Israeli worker… Foreign workers are the most vulnerable sector, from the viewpoint of breaching the Minimum Wage Law. Exploitation of foreign workers by employers can also be seen from a survey conducted by the Manpower Planning Authority in 1998 with regard to foreign workers in Israel without a permit. Approximately 70% of those interviewed earned less than the minimum hourly wage…' (State Comptroller's Annual Report for 1999, at pp. 278-279).

Even the work and subsistence conditions offered to foreign workers are poor, and many of them find themselves living in crowded accommodation and unpleasant living conditions (see State Comptroller's Annual Report for 1995, at pp. 476, 493; CrimC (Jer) 106/03 *State of Israel v. Mordechai Aviv Construction Enterprises Ltd* [27]). They do not benefit from the effective protection of protective legislation (see O. Yadlin, 'Foreign Work in Israel,' *Menachem Goldberg Book* (A. Barak et al. eds., 2001), at p. 350 and the references cited there; LabC (BS) 1347/03 *Atzova v. Sansara Health Club Management Ltd* [28]); they are exposed to abuse, exploitation and oppression (see LCrimA 10255/05 *Hanana v. State of Israel* [1]; see also the Report of the Ministry of Justice, Ministry of Labour and Social Affairs and the Ministry of Foreign Affairs, *Implementation of the International Covenant on Economic, Social and Cultural Rights* (1997), at p. 27), and they find it difficult, *inter alia* because of a lack of the knowledge and the funds that are required in order to pursue a legal recourse, and because of their great dependence on their employers, in bringing their cases to the courts (see LabA 1064/00 *Kinianjoi v. Olitziki Earth Works* [25], at p. 638).

Deliberation

Violation of basic rights

28. Our journey begins with the question whether the restrictive employment arrangement violates basic rights, in view of the dispute between the petitioners and the respondents on this preliminary question. The deliberations below will principally address the arrangement that prevails in the nursing, agriculture and manufacturing industries, which are employment

sectors that are governed by the restrictive employment arrangement in its earlier form.

Before we consider the matter in depth, I think it appropriate to mention the following. The question whether the restrictive employment arrangement violates the rights of the employee to dignity and liberty cannot be considered in a vacuum. It should be considered in view of the reality of the employment of foreign workers in Israel. It should be sensitive to the complex circumstances that led to the possibility of foreign workers coming to Israel in the first place. It should take into account the special status of the group of foreign workers in the Israeli work market — a group that is composed of weak, 'temporary,' poor and unorganized workers. It should take into account the huge disparity in forces between the foreign worker and the state that is allowing them to enter its work market on its terms, and the manpower agencies and companies that operate in this work market. As stated — and we have discussed these questions extensively — foreign workers that come to Israel to work here do so against a background of economic distress and their desire to provide for their families. In the process of coming here, they are charged, not infrequently, large sums of money, which in terms of what is customary in their countries of origin are sometimes enormous, in return for arranging their coming and staying in Israel. For these reasons, deporting them from Israel before the worker has the opportunity of earning an amount of money that is at least sufficient to 'cover' his debt is an action that deals a mortal economic blow to the worker and his dependents.

29. Against the background of this reality, is it indeed possible to hold, as the respondents argue, that the restrictive employment arrangement does not violate the basic rights of foreign workers to dignity and liberty? My answer to this question is no. The restrictive employment arrangement violates the basic rights of the foreign workers. It violates the inherent right to liberty. It violates human freedom of action. It denies the autonomy of the free will. It tramples the basic right to be released from a work contract. It takes away a basic economic bargaining power from a party to employment relations who is already weak. By doing all this, the restrictive employment arrangement violates his human dignity and liberty in the most basic sense.

30. Human dignity is the central value that stands at the centre of our constitutional law. The rights that derive from it 'are based on the recognition of the value of man, the sanctity of his life and the fact that he is entitled to liberty' (s. 1 of the Basic Law: Human Dignity and Liberty). It is given to every person in as much as he is a human being (s. 2 of the Basic Law:

Human Dignity and Liberty). The essence of the recognition of human dignity as a constitutional right is based on the outlook that the human being — every human being — is an autonomous and free creature, who develops his body and spirit as he wishes, and who writes the story of his life as he chooses (HCJ 5688/92 *Wechselbaum v. Minister of Defence* [2], at p. 827; CrimA 115/00 *Taiev v. State of Israel* [3], at p. 329). This was discussed by Professor Barak, who said:

> 'Human dignity is the freedom of each person to shape his personality. Human dignity is the autonomy of the will of the individual, and the freedom of choice. Human dignity is the value of the human being, the sanctity of his life and the fact that he is entitled to liberty. Human dignity regards the human being as an end and not as a means to achieve the purposes of others. What underlies all of these is the freedom of decision of the human being, which is not a means but an end in itself. From this outlook of human dignity and liberty, which connects it with the autonomy of the will of the individual, we can conclude that human dignity is the freedom of action (both physical and legal) of the individual (A. Barak, *Constitutional Interpretation* (1994), at p. 421).

This was also well expressed by Justice Or:

> '… Every human being has a basic right to autonomy. This right has been defined as the right of every individual to decide his actions and desires in accordance with his choices, and to act in accordance with these choices… this right of a human being to shape his life and his fate includes all the central aspects of his life: where he will live, what occupation he will choose, with whom he will live, what he will believe. It is central to the life of each and every individual in society. It involves an expression of a recognition of the value of each individual as a world in himself. It is essential for the self-definition of each individual, in the sense that all the choices of each individual define the personality and the life of the individual…' (CA 2781/93 *Daaka v. Carmel Hospital* [4], at p. 570 {460-461}).

31. The right to autonomy, freedom of action and freedom to enter into contracts are therefore central aspects of the human right to dignity. Their realization is dependent on the ability given to him, the human being, to make decisions concerning his life and path, and the possibilities that are

available to him to act in accordance with them. The restrictive employment arrangement deals a mortal blow to these rights. As we have said, according to the restrictive employment arrangement the residence permit given to the foreign worker who comes to Israel is conditional upon him working for a specific employer whose name is stipulated in the residence permit. A termination of the work for this employer, whatever the reason for it may be, means that the permit to reside in Israel expires. In view of the money and the effort that the foreign worker invests in 'acquiring' the possibility of working in Israel for a fixed period, it is clear that this connection between the validity of the residence permit and the work for a single employer seriously violates the autonomy of his will. It weakens, and possible even negates, his bargaining power. It leaves him with no real choice between being compelled to continue working in the service of an employer who may have violated his rights, delayed paying his wages and abused him, on the one hand, and resignation on the other, a choice that means losing the permit to reside in Israel. Thus the restrictive employment arrangement limits the freedom of operation given to the worker to a single choice between a bad alternative and a worse one. The scholar Raz discussed the 'acceptability' of the alternatives between which a person may choose as a basic condition for realizing the right to personal autonomy:

> 'If having an autonomous life is an ultimate value, then having a sufficient range of acceptable options is of intrinsic value, for it is constitutive of an autonomous life that is lived in circumstances where acceptable alternatives are present… a person whose every major decision was coerced, extracted from him by threats of his life, or by threats that would make the life he has or has embarked upon impossible, has not led an autonomous life… the ideal of personal autonomy… requires not merely the presence of options but of acceptable ones' (J. Raz, *The Morality of Freedom* (1986), at p. 205).

32. The restrictive employment arrangement therefore associates the act of resignation — a legitimate act and a basic right given to every employee — with a serious sanction. There can be no justification for this. Imposing a sanction in the form of the loss of the permit to reside in Israel on a person who wishes to terminate an employment relationship is tantamount to an effective denial of the freedom to resign. Associating the act of resignation with a serious resulting harm is equivalent to denying the individual of the possibility of choosing with whom to enter into a contract of employment, and compelling a person to work in the service of another against his will.

This not only violates the right to liberty, but it creates a unique legal arrangement that is by its very nature foreign to the basic principle of employment law, the moral value of the employment contract and the basic purpose of the employment contract in guaranteeing the economic survival, dignity and liberty of the worker. It gives the employer of the foreign worker an enforcement tool that is unrecognized in our legal system, which has freed itself of the idea of enforcing employment contracts (see s. 3(2) of the Contracts (Remedies for Breach of Contract) Law, 5731-1970). It deprives the worker of the basic ability to negotiate for the remuneration that he will receive for his work potential, and for the terms of his employment and his social benefits. The moral defect in depriving the foreign worker of his bargaining ability was discussed by G. Mundlak, who says:

> 'When the employee loses his ability to operate in the market as a free person, the morality of the market itself is undermined… The moral defect that underlies the restrictive arrangement is made starker in view of the ramifications of this arrangement on the employment patterns and the search of foreign workers for employment in Israel. From the viewpoint of employment patterns, the restrictive arrangement allows a violation of the rights of the foreign workers, since the employer is aware that the employee cannot work for another employer or that changing over to do this will be difficult and cumbersome… Moreover, employers, and particularly manpower companies, charge the assets of workers in order to ensure that the worker does not leave his employer. Methods such as these are used in addition to the demand of the manpower companies that the foreign workers pay large amounts in their country of origin for receiving a residence visa in Israel and a work permit… The cumulative result of these methods is that the foreign worker is compelled to continue to work for his employer, even if his conditions of work are inferior to the ones required by law, until he can at least repay the debts that he has incurred. In such circumstances, the loss of a place of work and the residence permit that accompanies it are a more severe sanction than the one imposed on the local worker who loses his place of work. This difference is not only a quantitative one. The accumulated debt creates a serious dependence of the worker beyond what is usually implied by the mere contractual relationship between a worker and an employer, and there are those who regard this as

> creating a quasi-property relationship between the employer and the worker' (G. Mundlak, 'Neither Insiders nor Outsiders: The contractual construction of migrant workers' rights and the democratic deficit,' 27 *Tel-Aviv University Law Review (Iyyunei Mishpat)* (2003) 423, at p. 442).

33. In HCJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* [5] this court considered the question of the status and rights of workers when the plant in which they work is sold to another employer. In that case, Israel Aerospace Industries Ltd wanted to transfer one of its plants into the ownership of another company, Ramta Ltd, as a part of a change of the organizational structural of the company and as a preparatory step for privatization. The question that arose before this court is whether in this situation a worker has the right to remain the employee of the original employer, notwithstanding the change in the identity of the employer, in a manner that gives the employer the choice of terminating the employment contract with him in accordance with the provisions of the employment agreement to which it is a party, continuing to employ him or reaching an agreement with him, or whether he becomes the employee of the new employer, in a manner that leaves the employee the choice of resigning from his place of work.

In answering this question, the justices on the panel were of different opinions. The issues that they considered in their opinions are not of the same kind as in the case before us, but at the same time, from a study of the opinions of the justices on the panel, there is no doubt that the fundamental question that concerned the liberty of the worker and his natural right not to be compelled, or restricted, in an employment contract to an employer against his will was not the subject of any real dispute. The remarks of Vice-President Emeritus Or were as follows:

> 'The employer's management prerogative… grants him freedom of operation in managing his business and in carrying out various actions that concern it… but it is superfluous to say that the workers are not the "property" of the employer… The workers have a right to choose the identity of the party that enters into a contract with them. This right is a basic constitutional right… and it is enshrined today in the Basic Law: Human Dignity and Liberty. This basic right also includes the freedom of the worker to choose his employer. *The special character of the personal service that the worker provides for*

the employer requires extra protection for the autonomy of the worker and his right to choose, in a real choice, with whom he will enter into a contract, including a work contract, and with whom he will not enter into a contract' (*ibid*. [5], at p. 541; emphasis supplied).

Similar remarks were made by my colleague Justice Cheshin:

'It seems to me that it is not possible to dispute the conclusion of my colleague Justice Or that under the general law — the basic principles, doctrines and specific rules — an employer is not entitled or competent to "transfer" his workers to another employer. This is the case under the law of contract, it is the case under the law of assigning obligations — both statute and case law — and it is also implied by the basic rights of the individual… An inanimate object, or an animal, may be moved by its owner as he wishes from place to place, from person to person, and no one will make any complaint. This is not the position with regard to a human being, who may not be dealt with or transferred between employers without his consent. Upon this, I think, everyone will agree without exception' (*ibid*. [5], at p. 574).

Justice Rivlin added to this:

'The liberty of the worker to choose the employer does not originate in the freedom of occupation in its narrow sense. It originates in the freedom and dignity of the human being. Admittedly, the right to property is a basic right, and there is no dispute concerning the employer's property rights. But this important right should not include the power to hold onto a worker, even only as a premise. I said as a premise, because no one disputes that the worker always has the power to leave his new employer, just as he had the power to leave his previous employer. But a right to leave an employer that is based on the premise of the liberty of the worker is not the same as a right to leave an employer that is based on the premise of the employer's prerogative. There can only be one premise, the former one, if we agree that the employer's property rights will never also include control of the worker's liberty. Moreover, even the property right of selling a business as a "going concern" does not include the right to transfer the living and breathing workers

> who are employed by it. The liberty of the worker to choose his employer is derived from the right to liberty, which is enshrined in the Basic Law: Human Dignity and Liberty, and from the value of human dignity, which is the foundation of the aforesaid Basic Law.
>
> …
>
> This liberty of the worker is derived directly from the outlook that the human being is an end and not a means. It constitutes a basis for the worker's freedom of choice, his autonomy of will and his liberty to shape his life and develop his character as he wishes… Compelling the worker to change over to the new employer — even as a working premise — is inconsistent with the basic right of the worker to choose his employer and not to be employed by an employer whom he did not choose freely… Indeed, whether we adopt the approach that extends the "radiation boundaries" of human dignity or whether we restrict them, the liberty of the human being not to be treated like property that is passed from hand to hand lies in the nucleus of this value. Even if we were of the opinion that this liberty detracts somewhat from the employer's property rights — and we are very doubtful whether this is the case — in the conflict between these two rights liberty should prevail.
>
> …
>
> Liberty lies in this case "closer" to the nucleus of the value of human dignity and realizes it to a greater degree. Therefore it should be given preference. Any other premise will not be consistent with the constitutional position in the State of Israel' (*ibid*. [5], at pp. 595-597).

Can it therefore be seriously argued that making the residence permit held by the foreign worker conditional upon working for only one employer, in such a way that it links resignation from working for him with the loss of the permit to reside in Israel, does not violate the right to the worker to dignity and liberty? How can it be said that such a flagrant denial of the contractual autonomy of a human being, particularly with regard to a matter so important as employment relations — the identity of the employer — does not involve a violation of the worker's right to autonomy and freedom of action?

34. I think it appropriate to point out, in this context, that Vice-President Emeritus Or, whose opinion was determined to be the majority opinion in

New Federation of Workers v. Israel Aerospace Industries Ltd [5], addressed in his remarks the inability to choose, in the circumstances of the case, the alternative of resigning, and the remarks that he uttered are apt, very apt, in our case as well:

> '… I have difficulty in accepting the position of my colleague the vice-president, Justice Mazza, according to which the possibility given to the worker to resign negates the argument that, in practice, the result of the majority opinion forces on the worker a new employment contract with an employer whom he did not choose. It seems to me that the alternative of resigning, which severs the worker's source of livelihood, cannot be considered as allowing him a real choice… The right to freedom of occupation allows a person to choose where he will invest his human capital. This choice is affected by a variety of considerations, which also include the identity of the employer… Compelling a worker to choose between changing over to a new employer and resigning (even if this is regarded as a dismissal), when there is an option of remaining the employee of the original employer, involves a violation of his freedom of occupation. A violation of freedom of occupation occurs not only when the worker is deprived completely of the right to choose his employer but also when his right of choice is harmed, even indirectly' (*ibid*. [5], at p. 542).

If this is the case with regard to the constraints inherent in choosing between resignation (which is regarded as dismissal) and changing over to work for a new employer, in circumstances in which the worker's place of work is transferred into the ownership of another employer, then it is certainly the case where the resignation not only severs the source of the worker's livelihood but leads to a result that is far worse: the loss of the permit to reside in a country, when coming to that country involved the payment of a large amount of money, and when working in that country is the result of harsh economic constraints.

35. It is not superfluous to point out that the right of the individual to take on work freely and willingly is also enshrined in international law. Thus article 6 of the International Covenant on Economic, Social and Cultural Rights that was signed and ratified by Israel on 3 October 1991 provides the following:

> 'Article 6

> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
> …'

On the right to chose work 'freely' see also: the Universal Declaration of Human Rights, article 23(1); the International Covenant on Civil and Political Rights, article 8; the European Social Charter, part 1, article 1; the American Declaration of the Rights and Duties of Man, article 14. The significance of the right to obtain work 'freely' was discussed by Ben-Israel, who said:

> 'The freedom to choose an occupation has three meanings: a first meaning is expressed in the fact that everyone has a right to choose his occupation freely. This meaning of the freedom to choose an occupation supplements what is implied by the freedom from forced labour. A second meaning is reflected in the requirement that a person should not be prevented from engaging in any occupation or profession when he has the qualifications required for engaging in it… A third meaning is enshrined in the right of every human being to receive an equal opportunity in employment' (Ben-Israel, 'Social Justice in the Post-Work Age: Distributive Justice in Distributing Work in the Twenty-First Century,' *supra*, at p. 329).

Article 7 of the International Covenant on Economic, Social and Cultural Rights further provides the following:

> 'Article 7
>
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
>
> (a) Remuneration which provides all workers, as a minimum, with:
>
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind…
>
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
>
> (b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.'

In addition to this, Convention (no. 97) concerning Migration for Employment of the International Labour Organization, which was signed and ratified by Israel on 30 March, 1953, provides in article 6 the following:

'Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities —

(i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;

(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

…'

36. These conventions have not been adopted in Israeli internal law by means of legislation. *Prima facie*, therefore, they do not create any obligation in this sphere. But it is possible that obligations in these conventions have taken on a customary character (see. Y. Shani, 'Social, Economic and Cultural Rights in International Law: What Use can the Israeli Courts Make of Them,' *Economic, Social and Cultural Rights in Israel* (Y. Rabin, Y. Shani eds., 2004) 297, at p. 342, and the references there; HCJ 2587/04 *Bucharis v. Hadera Assessment Officer* [6], at para. 15 of the judgment, where my colleague the president leaves the question of the customary status of the

Convention concerning Migration for Employment undecided), and that they therefore constitute 'a part of Israeli law, subject to any Israeli legislation that stipulates a conflicting provision' (HCJ 785/87 *Afu v. IDF Commander in Gaza Strip* [7], at p. 35). But since the petitioners did not focus their arguments on international law and the extent to which it should be applied to the question that is required for our decision, and since we have not been asked to decide the status of these obligations, we shall not make any firm determination on this issue (for the status of foreign workers in the countries admitting them under international law, see L.M. Hammer, 'Migrant Workers in Israel: Towards Proposing a Framework of Enforceable Customary International Human Rights,' *Netherlands Quarterly of Human Rights*, vol. 17, no. 1, 10; Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, *supra*, at p. 47; Sivakumaran, 'The Rights of Migrant Workers One Year On: Transformation or Consolidation?' *supra*, at p. 119).

37. Whatever the position is, everyone agrees that by virtue of the 'presumption of conformity' of Israeli internal law to the provisions of international law, we are required to interpret legislation — like a power given to a government authority — in a manner that is consistent with the provisions of international law (see CrimA 131/67 *Kamiar v. State of Israel* [8], at p. 112; CrimFH 7048/97 *A v. Minister of Defence* [9], at p. 742, and the references there; HCJ 2599/00 *Yated, Children with Down Syndrome Parents Society v. Ministry of Education* [10], at p. 846). It follows that the power of the Minister of the Interior 'to determine conditions for giving a visa or a residence permit' is limited and restricted, *inter alia*, by the right given to every person 'to earn his living by means of work that he chooses, or obtains, freely,' by the right given to every individual to enjoy 'just and fair work conditions,' and by the principle of non-discrimination between workers who are citizens and workers from foreign countries, which is enshrined in the Convention concerning Migration for Employment (for the principle of non-discrimination with regard to restrictions on the employment of migrants, see also recommendation 86 of the International Labour Organization that is attached to the Convention concerning Migration for Employment (Migration for Employment Recommendation (Revised) 1949, article 16).

38. To the 'theoretical principles and rules of doctrine' (in the words of my colleague, Justice Cheshin, in CrimFH 6008/93 *State of Israel v. A* [11], at p. 870), I would like add a few remarks also with regard to the realities of the matter and practical principles. I think that there is nothing like the findings

contained in the most recent State Comptroller's Report to emphasize how bad is the harm caused by the restrictive employment arrangement to the basic rights of foreign workers in Israel. The State Comptroller confirms the petitioners' claims with regard to the 'transfer' of workers without their knowledge by their employers, an act that leads to the immediate expiry of their residence permit:

> '… The state determined that the foreign worker is bound to a certain employer, i.e., the employer is prohibited from transferring him to another employer or to another place of work contrary to the terms of the permit. Notwithstanding, because of economic considerations, employers transfer their foreign workers to another employer, and thus they become illegal foreign workers that can be deported. In other words, most of the foreign workers who are moved by their employers become illegal for reasons that are not dependent on them: the ability of the foreign worker to stand up to his employer who is moving him is small, and it can be assumed that sometimes he is not even aware that he is being moved contrary to the law. The review has shown that these foreign workers were imprisoned, but the immigration administration in many cases took no action against the employers' (State Comptroller's Annual Report for 2004, at p. 379).

Later in his remarks, the State Comptroller describes a concrete example of the manner in which this practice operates on an everyday basis:

> 'In March 2004, for example, eleven foreign workers from China were arrested at one building site. Seven of them were arrested approximately three weeks after they came to Israel, one worker was arrested after being approximately five weeks in Israel and three workers were arrested after approximately seven weeks in Israel. Two of the workers said to the border control authorities that they paid ten thousand dollars in order to come to work in Israel. These workers came to Israel with employment permits that were given by the State of Israel to their employers for a period of a year for work in the manufacturing industry. According to the testimony of the workers before the border control authorities, their employers violated the terms of the permit and moved them to other employers in another industry, the building industry, and they

> worked in floor tiling. In practice, four of the eleven workers stayed in the prison facility for 78 days until an employer was found who wished to employ them. The other workers — the remaining seven — were deported from Israel, four of them after staying 32 days in the prison facility, two of them after staying 17 days in the prison facility and one worker immediately after being imprisoned. In this case too the workers paid by losing their liberty and by being deported from Israel for offences committed by the employers. The employers, by contrast, were not punished at all' (*ibid*., at p. 380).

The State Comptroller also spoke of the ease with which workers lose their status in Israel as a result of complaints of their employer, and the similar ease with which they lose their liberty as a result of these complaints:

> '… According to the "restrictive arrangement," a foreign worker must work for his employer for the duration of the permit. A foreign worker who leaves his employer becomes an illegal worker, and he is classified by the Ministry of the Interior as an "absconder" who is designated for deportation. At the end of August 2004, approximately 1850 foreign workers who were classified as "absconders"… were registered in the computerized system of the Ministry of the Interior. The review found that a letter from the employer informing the authorities that the foreign worker left his place of work was sufficient for the Ministry of the Interior to classify the foreign worker as an "absconder." *It can be seen from the documents that there were cases in which the employer reported that the worker was an "absconder," and from the investigation made by the immigration administration afterwards it transpired that the worker had not left his employer at all. Even in these cases the employers were not punished*... Sometimes employers report that workers are "absconders" and turn them in to the immigration administration, after the workers complain (mainly to human rights organizations) that the employers are exploiting them. The employer's assumption in this case is that if the foreign workers are deported from Israel or moved to another employer with the consent of the Ministry of the Interior, the employment permit quota given to him (the employer who filed the complaint) will be credited and he will be able to employ

another foreign worker instead of the "absconder"' (*ibid*.; emphasis in the original).

See also AP (TA) 2036/04 *Quijan v. Minister of Interior* [24].

The violations of basic rights that result from the restrictive employment arrangement were also discussed by the Advisory Committee for Examining the Immigration Policy of the State of Israel, which saw fit to recommend its cancellation:

> 'Currently the worker is "attached" to a certain employer. When his work with that employer is termination, the visa for entering Israel and the permit to work here expire, and the worker is required to leave Israel. This is the position even if the worker has not completed the period of time during which he was supposed to work in Israel, but is dismissed before this by the employer. This arrangement is not fair, and very often it is cruel, because many of the workers invest all their limited property and even take loans in order to pay the agents who make the connection between them and the employers and who arrange for the issue of the visas and the permits required in order to work in Israel. The significance of compelling a worker who was dismissed early to leave Israel before he has had time to cover the expenses that he incurred in order to obtain the work permit is therefore very serious. The current arrangement also gives the employers huge power and is often abused. The worker frequently becomes enslaved to the employer. It is proposed that the entry visa into Israel and the work permit given to the worker should be for a period that is not less than three years (even if the worker stops working for the original employer)…' (Advisory Committee for Examining the Immigration Policy of the State of Israel, *Interim Report — February 2006*, at p. 13).

39. My conclusion is therefore that the restrictive employment arrangement violates the human right to dignity and the human right to liberty, which are enshrined in the Basic Law. Human dignity is not satisfied because the restrictive employment arrangement violates the freedom of action of the individual and his autonomy of will. The right to liberty, for its part, is violated because the individual is denied the possibility of choosing the identity of the party that enters into an employment contract with him, and because he is compelled — by the connection between the act of resignation and the serious harm that accompanies it — to work for another

against his will. These serious results are utterly foreign to the basic principles underlying our legal system.

40. It should be noted that even if the relationship between the workers and the manpower companies reveals many problematic aspects, as the respondents claim, this still cannot eliminate the problematic nature of the restrictive employment arrangement or the independent violation of the basic rights of the foreign workers that results from it. I should point out, in this context, that it would appear that even the respondents are not comfortable with the restrictive employment arrangement, and it is clear that even they agree with some of the petitioners' complaints concerning it (see the letter of the assistant director of budgets of 19 December 2003, appendix 3 of the respondents' statement of reply dated 1 January 2004; Recommendations of the Inter-ministerial Committee, at pp. 5, 11).

41. Since it has been found that the restrictive employment arrangement violates the rights of the foreign workers to dignity and liberty, I see no need to consider the abandoned dispute between the petitioners and the respondents on the question of the right of foreign workers in Israel to freedom of occupation, which is enshrined in the Basic Law: Freedom of Occupation. I think it appropriate to point out, nonetheless, that the laconic and sweeping position of the respondents, on the face of it, that foreign workers in Israel do not enjoy the constitutional right to freedom of occupation, in view of the language of the Basic Law: Freedom of Occupation, is in my opinion problematic, in view of the case law recognition of the right to freedom of occupation as a right enjoyed by 'everyone,' a case law recognition that preceded the Basic Laws (see HCJ 1/49 *Bajerno v. Minister of Police* [12]; HCJ 337/81 *Miterani v. Minister of Transport* [13]; see also the position of Prof. Barak on freedom of occupation as a 'constitutional' right as opposed to freedom of occupation as a 'case law' right, and the connection between freedom of occupation and human dignity: Barak, *Constitutional Interpretation*, at pp. 585, 598), in view of the status of the right in international law, and especially in view of the nature of the alleged violation to the right to freedom of occupation in the case before us — a violation that is directed at the most basic core values that the right to freedom of occupation seeks to protect.

Can the 'change of employer procedure' negate the violation of basic rights caused by the restrictive employment arrangement?

42. My conclusion with regard to the violation of basic rights caused by the restrictive employment arrangement requires us to examine whether, as

the respondents claim, the 'change of employer procedure' — a procedure that aims to allow workers to change from one employer to another, in certain circumstances — cannot negate this violation. My firm opinion is that this procedure cannot negate the violation of basic rights caused by the restrictive employment arrangement. There are two reasons for this. The first reason is that the change of employer procedure does not significantly change the excessive power held by the employer. The initial link between the legality of the residence of the foreign worker in Israel and the identity of the employer is likely to lead to a situation in which the worker, even though he came to Israel lawfully, will become an illegal resident as early as his first day in Israel in circumstances that are beyond his control, and often without his knowledge. Such is the case, for example, where the employer takes advantage of this initial link and makes the commencement of the worker's employment conditional upon his fulfilling certain conditions, such as the payment of additional amounts of money, or where the employer tells the worker to work for another employer, or on another project. Moreover, an application to change employer involves, according to the procedure, the loss of the permit to work in Israel for an unknown period: the procedure states that in the interim period between finishing work for the original employer and changing over to the new employer, the worker will receive a B/2 residence permit. This permit is a temporary residence permit (which is usually given for visits of tourists), and it does not allow a person to work lawfully. It is not clear, therefore, how the worker is supposed to support himself in this interim period, and especially why his legitimate request to change employers should result in the loss of the permit to work in Israel for an unknown period (since the procedure does not stipulate a binding time limit for processing the request to change employers). It does not appear that a procedure that allows a worker's request to change his employer to be rejected for the reason that 'the case is one of a worker who has changed employers several times and therefore there is no basis for approving his request for a further change' or that 'there is a certain restriction on providing the service in the Aviv (foreign worker) system' (paragraphs c4 and c5 of the change of employer procedure) takes sufficiently into account — if at all — the inherent right given to every person to terminate an employment contract that he made.

43. The second reason, which in my opinion is the main one, is that the change of employer procedure assumes, as a premise, the power to hold onto a worker. The premise underlying the normative structure created by the restrictive employment arrangement — a normative structure that is not

changed by the procedure — is that the employer is entitled to hold onto his worker, whereas the worker is entitled, only in certain circumstances, to be released lawfully from the employment contract with the employer. A normative structure of this kind is inconsistent with the constitutional status of the right to liberty, human dignity, autonomy and freedom of action. Indeed, 'a right to leave an employer that is based on the premise of the liberty of the worker is not the same as a right to leave an employer that is based on the premise of the employer's prerogative' (*per* Justice Rivlin in *New Federation of Workers v. Israel Aerospace Industries Ltd* [5], at p. 595). A legal system that provides constitutional protection to human rights cannot accept a normative premise that assumes the absence of basic rights as a fundamental rule. It is impossible to accept that in a legal system that has established human dignity as a protected constitutional value the individual will be allowed to enforce his basic rights only in 'exceptional' cases. The change of employer procedure seeks to make basic rights that the individual — every individual — possesses into a mere 'administrative' matter that can be dealt with by officials. This is the essence of the matter. And since the procedure purports to do what cannot be done — at least, in a constitutional legal system that exalts the rights of the individual — we must conclude that it cannot, contrary to the respondent's argument, negate the violation of basic rights caused by the restrictive employment arrangement.

Administrative discretion and the principle of proportionality

44. The restrictive employment arrangement links the employment of foreign workers in Israel to their residence here, and it is therefore created by combining the sources of authority from these spheres. The authority concerning the employment of foreign workers is the authority given to the foreign workers' department at the Ministry of Industry, Trade and Employment to give permits for employing foreign workers to employers who request one, pursuant to the Foreign Workers Law, whereas the authority concerning the residence of foreign workers in Israel is the authority given to the Minister of the Interior to stipulate conditions for the residence permit given to foreign workers, pursuant to the Entry into Israel Law. Limiting the possibility of changing employers is possible by virtue of the latter authority which is given to the Minister of the Interior. Naturally, our scrutiny will focus on the manner in which this authority is exercised.

45. Section 6 of the Entry into Israel Law expressly authorizes the Minister of the Interior to make a residence permit that is given to someone who enters the borders of Israel conditional, by providing that 'The Minister

of the Interior may stipulate conditions for giving a visa or a residence permit.' I therefore have difficulty in accepting the petitioners' argument that the Minister of the Interior has 'no authority' to stipulate conditions for the residence permits of foreign workers who come to Israel. Notwithstanding, I think I should point out that a large degree of discomfort arises from the fact that all the serious violations caused by the restrictive employment arrangement to basic rights are based on that authority given to the Minister of the Interior under the Entry into Israel Law, which is an authority that was intended, according to its purpose, to be exercised in specific cases, and not to serve as a basis for making general arrangements. A general policy of this kind, in my opinion, should be based upon a primary arrangement, especially in view of its violation of basic rights (see and cf. HCJ 3267/97 *Rubinstein v. Minister of Defence* [14], at p. 515 {182}).

46. It is a well-established rule in Israel that the Minister of the Interior has broad discretion in exercising powers that are given to him under the Entry into Israel Law. This is especially the case where the empowering legislation — in our case the Entry into Israel Law — does not contain criteria and guidelines concerning the manner of exercising the executive discretion. But the breadth of the discretion given to the Minister of the Interior and the absence of criteria and guidelines do not mean that the Minister of the Interior has absolute discretion (HCJ 758/88 *Kendall v. Minister of Interior* [15], in the opinion of Justice Cheshin). The significance of this is not that the discretion exercised by the Minister of the Interior when exercising powers that are given to him under the Entry into Israel Law is exempt from the scrutiny of the High Court of Justice. Quite the contrary; the breadth of the discretion is precisely what necessitates caution and special care when exercising it; the absence of criteria and guidelines in the empowering law for exercising the executive power requires special attention to the general principles that limit and restrict administrative authority.

47. The requirement that the Minister of the Interior operates within the scope of the authority given to him under the Entry into Israel Law is of course insufficient. The legality of the executive discretion is examined from the viewpoint of the principle of proportionality (HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [16], at p. 11). This principle states that an executive action that is intended to realize a proper purpose — in our case, supervision of the residence and employment of foreign workers in Israel — should be carried out in an appropriate manner, and not excessively (*ibid*. [16]). It is made up of three subtests. The first subtest requires the existence of a rational connection between the purpose and the executive

measure chosen to achieve it. The second subtest requires that the harm caused by the executive measure to the individual should be as small as possible. The third subtest requires that the violation of the right caused by the chosen measure should be proportionate to the benefit arising from it (see CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [17], at p. 436; HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [18], at p. 385).

48. My opinion is that the means chosen by the respondents — making the residence permit given to the foreign worker conditional upon working for a single employer — does not exhibit a rational connection to the purpose of supervising the residence and employment of foreign workers in Israel. The harm caused by this measure to the individual is not as small as possible. It is also not proportionate to the benefit arising from it. I will explain my remarks below.

The connection between the means and the end

49. As stated above, the respondents' approach is that because of the negative ramifications arising from the employment of foreign workers in Israel, 'it is necessary to impose restrictions on the very permission to enter Israel, to ensure that the foreign workers can only work for those employers who, in the respondents' opinion, should be allowed to employ foreign workers to a limited degree, and to create various mechanisms for the purpose of ensuring the workers leave Israel when the period of their residence permit expires.' Does the measure adopted by the respondents lead, rationally, to the achievement of these purposes?

50. We should remember that the restrictive employment arrangement has been in force in Israel for more than a decade, from the time when it was decided to allow workers from foreign countries to enter Israel. According to the estimates of the Manpower Planning Authority at the Ministry of Industry, Trade and Employment (which is, as stated above, the third respondent), the number of foreign workers residing in Israel in 1996 reached 161,000, of whom only 89,000 were residing in Israel with a permit. At the beginning of 1998, the number of foreign workers reached approximately 170,000, of whom 90,000 were residing in Israel without a permit. In 2001, the number of foreign workers residing in Israel jumped up to 243,000. *Most of these*, so it appears, were residing in Israel without a permit. From these estimates it also transpires — and nothing is more indicative than numbers — that the number of foreign workers with permits is decreasing whereas the number of foreign workers without permits is increasing (State Comptroller's

Annual Report for 1998, at pp. 274-275; State Comptroller's Annual Report for 2004, at p. 373). Thus we see that even though the policy adopted by the respondents has been in force for several years, since the actual time when it was decided to allow the employment of foreign workers in Israel, it has not been proved at all that it allows the existence of proper supervision of the residence and employment of foreign workers in Israel, which, it will be remembered, is its main goal. The opposite is the case: during these years, the number of the workers who reside in Israel unlawfully has continually increased. How, then, can it be argued that the restrictive employment arrangement exhibits a rational connection with the purpose of supervising the residence and employment of foreign workers in Israel?

51. These figures are accompanied by other figures, which also originate in research conducted for the Ministry of Industry, Trade and Employment. This research sought to examine, *inter alia*, the effect of the restrictive employment arrangement on the changeover of foreign workers to unlawful employment (Y. Ida, *The Factors Affecting the Changeover of Foreign Workers to Unlawful Employment* (State of Israel, Ministry of Industry, Trade and Employment, Planning, Research and Economics Administration, 2004). The conclusions of the research were that the restrictive employment arrangement encourages illegal work and makes it difficult to supervise the employment of foreign workers in Israel, and the harsh work conditions created as a result also harm Israeli workers:

> '…The background to the restrictive employment arrangement was a concern of the policy makers that the workers would settle in Israel… and in order to protect local workers against competition from foreign workers for places of work. But has the "restrictive employment arrangement" really achieved these goals? With regard to preventing the foreign workers from settling in Israel, it does not appear that the arrangement prevents them settling in Israel. On the contrary, it encourages working in a manner that is not organized, increases the number of illegal foreign workers and makes it even more difficult to supervise the employment of foreigners. With regard to protecting the population of local unskilled workers against competition from the foreign workers, it is almost certain that the low wage level paid to the legal foreign workers in the restrictive employment arrangement has had an effect on the whole market of unskilled workers, including local ones, who are compelled to satisfy themselves with low wages or to be

> pushed out into the ranks of the unemployed… The actual beneficiaries of the arrangement are precisely the employers, who pay lower wages both to the foreign workers and to the local workers. In other words, it is reasonable to assume that the restrictive employment arrangement has actually harmed the local unskilled workers rather than protecting them' (*ibid*., at pp. 67-68).

It has for a long time been a rule of ours that 'before an authority makes a decision that affects the rights of the individual — whether it is a decision in a specific case or a general policy decision — it should compile figures on the matter, separate what is relevant from what is irrelevant, analyze the figures, consider them, discuss the significance of the proposed decision and its estimated results, and only then should it act' (HCJ 3648/97 *Stamka v. Minister of Interior* [19], at p. 776). Thus the figures compiled by the respondents themselves show that the policy adopted by them not only does not further the purpose for which it was intended, but even undermines it. The only possible conclusion in these circumstances is that it cannot be held that the restrictive employment arrangement satisfies the requirement of a rational connection to the purpose underlying it.

The least harmful measure

52. My outlook is that the restrictive employment arrangement is not the least harmful measure. It follows that it does not satisfy the second subtest of the requirements of proportionality. Of course, the tests of proportionality are applied 'while taking into account the nature of the right under discussion, the reasons underlying it and the values and interests that are harmed in the specific case… When speaking of an especially important basic right, greater care should be taken to choose a measure that violates it to the smallest degree possible, even if this means a measure that involves a substantial cost' (*Israel Investment Managers Association v. Minister of Finance* [18], at p. 418; see also HCJ 6055/95 *Tzemah v. Minister of Defence* [20], at p. 282 {684}).

53. I discussed in detail the supreme status of the rights that are violated by the restrictive employment arrangement and the seriousness of these violations in my remarks above (see paras. 28-39). I see no need to add to those remarks. The status of the rights and the severity of the violation thereof almost automatically require the choice of an alternative measure which is less harmful but which is faithful to the purpose that the respondents wish to promote. I have difficulty in accepting that compelling a person to

work for a single employer is the only way of realizing the purpose of supervising the work and residence of foreign workers in Israel. It is possible that it is the simplest way, since by 'delegating' the duty of supervision to the employers, who are required to ensure that their workers leave Israel when the period of the permit expires, it removes the duty of supervision from the state. It is possible, for this reason, that it is also the cheapest method. But it is not the method that is least harmful, and in any case these facts in themselves cannot justify adopting the serious measure of the restrictive employment arrangement (cf. *Stamka v. Minister of Interior* [19], at p. 782).

54. Less harmful measure might be found in the form of measures such as the increased enforcement of the prohibition against unlawful residence in Israel or increased supervision of the employers of foreign workers. The possibility of other methods of operation with regard to the employment of foreign workers can also be seen from the report of the inter-ministerial team, which saw fit to recommend the implementation of a new employment model for foreign workers, a model that was implemented not long ago in the construction industry. It can also be seen from the report of the inter-ministerial team that an alternative arrangement to the restrictive employment arrangement can be made also in other industries. But these recommendations have not been implemented. The qualified tone of the remarks of counsel for the respondents in the hearing that took place before us also did not leave an impression that there is any plan, within a reasonable timeframe, to implement these recommendations or to adopt any other measure to reduce the harm. In these circumstances, my conclusion is that the restrictive employment arrangement does not constitute the least harmful measure.

Proportionality in the narrow sense

55. The restrictive employment arrangement also does not satisfy the test of proportionality in the narrow sense. The harm caused by it is out of all due proportion to the benefit that is believed to arise from it. I say 'is believed' because, as I said above, this arrangement is far from bringing about the consequences which it was intended to realize. Consequently, the 'benefit' that arises from the violation is nothing more than a 'speculative and unproven' benefit (*Stamka v. Minister of Interior* [19], at p. 783). But even if this were not the case, and we found that the restrictive employment arrangement resulted in a benefit in the form of easier supervision of the residence and work of foreign workers in Israel, I have great doubt as to whether the serious violation caused by this arrangement to basic rights could

be regarded as being in due proportion to the benefit — any benefit — that can be derived from it.

56. It should be noted that no one disputes the fact that the rights to which the foreign worker is entitled and the obligations that the state has towards him, which are their mirror image, are not exactly the same in content and scope as the rights to which an Israeli citizen is entitled or the obligations that the state has towards a citizen (thus, for example, an Israeli citizen has the right to vote and stand for public office, he has immunity against being deported from Israel, and he has other similar rights that are not possessed by someone who is not a citizen); that the individual who is not an Israeli citizen does not have a right to enter the state (s. 6(b) of the Basic Law: Human Dignity and Liberty) or to receive a work permit in Israel; and that the state is entitled and obliged to control the work market and supervise the employment of foreigners in it, in accordance with the changing needs of the economy. We know that the state has a very broad prerogative in these areas, and it may decide who will be allowed in, and on what conditions, and who will be kept out. But these arguments only work up to a certain point, since it is clear that one cannot deduce from the entry permit given by the state to the foreign worker for the purpose of employment an unlimited authority to violate his rights. The foreign worker does not lose his humanity and his basic rights when he enters Israel. Even the fact that the state does not have a duty to allow foreign workers in does not mean that once it has decided to do so it may do so upon any conditions. Therefore, even if we accept that the rights of the foreign worker are not the same as those of the citizen, this is of little significance in our case, since the rights that are being violated as a result of the restrictive employment arrangement derive from the humanity of the individual, and they are not rights that belong to the state which it may give or withhold. This is certainly the case where this is done in a sweeping and disproportionate manner as it is in our case.

57. On the basis of the aforesaid, my conclusion is that the restrictive employment arrangement — an arrangement that is reflected in making the residence permit given to the foreign worker conditional upon his working for a single employer — does not satisfy the test of proportionality.

The nursing industry

58. The conclusion that I have reached with regard to the disproportionality that characterizes the restrictive employment arrangement applies to all the employment sectors to which this arrangement applies, which are the agriculture, manufacturing and nursing industries. I do not

think that the nursing industry is different from the other industries in which foreign workers are employed. But since the respondents argue that employment in this industry has a special character, I will add a few remarks with regard to this matter.

59. As stated above, in so far as the nursing industry is concerned, the position of the respondents is that the employers have a significant interest in 'binding' their workers to them, in view of the vulnerability that is characteristic of this special sector of employers. The vulnerability of the employers, according to the respondents, justifies placing certain obstacles in the path of person working for them to stop them resigning from their work with them. This is what the respondents said in their reply:

> 'Particularly in the field of nursing… there is a real difficulty in cancelling the connection between the foreign worker and the specific employer who requires his services and in implementing an industry-wide restriction as proposed by the petitioners. Adopting this measure is likely to lead to certain persons who need nursing services — who are also as aforesaid a weak sector of the population — not being able to employ a foreign worker, either because of the special difficulty in looking after them relative to other persons in need of nursing care, because of a shortage of funds or because of the place where they live in Israel' (para. 16 of the supplementary statement of the respondents of 21 May 2003).

I accept the approach that in this field of nursing the 'point of balance' between the conflicting interests of the employer, on the one side, and the foreign worker, on the other, is different from other fields in which foreign workers are employed. Notwithstanding, I am of the opinion that the reasoning advanced by the respondents is no reasoning at all. Let me explain my position.

It is true that the relationship between the nursing worker and his employer who requires nursing is not an ordinary relationship between a worker and an employer. The personal nature of the service that is provided, the intensity of the work for the employer and the dependence that exists between the employer and the worker in his service create work relations of a special character. I also accept — and how could I not do so — that persons who require nursing services, including the elderly and the disabled, are sectors of the population that are characterized by a special vulnerability, and

the formulation of a government plan of operation that may affect their lives and welfare should be made while taking into account these potential factors.

It is well known that the purpose of nursing services is to help persons who need them to carry out basic actions, and to allow them — in so far as possible — to lead normal lives. Nursing services also allow supervision of the person who needs them during the hours of the day, where constant supervision of this kind is required. We can easily understand that the importance of the nursing services for those who receive them is great. They can facilitate the movement of the person who requires nursing and allow him a reasonable quality of life. They can allow him to be involved in his environment and to enjoy, as a result, reasonable social functioning in the society in which he lives. The connection between these abilities and human dignity is a close one (see HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [21]). No one will therefore deny that the respondents have a duty to ensure that the elderly and the disabled in Israel enjoy conditions in which their humanity is not humiliated and their dignity as human beings is maintained.

60. However, there is a great gulf between this and the conclusion that realizing this obligation justifies restricting a person to his employer by forcing him, in practice, to provide a personal service under duress. In theory, the respondents approach is that we must guarantee that every person who needs nursing as such can employ a foreign worker, irrespective of the question of wages and the conditions of work that he wishes and is able to give to his employee, by linking the resignation of the caregiver from his employment with the person in need with a harsh sanction of losing his status in Israel. This approach, as stated above, does not stand up to constitutional scrutiny, since it does not satisfy the principle of proportionality. It also does not stand up to moral scrutiny, since human beings always are an end and a value in themselves. They should not be regarded merely as a means to an end or as a product to be traded, no matter how exalted the purpose (cf. HCJ 7357/95 *Barki Feta Humphries (Israel) Ltd v. State of Israel* [22], at p. 783).

The purpose that the respondents set for themselves — guaranteeing the welfare and the dignity of the elderly and the disabled who require nursing services — is a proper purpose. The law has a role in realizing it. But the right of one person to dignity does not mean the absolute denial of this right to another. It is not the right to employ another person under duress, with low wages and without social benefits. It is not an unlimited authority to violate the liberty of another. Its realization does not require another person to be

compelled to provide a personal service — and what service is of more 'personal' a nature than nursing care — under duress.

The relief

62. We have found that the restrictive employment arrangement, which makes the residence permit given to the foreign worker who comes to Israel conditional upon working for a specific employer and which applies — in the form currently practised – in the agriculture, nursing and manufacturing industries, violates basic rights. The harm caused by the arrangement is not proportionate. The operative ramification of this conclusion is that the Minister of the Interior is not entitled to make the residence permit given to foreign workers subject to the aforesaid condition. The respondents are consequently obliged to formulate a new employment arrangement, which is balanced and proportionate, with regard to foreign workers in these industries. This should not be based on the restriction of the worker who comes to Israel to a single employer, and it should refrain from linking the act of resigning with any sanction, including the loss of the status in Israel.

In view of the seriousness of the violation of the rights of foreign workers and in view of the period of time during which this has occurred, I propose to my colleagues that we determine that the respondents shall be liable to finish formulating a new arrangement within six months of the date of giving judgment.

63. One of the heads of the relief sought by the petitioners is that we order the respondents to introduce a 'restrictive industry' arrangement instead of the existing restrictive arrangement. We cannot grant this request. The court does not determine the executive plan of action. It is not for the court to decide what is the desirable employment policy with regard to foreign workers in Israel. Formulating the new employment arrangement and determining its details is not a relief that we can grant. All that the court can decide is whether the executive action — in our case, the restrictive employment arrangement — is legal. Does it satisfy, as an executive action, the terms of the limitations clause, and in particular the principle of proportionality? This is what we sought to do, and this is what we have done. We have found that the policy of employing foreign workers by restricting the worker to his employer disproportionately violates basic rights, and as such it is prohibited. Now the formulation of a new employment policy is a matter for the respondents to determine. They have the duty — after considering all the relevant considerations – of formulating a reasonable and balanced arrangement, which will be capable of guaranteeing the purpose of

supervising the residence and employment of foreign workers in Israel on the one hand, and the purpose of protecting their basic rights on the other. These purposes do not contradict one another. They should be consistent with one another. The respondents should formulate an arrangement that will incorporate both of them.

Conclusion

> 'And if a stranger dwells with you in your land, do not oppress him. The stranger who lives with you shall be like one of your citizens, and you shall love him like yourself, for you were strangers in the land of Egypt' (Leviticus 19, 33-34 [30]).

64. The individuals whose interests are addressed in the petition before us — the foreign workers — were invited by the respondents to come to Israel to work here, in those industries in the economy in which they thought their employment was required. Everyone knows the reason why they came here — the fact that they are prepared to engage in hard labour which has been abandoned by the local work force, for low wages, without social benefits, and sometimes in work conditions that are really harmful. This is the main 'attraction' in employing them. But the distress of these workers must not become something that we exploit. We must not make their poverty a tool for uncontrolled and disproportionate violations of basic rights. We in particular — for whom the bitter taste of living in a foreign land is all too familiar — we know the feelings of the stranger, for we were strangers in the land of Egypt (Exodus 23, 9 [31]).

I propose to my colleagues that we grant the petition and make an absolute order in the manner set out in para. 62 of my opinion.

Vice-President Emeritus M. Cheshin

I have read the opinion of my colleague Justice Levy — I will take the liberty of adding that it is a fine and sensitive opinion — and I agree with the remarks that he wrote. If I wish to add a few remarks of my own, it is only because the human predicament that presented itself before us and the opinion of my colleague raised in me strong feelings and emotions to which I wish to give expression.

2. The starting point for our journey is found in the provisions of s. 6 of the Entry into Israel Law, 5712-1952, according to which the Minister of the Interior may 'determine conditions for giving a visa or a residence permit and for extending or replacing a residence permit…' (s. 6(1)) and he may also 'determine in a visa or a residence permit conditions that are to be fulfilled as

a condition for the validity of the visa or of the residence permit' (s. 6(2)). The Minister of the Interior made use of these powers in the case of foreign workers, and he made their residence in Israel conditional upon an arrangement that bound them to a particular employer. My colleague gives this arrangement the name of a restrictive employment arrangement (or a restrictive arrangement) and I will follow him. Later the minister relaxed the position by means of an arrangement whereby foreign workers can change employer, but as my colleague has shown this arrangement did not significantly reduce or decrease the restrictive arrangement, nor did it really allow the foreign workers to change employer.

3. The aforesaid power of the Minister of the Interior in s. 6 of the Entry into Israel Law appears on the face of it to be a power of an absolute nature: an unbounded power, a power that extends in all directions without any limit. But as the court held in *Kendall v. Minister of Interior* [15], at p. 527 *et seq*.), there is no such thing in Israeli law as 'absolute' discretion, and even discretion that is called 'absolute' is not absolute discretion at all. The same is true of the discretion of the Minister of the Interior under s. 6 of the Entry into Israel Law: it is hedged in by legal restrictions that are inherent in every power wielded by the government; it yields to all the basic principles and doctrines of the legal system; and the basic rights of the individual, including first and foremost those rights enshrined in the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, are an integral part of the fabric of its genetic code.

4. A study of the restrictive arrangement that the state created and applied to foreign workers — unfortunate persons who are separated from their families for months, and even years — gives rise to astonishment mingled with anger: how can persons in authority in our country think that they can treat in this way women and men who only want to provide for their families? We do not deny that the persons in authority were required to consider important conflicting factors — considerations of proper administration and of the need to prevent abuse of the permit to reside in Israel — but how did they fail to see that the arrangement that they made seriously violated the dignity of the foreign workers as human beings? Every human being — even if he is a foreigner in our midst — is entitled to his dignity as a human being. Money is divisible. Dignity is not divisible. This is true of both the dignity and the liberty of the workers.

Indeed, we cannot avoid the conclusion — a painful and shameful conclusion — that the foreign worker has become his employer's serf, that

the restrictive arrangement with all its implications has hedged the foreign worker in from every side and that the restrictive arrangement has created a modern form of slavery. In the restrictive arrangement that the state itself determined and applied, it has pierced the ears of the foreign workers to the doorposts of their employers and bound their hands and feet with bonds and fetter to the employer who 'imported' them into Israel. It is nothing less than this. The foreign worker has changed from being a *subject* of the law — a human being to whom the law gives rights and on whom it imposes obligations — into an *object* of the law, as if he were a kind of chattel. The arrangement has violated the autonomy of the workers as human beings, and it has *de facto* taken away their liberty. According to the restrictive arrangement, the foreign workers have become work machines — especially in view of the fact that the employers have allowed themselves, unlawfully, to transfer them from one employer to another — and they have become likes slaves of old, like those human beings who built the pyramids or pulled oars to row the ships of the Roman Empire into battle.

What has happened to us that we are treating the foreign workers, those human beings who leave their homes and their families in order to provide for themselves and their families, in this way? We are overcome with shame when we see all this, and we cannot remain silent. How have we forgotten the law of the stranger that has been enshrined in the humanism of Judaism throughout the generations: 'And you shall not oppress a stranger, nor shall you pressurize him, for you were strangers in the land of Egypt' (Exodus 22, 20 [32]). Rabbi Shelomo Yitzhaki (Rashi) comments on this: 'Every use of the word "stranger" means a person who was not born in that country but came from another country to live there' (Rabbi Shelomo Yitzhaki (Rashi) on Exodus 22, 20 [33]). Was Rashi speaking of our case? As E.S. Artom says in his commentary: '"And… a stranger" — a gentile who lives among the Jewish people and who has no friends or relative who can come to his aid at a time of need.' Could these remarks refer to foreign workers? The Torah has also told us: 'And you shall not pressurize a stranger, for you know the feelings of the stranger, because you were strangers in the land of Egypt (Exodus 23, 9 [31]). The Torah tells us 'for you know the feelings of the stranger.' Rashi comments: 'The feelings of the stranger — how difficult it is for him when people pressurize him' (Rabbi Shelomo Yitzhaki (Rashi) on Exodus 23, 9 [34]). Do we really know how the stranger feels? I doubt it.

5. I am prepared to assume that the foreign workers — most of them — are prepared to suffer the violation of their dignity and liberty; even if they are not happy with this violation, they accept it with the submission that

comes from their having no other choice. It is even possible that this lifestyle is the accepted norm in their countries; in any case, they accept their fate as long as they can send the monthly amount to their families to support them. But even if the foreign workers are prepared to accept their fate, we cannot allow the phenomenon of the restrictive arrangement to continue to exist in our community. Indeed, the foreign workers, the weak and vulnerable among us, have had the good fortune that good people have voluntary come to their aid. These are the petitioners before us. By virtue of the merit of these compassionate people, we have been given the good fortune and the merit of protecting the human image of those workers. And we will protect them, the foreign workers, even though they have not asked this of us.

6. I saw what was being done in our country and I remembered a ruling that was made abroad. This was in the famous judgment given in the United States in *Lochner v. New York* [29]. In that case the State of New York limited the hours of work in bakeries to sixty hours a week and ten hours a day. But this was, apparently, social legislation that was ahead of its time. The court struck down the law by a majority (Justice Holmes and three of his colleagues were in the minority), on the grounds that by limiting the number of hours of work the legislator was interfering arbitrarily in the freedom of contract protected in the Fourteenth Amendment of the Constitution, i.e., in the right of human beings to work as they see fit ('the right to sell labor'). Later this decision was reversed, and rightly so. There are rights that were intended to protect a worker, and even if he wishes to do so, a worker may not and cannot waive them. Public policy prohibits us from recognizing the waiver. And in the same way that a person cannot, voluntarily, sell himself into slavery, so too we cannot recognize arrangements that, even though they are not slavery in the classic sense, nonetheless have certain aspects that were characteristic of slavery when it existed. See also HCJ 6845/00 *Niv v. National Labour Court* [23], at p. 695. We will not allow arrangements that involve a violation of human dignity, of the human image of a person, even if *prima facie* they were originally created — at least in part — for the benefit of that person. This is true as a rule, and it is also true in our case. A person is entitled to live a proper life.

7. In conclusion, I would like to point out that my colleague Justice Levy speaks in his opinion, time and again, of employers who have taken the liberty — contrary to the law — of 'moving' workers who were attached to them to other employers, and in this way they deprived the workers of their right to continue to reside in Israel. I can only express my amazement at how one person can act unlawfully, while another pays the penalty. The

authorities should adopt a strict line with employers who act in this way, and the sanction that should be imposed on them is very simple: they should be deprived of the right to have foreign workers working for them. This is what should be done to lawbreakers, and when it becomes known that the authorities are acting in this way, it can be assumed that employers will conduct themselves properly.

President A. Barak

I agree with the opinion of my colleague Justice E.E. Levy and with the remarks of my colleague the vice-president, Justice M. Cheshin.

Petition granted.

1 Nissan 5766.

30 March 2006.