HCJ 5666/03

Kav LaOved
and others
v.
1. **National Labour Court, Jerusalem**
2. **Givat Zeev Local Council**
3. **Attorney-General**
4. **New General Federation of Labour**
5. **Abir Textile Industries Ltd**
6. **Y. Zarfati Vehicle Services Ltd**
7. **Nituv Management and Development Company Ltd**
8. **Aqua Print Technological Toning Ltd**

The Supreme Court sitting as the High Court of Justice
[19 September 2007]
Before President D. Beinisch, Vice-President E. Rivlin
and Justices A. Procaccia, E.E. Levy, A. Grunis,
M. Naor, E. Arbel, S. Joubran, E. Hayut

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

Facts: Palestinian workers filed claims in the Labour Courts against their Israeli employers with regard to their employment in the Israeli enclaves in Judaea and Samaria. These claims gave rise to the question whether these employment relationships were governed by Israeli law or by the local law of Judaea and Samaria, which is Jordanian law, the significance of this question being that Israeli law grants workers more rights and protection than Jordanian law.

The National Labour Court held on appeal that in the absence of any stipulation on this issue in the employment contracts, these employment relationships were governed by Jordanian law as the local law in force in Judaea and Samaria, since Israeli law has never been applied to the occupied territories as a whole, but only to Israelis living in Judaea and Samaria.

The petitioners, who are human rights organizations, petitioned the Supreme Court on behalf of the Palestinian workers to set aside the judgment of the National Labour Court and to rule that Israeli law governs their employment relationship. They argued that this intention could be clearly seen from the employment contracts. They further

argued that this conclusion was also required on several other grounds: the second respondent is an Israeli government authority, and is therefore bound by Israeli law; the custom in employment law is that the employment contract should be governed by the law most favourable to the worker; in the absence of any agreement between the parties, the contract should be governed by the law that has the strongest ties to the contract, which in this case is Israeli law; the judgment of the National Labour Court is contrary to public policy; the judgment of the National Labour Court is discriminatory in that Palestinian workers and Israeli workers who do the same work receive different wages and employment benefits.

Held: The contracts in this case do not contain any express statement of the parties' intentions as to the law that should govern their employment relationships. Therefore, the law governing the contracts should be decided in accordance with the 'strongest ties' test. In applying this test, the territorial criterion has less weight in the Israeli enclaves in the occupied territories, where more than one set of laws operate. Consequently, the weight of the other ties and of the principles of the legal system becomes greater when choosing the applicable law.

The circumstances of the case lead to the conclusion that the employment relationships are more closely connected with Israeli law than with Jordanian law.

This conclusion is also supported by the principles of substantive employment law, for which the choice of law is required. The principle of equality, which is a fundamental principle of employment law, demands that the same law govern both Israeli and Palestinian workers who work in the same place. Applying different sets of laws for Israeli workers and Palestinian workers necessarily results in discrimination. The conflict of law rules were not intended to legitimize such an outcome.

There is no decisive significance to the question of what law will benefit workers the most.

Petition granted.

Legislation cited:

Administration of Local Authorities (Judaea and Samaria) Order (no. 892), 5741-1981.

Basic Law: Freedom of Occupation.

Basic Law: Human Dignity and Liberty.

Contracts (General Part) Law, 5733-1973, s. 26.

Equal Employment Opportunities Law, 5748-1988.

Equal Remuneration for Female and Male Employees Law, 5756-1996.

Proclamation Concerning Law and Administration (Territory of the West Bank) (No. 2), 5727-1967, s. 2.

Law and Administration Arrangements Order (No. 1), 5727-1967.

Hours of Work and Rest Law, 5711-1951.
Protection of Wages Law, 5718-1958.
Women's Employment Law, 5714-1954.

Israeli Supreme Court cases cited:

[1] HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785.
[2] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.
[3] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.
[4] HCJ 2612/94 *Shaar v. IDF Commander in Judaea and Samaria* [1994] IsrSC 48(3) 675.
[5] HCJ 61/80 *Haetzni v. State of Israel (Minister of Defence)* [1980] IsrSC 34(3) 595.
[6] HCJ 785/87 *Afu v. IDF Commander in Gaza Strip* [1988] IsrSC 42(2) 4.
[7] CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [2005] IsrSC 59(1) 345.
[8] HCJ 205/82 *Abu Salah v. Minister of Interior* [1983] IsrSC 37(2) 718.
[9] CA 419/71 *Menorah Liability and Secondary Insurance Co. Ltd v. Numikos* [1972] IsrSC 26(2) 527.
[10] CA 352/87 *Griffin Corp. v. Koor Sahar Ltd* [1990] IsrSC 44(3) 45.
[11] CA 165/60 *Union Insurance Co. Ltd v. Moshe* [1963] IsrSC 17 646.
[12] CA 750/79 *Klausner v. Berkovitz* [1983] IsrSC 37(4) 449.
[13] CA 300/84 *Abu Atiya v. Arbatisi* [1985] IsrSC 39(1) 365.
[14] CA 5118/92 *Altripi Laltahoudat Ala'ama Ltd v. Salaima* [1996] IsrSC 50(5) 407.
[15] HCJ 3512/04 *Shezifi v. Interclub Ltd* (unreported decision of 29 December 2004).
[16] HCJFH 922/05 *Shezifi v. Interclub Ltd* (unreported decision of 20 March 2005).
[17] CA 6601/96 *AES Systems Inc. v. Saar* [2000] IsrSC 54(3) 850.
[18] HCJFH 4191/97 *Recanat v. National Labour Court* [2000] IsrSC 54(5) 330.
[19] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.
[20] CA 239/92 *Egged Israel Transport Cooperation Society v. Mashiah* [1994] IsrSC 48(2) 66.
[21] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* **[2006] (1) IsrLR 105**.
[22] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693; **IsrSJ 8 13.**
[23] HCJ 114/78 *Burkan v. Minister of Finance* [1978] IsrSC 32(2) 800.
[24] HCJ 6698/95 *Kadan v. Israel Land Administration* [2000] IsrSC 54(1) 258.

[25] HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [2002] IsrSC 56(5) 393.
[26] HCJ 525/84 *Hativ v. National Labour Court* [1986] IsrSC 40(1) 673.
[27] HCJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* [2004] IsrSC 58(6) 481.
[28] HCJ 104/87 *Nevo v. National Labour Court* [1990] IsrSC 44(4) 749; **IsrSJ 10 136**.
[29] HCJ 608/88 *Finkelstein v. National Labour Court* [1989] IsrSC 43(2) 395.
[30] HCJ 932/91 *Central Pension Fund of Federation Employees Ltd v. National Labour Court* [1992] IsrSC 46(2) 430.
[31] HCJ 1199/92 *Lusky v. National Labour Court* [1993] IsrSC 47(5) 734.
[32] HCJFH 4601/95 *Serrousi v. National Labour Court* [1998] IsrSC 52(4) 817.
[33] HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [2003] IsrSC 57(3) 31.
[34] HCJ 240/98 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [1998] IsrSC 52(5) 167.
[35] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309.
[36] HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [1998] IsrSC 52(4) 193.
[37] HCJ 6924/98 *Association for Civil Rights in Israel v. Government of Israel* [2001] IsrSC 55(5) 15.
[38] HCJ 663/78 *Kiryat Arba Administration v. National Labour Court* [1979] IsrSC 33(2) 398.

Israel National Labour Court cases cited:

[39] NLC 42/2-13 *Nordan Oil Services Ltd v. Mori* [1982] IsrLC 13 368.
[40] LabA 1372/01 *Shezifi v. Interclub Ltd* (unreported decision of 11 February 2004).
[41] NLC 42/2-33 *State of Israel v. Azoulay* [1983] IsrLC 15 105.
[42] NLC 37/3-71 *Elite Israeli Chocolate Industry Co. Ltd v. Lederman* [1978] IsrLC 9 255.

For the petitioners — A. Spinrad, N. Pinchuk-Alexander.
For the second respondent — B. Ablin, R. Plitt.
For the third respondent — Y. Amsalem.
For the fourth respondent — E. Shilony.
For the fifth respondent — R. Hadar-Barabash.
For the sixth respondent — E. Bentovim.
For the seventh respondent — Y. Peri.
For the eighth respondent — A. Rivlin.

JUDGMENT

Vice-President E. Rivlin

1. Several inhabitants of Judaea and Samaria, who are not citizens of Israel (hereafter: the Palestinian workers) filed claims in the Regional Labour Courts against their Israeli employers, who conduct business in the occupied territories. During the hearings, a question arose as to whether the claims should be governed by Israeli law or the local law. The Labour Courts held that Israeli law applied. The National Labour Court (the honourable President S. Adler, the honourable Judges N. Arad and S. Tsur, Workers' Representative S. Guberman and Employers' Representative H. Dudai) heard the employers' appeals jointly, and held that the law applicable to the employment contracts between the parties was the law that governs the occupied territories. The National Labour Court also held that the hearing of each case would be returned to the Regional Labour Courts for them to examine the provisions of the law applicable in the occupied territories and to clarify the need for subjecting the employment contracts to special provisions of Israeli law by virtue of the principle of public policy. The first petitioner, Kav LaOved Workers' Hotline, is challenging these findings of the Labour Court on behalf of all the Palestinian workers.

The proceedings in the Regional Labour Courts

2. Claims were filed in the Regional Labour Courts by the Palestinian workers, who were employed in the occupied territories by various employers: the Givat Zeev Local Council, Abir Textile Industries Ltd, Y. Zarfati Vehicle Services Ltd, Nituv Management and Development Company Ltd and Aqua Print Technological Toning Ltd (hereafter: the employers). The plaintiffs claimed that they were entitled to be paid the minimum wage, severance pay and various employment benefits, all of which in accordance with Israeli employment law. As stated above, the main question before the courts concerned the question of which law should apply to the employment relationships between Palestinian workers who are inhabitants of the occupied territories, and Israeli employers, when the place of work is in the 'Israeli enclaves' in the territories. In view of the intentions and expectations of the parties, an analysis of which law is most applicable to the contract, and the special characteristics of employment law that are regarded as part of the contract by virtue of public policy, the Regional Labour Courts reached the conclusion that in the aforesaid cases the plaintiffs should be subject to Israeli law, rather than the law in the territories.

The employers challenged this finding in the National Labour Court.

The judgment of the National Labour Court

3. When it considered which law should apply to the employment contracts under discussion, the National Labour Court addressed the question of what law is applicable in the territories and the conflict of law rules with regard to contracts where the parties are subject to different legal systems. The National Labour Court held that, as a rule, in the absence of strong ties linking the contract to the law of another place, the employment agreement should be governed by the law that is applicable in the place where the work is done. The National Labour Court took as its starting point s. 2 of the Proclamation Concerning Law and Administration Arrangements (Territory of the West Bank) Declaration (no. 2), 5727-1967, which provides:

'Validity of existing law

> 2. The law that was in force in the territory on 28 Sivan 5767 (7 June 1967) shall remain in force, in so far as it does not conflict with this declaration or any declaration or order that will be made by me, subject to changes that derive from the establishment of the rule of the Israel Defence Forces in the territory.'

The court explained that, according to this section, the law that applies in the territory of Judaea and Samaria consists of the Jordanian law that governed this territory until 1967 and orders that have been made by the military commander of the territory from then until today. This law has been supplemented by provisions of Israeli internal statutes that have been applied individually to Israeli citizens that live in the territory of Judaea and Samaria, but not to the whole territory or to all of its inhabitants. From this the National Labour Court concluded that in the absence of a provision of statute that expressly applies Israeli employment law to the territory, the law in force is Jordanian employment law, as amended by the orders of the military commander. The National Labour Court therefore went on to examine the question of whether there were any legal rules that might justify imposing provisions of Israeli law to Palestinian workers that are employed by Israeli employers.

4. Since there was no express provision in the employment contract itself with regard to the law governing it and since it was not possible to find any indication of the intentions of the parties in this matter by interpreting the agreement, the National Labour Court turned to consider all of the ties that link the parties to the occupied territories, on the one hand, or the State of

Israel, on the other. The National Labour Court found that the 'Israeli' ties, such as the fact that the employer was Israeli, the payment of wages in Israeli currency, the fact that various documents concerning the employment were in Hebrew, the determination of rest days and holidays in accordance with accepted practice in Israel, and the payment of tax to the Israeli tax authorities (in one of the cases under consideration) were insufficient to tip the balance in favour of the contract being governed by Israeli law. On the contrary, the National Labour Court was of the opinion that the fact that the occupied territories were the place where the contract was made and where the main work was carried out, and the fact that all of the parties were inhabitants of the territories tipped the scales in favour of the contracts being governed by the local law in force in the territories. Since there was no express arrangement that applied parts of Israeli employment law to these workers, and since there were insufficient ties to link the contracts to Israel law, the National Labour Court reached the conclusion that there was no justification for applying Israeli employment law to the Palestinian workers. The National Labour Court therefore decided that each of the employment contracts under consideration was governed by the local law of the occupied territories.

5. Notwithstanding, the National Labour Court held that when an Israeli court acquired jurisdiction to hear the case, it was entitled, and even obliged, to examine every provision of a contract that is governed by a foreign law from the perspective of the principle of public policy, and to refrain from enforcing a contractual provision if it is contrary to public policy. It held that applying the rules of public policy to a specific case is a matter that requires a careful consideration of facts and ethics for each norm that is being considered. This was not done in the Regional Labour Courts, and therefore the National Labour Court decided to return all of the cases to the Regional Labour Courts. With regard to the employers' *prima facie* breach of their duty to treat all of their workers fairly and equally, the National Labour Court stated that the question should be considered separately. In so far as private employers are concerned, this question can be considered within the framework of the examination of the rules of public policy and the principle of good faith. Finally, the National Labour Court held that in the absence of an express provision, a collective agreement to which the Israeli employer is a party does not apply to workers who are inhabitants of the occupied territories.

The arguments of the parties

6. The judgment of the National Labour Court lies at the heart of this petition. The petitioner claims that the employment contracts clearly show that

the parties intended them to be governed by Israeli law. To the extent that the Givat Zeev Local Authority is concerned, the petitioner argues that where a government authority enters into a contract with another party, it is clear that Israeli law should apply. The petitioner further claims that in so far as a government authority is concerned, where the work was done in an Israeli 'enclave' in the territory of Judaea and Samaria, it is clear that the employer's intention is that Israeli law should apply, and it is also clear that this is the workers' expectation. The petition also claims that even if the applicable law is not expressly stated in the contract, the contract should be regarded as incorporating custom, by virtue of the provisions of s. 26 of the Contracts (General Part) Law, 5733-1973. The petitioner goes on to argue that the custom that prevails in the field of employment law is that the employment contract should be governed by the provision of law that is most favourable to the worker, and this custom should also be applied in the present case. The petitioner further claims that in the absence of any express or implied agreement between the parties, the contract should be governed by the law that has the strongest ties to the contract in the circumstances of the case, and in this case the 'strongest ties' test clearly indicates that this law is Israeli law, since the place where the negotiations between the parties took place is an Israeli enclave in the territory of Judaea and Samaria, the workers are far more closely associated with the Israeli government with regard to their work than they are associated with the Palestinian Authority, and the place where the agreement was made, the work was done and the breach was committed, as well as the currency used for payment, indicate the close ties to Israeli law.

The petitioner is also of the opinion that the findings of the National Labour Court conflict with the principle of public policy, according to which the workers should be subject to Israeli law, which benefits them, and its findings are contrary to the principles of justice that bind the courts. The petitioner also complains of the discrimination that results, in its opinion, from the decision of the National Labour Court. It claims that the discrimination is reflected in the fact that Palestinian workers and Israeli workers who do the same work receive different wages and employment benefits — all because of the different laws that are applied to them.

7. The petitioner's positions were supported, after the filing of the petition, by the New General Federation of Labour (hereafter: the General Federation of Labour). It emphasized in its closing arguments the importance of determining a single rule for the employment of Palestinian workers by Israeli employers in the Israeli towns in the occupied territories, and the advantages inherent in having a uniform bargaining standard. From a

collective perspective, the General Federation of Labour insists that there is no moral or legal reason why non-Israeli workers should be excluded from the application of the collective agreements that bind the Israeli employer in an 'Israeli enclave' and his Israeli workers. According to the General Federation of Labour, no departure should be allowed from the principle of treating all the workers of one employer at a given plant uniformly, other than on the basis of legitimate class distinctions, and for this purpose a distinction on the basis of nationality of country of origin between citizens, residents and 'foreign workers' cannot be justified.

8. The second respondent, which is the Givat Zeev Local Council, claims that the petitioner's objections were considered extensively by the National Labour Court, even if the petitioner was not the party that raised then in that forum, and there is no adequate justification for the intervention of the High Court of Justice, as a third instance, in the decision of the National Labour Court. On the merits, the Givat Zeev Local Council relies on the judgment of the National Labour Court and argues that there is no real concern of harm to the Palestinian workers, since the judgment guarantees an individual examination of each of their claims in accordance with the principle of public policy. The second respondent also claims that Israeli employment law was not applied by the legislature to the territory of Judaea and Samaria, and that we are not dealing with a situation of a conflict of laws at all. In any case, it claims that the 'strongest ties' test does not lead to the contract being governed by Israeli employment law.

9. The attorney-general agrees with the position of the Givat Zeev Local Council; he too is of the opinion that there is no justification for any intervention in the findings of the National Labour Court. On the merits of the matter, the attorney-general claims that where there is no contrary stipulation, the employment of a Palestinian who is a resident of the occupied territories is governed by the local law, and as a rule the Israeli ties of the employer does not result, under the 'strongest ties' test, in the applicability of Israeli employment law, unless this is justified by virtue of the principle of public policy. The attorney-general also seeks to emphasize that 'what the Israeli legislature or the military commander in the territories have not done should not be done by resorting to the rules of private international law, so that a kind of "back door" is used to apply Israeli private law to the Israeli towns in Judaea and Samaria.' This interpretation is unfounded, as we shall explain later.

10. The fifth respondent, Abir Textile Industries Ltd, relies on its arguments in the National Labour Court, and it supports the claim of the other employers that there is no basis for any intervention in the judgment. The seventh respondent, Nituv Management and Development Company Ltd, also argues that there is no reason for any intervention in the findings of the National Labour Court, and it emphasizes in its pleadings the distinction between a public employer and a private employer. In doing so it argues that private employers who have set up or moved their businesses to the occupied territories relied on the cheaper cost of labour because of the applicability of Jordanian employment law. The eighth respondent, Aqua Print Ltd, which was a party to a settlement in the previous proceeding, was joined as a respondent but chose not to present any further argument. The sixth respondent, Y. Zarfati Vehicle Services Ltd, gave notice that it had no interest in participating in the proceeding.

The local normative framework — the law of the enclaves

11. This court has held in a host of judgments that the territories of Judaea and Samaria are subject to a belligerent occupation of the State of Israel, with all that this implies from the viewpoint of the applicable law:

> 'Judaea and Samaria are subject to a military or a belligerent occupation by Israel. Military rule has been established in the territory, for which a military commander is responsible. The powers and authorities of the military commander derive from the rules of public international law relating to a military occupation. According to the provisions of these rules, all the executive and administrative powers are held by the military commander… Some of these powers derive from the law that prevailed in the territory before the military occupation, and some derive from new legislation, which was enacted by the military commander… In both cases the exercise of authority should comply with the rules of public international law relating to a military occupation, and the principles of Israeli administrative law relating to the exercise of executive authority by a civil servant' (HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1], at p. 792; see also HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2], at pp. 558-559; HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [3], at para. 14 of the opinion of President A. Barak).

Thus it has been held that the judicial and administrative jurisdiction of the State of Israel has no application in the territory of Judaea and Samaria (see for example HCJ 2612/94 *Shaar v. IDF Commander in Judaea and Samaria* [4], at p. 681). Indeed, for years the State of Israel has consciously refrained from applying Israeli law to the territories of Judaea, Samaria and the Gaza Strip (see, by contrast, the Law and Administration Arrangements Order (No. 1), 5727-1967, which applies the 'law, jurisdiction and administration of the state' to East Jerusalem). Indeed, from the arrangement provided in s. 2 of the Proclamation Concerning Law and Administration Arrangements (no. 2), 5727-1967, it can be seen that there are two main elements of the legislation applicable to the Palestinian inhabitants of the territories: one element is the law that was in force in the occupied territories until 1967, and in the case of Judaea and Samaria this is Jordanian law; the other element is the orders made by the area commander, which serve as primary and subordinate legislation in the territories. This normative position is also consistent with the outlook of customary international law with regard to the law applicable in a territory that is held under a belligerent occupation, as laid down in article 43 of the regulations appended to the Fourth Hague Convention Respecting the Laws and Customs of War on Land, 1907 (without considering the question of the status of the Hashemite Kingdom of Jordan in the West Bank prior to the occupation of the territory by the Israel Defence Forces and the question whether Jordanian law satisfies the tests of constitutionality accepted in public international law — see HCJ 61/80 *Haetzni v. State of Israel (Minister of Defence)* [5], at pp. 597-598; see also E. Zamir and E. Benvenisti, *Jewish Land in Judaea, Samaria, the Gaza Strip and East Jerusalem* (1993)).

The law is different for Israeli inhabitants of the occupied territories. They are subject to a different legislative element, which is known as 'the enclave law' and includes Israeli internal legislation that was applied on a personal basis solely to persons living in the territories that are Israeli citizens or entitled to become Israeli citizens. This was discussed by the learned A. Rubinstein and B. Medina:

> 'Over the years a clear distinction has been made between the law applicable to Israeli settlers and the law applicable to the local inhabitants. Beyond the personal application of various provisions of law to the inhabitants of the settlements in Knesset legislation, there have also been acts of legislation of the military administration that apply solely to Jewish settlements' (A. Rubinstein and B. Medina, *The Constitutional Law of the State of*

> *Israel* (vol. 2, fifth edition, 1996), at p. 1181, and see also the new version of the book (vol. 2, sixth edition, 2005), at pp. 927-928).

Elsewhere Rubinstein has clarified that —

> 'A resident of Maaleh Adumim, for example, is *prima facie* subject to the military administration and local Jordanian law, but in practice he lives subject to Israeli law both from the viewpoint of his personal law and from the viewpoint of the local authority in which he resides. The military administration is merely a remote control, through which the Israel law and government operate' (A. Rubinstein, 'The Changing Status of the Occupied Territories,' 11 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 439 (1986)).

Indeed, the legal system that applies to the inhabitants of the territories — Israelis alongside Palestinians — is unique and complex. Within this framework, and for the purpose of the decision in the case before us, it is important to distinguish between the systems of public international law and private international law that apply to the area in general and to the employment contracts under consideration in particular.

Conflict of laws in the occupied territories between public and private international law

12. There is no dispute that with regard to the occupied territories the courts in Israel are subject to the provisions of the Proclamation Concerning Law and Administration Arrangements (Territory of the West Bank) (no. 2), 5727-1967, and the rules of customary *public* international law (HCJ 785/87 *Afu v. IDF Commander in Gaza Strip* [6], at pp. 35, 76). Notwithstanding, we have held in the past that 'this alone cannot prevent the court from applying Israeli law to events that occur in the occupied territories, where such an application is required in view of the rules of *private* international law' (CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [7], at p. 356). In other words, whereas public international law determines the local law — i.e., which law will apply, as a rule, in the geographic area of 'the territory of Judaea and Samaria' — private international law determines *which law will apply in a given case* of a dispute in the field of private law. In our case, public international law and the provisions of the Proclamation Concerning Law and Administration Arrangements (Territory of the West Bank) Declaration (no. 2), 5727-1967, provide, as a starting point, that as a rule the law applicable in the territory of Judaea and Samaria, including the 'Israeli enclaves' in that territory, is the law of the Hashemite Kingdom of

Jordan that was in force on the date when the territory was occupied by the Israel Defence Forces. But this alone does not necessarily mean that the rules of *private* international law provide that the employment contracts in this case are indeed governed by Jordanian law. In order to determine the issue before us, there is no real significance to the fact that the vast majority of Israeli employment law has not been applied to the occupied territories or to the 'Israeli enclaves.' The decision regarding the law of contracts in this case will be made in accordance with the conflict of law rules accepted in *private* international law, as interpreted by the court. In this regard we should emphasize that although the conflict of laws process takes place at a kind of 'international junction of law,' every sovereign state is entitled to formulate the conflict of law rules that it will apply. In practice, most Western legal systems have formulated the conflict of law rules in accordance with several general theories (see M. Karayanni, *The Influence of the Conflict of Law Process on International Jurisdiction* (2000), at pp. 45-48).

For the sake of completeness, we should clarify that a decision within the context of the conflict of law rules that a given contract that was made in the occupied territories or to which one of the parties is an inhabitant of the occupied territories is governed by Israeli law does not, in itself, affect the sovereign status of those territories. We have said in the past 'that the mere application of a certain Israeli norm to a place outside the State of Israel does not necessarily make that place a part of Israel' (HCJ 205/82 *Abu Salah v. Minister of Interior* [8], at p. 720).

We should now turn to examine the law applicable to the employment relationship in the cases before us. We should first explain that Israeli law has not yet expressly adopted any conflict of law principles with regard to employment relations (but see NLC 42/2-13 *Nordan Oil Services Ltd v. Mori* [39]). Therefore, we shall first review the conflict of law rules in the contractual sphere in general, and subsequently we shall examine the specific applicability of these rules to employment relations.

Conflict of laws in the contractual sphere

13. In Israel there is no general legislation that regulates the subject of the conflict of laws in private law. Although there are several specific statutory provisions that regulate the conflict of laws in various areas, the sphere of the law of contracts has not been expressly regulated by the legislature (but see A. Levontin, *Conflict of Laws — Proposed Legislation with Introduction and Brief Explanatory Notes* (1987), which proposed a model whereby the conflict of laws in the contractual sphere should be based on the consent of the parties

to the contract, and in the absence of such consent, an examination should be made with regard to the proximity of the contract to a certain set of realities and circumstances and an objective test should be applied to determine which law should apply (for details, see p. 32)). In such circumstances, as in most countries around the world, it is the court that is required to formulate the conflict of law rules that will apply, which it does by taking into account the conflict of law policy and the basic principles of the substantive law of that legal system (for a comprehensive discussion, see L. Brilmayer, 'The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules,' 252 *Collected Courses* (1995)).

14. The basic principle in the law of contracts — a respect for the individual will of the parties in order that they may realize their 'legitimate expectations' — also lies at the heart of the conflict of law rules concerning contracts. Therefore, as a rule, the law of the contract is the law that the parties agreed should govern their conduct. But if the parties have not revealed their intentions, a need arises to determine 'the law to which the transaction has the strongest and most tangible ties' (CA 419/71 *Menorah Liability and Secondary Insurance Co. Ltd v. Numikos* [9], at p. 531). For this purpose, focusing on a certain factual connection, such as the place where the contract was made or the place where it was performed, and applying the law of that place, may result in a simple and clear solution, but in Israel, as in most Western legal systems, a broader and more flexible test is now accepted for identifying the law that governs the contract. This test —

> '… is made in accordance with several factors, of which the most important is the express intention of the parties. The absence of an express intention makes it necessary to discover the intention of the parties by means of objective criteria. In other words, the goal is to discover which legal system served as the basis for making the contract; it is the system to which the transaction has the closest ties' (CA 352/87 *Griffin Corp. v. Koor Sahar Ltd* [10], at p. 62).

To this end, each contract should be examined according to its circumstances, on the basis of objective criteria, such as the place where the contract was made, the place where it was performed, the identity of the parties to the contract, the language of the contract, the currency of the contract, etc. (see *Griffin Corp. v. Koor Sahar Ltd* [10], at pp. 62-63, 70-71; see also CA 165/60 *Union Insurance Co. Ltd v. Moshe* [11], at pp. 652-659). In addition to specific criteria found in the actual contract, it is possible in

appropriate cases to resort, as suggested by the learned A. Levontin, to an examination of objective criteria:

> 'The law of the contract is the law that the parties adopted jointly, whether in an express choice or by implication, as the law that applies to the contract between them.
>
> If the parties did not adopt a law for the contract as aforesaid, they may be presumed to have conducted business in accordance with the reality and circumstances with which a contract of the kind that they made is most closely associated; and what is accepted and customary in that reality and in those circumstances will serve, in so far as it is applicable, as the law of the contract' (Levontin, *Conflict of Laws — Proposed Legislation with Introduction and Brief Explanatory Notes*, *supra*, at p. 1 (para. 2)).

15. Many Western countries have followed a similar course. Thus the status of the territorial approach, which had a central role in forming the conflict of law rules in common law and in Continental law until the middle of the twentieth century, has become somewhat eroded, because of the inflexibility of this approach and because sometimes the connection between the contract and a certain territory, such as the place where the contract was made, is not of great significance (see also Karayanni, *The Influence of the Conflict of Law Process on International Jurisdiction*, *supra*, at pp. 51-52). Main examples of the flexible modern approach can be found in articles 3 and 4 of the EC Convention on the Law Applicable to Contractual Obligations, 1980 (hereafter: the Rome Convention), which proposes a conflict of law arrangement for contracts within the European Union, and in sections 6 and 186-188 of Restatement of the Law (2d), *Conflict of Laws*, which regulates the conflict of law rules for contracts in the United States (see also L. Collins (ed.), *Dicey & Morris on the Conflict of Laws* (thirteenth edition, 2000), at pp. 1195-1250).

A study of these rules shows a clear legal trend that in the absence of any consent between the parties with regard to the law that will govern the contract, *every specific issue or provision* in the contract will be governed by the law of the state that has the strongest ties to that issue. Admittedly, in the Rome Convention and the Restatement the territorial connection is given real significance, but the general trend that can also be seen from these documents is that the 'centre of gravity' of the legal relations will be determined on the basis of a combination of *all* of the contract's ties, and the country with the

strongest ties to a given dispute will be regarded as the country whose law applies. This trend allows a degree of flexibility to be introduced into the conflict of law process; it gives the court a margin of discretion in determining the applicable law, while at the same time it prevents a mechanical selection process.

16. It should be pointed out in this respect that the advantages of the 'strongest ties' approach, as a principle that allows flexibility and justice in choosing the law that will apply in each case, have also been discussed in Israeli case law with regard to the conflict of laws in other contexts, and especially with regard to torts (see *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [7], and the remarks of Justices M. Ben-Porat and M. Bejski in CA 750/79 *Klausner v. Berkovitz* [12], the remarks of Justice T. Strasberg-Cohen in CA 300/84 *Abu Atiya v. Arbatisi* [13], and the remarks of Justice T. Or in CA 5118/92 *Altripi Laltahoudat Ala'ama Ltd v. Salaima* [14]). In *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [7], we preferred a territorial conflict of law rule (the place where the tort was committed), but we held that there would be an exception that would allow the choice of law to be made in accordance with other ties where this was required by considerations of justice. The differences between the law of torts and the law of contracts tip the scales in favour of greater flexibility in the *contractual* sphere, in the sense that the territorial connection should not be held to be the rule, but in each case the court should examine all of the ties according to their nature and their relative weight in the circumstances of the case.

As a matter of policy, it would appear that there are various reasons why the territorial connection should not be regarded as an independent conflict of law rule or as an exclusive and decisive element of the conflict of laws in the contractual sphere. In this context, we should examine the connection between the obligation and a particular territory against the background of the distinction between a voluntary obligation and an involuntary obligation. Thus it would appear that an involuntary obligation that arises from the commission of a tort is usually more closely connected with the place where the tort was committed, since by its very nature it is not the result of any planning or a joint intention or expectation of the parties, and its circumstances are usually random. We have therefore held, as stated above, that in the tortious sphere we should adopt the law of the place where the tort was committed as the ideal conflict of law rule, subject to an exception 'that will allow the law of the place where the tort was committed not to be applied where considerations of justice so demand' (*Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [7], at p. 374). It was held in that case that the rule — the principle of

territoriality — was justified because it provides a solution to the need to maintain public order in the territory of the countries that are involved, and it is also usually consistent with the expectations of the parties and creates certainty. Notwithstanding, it was also held that in cases where it is found that the connection of a given country to the tort is significantly stronger than the connection of the country where the tort occurred (and consequently the place where the tort was committed becomes incidental), the aforesaid exception is likely to apply.

17. By contrast, a voluntary obligation in a contract is not necessarily tied to the place where it was made or where the contract is performed, and therefore to the law of those places, but by virtue of other ties it may involve another law, and in any case it is subject to the apparent intentions of the parties. This gives rise to the approach that when considering the law that will apply to a contract, all of the relevant ties should be considered. All of this is naturally subject to the policy considerations underlying the legal system and the relevant legal subject-matter. The burden of proving the existence of a certain connection rests with the party claiming that it exists, and the proof of the connection is made on a qualitative basis rather than a quantitative one (see also P. Kaye, *The New Private International Law of Contract of the European Community* (1993), at pp. 236-237).

This approach to the conflict of law process in contracts is dictated by modern realities, which are characterized by extensive social and commercial mobility, which allows the existence of global activity and of transnational relations that result in the making of contracts that have a connection with more than one legal system, in which the territorial element is not of decisive significance. In addition to the fact that the connection to the place where contracts in general, and transnational contracts in particular, are made is not necessarily the strongest connection, contracts also frequently involve public (national and international) interests and various private interests, which should be taken into account when deciding which law will apply (see also A. Shapira, 'Comments on the Nature and Purpose of the Conflict of Law Rules in Private International Law,' 10 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 275 (1984), at p. 276). Already at this point we should emphasize that the weight of the public and private interests increases when we are speaking not merely of any contractual arrangement, but of *employment relations*, which are naturally based not only on the contractual consents of the parties but also on employment law (which the parties cannot contract out of). This is also of significance for the purpose of the conflict of law process, as will be explained below.

Indeed, the development of commerce requires the formulation of conflict of law rules that are consistent with this new reality. Thus, for example, the difficulty in relying on the territorial connection alone for the purpose of choosing the law is exemplified by the spread of the phenomenon of entering into contracts via the Internet, where the place of the negotiations, the place where the contract is made, the place where the parties reside, and the place where the obligation is performed may be incidental and possibly even 'virtual.' It is therefore unsurprising that in such a framework these connections will, in certain cases, lose their weight and practical significance (see also in this regard Y. Bar-Sadeh, *The Internet and Online Commercial Law* (1998), at pp. 48-51). As we said above, a survey of American and European law also shows a general approach that the territorial connection, such as with the place of making or performing the contract, is not the entirety of the matter, and it should be considered against the contract's other ties — ties that can lead to the application of the law of another country to the employment contract.

18. Moreover, the purposive doctrine that characterizes the modern conflict of law process necessitates a consideration of additional factors beyond the contract's direct ties — factors that are capable of guaranteeing a proper and desirable outcome with regard to the choice of the applicable law (see, for example, s. 6(2) of the Restatement, the remarks of Karayanni, *The Influence of the Conflict of Law Process on International Jurisdiction*, *supra*, at pp. 52 and 234-237, and F.K. Juenger, *Choice of Law and Multistate Justice* (1993), at p. 191). In this context, modern private international law indicates an inclination to attach considerable weight, within the framework of the conflict of law process, to general policy considerations and principles that lie at the heart of the substantive law whose application is being considered. This was discussed by the learned M. Karayanni:

> 'According to the methodology that currently characterizes the conflict of law rules, the aspiration is to formulate purposive rules that aim to reach just results. One of the declared purposes of this approach is the replacement of the traditional conflict of law rules, which sought to rely on mechanical formulae and in many cases led to unjust outcomes. The purpose of the modern methodology of the conflict of law rules is to be aware of and take into account every factor that can be relevant to the choice of law process, including the normative interest of the forum, in order to guarantee that just decisions are made' (Karayanni, *The Influence of the Conflict of Law Process on International*

Jurisdiction, *supra*, at p. 233; see also Brilmayer, 'The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules,' *supra*, at pp. 60-97).

The essence of the matter is that the accepted conflict of law test for the law of contracts is the consent of the parties, or in the absence thereof, the 'strongest ties' test, where the result of the test may be affected by wider policy considerations that serve general normative interests. When applying the test, the nature and weight of the ties that are examined may naturally vary in accordance with the specific laws whose application is being considered and in accordance with the special circumstances of a given contract. As a rule — and we are not intending to set out a comprehensive list — it would appear that the contract's ties to a given law should be examined with a view to the place where the contract was made, the place where the negotiations took place before the contract was made, the (only, main or usual) place where the contract is performed, the identity of the parties to the contract (including their place of residence, citizenship, incorporation and business activity), the language of the contract, the payment currency, the place where taxes are paid and the intention of the parties with regard to the conflict of laws in other aspects of their relationship. In identifying these ties and determining their weight, there is no reason why the court should not take into account general policy considerations of the legal system and the fundamental principles of the contractual sphere for which the choice of law is required. In the absence of concrete ties, the court may resort to objective ties of the contract, namely the law that is applied to similar contracts, between similar parties and in similar circumstances.

The conflict of laws and employment relations

19. As a rule, the 'strongest ties' test that we have discussed is also a proper test for choosing the law relating to employment relations. Thus, for example, in the American Restatement rules the employment contract is not excluded from the application of the rules listed in ss. 6 and 186-188, which concern contracts in general. Notwithstanding, we cannot ignore the fact that the employment contract is not an 'ordinary' contract, and employment law is a separate discipline from the law of contracts. Indeed, in most countries around the world these is a greater or lesser degree of regulation in employment relations, and this also has a real and important effect on the conflict of law rules regarding employment contracts. Article 6(2) of the Rome Convention, for instance, provides special conflict of law rules for the personal employment contract (the article does not apply to collective agreements),

according to which, as a premise, a territorial conflict of law rule will apply to employment relations (the place where the work is carried out or the employer's place of residence), unless most of the objective and subjective ties of the contract connect it with the law of another country with which the contractual relationship has a closer and more realistic connection (see also *Dicey & Morris on the Conflict of Laws*, *supra*, at pp. 1303-1322). In any case, it is clear that in view of the unique nature of employment law, the conflict of law rules that apply to employment relations should be adapted to the subject-matter of the substantive law in this field.

In Israeli law employment relations have an internal contractual element and an external element that the parties cannot contract out of, where the former is subject to the latter. The rights and liabilities of the parties to an employment relationship are not determined merely by the employment contract itself. They are also subject to external involvement in the internal contractual relationship of the parties: binding protective legislation, collective employment law, public policy and general principles of justice. Israeli law has assimilated the approach that the expectations of the parties and their consents in the employment contract are subject to an external legal framework that overrides them (even if there is no complete consensus as to the *manner* in which the binding rules influence the consents between the parties; see LabA 1372/01 *Shezifi v. Interclub Ltd* [40], and the petition to the High Court of Justice and the further hearing that were denied in HCJ 3512/04 *Shezifi v. Interclub Ltd* [15] and HCJFH 922/05 *Shezifi v. Interclub Ltd* [16]). This approach also has an effect on the conflict of law rules in the field, especially in the sense that when applying the 'strongest ties' test the weight of the various ties should be adapted to the fundamental concepts of employment law, and the cumulative weight of the ties should be examined in accordance with the working assumption that the consents between the employee and the employer are not the entirety of the matter. The National Labour Court addressed this when it examined the law applicable to employment contracts between an Israeli employer and employee that were supposed to be performed beyond the borders of the State of Israel:

> '… This viewpoint leads us to the main question in the field of the conflict of laws, which is unique to employment law or whose weight is particularly great in the field of employment law. The question is whether the applicable law should be determined exclusively in accordance with the rules that apply to the law of commercial contracts…

> Those who refrain from speaking of a concept of an "employment contract" do so because of the ever-increasing weight of legal norms that regulate the relationship between an employee and an employer, which do not originate in the "wishes of the parties" but in the wishes of the legislator or the parties to collective relationships… The aforesaid is not relevant to every country, but it does apply to Israel. From the time of the first employment statute, the Knesset has refrained from using the term "employment contract" and has preferred the concept of "employee-employer relations." The departure from the common expression certainly had a reason, and this remains true today' (*Nordan Oil Services Ltd v. Mori* [39]).

20. Like the general trends in the field of the conflict of laws, which allow the courts in the country of the forum to consider, within the context of the conflict of law process, the policy, principles, purposes and public interests underlying the rules being examined (see also Shapira, 'Comments on the Nature and Purpose of the Conflict of Law Rules in Private International Law,' *supra*, at pp. 291-293), the determination of the conflict of law rules in the field of employment law is also not the result of mere technical criteria that take into account the different elements of the employment relationship. The principles, purposes and public interests underlying the concept of the 'employment contract' should also be taken into account, as well as the accepted subordination of the employment contract to the binding set of rights and liabilities. This legal policy, which involves complex social and ethical decisions with regard to what is desirable and proper in employment relations, also influences the conflict of law rules in this field. Therefore, when examining the various ties of the employment relationship within the context of the 'strongest ties' test, the relevance of each tie should be considered not only against the background of the facts of the specific case, but also with reference to the policy underlying the legal rule whose application in the circumstances of the case is under consideration.

21. Within this framework, and in view of the binding provisions of legislation in the field of employment law, there is no doubt that the ties based on the consent of the parties are likely to have less weight where the consent is inconsistent with the principles of employment law. In exceptional cases, it is possible that certain ties will not be taken into account at all. The weight of the ties arising from the language of the employment contract, in so far as it is drafted by the employer, should be reviewed in light of the outlook that there is a disparity of forces between the employee and the employer, subject to the

circumstances of the concrete case. Where there is a lack of clarity or a lacuna in the contract with regard to the express or apparent intentions of the parties, the 'strongest ties' test should be influenced by the principle of equality — equal wages and employment conditions for the same or effectively the same work, whether the employees are men or women, parents or not parents, Jews or Moslems, Israelis or Palestinians. This influence may be realized by means of the principle of public policy (see, for example, CA 6601/96 *AES Systems Inc. v. Saar* [17], and the remarks of President Barak in HCJFH 4191/97 *Recanat v. National Labour Court* [18], at p. 370, and in the appropriate circumstances, also with regard to private employers; see also the remarks of Justice A. Barak in CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [19], at pp. 530-532; CA 239/92 *Egged Israel Transport Cooperation Society v. Mashiah* [20], at pp. 71-73; A. Barak, 'Protected Human Rights and Private Law,' *The Klinghoffer Book of Public Law* (Y. Zamir, ed., 1993) 163; N. Cohen, 'Equality vs. Freedom of Contracts,' 1 *HaMishpat* 131; R. Ben-Israel, *Equal Opportunities and the Prohibition of Work Discrimination* (vol. 1, 1998), at pp. 255-259); it may also be realized by virtue of a basic principle of the substantive law whose application is being considered (see, *inter alia*, the Equal Employment Opportunities Law, 5748-1988; the Equal Remuneration for Female and Male Employees Law, 5756-1996; NLC 42/2-33 *State of Israel v. Azoulay* [41], at p. 113; NLC 37/3-71 *Elite Israeli Chocolate Industry Co. Ltd v. Lederman* [42]; Ben-Israel, *Equal Opportunities and the Prohibition of Work Discrimination*, *supra*; and it may also be realized as a part of a basic principle of the forum law (see, for example, HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [21], at para. 13 of the opinion of President A. Barak; see also HCJ 98/69 *Bergman v. Minister of Finance* [22]; HCJ 114/78 *Burkan v. Minister of Finance* [23], at p. 806; HCJ 6698/95 *Kadan v. Israel Land Administration* [24]; HCJ 4112/99 *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [25], at p. 415). A violation of equality in the field of employment law can also constitute a violation of rights protected by the Basic Law: Human Dignity and Liberty and rights protected by the Basic Law: Freedom of Occupation.

22. The influence of the substantive law whose application is being considered and of the policy and fundamental principles that lie at the heart of the legal system on the conflict of law rules is also accepted in comparative law. Thus, article 6(2) of the Rome Convention has been interpreted as seeking to protect the (at least ostensibly) weaker party to a contract against attempts to prevent the application of the most appropriate protective law in the

circumstances of the case, and there are those who have gone so far as to interpret the rule as a principle that was intended to allow the worker to rely on the provisions of law that will give him the broadest protection, even if this protection is based on more than one legal system (see Kaye, *The New Private International Law of Contract of the European Community*, supra, at p. 221, and *Dicey & Morris on the Conflict of Laws*, *supra*, at p. 1304). The Restatement also allows the court, when deciding which law should apply in the absence of a conclusive provision of statute, to take into account general policy considerations, and, as can be seen from s. 6(e), considerations relating to the field of substantive law with regard to which the choice of law needs to be made:

> 'a) the needs of the interstate and international systems,
>
> b) the relevant policies of the forum,
>
> c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issues,
>
> d) the protection of justified expectations,
>
> e) the basic policies underlying the particular field of law,
>
> f) certainty, predictability and uniformity of result, and
>
> g) ease in the determination and application of the law to be applied.'

23. In summary, the conflict of law rule that applies to employment relations is influenced by the two foundations on which this field stands — the contractual foundation and the binding legislative foundation. The application of the 'strongest ties' test is influenced by the basic principles of employment law and the fundamental principles of the legal system, both internally, by identifying the relevant ties and giving proper weight to the ties being considered, and externally, by virtue of the principle of public policy and a constitutional scrutiny of the rights of the parties. Therefore, in an employment relationship where the parties have made no express agreement with regard to the law that will apply in their case, the court will apply the 'strongest ties' test in order to identify the law that will apply, in view of the aforesaid principles. It may be possible — but we do not need to discuss this at the present time — that in the field of employment relations there may be exceptional cases in which a certain consent of the parties will not in itself determine the question of the conflict of laws.

From general principles to the specific case

24. In our case, the contracts that were made do not contain any express statement of the parties' intentions with regard to the identity of the law that governs the relationship between them. In the many documents that the parties filed, neither the Labour Court nor we were referred to any stipulation in a contract that expressly provides that one law or another governs the employment relationship between the parties. As a rule, in the absence of any expression of the parties' intentions, the territorial connection would lead to the conclusion that the law that governs the Palestinian workers is Jordanian law, since the place where the Palestinian workers are employed is situated in the occupied territories. But, as stated above, the territorial test does not stand on its own, and the general position of the respondents, who sought to rely on the territorial connection to the place where the work is carried out as the sole and decisive tie, should certainly not be accepted. The place where the work was carried out, which is the immediate territorial connection of the employment relationship, should be considered together with the various ties that are examined within the framework of the 'strongest ties' test in this regard. In view of the principles of employment law that we have already discussed and in view of the special legal status of the 'Israeli enclaves,' which we shall address below, the 'strongest ties' test leads to the conclusion that the employment relationship under consideration should be governed by Israeli employment law.

25. No one disputes that the Givat Zeev Local Council, as well as the local authorities where the other employers (Israeli companies whose production plants are situated in the territories) operate, are Israeli enclaves in Judaea and Samaria. These authorities are listed in the schedule to the Administration of Local Authorities (Judaea and Samaria) Order (no. 892), 5741-1981 (Amendment of 20 July 1989 Order) (except for one employer whose production plant is situated in the 'Barkan' Industrial Zone, which lies within the jurisdiction of the Samaria Regional Council), and they are Israeli local authorities according to law. The negotiations between the Palestinian workers and the employers with regard to their terms of employment took place in these 'Israeli enclaves,' and the contract was performed there. These territorial ties require a comprehensive study of the legal position that prevails in the 'Israeli enclaves,' and the effect that this position has on choosing the law that will apply.

In other words, in the circumstances of the case before us, because of the identity of the parties and because of the geographic location in which the dispute took place, we should consider the unique nature of the legal position in the occupied territories and the 'Israeli enclaves.' *Within the framework of*

the examination of the territorial connection, the conflict of law process should also take into account the special legal position that prevails in the place where the employment contract is made or performed, i.e., the 'Israeli enclaves.' From a theoretical viewpoint, basing the choice of law on a territorial factor relies on the assumption that a given territory has only one law, so that the individual develops a clear expectation with regard to which law will govern his transactions there. But in the case of the 'Israeli enclaves' in the occupied territories, there is a complex reality and a multi-faceted legal position. The Israeli inhabitants living in those territories are subject to extensive parts of Israeli law, in addition to special legislation of the military commander that also applies solely to the Israeli inhabitants. The Palestinian inhabitants who live in the very same territories are subject to Jordanian law and to the legislation of the military governor that applies to them (see *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [7], at pp. 378-379). Thus we see that in the case before us the law of the place where the work was performed is not uniform and does not depend merely on a territorial factor, but also on a personal factor. This outcome creates a situation in which different sets of laws operate in one territory and the ordinary expectations of the parties with regard to the law that will govern their actions has less weight. It may be, however — and we shall return to this later — that we can identify an expectation that certain workers will not be discriminated against, with regard to their rights, in comparison to their colleagues who are carrying out the same work, simply because the former are governed by different laws than the latter. Moreover, the legal character of the Israeli settlement as an 'enclave,' which is not *de facto* subject to the general law that governs that territory, weakens to a certain extent the connection between the place where the work is being carried out and the law that applies to the work contract. We discussed this in *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [7], and what we said is also pertinent to this case:

> 'In view of the unique legal reality that exists with regard to the Israeli settlements situated in the occupied territories, the reasons underlying our choice of the rule that the law that governs a tort is the law of the place where it was committed do not apply. The rule was not intended to operate in such a reality, which is in no way similar to the framework in which the rule operates in the world of Western law.
>
> …

> The legal position in the Israeli settlements in the occupied territories is an exception to the territorial principle, and this exception is what justifies the need to apply the exception to the rule that a tort should be governed by the law of the place where it was committed (*ibid*. [7], at pp. 378-379).

Indeed, the question of the character of the place to which the rules apply is a critical question, and appropriate weight should be given to the various relevant factors.

26. In our case, because of the nature of the territory under consideration, the weight of the territorial connection is lessened, so much so that it is difficult to choose which law is required by the connection to the place where the contract is performed. Thus, within the framework of the 'strongest ties' test, the cumulative weight of the other ties and of the principles of the legal system become greater when choosing the law that will apply. Within this context, we should take into account the fact that the workers were paid in Israeli currency, various documents concerning the employment, such as letters of dismissal, salary slips and time cards were written in Hebrew, the days of rest and religious holidays were determined in accordance with the usual practice in Israel, and in one case before us the worker even paid tax in Israel. Thus, these other circumstances strengthen the conclusion that the connection of the employment relationships under discussion to Israeli law is stronger than their connection to the Kingdom of Jordan and its laws.

This conclusion is also supported by the principles underlying the substantive law for which the choice of law is required, namely employment law. These principles lead to the presumption that, as a rule, in the absence of a clear consent between the parties, the aspiration should be that the choice of law will result in an identical and equal law applying in the field of *employment relations* to all the workers who have no relevant difference in that they carry out the same or effectively the same work. Just as the employment of a Palestinian worker, by virtue of the proper permits, in the territory of the State of Israel by an Israeli employer is governed — in the absence of any agreement to the contrary or any other significant ties — by Israeli law, so too Israeli law should also govern the employment of a Palestinian worker who is employed, with the proper permits, by an Israeli employer in an 'Israeli enclave.' There should be no discrimination between the two, just as there should be no discrimination between them and an Israeli worker who is employed by the same Israeli employer in the 'Israeli enclaves,' if he performs the same or effectively the same work. The contractual

relationship has the same form. A distinction of a kind that relies on citizenship or nationality is inappropriate. It does not point to any relevant difference and it is not required by the circumstances. This is true of the Palestinian workers *inter se* and also of any distinction between Palestinian workers and Israeli workers. Applying two different sets of laws to workers who work together for the same employer will necessarily result in prohibited discrimination. The conflict of law rules for employment law were not intended to sanction such an outcome. These rules, which are formulated in a normative environment that is determined by the fundamental values of Israeli society and the basic principles of the whole community of nations, are intended to prevent inequitable employment patterns based on distinctions relating solely to the national and ethnic origin of the workers.

Consequently, in the special circumstances before us, there is no alternative but to hold that the law that should govern the employment relationships under discussion — which is the law that has the 'strongest ties' with the employment contracts — is Israeli law.

27. We should clarify and emphasize that in the case before us — as in any other case concerning the formulation of conflict of law rules — there is no decisive significance to the question of which law will benefit the petitioners (and therefore we also do not need to adopt, in our case, a broad interpretation that the worker is entitled to benefit from the maximum protection possible under the laws whose application is being considered). Indeed, the aspiration to better the petitioners' wages and their employment benefits lay at the heart of this litigation, but, as stated above, it is not capable to deciding the question of the choice of law that governs the contracts.

Now let us turn to the question of the relief sought.

Intervention in the ruling of the National Labour Court

28. This court may intervene in the rulings of the National Labour Court when two conditions are satisfied: one is that there is a material legal mistake in the judgment, and the other is that justice requires our intervention (HCJ 525/84 *Hativ v. National Labour Court* [26]). The main consideration when examining whether there has been a 'material legal mistake' concerns 'the nature of the problem, namely its general public importance or its unique legal significance or its general applicability and recurrence as a phenomenon in employment relations or its general effect on social processes and other similar considerations' (*ibid.* [26], at pp. 682-683; see also HCJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* [27]; HCJ 104/87 *Nevo v. National Labour Court* [28], at p. 767 {161}; HCJ 608/88 *Finkelstein*

v. National Labour Court [29]; HCJ 932/91 *Central Pension Fund of Federation Employees Ltd v. National Labour Court* [30]; HCJ 1199/92 *Lusky v. National Labour Court* [31]; HCJFH 4601/95 *Serrousi v. National Labour Court* [32]).

It would appear that these two conditions are satisfied in our case. No one disputes that the question before us has wide-ranging ramifications for all of the workers that are employed in Israeli settlements in the occupied territories and that its solution affects the relationship between the Israeli employers in the territories on the one hand and both Israeli and Palestinian workers on the other. The issues in dispute give rise to legal questions that involve several branches of law, and especially the conflict of law rules and employment law. This case requires a clear statement of how the 'strongest ties' test should be formulated and applied in general, and in particular how it should be applied in the field of employment law in the reality that prevails in certain parts of the territories. Moreover, applying Israeli law to the Palestinian workers is necessitated by the principle of equality and by the fundamental purpose of eliminating improper discrimination in the work market. It is thereby based on the basic principles of the legal system. Justice therefore requires intervention in the conclusions of the National Labour Court.

I would therefore propose to my colleagues that we grant the petition and make an absolute order setting aside the judgment of the National Labour Court and holding that, in the circumstances of the cases before us, Israeli law governs the employment relationship between the Israeli employers and the Palestinian workers who are inhabitants of the territories.

President D. Beinisch
I agree.

Justice E.E. Levy
I agree.

Justice A. Grunis
I agree.

Justice M. Naor
I agree.

Justice E. Arbel

I agree.

Justice E. Hayut

I agree.

Justice S. Joubran

1. I agree with the opinion of my colleague, Vice-President E. Rivlin, that the petition should be granted. As I shall clarify below, I accept the petitioners' claim that the ruling of the National Labour Court creates discrimination between Palestinian workers and Israeli workers who are carrying out the same work but receiving different wages and employment benefits. I also agree that it is important to determine a uniform rule for the employment of Palestinian workers by Israeli employers in Israeli settlements in the occupied territories.

2. The main question that we need to decide in this petition concerns the law that applies to a claim brought by workers, who are inhabitants of Judaea and Samaria but not Israeli citizens, against an employer that is a local authority listed in the schedule to the Administration of Local Authorities (Judaea and Samaria) Order (no. 892), 5741-1981 (hereafter: 'the schedule'). I accept the analysis of my colleague the vice-president, from which it can be seen that in view of the special character of employment law, applying the 'strongest ties' test in our case leads to the conclusion that the petitioners' employment contracts should be governed by Israeli law. Notwithstanding, because of the importance of the issue, I would like to emphasize several points that arise from the opinion of my colleague the vice-president with regard to the application of the principle of equality in this case.

3. It is well known that this court has held on many occasions that the principle of equality is one of the most basic principles of the State of Israel. This court has held in the past that 'the right to equality is one of the most important human rights. It is "the heart and soul of our whole constitutional regime"' (*Bergman v. Minister of Finance* [22], at p. 698 {18}). Indeed, 'it is common knowledge that equality is one of the basic values of the state. It lies at the heart of social life. It is one of the pillars of democracy' (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Tel-Aviv Municipality* [25], at p. 415; HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in*

Israel v. Prime Minister [33], at p. 39). It is the supreme principle for the interpretation and implementation of statutes (HCJ 240/98 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Religious Affairs* [34], at p. 177).

In *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [21], I said *inter alia* that:

> 'Of the essence of equality and the deleterious effect of discrimination it has been said that —
>
> > "… equality is a basic value for every democracy… it is based on considerations of justice and fairness… the need to maintain equality is essential for society and for the social consensus on which it is built. Equality protects the government from arbitrariness. Indeed, there is no force more destructive to society than the feeling of its members that they are being treated unequally. The feeling of inequality is one of the most unpleasant feelings. It undermines the forces that unite society. It destroys a person's identity" (*per* my colleague Justice A. Barak in *Poraz v. Mayor of Tel-Aviv-Jaffa* [35], at p. 330).
>
> In the same spirit it has been said that —
>
> > "… (True or perceived) discrimination leads to feelings of unfair treatment and frustration, and feelings of unfair treatment and frustration lead to envy. And when envy comes, good judgment is lost… We are prepared to suffer inconvenience, pain and distress if we know that others too, who are our equals, are suffering like us and with us; but we are outraged and cannot accept a situation in which others, who are our equals, receive what we do not receive" (*per* my colleague Justice M. Cheshin in *C.A.L. Freight Airlines Ltd v. Prime Minister* [36], at pp. 203-204).'

Likewise, the Declaration Concerning the Aims and Purposes of the International Labour Organization of 10 May 1944 (the Declaration of Philadelphia) states that 'labour is not a commodity,' because of the international recognition of the need to respect human dignity, including equal

opportunities in employment, as paramount measures of creating a proper employment environment:

> 'The Conference affirms that —
>
> (a) All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.'

This recognition constituted the basis for the later conventions of the International Labour Organization, which were adopted by the community of nations. Thus, for example, convention 111 of the International Labour Organization concerning the prohibition of discrimination in employment and occupations, which has been adopted by 141 countries, including the State of Israel on 12 January 1959, defined discrimination as follows:

> 'Article 1
>
> (1) For the purpose of this Convention the term "discrimination" includes —
>
> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
>
> …
>
> (3) For the purpose of this Convention the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.'
>
> Discrimination (Employment and Occupation) Convention, 1958.

Similarly, the Universal Declaration of Human Rights enshrined the international recognition of the principle of equality between human beings and the prohibition of discrimination on the basis of national or social origin:

> 'Article 1
>
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> Article 2
>
> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour,

> sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'
>
> Universal Declaration of Human Rights (10 December 1948).

4. In our case, the decision of the National Labour Court gives rise to the result that the only difference between the Palestinian workers and the Israeli workers — with regard to the law that governs their employment contracts — is the fact that the Palestinian workers are Palestinians living in the Palestinian Authority, whereas the Israelis are citizens of Israel.

This distinction on the basis of national identity for the purpose of deciding the law that is applicable to the employment contracts is, in my opinion, inappropriate and amounts to prohibited discrimination. In my opinion, all of the workers of the local authority, whether they are Israeli or Palestinian, should be governed by the same law, which in this case is Israeli law. This will lead to an equitable result that makes no distinction on the basis of nationality, in the spirit of the values of the State of Israel and in accordance with the spirit of the Basic Law: Human Dignity and Liberty.

5. It was held by this court in HCJ 6924/98 *Association for Civil Rights in Israel v. Government of Israel* [37], at pp. 26-27, that:

> 'The court has given a broad meaning to the principle of equality in a whole host of judgments, and it has applied it to almost every type of distinction between human beings on the basis of improper criteria. Thus, for example, a distinction between persons who apply to receive a subsidy according to their place of residence or according to the date of the application may be considered a violation of the principle of equality. But the original meaning of the principle of equality, and I think that this is also the precise meaning, is narrower. In this sense, which is accepted in other countries, the principle of equality applies to a limited list of defined grounds that can be called the classic grounds of equality, or, as Justice M. Cheshin calls them, the generic grounds of equality. Examples of these are religion, race, nationality and sex: every person is entitled to equality irrespective of religion, race, nationality or sex. The principle of equality in this sense, as distinct from the broad sense, is considered in many countries,

> and ought to be considered, a constitutional right. It is for good reason that the Declaration of the Establishment of the State of Israel proclaims… the commitment of the state to uphold "complete social and political equality of rights for all its citizens irrespective of religion, race and sex."
>
> *A breach of the principle of equality in the narrow sense is considered especially serious. As Justice M. Cheshin said in the second Women's Network case… (at pp. 658-659):*
>
> > "*Another example of generic discrimination [in addition to discrimination against a woman because she is a woman] is discrimination against a person because of the colour of his skin or because of his race. Generic discrimination, as has already been said, is discrimination that deals a mortal blow to human dignity*."
>
> See also *Kadan v. Israel Land Administration* [24] … at pp. 275-276.
>
> *The same is true of discrimination against Arabs because they are Arabs, and it makes no difference whether the discrimination is based on religion or nationality. This is a violation of the principle of equality in the narrow sense. It is therefore particularly serious.*
>
> The principle of equality in this sense is the essence of democracy. Democracy requires not only one vote per person on election day, but also equality for everyone at all times. *The true test of the principle of equality can be found in attitudes towards religious, national or any other minority. If there is no equality for the minority, there is also no democracy for the majority.*
>
> *The same is also true with regard to the question of equality for Arabs.*'
>
> (Emphases added).

6. It is my opinion that even though the work was not carried out in the territory of the State of Israel, but in the territory occupied by the Israel Defence Forces, which is outside the State of Israel, this cannot work to the detriment of the Palestinian workers, and where there is no express intention in the employment contracts between the parties, Israeli law should apply. Obviously there is nothing to prevent different workers receiving different

salaries that are based on the quality of their work or any other relevant difference, but this may not be done because of their ethnic origin or group.

7. In our case, it seems to me that applying a foreign law to the Palestinian workers, while Israeli workers are governed by Israeli law, violates the basic rights of the Palestinian workers and leads to discrimination against them — in relation to the Israeli workers — because they are Palestinians, even though all of the workers work side by side. Discrimination on the basis of nationality was described by Dr M. Karayanni in *The Influence of the Conflict of Law Process on International Jurisdiction* (2002), at p. 271, in the following terms:

> 'Therefore, if the law that is applied in the other forum conflicts with the "principles of the lifestyle of the local society," because it violates the basic principle of equality between the sexes or the best interests of the child, or because it is discriminatory on the grounds of race, nationality or religion, it may be assumed that the original forum will refrain from compelling the parties to litigate before the other forum by accepting a claim of *forum non conveniens*. This is also true if the norm that will be applied in the other forum violates the "basic values of morality, justice, freedom and fairness…".'

8. When we are speaking of employment relations, these remarks are doubly valid, since it is well known that the Israeli legislature saw fit to protect the worker by means of binding statutes that the worker cannot contract out of, in which the legislature took into account the best interests of the worker and sought to protect him from exploitation by the employer. For these reasons it enacted statutes such as the Protection of Wages Law, 5718-1958, the Women's Employment Law, 5714-1954, the Hours of Work and Rest Law, 5711-1951, and other similar statutes.

9. Applying the foreign law violates the basic rights of the Palestinian workers, contrary to Israeli employment law. The National Labour Court *de facto* deprived the Palestinian workers that are employed by the Givat Zeev Local Council of the protection that the Israeli legislature saw fit to give Israeli workers. In my opinion, removing this protection in the circumstances of the case constitutes improper discrimination and it *de facto* creates a distinction that is neither objective nor ethical in the employment terms of Israeli workers as compared to Palestinian workers, so that the same employer applies different laws, one of which benefits the worker whereas the other does not.

10. In my opinion, since employment relations are determined by rights and duties that are imposed on the parties, an Israeli authority that acts under the law may not discriminate between workers of different nationalities that do the same work, even on the basis of the principle of good faith and the principles of equality and justice. Since the principles of Israeli employment law are more favourable to the worker that the provisions of Jordanian law, in the circumstances of the case they should be preferred since they reflect the principles of employment law that protect the worker (see HCJ 663/78 *Kiryat Arba Administration v. National Labour Court* [38]).

The Rome Convention of 1980 also adopted this outlook for this very reason, namely that the worker should be given maximum protection. The purpose of article 6 is to prevent a situation in which a worker, who comes from a country where the employment conditions are worse than in the country where he works, becomes a victim of discrimination. The assumption is that a worker will not go from a wealthy country to a poor one, unless it is worth his while, in which case he does not need the protection of the law.

Article 6 of the Rome Convention of 1980 states the following:

> 'Article 6 — Individual employment contracts
>
> 1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.
>
> 2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
>
> (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
>
> (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;
>
> unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.'
>
> EC Convention on the Law Applicable to Contractual Obligations (19 June 1980).

11. In the case before us, it is true that we are speaking of inhabitants of the territories who are not generally subject to Israeli law and who are doing work in a place that from a geographic viewpoint lies outside the territory where Israeli law applies. But in practice the Israeli enclaves have the legal status of Israeli towns, at least for the purpose of the application of Israeli law, and especially employment law. Workers who have Israeli citizenship and who work in these enclaves are subject to Israeli employment law, with all that this implies. Therefore, in view of what we said above with regard to the principle of equality, no distinction may be made between these workers and their Palestinian colleagues, who differ from them in nothing other than their national identity.

12. In conclusion, for all of the aforesaid reasons I agree with the opinion of my colleague the vice-president that the petition should be granted and the order should be made absolute.

Justice A. Procaccia

I agree with the opinion of my colleague Vice-President Rivlin and with the remarks of my colleague Justice Joubran.

Petition granted.
27 Elul 5768.
10 October 2007.

HCJ 10843/04

1. Hotline for Migrant Workers
2. Kav LaOved Worker's Hotline

v.

1. Government of Israel
2. Minister of Interior
3. Minister of Industry, Trade and Employment
4. Yilmazlar International Construction Tourism and Textile Co. Ltd
5. Israel Military Industries Ltd (IMI)

The Supreme Court sitting as the High Court of Justice
[19 September 2007]
Before Vice-President E. Rivlin and Justices E.E. Levy, E. Hayut

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

Facts: Within the framework of an agreement between the fifth respondent and the Turkish Ministry of Defence, the State of Israel undertook that the fourth respondent would be given permits by the Israeli authorities to employ Turkish workers in Israel in the construction industry. According to the terms of these permits, the Turkish workers are only permitted to be employed in Israel by the fourth respondent. Following the decision of the court in *Kav LaOved Worker's Hotline v. Government of Israel* [1], which set aside arrangements that restricted foreign workers in Israel to a specific employer as a violation of their human rights, the petitioners challenged the restrictive arrangement relating to the Turkish employees of the fourth respondent.

Held: (Majority opinion — Vice-President Rivlin and Justice Hayut) The arrangement in this case differs from the restrictive arrangements addressed in *Kav LaOved Worker's Hotline v. Government of Israel* [1] in two major respects. First, unlike the foreign workers in *Kav LaOved Worker's Hotline v. Government of Israel* [1], the Turkish workers do not pay substantial sums to manpower contractors to be allowed to come to Israel. Second, the rights of the Turkish workers are subject to the supervision of both the Turkish authorities and the Israeli authorities, which both have an interest in ensuring that the Turkish workers' wages are paid and remitted to Turkey.
(Minority opinion — Justice Levy) The fact that the Turkish workers are not required to pay substantial sums to manpower contractors in order to come to work in Israel

does not derogate from the fact that they are subject to a restrictive arrangement that prevents them from changing employers in Israel. The result of this is that they are unable to realize their market value in the work market. The restrictive arrangement thus violates the rights of the Turkish workers, and this violation is unconstitutional.

Petition denied, by majority opinion (Vice-President Rivlin and Justice Hayut), Justice Levy dissenting.

Legislation cited:

Companies Law, 5759-1999, s. 2.
Contracts (General Part) Law, 5733-1973, s. 30.
Courts (Mediation) Regulations, 5753-1993, r. 4A.
Employment Service Law, 5719-1959.
Hours of Work and Rest Law, 5711-1951.

Israeli Supreme Court cases cited:

[1] HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* **[2006] (1) IsrLR 260**.
[2] HCJ 8155/03 *A. Arenson Ltd v. Director of the Foreign Workers Department* (not yet reported).
[3] HCJ 3541/03 *A. Dori Engineering Works Ltd v. Government of Israel* (not yet reported).
[4] HCJ 1963/04 *Resido Fi. Bi. Ltd v. Ministry of Industry, Trade and Employment* (not yet reported).
[5] HCJ 10692/03 *Plassim Development and Construction Co. Ltd v. Prime Minister* (not yet reported).
[6] CA 11152/04 *Pardo v. Migdal Ltd* **[2006] (2) IsrLR 213**.
[7] CrimA 11196/02 *Frudenthal v. State of Israel* [2003] IsrSC 57(3) 40.
[8] CrimA 7757/04 *Borstein v. State of Israel* [2005] IsrSC 59(5) 218.
[9] LCA 267/06 *Yilmazlar International v. Yagel* (unreported decision of 9 January 2006).
[10] HCJ 4999/03 *Movement for Quality Government in Israel v. Prime Minister* (not yet reported decision of 10 May 2006).
[11] HCJ 1030/99 *Oron v. Knesset Speaker* [2002] IsrSC 56(3) 640.
[12] CA 10078/03 *Shatil v. State of Israel* (not yet reported decision of 19 March 2007).
[13] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* (not yet reported decision of 11 May 2006).
[14] HCJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* [2004] IsrSC 58(6) 481.

[15] CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [1993] IsrSC 47(5) 189.
[16] CA 337/62 *Riezenfeld v. Jacobson* [1963] IsrSC 17(2) 1009; **IsrSJ 5 96**.

Israeli District Court cases cited:
[17] LCA (TA) 2782/05 *Yilmazlar International v. Yagel* (unreported decision of 4 January 2006).

Israeli Magistrates Court cases cited:
[18] CC 2992/05 (Ram) *Yagel v. Nomdar* (unreported decision of 4 September 2005).

Canadian cases cited:
[19] *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016.

For the first petitioner — N. Levenkron, Y. Berman.
For the second petitioner — Y. Livnat.
For respondents 1-3 — A. Helman.
For the fourth respondent — T. Benenson.
For the fifth respondent — R. Wolf.

JUDGMENT

Vice-President E. Rivlin

The background to the petition and the arguments of the parties

1. In 2002, an agreement was signed between Israel Military Industries Ltd (IMI) and the Turkish Ministry of Defence to upgrade 170 Turkish Army tanks, for a sum of approximately 700 million dollars. The agreement included an undertaking on the part of the State of Israel to make reciprocal purchases in an amount of approximately 200 million dollars over a period of ten years, i.e., approximately 20 million dollars per annum. An undertaking of this kind for a reciprocal purchase, which is called an 'offset arrangement,' is intended as a rule to compensate local industry for sending sources of income and employment out of the country, as well as to create an economic balance so that together with the purchase from a party outside the country, foreign currency will also travel in the opposite direction, which in our case is from Israel to Turkey. There is therefore no dispute that, without the undertaking to

make a reciprocal purchase, the Turkish Ministry of Defence would not have approved the transaction as a whole.

In 2003, it was agreed between IMI and the Turkish Ministry of Defence that a part of the offset undertaking to which IMI committed itself would be realized by means of granting a permit to the fourth respondent, Yilmazlar International Construction Tourism & Textile Co. Ltd (hereafter: the Yilmazlar company), a company registered in Israel with Turkish owners, to employ workers from Turkey in the construction industry. Within the framework of the agreement it was stipulated that the wages of the Yilmazlar company's workers, less the amounts of money that the employees would keep for themselves for the purpose of their living expenses in Israel, would be sent directly to Turkey, and would be deducted from the offset debt. In order to ensure that most of the amounts that the Yilmazlar company's workers would receive would indeed be sent to Turkey and be deducted from the offset liability, it was stipulated that at least 90 per cent of the Turkish workers who would be employed by the Yilmazlar company within the framework of the agreement would have families to support.

The aforesaid agreement was enshrined in government decision no. 2222 of 11 July 2004 (hereafter: the government decision). It was stipulated in the decision that the Yilmazlar company would receive a special permit to employ 800 foreign workers from Turkey in the construction industry during the years 2004-2007, without this leading to an increase in the overall maximum number of foreign workers in the construction industry. The petition before us was filed against this decision.

2. The petitioners before us — the Hotline for Migrant Workers and the non-profit organization Kav LaOved Worker's Hotline — are challenging the aforesaid decision of the government. In their petition, they explain that the workers of the Yilmazlar company are not subject to the procedures that apply to other foreign workers in the construction industry in Israel with regard to the possibility of changing employers, but they are subject to the arrangement that existed before the aforesaid procedures were formulated. According to the previous arrangement, a worker may work solely and exclusively for the employer for whom he came to work in Israel, and when the contract between the worker and that employer ends, the validity of the worker's entry visa and his permit to live in Israel expires. As a result of this, the workers of the Yilmazlar company are 'bound' to their employers. In view of the aforesaid, the petitioners demand that respondents 1-3 (hereafter: the respondents) apply to the workers of the Yilmazlar company the arrangements that apply to the

other foreign workers in the Israeli construction industry. In particular the petitioners demand that the 'change of employer' procedure and the 'closed skies' procedure should be applied to the workers of the Yilmazlar company. The 'change of employer' procedure, it should be clarified, was intended to allow a worker to submit an application to change employers before he leaves his lawful employer or immediately after leaving him, if he proves that he was unable to submit the aforesaid application before he left. The procedure stipulates conditions that allow a worker to leave the employer whose name is stated in his permit and change over to a different employer, subject to the conditions and requirements stipulated therein. The 'closed skies' procedure allows in certain circumstances a worker who has been arrested for illegal residence in Israel to be released from custody and to obtain work with another employer. This is intended to provide a solution for employers who have a shortage of workers, in view of the closed skies policy. The petitioners therefore argue that the government decision, which provides that the Yilmazlar company's workers shall not be subject to the aforesaid procedures, is an unreasonable decision that violates the basic constitutional rights of the workers.

3. The petitioners give details in their petition of several cases in which the Yilmazlar company's workers applied, because of allegedly harsh and illegal conditions of work and wages, to change over to another employer within the framework of the 'closed skies' procedure. The applications of these workers were refused — so it is alleged — because the state relied on the government decision that is the subject of the petition. The petitioners argue that the Yilmazlar company's workers suffer from harsh work conditions and meagre, illegal wages. They explain that the Yilmazlar company's workers are recruited for the work in Turkey and are immediately required to sign a several-page agreement, without being given the possibility of reading the agreement and without being given a copy of it. It is alleged that the workers' wages, without overtime, are less than the minimum wage required by law. The workers are required to sign a blank promissory note, which remains in the possession of the Yilmazlar company and allows it to attach the worker's money and property unconditionally and for whatever amount that it sees fit to write in the promissory note. The petitioners further argue that when the workers come to Israel, their passports are taken from them; that in the first few months of their work, the Yilmazlar company does not pay their wages; that they work many hours each day and in rare cases they are even required to work almost a whole day without interruption; that the workers are not paid for overtime; that in some cases the workers are forbidden to leave the site

after the workday ends without the approval of the work manager or they are required to return home no later than 10:00 p.m.; that at some sites the workers are forbidden to have cellular telephones; that if workers make a complaint, they are fined by the company and threatened that they will be dismissed and sent back to Turkey; and that the company has the habit of holding 'threat meetings' from time to time. The petitioners claim that the respondents' policy, according to which they do not allow the Yilmazlar company's workers to change over to another employer, gives Yilmazlar absolute power over its workers, who are compelled to suffer any condition and any stricture that is imposed upon them. They also say that the petition is filed as a public petition and that the petitioners do not include any worker of the Yilmazlar company who has been personally harmed by the company's policy. The reason for this, according to the petitioners, is that the Yilmazlar company has succeeded in exploiting its absolute power over the workers in order to suppress any possibility of a 'revolt' against its conditions of work, as well as against the restriction upon changing over to another employer.

The petitioners raise a host of arguments against the government decision. *Inter alia*, they argue that the government decision with regard to the restrictive arrangement was made *ultra vires* and is contrary to the provisions of the Employment Service Law, 5719-1959, and contrary to the decision of a previous government; that it is a restrictive arrangement that violates the dignity and liberty of Yilmazlar's workers, the freedom of occupation, the freedom of contracts and their freedom to enter into contracts; that the decision is contrary to public policy, contrary to the principle of equality and unreasonable. Finally they are of the opinion that we ought to decide that the offset transaction that was signed between the Government of Israel and the Government of Turkey is nothing more than trafficking in human beings.

4. The state argues at the beginning of its reply that no foreigner has an inherent right to work in Israel, and a foreigner certainly does not have an inherent right to work in any place of work where he wishes to work, for any employer whom he chooses. It argues that every state may make its willingness to allow a foreign national to enter and work in it conditional upon him working only for a specific employer for whose benefit a visa was issued to the worker. On the merits, the state is of the opinion that the government decision does not violate any inherent rights of the company's workers and that there are objective and reasonable grounds that justify not applying the 'closed skies' procedure and the 'change of employer' procedure to the Yilmazlar company's workers. The state argues that there are significant differences between the Yilmazlar company's workers and other foreign

workers. *First*, the state says that the Yilmazlar company's workers do not, when they enter into a contract with the company, pay large sums of money for their actual employment in Israel. This is different from other foreign workers, who pay huge sums to manpower companies or other agents in return for their actual employment in Israel, and they are therefore subject to the possibility of exploitation by the employer. In view of the aforesaid, the state argues that a worker who is not satisfied with the terms of his employment with the Yilmazlar company and wishes to terminate his employment with it can return to Turkey without suffering serious economic loss as a result, and there is no ground or reason that justifies allowing him to remain in Israel and to work here. *Second*, the state claims that the Yilmazlar company's workers are different from other foreign workers in Israel in that they are employed in Israel within the framework of an agreement that was made with the approval of the Turkish government and they are entitled to the protection of the Turkish government with regard to their rights as workers. *Third*, the state further argues that the State of Israel has a clear special interest in protecting the rights of the Turkish workers to earn proper wages and to receive their wages on time. It is emphasized that the State of Israel attributes great importance to carrying out the offset undertaking within the framework of the agreement with Turkey, both because of the serious economic consequences that could result from a breach of the undertaking and because of the negative consequences that could result from a breach of the undertaking in the sphere of Israel's foreign relations with Turkey. The respondents say in this regard that the Turkish Ministry of Defence and the Israeli government check the conditions of employment of the Yilmazlar company's workers. Thus a delegation from the Turkish Ministry of Defence visited Israel in order to check the conditions of employment of Yilmazlar's workers. In addition, the Director of the Foreign Workers Department at the Ministry of Industry, Trade and Employment (hereafter: the Ministry of Industry) ordered a comprehensive investigation to be made of the conditions of employment of Yilmazlar's workers at the various sites of the company throughout Israel. It is claimed that the findings of this investigation showed that, as a rule, the company's workers are employed on fair conditions, their wages are not less than the minimum wage provided by law and their housing conditions at the company's sites are reasonable. The state clarifies that where problems were found, a further check was made and this showed that most of the problems had been corrected, and it declares that, in any case, the department will continue to consider whether to take action pursuant to its powers under the law to prevent additional problems in the future. *Finally*, the state claims that

the petitioners did not succeed in establishing their claim with regard to a systematic violation of the rights of the Yilmazlar company's workers, and that in any case, even if there is a basis to their claims, nothing prevents the workers who are dissatisfied with their terms of employment from leaving their work and returning to Turkey.

5. The Yilmazlar company, the fourth respondent, requests in its reply that we deny the petition against it in its entirety. Yilmazlar claims that the petitioners, in their innocence, have been deceived by parties that have economic interests — employers and manpower contractors — who wish to devise a method of bringing foreign workers into the State of Israel, who will operate without supervision and in circumvention of the 'closed skies' policy of the Israeli government. Yilmazlar regrets the fact that the petitioners made no contact with it requesting to receive the relevant details and to clarify the truth of the claims raised against it. The company claims that the documents in its possession — salary slips, confirmations of the payment of wages by bank transfer, confirmations of direct payments to workers and work agreements — show that it fully complied with the employment laws, and that investigations that have been carried out, both by Turkish government authorities and by Israeli authorities, show this to be the case. Yilmazlar requests that we do not accept the affidavits of the three foreign workers on which the petition is based. It claims that a comparison of these affidavits with other affidavits, which were filed by workers in administrative petitions relating to them, show many contradictions and that many of the facts included in them are incorrect. *Inter alia*, Yilmazlar says that the workers keep their Turkish passports, which they claim was proved in the investigation carried out by the Ministry of Industry; that the workers, including the deponents, come to Israel after signing work agreements with Yilmazlar that are supervised and approved by the Turkish Ministry of Labour; that the terms of the agreements with them, including increases in wages, are punctiliously observed by Yilmazlar; that the Turkish Ministry of Employment controls the travelling of Turkish workers to Israel and supervises the procedure carefully; and that the fact that many of the workers who return to Turkey, including one of the petitioners' deponents, wish to return to Israel and to be reemployed specifically by Yilmazlar shows that the employment is fair and the wages are proper and lawful. Yilmazlar claims that the offset agreement constitutes a golden economic opportunity for the Turkish workers, and that granting the petition and setting aside the agreement will inflict a mortal blow upon hundreds of Turkish workers who are employed by the company.

6. IMI, which was joined as a party to the petition at a later stage, is also of the opinion that it should be denied. It argues that the petition should be denied *in limine* because of delay in filing it, both because it was filed more than four months after the date on which the government decision was made, and because IMI was joined as a party to the proceedings another four months thereafter. IMI explains that the realization of the undertaking to make a reciprocal purchase — in an amount of tens of millions of dollars, and in accordance with predetermined timetables — involves lengthy and complex planning. It argues that setting the government decision aside will case IMI real and serious damage, since it will have difficulty, and maybe will not succeed at all, in complying with its undertakings to make a reciprocal purchase within the timetable that applies in this regard. IMI points out that Turkey is one of its important strategic targets. It argues that a failure to comply with the undertakings that IMI took upon itself is likely to result in fines in a sum of millions of dollars; damage to its chances of winning a further order for the project; the inclusion of IMI on the 'blacklist' of the Turkish defence establishment; exclusion from participation in additional tenders in Turkey in the military-security sphere; damage to IMI's additional projects in Turkey; and damage to other joint projects between Israel and Turkey and the strategic relationship between the countries.

Decision no. FW/3 of the ministerial committee and Government Decision no. 4024

7. Before we turn to consider the merits of the petition, we should discuss several developments that have occurred since the court began hearing the petition. *First*, on 7 September 2005, the state filed an update statement, in which it gave notice that on 7 June 2005 the ministerial committee for the employment of foreign workers adopted a decision concerning the workers of the Yilmazlar company (hereafter: ministerial committee decision no. FW/3), which states the following:

> '1. a. Further to Government Decision no. 2446 of 15 August 2004 and Government Decision no. 2222 of 11 July 2004 [the decision that is the subject of this petition], it shall be determined that the permits that were given to Yilmazlar… to employ 800 foreign workers until the end of 2007 shall not be subject to the procedures concerning the employment of foreign workers through licensed corporations, and the Minister of Industry, Trade and Employment shall be directed to grant an exemption to the Yilmazlar company from paying the permit fees

for employing those workers. In addition, the Ministry of the Interior shall be directed not to apply the transfer procedure and the change of employer procedure to the Yilmazlar company's workers, subject to the decision of the Supreme Court in petition HCJ 10843/04, and at the same time the Director of the Foreign Workers Department at the Ministry of Industry, Trade and Employment shall be directed to carry out special periodic checks of the conditions according to which the company's workers are employed, in order to ensure the payment of wages and ancillary benefits to the workers according to law.

b. It is clarified that only the government has the power to approve, in very exceptional cases, any additional arrangement for the bringing or the employment of foreign workers as a part of reciprocal purchase transactions.'

The update statement made it clear that the Minister of Finance submitted an objection to the aforesaid ministerial committee decision no. FW/3, and on 31 July 2005 the government adopted decision no. 4024 (hereafter: decision no. 4024), in which it decided, *inter alia*, to approve the aforementioned paragraph 1, which lies at the heart of this petition and which concerns the arrangement whereby the foreign workers are employed by the Yilmazlar company. The state, therefore, emphasizes that both the ministerial committee and the government directly considered the matter lying at the heart of the petition, and they decided, in the circumstances of the case, that the transfer procedure and the change of employer procedure should not apply to the 800 foreign workers who are employed by Yilmazlar. It is argued that the margin of discretion given to the government, as the executive branch of the state, with regard to the policy of employing foreign workers in Israel, is very broad. In view of the aforesaid, the state argues that Government Decision no. 4024 falls within the margin of reasonableness, and that there are no legal grounds for the court's intervention.

8. For their part, the petitioners filed a response to the update statement, in which they clarified that they stand behind everything stated in their petition and insist upon the relief sought therein. The petitioners claim that the decision of the ministerial committee and Government Decision no. 4024 do not change the position of Yilmazlar's workers. Moreover, the petitioners emphasize that other foreign workers who work in the construction industry are no longer employed by construction companies, but through licensed corporations who supply manpower to the construction companies. As we said

above, these workers are subject to the 'closed skies' procedure and the 'change of employer' procedure, which allow workers to change over from one manpower company to another once every three months. The petitioners argue that, by contrast, Yilmazlar remains the only construction company in Israel which has permits to employ non-Israeli construction workers directly, and whose workers suffer from being absolutely bound to their employer and from a continued violation of their rights.

9. On 8 February 2006, the petitioners filed an application to attach documents, which they claim are capable of shedding light on the harsh consequences of the arrangement under discussion in the petition, and of the violation of the rights of the Yilmazlar company's workers. The documents that the petitioners wish to attach are the decisions of three instances of the courts in an action filed by the village of Yagel against the Yilmazlar company. In the action, the Yilmazlar company was requested to vacate a building in the village in which it had housed its workers. It was alleged that the company housed approximately one hundred of its workers in a building designed as a home for one family, thereby violating their rights. The petitioners claim that the Magistrates Court, the District Court and finally this Court accepted the factual contentions of the village of Yagel in this regard.

In response, Yilmazlar argues that the housing conditions of its workers are not a part of the petition, and the facts of this matter should be examined, if at all, in other proceedings. It argues that the citations from the judgments that the petitioners wish to attach are *obiter* remarks that were made within the framework of the hearing for a temporary order, before the actual claim was tried. Finally, Yilmazlar argues that inspectors from the Department for Enforcing the Employment Laws at the Ministry of Labour and Social Affairs made an inspection of the housing conditions of the workers who were housed in the village of Yagel. They argue that that the report that was compiled shows that the housing conditions of the workers were satisfactory and that Yilmazlar passed the inspection after correcting minor defects. Yilmazlar therefore wishes to attach to its submissions the report of the inspection of the foreign workers' housing by the Department for Enforcing the Employment Laws of the Ministry of Labour and Social Affairs of 8 November 2005, and the report of the inspection after correcting the defects, in order to prove that there is no basis to the petitioners' claims.

The judgment in Kav LaOved Worker's Hotline v. Government of Israel [1]

10. On 40 March 2006, judgment was given by this Court in HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* [1]. The petition in *Kav*

LaOved Worker's Hotline v. Government of Israel [1] was filed *inter alia* by the petitioners before us. In that petition it was claimed that the arrangement that bound foreign workers in Israel to one employer seriously violated the rights of those workers. The Supreme Court granted the petition. In a comprehensive judgment (written by Justice E. Levy, with the agreement of President A. Barak and Vice-President M. Cheshin), the court first considered the realities of the employment of foreign workers in Israel. The position of the workers was described (in paragraph 27 of the judgment) as follows:

> '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*). 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*). 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*); they are exposed to abuse, exploitation and oppression (see LCrimA 10255/05 *Hanana v. State of Israel*; 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*, at p. 638).'

Against the background of this harsh reality, the court reached the conclusion that the arrangement that restricts a worker to one employer violates the basic rights of the foreign workers to dignity and liberty. The court explained that in view of the large sums that the worker invests in acquiring the possibility of working in Israel, the connection between the residency permit in Israel and working for one employer seriously violates the foreign worker's autonomy of will, which constitutes a central part of the human right to dignity. It was held that the restrictive employment arrangement means that the act of resignation, which is a legitimate act and a basic right of every worker, is accompanied by a serious sanction — the person who wishes to terminate the employment relationship loses the licence to live in Israel. This

involves a violation of the worker's right to operate in the work market as a free agent. The judgment explains that:

> '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' (*Kav LaOved Worker's Hotline v. Government of Israel* [1], at para. 32).

The court went on to hold that the arrangement that binds a worker to one employer does not satisfy the proportionality test. In view of the aforesaid, the court ordered the respondents:

> '…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.'

11. Following the judgement in *Kav LaOved Worker's Hotline v. Government of Israel* [1], the parties were asked to notify the court of their position with regard to the ramifications of the aforesaid judgment on the petition before us. From the statements of the parties it can be seen that both the petitioners and the respondents have not changed their positions. According to the petitioners, the judgment in *Kav LaOved Worker's Hotline v. Government of Israel* [1] strengthens their petition and what is stated therein applies *a fortiori* to the specific restrictive arrangement of the Yilmazlar's company's workers. The petitioners are of the opinion that the arrangement

that is the subject of this petition should also be set aside, since it is a unique and even more drastic arrangement than the arrangement that previously governed all of the foreign workers in Israel. For their part, the respondents are of the opinion that *Kav LaOved Worker's Hotline v. Government of Israel* [1] does not have any effect upon their response. According to them, there is a material and relevant difference between the workers of the Yilmazlar company and the other foreign workers, who are required to pay large sums of money in order to come to Israel. The respondents are of the opinion that in view of the special employment arrangements of the Yilmazlar workers, the additional supervision of their employment, the fact that that this is an exceptional and special arrangement and the fact that the arrangement is supposed to continue only until the end of 2007, a distinction should be made between the specific case in this petition and the general question considered in *Kav LaOved Worker's Hotline v. Government of Israel* [1].

Consideration of the arrangement that applies to the Yilmazlar workers

12. No one disputes that the offset arrangement between the Turkish government and IMI, which is the background to this petition, involves important public interests of the State of Israel. Granting the petition, by ordering the state to apply to the workers of the Yilmazlar company the arrangements that apply to all the foreign workers in the construction industry, in so far as this concerns the ability to change employers, is likely to result in serious damage to essential interests of the state, since it will lead to one of two possibilities. The first possibility is that the Yilmazlar company will be given an opportunity to employ new workers from Turkey, as replacements for workers who leave it and change over to other employers. This course of action will allow foreign workers to be brought into Israel without any limit, which is completely contrary to the 'closed skies' policy that the government adopted in order to limit the number of foreign workers and to encourage Israelis to re-enter the work market. The respondents explain that this policy has, in the last two years, resulted in thousands of new Israeli workers joining the construction industry. It has also been approved in several decisions of this Court, which has held that it contains no flaw and that there are no grounds for court intervention (HCJ 8155/03 *A. Arenson Ltd v. Director of the Foreign Workers Department* [2]; HCJ 3541/03 *A. Dori Engineering Works Ltd v. Government of Israel* [3]; HCJ 1963/04 *Resido Fi. Bi. Ltd v. Ministry of Industry, Trade and Employment* [4]; HCJ 10692/03 *Plassim Development and Construction Co. Ltd v. Prime Minister* [5]). The second possibility available to the state is that it will not allow Yilmazlar to bring new workers from Turkey to replace those workers who have changed over to other employers. It

should be noted that the employment of a worker who changes over to any employer other than the Yilmazlar company, which as we said above has Turkish owners, will not be credited to the implementation of the reciprocal purchase undertaking, unless the Turkish Ministry of Defence approves the identity of the employer. Consequently, this course of action will lead to a breach of the offset agreement with Turkey, and the respondents assert that it is likely to result in serious damage to IMI in particular, and to Israel's foreign relations and security in general. In this regard, the state emphasized the great importance of the strategic relationship between the State of Israel and Turkey and the fact that Turkey is one of Israel's most important allies.

13. Indeed, the concern that important interests of the state may be harmed carries great weight. However, in the case before us, I have reached the conclusion that in and of itself this concern need not lead to the denial of the petition because I am persuaded that the petition is unjustified on its merits and that the rights of the foreign workers, whom the petitioners wish to protect, are not being violated to a degree that justifies our intervention.

The position of the Yilmazlar company's workers is incomparably different from the position of the foreign workers whose case was considered in *Kav LaOved Worker's Hotline v. Government of Israel* [1], because of a combination of several factors that are all present in our case. *First*, there is no dispute that the workers of the Yilmazlar company are not required to pay large sums of money in order to come to Israel for the purpose of working for Yilmazlar. In the judgment in *Kav LaOved Worker's Hotline v. Government of Israel* [1], the court emphasized that:

> '*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' (*Kav LaOved Worker's Hotline v. Government of Israel* [1], at paragraph 28; emphasis supplied).

Indeed, the court went on to discuss this reality. It explained that:

> '… 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' (*Kav LaOved Worker's Hotline v. Government of Israel* [1], at paragraph 28; emphasis supplied).

Later the court 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…' (*Kav LaOved Worker's Hotline v. Government of Israel* [1], at para. 31; emphasis supplied).

The conclusion of the court in the aforesaid *Kav LaOved Worker's Hotline v. Government of Israel* [1] was therefore based to a large extent on the factual background. In the case before us, as we have said, the position is different: the Turkish workers are not required to pay huge amounts to middlemen or to manpower companies in order to come to Israel to work for Yilmazlar. The opposite is true: Yilmazlar pays the cost of bringing the workers to Israel, including the costs of medical checks, flights to Israel and medical insurance. In view of the aforesaid, and as the respondents justly point out in their replies, an employee of the Yilmazlar company who is not satisfied with his conditions of employment may terminate his work relationship with the company, return to his country of origin, and this too is at Yilmazlar's expense (except in exceptional cases where the worker is dismissed because of damage and loss

that he deliberately and wilfully caused to the company), without the worker being encumbered by any significant debt. Indeed, a foreign worker who enters Israel within the framework of the offset arrangement does not have any acquired right to work in Israel; he certainly does not have an acquired right to work at any place of work that he wishes and for any employer that he chooses. Notwithstanding, a worker who has returned to Turkey can, if he so wishes, take the necessary steps in order to be employed by another Israeli employer, like any foreign national who wishes to be employed in Israel.

14. Moreover, I have been persuaded that there is a significant difference between the Yilmazlar workers and other foreign workers. This difference finds expression in a host of other parameters: the procedure of making a contract with Yilmazlar's workers is carried out under the auspices and supervision of the Turkish government; the employment agreement with the workers is drafted and prepared by the Turkish Ministry of Labour together with the Turkish Ministry of Defence; the agreement is written in Turkish, the mother-tongue of the workers, and a copy of it is kept in the file that is maintained by the central management of the Turkish employment office; the work agreement is signed in Turkey as a three-party agreement by the worker, the Yilmazlar company and also a representative of the Turkish Ministry of Labour; the agreement grants the Yilmazlar workers a right to sue Yilmazlar even in Turkey. In this respect, their situation is also different from other foreign workers, since the deportation of the latter from Israel to their country of origin is likely to make it impossible for them to pursue their rights against their Israeli employer. With regard to the work conditions of the Yilmazlar company's workers, the employment of these workers requires compliance with very strict conditions that were determined by the Turkish authorities. The respondents declare that the workers enjoy good working conditions, which includes receiving three meals a day, housing and medical insurance that are all paid for by Yilmazlar. The activity of the Yilmazlar company, in so far as it concerns the protection of the rights of the Turkish workers employed by it in Israel, is subject to the institutional supervision and strict review of several bodies, both on the Turkish side and on the Israeli side: the Turkish Ministry of Labour recruits the workers, prepares the work agreement with them and signs it, as aforesaid, as a third party, together with the worker and the Yilmazlar company. In this way, it is possible for the Turkish authorities to monitor the conditions in which the workers are employed. It was also stated that a delegation from the Turkish Ministry of Defence actually visited Israel in order to check the employment conditions of the Yilmazlar workers; the Turkish authority that supervises the offset arrangement supervises the

transfers of the money and payments to the workers. The money (at least 75% of the workers' salaries) is transferred to a central account that is managed in a bank in Turkey and from that account the money is transferred to the private accounts of the workers. From the Israeli side, there is an equal degree of supervision: IMI sends the Turkish authorities copies of all the transfers of money to the workers' accounts and in return it benefits from a credit for the reciprocal purchase in the total amount of those transfers; the Israeli Ministry of Industry, which is responsible for the performance of the offset agreement, conducts inspections of the Yilmazlar company. As the state explained in its reply, the Foreign Workers Department at the Ministry of Industry carries out checks at the company's sites throughout Israel. In the most recent check that was made, it was found that all of the company's workers are employed in decent conditions, their wages are not less than the minimum wage provided by law and their housing conditions at the company's sites are reasonable. The state also declared that in places where problems were found, a further inspection was made, and this showed that most of the problems had been corrected. The state further declared that the Foreign Workers Department will continue to check that measures are taken in accordance with its powers under the law in order to prevent additional problems in the future. It will be remembered that in decision no. FW/3 of the ministerial committee, which was approved in Government Decision no. 4024, it was stated that:

> 'The Director of the Foreign Workers Department at the Ministry of Industry, Trade and Employment shall be directed to carry out special periodic supervision of the conditions of employment of the company's workers, in order to ensure the payment of wages and ancillary benefits to the workers according to law.'

In addition, the Israeli Ministry of Labour and Social Affairs is also carrying out checks, on a regular basis, of the manner in which Yilmazlar treats its workers.

15. From all of the aforesaid and after reviewing all the additional documents in the application to attach documents, it transpires that the position of the Yilmazlar company's workers is materially different from the position of the foreign workers whose case was considered in the aforesaid *Kav LaOved Worker's Hotline v. Government of Israel* [1]. In the circumstances described, I am satisfied that the rights of Yilmazlar's workers are being protected, thanks to the strict supervision that is imposed both from the Turkish side and from the Israeli side. Indeed, the arrangement under review in this petition is an unusual and special arrangement. Counsel for the

state emphasized that, according to Government Decision no. 4024, it will not be possible in the future to make an additional arrangement to bring foreign workers to Israel or to employ them as a part of reciprocal purchase agreements without the approval of the government. In view of the state's foreign affairs and security interests that are in the balance, the fact that the arrangement under discussion is supposed to continue only until the end of this year, and that the workers' terms of employment were dictated by the Turkish government, which has a sincere concern for the conditions in which its citizens are employed, there are no grounds for granting relief to the workers. This is especially so when considering that it is questionable whether they want such relief. I propose to my colleagues that the petition should be denied.

16. I have studied the comprehensive opinion of my colleague Justice E.E. Levy and the opinion of my colleague Justice E. Hayut. I agree in principle with everything stated in them. Indeed, no one could dispute that the restrictive employment arrangement is highly undesirable, and that its causes very great harm to the foreign workers.

In the course of his wide-ranging opinion, my colleague devoted approximately two pages to an examination of the 'actual harm' to the Yilmazlar workers. In his consideration of the concrete expression of the harm to the workers, my colleague reaches the conclusion that 'the factual picture is not entirely clear,' but he determines that, from his point of view, it is sufficient that there is 'a real concern that arises from the case that the rights of the Yilmazlar workers may be violated in various respects.' The heart of the matter, in his opinion, is therefore 'the *normative* situation created by the Government Decision' (paragraphs 19 and 20 of his opinion; emphasis in the original). It should be noted that this is the point of dispute between us: I agree with the rule held in *Kav LaOved Worker's Hotline v. Government of Israel* [1] as well as with the vast majority of the legal analysis put forward by my colleague in the course of his opinion in this case. But, I am of the opinion that this Court cannot consider the legal position without reference to the actual factual position. In our case, we are dealing with a special group of workers, and in the *special circumstances that have been brought before us*. As I have emphasized and I emphasize once again, there is no basis for granting the petition.

17. In the case before us, it is not possible to examine the specific work relationship between the parties — the foreign worker on the one hand and the employer on the other — without reference to all of the factors that are involved in the transaction between them. In the case before us, the contract

between the foreign workers and Yilmazlar is based on the agreement between the Israeli and Turkish governments, with the respective supervision mechanisms contained therein, which constitute a kind of 'collective protection' for Yilmazlar's workers. The fundamental agreement between the governments strengthens the position of Yilmazlar's workers; these workers benefit *ab initio* from a different status than that of other foreign workers, since the Turkish government represents them, conducted the negotiations concerning their terms of employment and is responsible for ensuring that the terms that were agreed to are upheld. In the present case, the protection of the rights of Yilmazlar's workers does not rely solely on the goodwill of the employer, but involves international political interests, which arise from the relationship between the two countries. Thus, the Yilmazlar workers are employed within the framework of a government arrangement, by virtue of a political agreement, which imposes on the private subcontractor (Yilmazlar) duties that do not apply in general to private manpower contractors. We cannot ignore the clear purpose of the offset agreement between the two countries, which is the background to the employment of the workers. Whereas, as a rule, the assumption is that the employer, who is motivated by economic interests, is likely to minimize his workers' rights, in the present case it is in the interest of the Turkish government that foreign currency—the workers' wages—will flow into it. In these circumstances, the Turkish government can be presumed to ensure that the economic value that was agreed to will actually be transferred, since this is the main declared and agreed purpose of the agreement.

18. Finally, I should point out that a consideration of the operative consequences of my colleague's opinion raises the question of whether, if the outcome proposed by him is adopted, the condition of Yilmazlar's workers will actually be improved. Since a cancellation of the open skies policy is no longer a possibility, adopting my colleague's position would lead to the cancelling of the offset agreement, and, as a consequence thereof, completely denying the Yilmazlar workers the possibility of earning their livelihoods in Israel. I think that, in view of the serious state of the Turkish job market, which my colleague also discusses in his opinion, the actual harm that such a decision will cause the Yilmazlar workers is very serious indeed, and is far greater than the theoretical concerns raised by my colleague. The interests and concerns of the foreign workers are the main focus of my decision. I also agree with the remarks of my colleague, Justice E. Hayut, that we are dealing with an agreement that is limited in time and subject to special supervision, and that any change will justify a reconsideration of the matter by this Court.

Justice E.E. Levy

1. On 30 March 2006, this Court held that a procedure that made the entitlement of a migrant worker to a residency and work licence in Israel conditional upon his remaining with the employer whose name is stipulated in the licence was void because it violated basic rights excessively (HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* [1]). It was held that the procedure blatantly conflicted with a major principle in labour law — the right of a person to cease working for an employer with whom he no longer wants to be associated, without this involving such a serious sanction that it makes the termination of the employment relations not worthwhile. If you deny this right of someone — and with it the fundamental principle of competition between employers — there is a significantly greater risk that his rights as an employee will be violated. This violation, as we know, frequently results in serious cases of exploitation. It deprives the worker of the only real protection that he has — his "market value". Thus, in the absence of any sense of moral responsibility, which it would appear many people have long forgotten, it is as if we have removed the last barrier preventing the dissemination of the outlook that seeks to blur the image of the worker as a human being and to reduce his existence to being no more than a pair of working hands, a machine to be used by the employer. In the works of Aristotle:

> καὶ ὁ δοῦλος κτῆμά τι ἔμψυχον, καὶ ὥσπερ ὄργανον πρὸ ὀργάνων πᾶς ὑπηρέτης. [Greek letters unclear in source – Trans.]
>
> 'And the slave is a living possession, and every slave is like a tool that is preferable to all others' (Aristotle, *Politics* 1, 21).

The fundamental case law ruling that the restrictive arrangement is void remains valid, even if it has not been implemented in full (see the decisions of October-December 2006 in the aforesaid *Kav LaOved Worker's Hotline v. Government of Israel* [1]; see also Hotline for Migrant Workers and Kav LaOved Worker's Hotline, *Binding Migrant Workers to Corporations*, 11 (March 2007), and *Freedom Inc. — Binding Migrant Workers to Manpower Corporations in Israel*, 14, 38 (August 2007)). It created a new legal position, in which the law is no longer prepared to tolerate the making of arrangements of this kind. It plays a major role in the normative framework in which migrant workers are employed in Israel. It looks equally to the present and the future. It binds all the organs of government, and in particular the government. As long as it is valid, it is also the concern of the court, whether it is this Court, the administrative courts, the labour courts or the detention courts.

2. The ink has not yet dried on that ruling, and the question of employment restrictions has once again come before us. This time, it is alleged, it takes a different form, which should be distinguished from the case that we decided. It presents us with a specific and special arrangement that is based on important security, economic and political interests. This arrangement is limited in scope and *prima facie* concerns no more than several hundred workers. The seriousness of this arrangement is reduced — so it is alleged — because of the low level of the violation of rights that is actually inflicted. In all of this my colleague Vice-President Rivlin found a basis for departing from the case law ruling that was made. My position is different. Adopting my colleague's approach means nothing more than turning the normative clock back and returning to a previous legal position that was found to betotally unacceptable. Were my opinion heard, we would hold that the restrictive element in the Government Decision cannot stand, because it is inconsistent with the provisions of the prevailing law.

Restrictive arrangements come in many forms but have the same result

3. In *Kav LaOved Worker's Hotline v. Government of Israel* [1] my colleagues and I discussed briefly the negative effects of restricting foreign workers to one employer, throughout the world in general and in Israel in particular (see, *inter alia*, paragraphs 24 and 38 of that decision and the citations there). I personally wonder whether the normative position that was set out in that case was not clear enough. I will not mention my own comments there, but can anyone who reads the judgment not be be disturbed by the profound question of Vice-President Cheshin who asked —

> '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 how can we remain silent?' (*ibid.*, at paragraph 4 of his opinion).

It is therefore incumbent upon us, and this time with even greater force, to reemphasize the gravity of the harm caused by restrictive employment mechanisms, and the immense injustice caused by their toleration. By considering these, we will also find an answer to the claims that are unique to the case before us.

4. Throughout the world there are arrangements that apply to migrant workers, which, despite the many ways in which they are expressed, the different methods that they adopt and the various sectors of industry to which they apply, all have a similar purpose — to restrict an employee to one

employer. By denying the employee of the natural protection inherent in the idea of the free market, the restrictive arrangement exposes him to violations of his rights concerning wages, including the payment of lower wages than the minimum wage provided by law and prohibited deductions from the wages actually paid, to the imposition of hours of work that are far longer than those permitted, to the seizing of travel papers by employers as a means of guaranteeing the continued existence of the work relationship, to poor quality housing, to the denial of proper medical care, to forced movement from one work site to another, and not infrequently also to sexual abuse and actual imprisonment. Where it concerns the treatment of migrant workers there is a considerable, surprising and most regrettable similarity between countries that are very distant from one another and between peoples who are completely foreign to one another. .

5. A description of some of these phenomena in *Israel* was given by the *State Comptroller* in reports that he issued (State Comptroller, *Annual report no. 49* (1998), at page 279; State Comptroller, *Annual Report no. 55b* (2005), at p. 379). Scholars have also written about them (see, *inter alia*, Amiram Gill and Yossi Dahan, 'Between Neo-Liberalism and Ethno-Nationalism: Theory, Policy, and Law in the Deportation of Migrant Workers in Israel,' 10 *Mishpat uMimshal (Law and Government)* 347 (2006), at p. 361; Adrianna Kemp and Rivka Reichman, '"Foreign Workers" in Israel,' 13 *Information on Equality and Social Justice in Israel* 1 (2003), at p. 13). They were well described in the annual journal of the Israeli Society for Labour Law and Social Security for 2004:

> 'The "restrictive arrangement" has led to widespread and serious phenomena of abuse and violations of the human rights of foreign workers. Many employers have exploited foreign workers in various ways. Workers are "charged" for fees and taxes that they [the employers] are liable to pay to the state, huge sums are deducted from the salaries of foreign workers on various pretexts and the workers are housed in wretched conditions. A large number of employers do not pay the foreign workers for all the hours during which they work, they pay less than the minimum wage and they do not pay overtime. Many employers do not pay medical insurance for their workers, and they shirk responsibility for them when they are hurt in work accidents and need medical treatment' (Sharon Asiskovitch, 'The Political Economy of Migrant Workers in Israel and the Immigration Policy vis-à-vis

Foreign Workers in the 1990s,' 10 *Labour, Society and Law* 79 (2004), at p. 90).

6. But the negative consequences of restricting workers to their employers are not found in Israel alone. In Great Britain the recognition of the serious harm caused by this restriction to foreign domestic workers led to the amendment of the law in 1998 and the cancellation of the restriction (recently human rights organizations are warning of its return, *de facto*, because of government policy. See Kevin Bales, *Disposable People: New Slavery in the Global Economy* (2000), at page 28; Kate Roberts, 'An important progressive response to globalisation is about to be reversed,' *Compass* (May 22nd, 2007)). In Italy migrant workers are compelled to endure harsh treatment by their employers, since an attempt to change employers results in immediate deportation from the country and a three-year ban upon returning to work there (John Wrench, *Migrants and Ethnic Minorities at the Workplace — The Interaction of Legal and Racial Discrimination in the European Union* (Danish Centre for Migration and Ethnic Studies, Papers, Migration No. 19, 1997), at p. 29). In the United States the restriction of a whole sector — seasonal migrant workers whose main occupation is in agriculture — is a key factor in the serious exploitation of migrant workers by their employers. A comprehensive report, which was published this year by an American human rights organization, discussed this relationship between the restrictive arrangement and the violation of the rights of temporary migrant workers, who are sometimes treated like commodities:

> 'Unlike U.S. citizens, guestworkers do not enjoy the most fundamental protection of a competitive labor market – the ability to change jobs if they are mistreated. Instead, they are bound to the employers who "import" them. If guestworkers complain about abuses, they face deportation, blacklisting or other retaliation… They are the foreseeable outcomes of a system that treats foreign workers as commodities…' (Southern Poverty Law Center, *Close to Slavery — Guestworker Programs in the United States* (2007) 1, 2, 33-40).

7. Some people regard restrictive arrangements as a means used by the host countries to keep the migrant workers apart and estranged from society, and to make them a cheap and available work force that can only be employed in difficult and unattractive jobs. The direct link between being bound to one employer, on the one hand, and a reduction in the wages paid and the migrant worker being forced to the bottom of the work ladder, on the other, was well

illustrated by what is happening in the labour markets in East and South Asia (Stuart Rosewarne, 'The Globalisation and Liberalisation of Asian Labour Markets,' 21 *World Economy* 963 (1998), at page 973) as well as in Canada (Nandita Sharma, 'On Being Not Canadian: The Social Organization of "Migrant Workers" in Canada,' 38 *Canadian Review of Sociology and Anthropology* 415 (2001), at pages 425, 433). This was also discussed in a working paper describing the territory of Macao in China, which each year attracts a significant number of migrant workers:

> '[Scholars] have gone a long way to expose the role of the state in keeping the migrant workers "cheap" and "flexible." The state has constructed a regulatory system in managing this category of foreigners. Many of these mechanisms are legislated into laws. Typically, migrant workers are denied the right to change employers. Since the ability of foreign workers to switch employer is severely curtailed, they are forced into a status of bonded labour and thus allow their employers to pay them a rate below that of the local workers' (Alex H. Choi, 'Migrant Workers in Macao: Labour and Globalisation,' *Southeast Asia Research Centre Working Paper Series* no. 66 (2004), at page 6).

In the United Arab Emirates, migrants that constitute the majority of the work force, are forbidden to change employers during their first two years and thereafter can only do so with the employer's consent. A particularly serious consequence of this is in the construction industry, where dozens of migrant workers *lose their lives* every year as a result of poor safety conditions. Dozens of others, in their distress, take their own lives. Others do not receive wages on time, live in poor conditions and are compelled to work long hours. All of this is because the employers regard themselves as not needing to compete for the market value of the worker (Hassan M. Fattah, 'In Dubai, an Outcry from Asians for Workplace Rights,' *The New York Times* (March 26th, 2006)). This was discussed by the international human rights organization, *Human Rights Watch*, in a comprehensive report published last year:

> 'In most other places, a worker faced with hazardous working conditions and unpaid wages, in a free market economy that has an extreme shortage of labor, would move to a different job. But this is not an option for the migrant construction workers of the UAE, who like all other migrant workers in the country are contracted to work only for a specific employer' (Human Rights

Watch, *Building Towers, Cheating Workers – Exploitation of Migrant Workers in the United Arab Emirates* (2006), at p. 13).

8. But what happens around the world does not only include direct restrictive arrangements. Sometimes the arrangements in the law take on an indirect guise, so that it appears that they originate in the *free will* of workers, even though this is not the case. The United States also provides an example of this. Not many years ago, in 2000, the American legislator addressed the impropriety whereby foreign skilled workers were subject to restrictions by law and repealed it (S. 2045 American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. 106–313, title I, § 105, Oct. 17, 2000 (8 USCS §1184(n))). These workers are therefore allowed to change employers, but few of them take advantage of this, since their loyalty to a single employer is almost always an essential condition for recognition of their entitlement to a permanent residency visa ('green card'). The strong desire to obtain this visa results in most workers binding themselves to an employer for many years. The direct and obvious result of this constraint — which as we have said appears to be a voluntary act deriving from freedom of choice — is the lack of competition for the workers, and consequently a significant worsening of their terms of employment. The figures show that even though these are skilled workers, including engineers, software and hi-tech personnel (who include, incidentally, no small number of Israelis), the wages paid to them are significantly lower than their American counterparts, they are compelled to work far more than the customary number of hours and they are harmed in other ways (Mark Krikorian, 'Slave Trade: Permitting Guest Workers Sounds like the Perfect Solution to the Immigration Imbroglio: Look Again,' *National Review* (September 14th, 1998); Norman Matloff, 'On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations,' 36(4) *University of Michigan Journal of Law Reform* 50 (2003), at page 64).

9. Additional aspects of an indirect restrictive arrangement, which results in workers refraining from changing employers and suffering unfair treatment and the loss of basic rights, may also be found in the following two measures. The *first* of these is where workers are required to sign promissory notes for large amounts or for unstated amounts, which allows the employer to sue the workers for large amounts of money at will and for any reason that he chooses. According to the petitioners, Yilmazlar's workers were required to sign such promissory notes. The s*econd* is where there are 'blacklists' by means of which employers work together to blacklist workers who have the temerity to complain about their conditions of employment. Being blacklisted has serious consequences, since not only does the complaint result in many cases in an

immediate termination of the work and deportation, but in the future also, even if those workers have a right in principle to ask for another work permit, they will have difficulty in finding someone who will be willing to employ them.

The restrictive arrangement and the alleged consent

10. Only a consideration of the complexity of the issue of restrictive arrangements, with the multitude of situations that it manifests, allows us to understand the real difficulty faced by migrant workers, for whom the restriction to one employer — whether overt or concealed, whether official or *de facto*, whether clearly the result of coercion or apparently the result of the worker's free choice — is a main source of the violation of their rights. It is clear to everyone that were migrant workers not prepared to suffer the restrictive arrangement, because they have no choice, the restrictive arrangement would never have come into existence. Were the workers to make their arrival in the host country conditional upon their ability to change employers, were they to apply on a constant basis to the courts and to enforcement agencies in government ministries for help and receive a positive response, and were they to refrain from working under the restrictive arrangement system, then it is doubtful whether it would survive for long. Similarly, were they to refuse poor employment conditions, the employers would be compelled to improve them.

Does this lead us to the conclusion that the responsibility for the restrictive arrangement should be imputed to those who suffer from it? Do migrant workers bring upon themselves the wrongs that they suffer, by continuing to look for employment despite what they know of it? Should they complain to no one other than themselves for choosing to look for work abroad? *This is exactly how we should understand the argument of the respondents before us*. This can also be seen from an approach that, regrettably, has obtained some credibility in the public debate concerning migrant work in Israel. It was written in one research paper that the treatment of migrant workers 'is based today on a contractual-commercial approach, according to which the consent of the migrant workers to accept the "rules of the game" makes the rules legitimate' (Ofer Sitbon, 'The Role of Courts in Israel and France in Designing the Policy towards Migrant Workers,' 10 *Mishpat uMimshal (Law and Government)* 273 (2006), at page 278). This was well described by Professor Guy Mundlak:

> 'One of the arguments raised in the public debate is that the discussion of the rights of the foreign worker is not important, since the state does not have a duty to take in foreign workers…

> The foreigner can decide if he wishes to accept the status that Israel offers and to work accordingly, or he can choose a competing status offered by another country or stay in his own country. [According to this argument], the willingness of a foreigner to enter a country with the status offered in itself indicates his consent to the conditions accompanying it that are presented before him. When this consent is given, it constitutes the moral basis for the whole set of rights that the state offers… If the number of foreigners who are interested in adopting this status, with its accompanying conditions, fills the quota, it means that these conditions are fair. The mere consent of the foreigners to accept them is the stamp of approval for their fairness' (Guy Mundlak, 'Workers or Foreigners in Israel? "The Basic Contract" and the Democratic Deficit,' 27 *Tel-Aviv University Law Review (Iyyunei Mishpat)* 423 (2003), at page 428).

11. According to the respondents, the violation of rights inherent in the restrictive arrangement of the Yilmazlar workers is not a violation, since it can be remedied at any time by means of a simple act — the return of the worker to his country of origin. If he does not choose to do this, on the basis of a profit and loss reckoning that finally leads him to the conclusion that working in Israel is worthwhile, what right does he have to complain about a work system that he chooses to join? A similar approach is also implied in the position of my colleague, the Vice-President, when he says: '… an employee of the Yilmazlar company who is not satisfied with his conditions of employment may terminate his work relationship with the company [and] return to his country of origin…' (paragraph 13 of his opinion, *supra*). Moreover, according to my colleague's approach, the employee has the right to apply once again, when he returns to Turkey, for a work permit in Israel, as if there were no 'closed skies' policyand as if the number of positions were not limited, and as if the workers could be confident or certain that they would not be prejudiced because they left in the first place.

In my opinion, this position cannot be tolerated, mainly for reasons of principle. It is inconsistent with the basic principles of our legal system. I am referring primarily to a fundamental principle in the law, which is a principle of public policy. It was my colleague, the Vice-President, who regarded this principle as 'one of the legal tools that were designed to protect the fundamental core values of the legal system and to steer the operation of the rules of law in a direction that is consistent with those basic values' (CA 11152/04 *Pardo v. Migdal Ltd* [6]). Indeed, the whole of public policy is based

on the recognition of the superiority of social values, which are even capable of prevailing over a contractual consent that was made freely and willingly. It allows the court to invalidate a contract whose content is immoral (section 30 of the Contracts (General Part) Law, 5733-1973); it denies the right of a person to form a company whose purpose is not a proper purpose (section 2 of the Companies Law, 5759-1999); a mediator may terminate a mediation proceeding where he is of the opinion that the settlement reached by the parties is an improper one (regulation 4A of the Courts (Mediation) Regulations, 5753-1993), and so on.

12. Thus we see that the outlook that regards consent as the whole of the matter is an idea that is foreign to our legal system. A clear example of this was provided in the past by the rulings that addressed the serious issue of trafficking in human beings, which despite the clear differences has more than one point of similarity with the issue that we are currently considering. In several cases that came before it, this Court emphasized the limited value of the argument of consent in that context. In CrimA 11196/02 *Frudenthal v. State of Israel* [7], at p. 46, Justice D. Beinisch emphasized that the consent of the victim of the trafficking to what is done to him is of no relevance. In CrimA 7757/04 *Borstein v. State of Israel* [8], at p. 233, Vice-President Cheshin also held that 'there is no significance to the issue of the consent or lack of consent of a person to work in prostitution; consent does not reduce the severity of the offence nor can it serve as a defence for the trafficker.' Within the narrow limits of the case before us, we are not dealing with criminal liability. But the criminal prohibition is one of several tools for expressing our unwillingness to tolerate moral wrongs, which harm the ethical basis on which our society is founded. Where someone wishes to put forward the argument of consent in order to indicate *prima facie* acquiescence in a situation that is regarded as ethically wrong, we have the power — or perhaps I should say that we are required by the law — not to satisfy ourselves with that argument but to investigate further the moral basis underlying the matter, and where necessary to set matters right.

This is the position in the law in general, and it is also the position in labour law, which for some time has not regarded a contract as the final word with regard to the relationship between a worker and his employer. An approach that consent is sufficient to make a contract for providing a service valid, whatever its contents, is inconsistent with our understanding of the labour laws and their purpose — to encompass, within the well-established limits of decency and morality, interactions between an employer and an employee. It is also clearly contrary to the rationale underlying protective

legislation, and regrettably we so often find ourselves acquiescing in the blatant breach of such legislation (see Gill and Dahan, *supra*, at p. 363). A 'foreign worker,' before he is a foreigner, is a worker. The spirit of labour law, which extends its protection to him, does not allow us to regard his relationship with his employer, as well as with the state, merely from the narrow viewpoint of informed consent.

Basic values of law, as well as basic principles of morality, cannot be excluded from the normative framework that applies to migrant workers. Mundlak answers the questions that we cited above so correctly that it is fitting that I should cite his remarks:

> 'Even if we accept the premise that the arrival of the foreigner to work in Israel is based on consent, there are limits to the extent of the consent that can be attributed to the contract that was agreed by the foreigner when he came to work in Israel. First, there are universal rights that do not depend upon prior association with the national community; contracting out of these in an agreement with a foreign worker has no effect… The mere presence of foreign workers in Israel cannot provide the answer to the question of the extent of the rights to which they are entitled. In essence, the argument of consent grants a legitimacy that does not depend on content but merely on procedure (a kind of offer and acceptance). But offer and acceptance are not the proper procedure… There is a basis for making the *prima facie* consent in the basic contract subordinate to norms of public policy, including the protection of human rights and democratic norms' (Mundlak, *supra*, at pages 430, 432, 480).

Although we have spoken above of 'market value,' we should always remember that this is a starting point, but not the end of the matter, and to this important element we ought to add other factors that are also capable of protecting workers — whether foreign or local — when their market value is limited.

13. The position adopted by my colleague also does not sufficiently take into account factors that are inherent to migrant workers. The first and foremost of these is the question of motivation. The foreign worker is almost always looking for employment opportunities outside his country of origin because of a desire to improve his economic condition. Sometimes poverty, which is clearly recognizable to western eyes, and a difficulty to support his family are what compel him to look for work abroad. The same economic

distress is also what leads temporary workers to return time after time to countries in which they were exploited in the past, in the hope — usually a false one — that this time they will receive better treatment. Indeed —

> 'Propelled by desperate economic circumstances in their home countries, and perhaps misplaced naive optimism, they return a second or third time with hopes of better conditions, only to experience salary reductions again' (Human Rights Watch, *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia* (2004), ch. 2).

In other cases, and it is possible that this is also the case before us, the background from which the migrant worker comes is better. But we should not treat lightly the economic constraints which the migrant worker faced and which led him to seek an alternative source of livelihood. Not infrequently the opportunity of employment in the host country is the alternative to a high level of unemployment in the country of origin, which reduces a person's chances of finding work in his homeland. The wages paid in the host country, which are often considerably higher than those in the country of origin, are also a major factor in encouraging migration for the sake of work. The economic enticement is great, and its effects are considerable. It is not difficult to imagine what motivates a person who earns a relatively low wage in his country of origin, sometimes merely a few dollars a day, to uproot himself from his home and his family and look abroad to the promise of wages that are hundreds of times higher. This promise, whether it is realized or not, is very powerful and has great effect. Frequently, it overrides concerns of difficulties, and even specific knowledge concerning the danger of exploitation and the loss of rights. This too was considered by the American report, which asked:

> 'This raises the question: Why do workers choose to come to the United States under these terms? The simple fact is that workers from Mexico, Guatemala and many other countries often have very few economic opportunities… Where jobs exist [in those countries], the pay is extremely low; unskilled laborers can earn 10 times as much, or more, in the United States as they can at home. So even though they risk being cheated, many workers are willing to take that chance. Most perceive the guestworker program as their best chance to provide a better life for their families. These desperate workers are easily deceived' (Southern Poverty Law Center report, *supra*, at p. 12).

14. Turkey is a developed country in comparison with many of the countries from which workers come to find employment in Israel. The Turkish economy has undergone considerable changes in recent years, and the economy of that country is experiencing growth and making efforts to increase employment opportunities. Notwithstanding, the report of the World Bank, which was written in 2006, indicates that the increase in jobs available there still lags considerably behind the natural growth of the population. Whereas the number of residents of working age has increased considerably — between 1980 and 2004 approximately 23 million potential employees entered the market — only six million additional jobs have been created (World Bank, *Turkey Labour Market Study*, report no. 33254-TR 12 (April 2006)). For this reason, the World Bank states that the employment rate in Turkey is *one of the lowest in the world* (*ibid.*). The report goes on to reveal that as a result of economic crises that Turkey underwent in 1994 and 2001, there was a significant reduction in the amount of the average wage paid in Turkey, and only recently has there been some degree of improvement in this index (*ibid*., at p. 21). To illustrate this, in 2004 — the year in which the arrangement that is the subject of the petition before us began to be implemented — the average monthly salary of a worker in Turkey was the equivalent of approximately 3,600 NIS. In Israel the amount of the average wage at that time was *double* — approximately 7,000 sheqels.(http://www.databasece.com/international.htm)

Moreover, precisely because of extensive protective legislation that is included in the Turkish code of laws and that makes the dismissal of a worker there very expensive for his employer, not only is the incentive for Turkish employers to take upon themselves the risk of creating new jobs small, but there is a flourishing market of informal workers who do not benefit at all from the protection of the labour laws (World Bank report, *supra*, at pp. iii, 21). The vast majority of formal workers do not benefit from proper protection because they are not parties to collective arrangements that are the result of collective bargaining (*ibid.*, at p. 26). Turkey has, of course, a long tradition as an 'exporter' of migrants to foreign countries, and the migration consciousness in Turkey, including for the purposes of work, is well developed. According to official figures of the Turkish Ministry of Labour, in June 2005 more than three and a half million persons with Turkish nationality lived in countries around the world (approximately five per cent of the country's population at that time), and of these almost a million and a half persons worked in the foreign workers market.

15. From reading all this it becomes very clear what motivates the persons who are employed as workers by Yilmazlar to look for a livelihood outside their country of origin, notwithstanding the difficulties that may accompany their work in Israel, including the absence of any possibility of choosing their employer here. Even more important is the understanding that it is not their informed choice — their preferred choice between several good options — that is the basis for their agreeing to the restrictive aspect of the agreement. Difficulty and distress are the essence of the matter. Their fear of a harsh economic fate, their natural desire to improve the living conditions of their families, their ambition to take advantage of an opportunity that the global village of the beginning of the twenty-first century has opened up to them — these are the motives of these workers to agree to a well-institutionalized denial of their rights. Can anyone fault them for this?

The argument concerning enforcement

16. It may be argued, and this reasoning is also used by my colleague the Vice-President in his opinion, that the concern with regard to the evil consequences of restricting the workers is allayed by the protection given to them in labour law, and especially the declared policy of the Israeli and Turkish governments that the employment of the workers shall be subject to 'institutional supervision and strict review,' in the words of my colleague. First I will say that I question how strict the supervision measures adopted can really be, and of this I will say more below. But before this I will emphasize that experience in most countries around the world, as well as in Israel, proves that in the main the enforcement authorities cannot provide a solution to the concern that we have described.

Not infrequently there is an inherent conflict of interests, even if it is an unspoken one, between the system of laws that is the basis for the policy whose main purpose is to provide a cheap and effective work force for various industries in the economy and the part of the legal system that concerns workers' rights.

> 'If supplying this labor force is a primary goal of immigration policy, then legal protections for guest workers cannot be guaranteed, since they contradict its essential purpose' (David Bacon, *Be Our Guests*, The Nation (September 27th, 2004)).

Second, the protection of the rights of foreigners, who are found on the margin of society, is usually a low-level priority for governments, and only limited resources are devoted to it. As a direct result, in many countries that host foreign workers the enforcement system has difficulty in preventing a

violation of their rights. It should be emphasized that I am not referring to rights of a vague or external nature that rely on the overburdened foundations of universal morality or general principles, which may well not be given any expression in the law of the host country. Even those principles that are expressly enshrined in the laws of the state and whose solid foundations are unchallenged, both in their application to local employees and also to temporary guests in the work force, are not sufficiently enforced. Often, even if on paper these rules are quite well-developed, when put to the test they are an empty shell and have no real effect (Sitbon, *supra*, at page 278). This is the case throughout the world, including in the United States (Southern Poverty Law Center report, *supra*, at pages 1, 7), in East Asia (Rosewarne, *supra*, at page 22), in Africa (Nasseem Ackbarally, *Foreign workers in Mauritius face torrid time*, Mail & Guardian Online (28 November 2006)), and in the countries of the United Arab Emirates (Human Rights Watch report regarding UAE, *supra*, at pages 9, 13, 48).

Even the countries of origin of migrant workers do not always have the same interests as their citizens abroad. Even if in some cases an effort is made to further the rights of the workers, usually in agreements with host countries, this effort is often confronted by, and sometime in direct conflict with, the interest of the country of origin to develop its economy by means of income from a foreign source and the import of knowledge and work methods. When this interest prevails, the first to be harmed are the workers (S. Rosewarne, *Globalisation and the Valorisation of Migrant Labour: Recasting the Migration-Development Nexus* (Paper presented to the Regional Conference on Institutions, Globalisation and their Impacts on Labour Markets in Pacific Island Countries, October, 2006), at page 4).

17. The case of the Yilmazlar workers, which according to the state's argument before us — an argument that my colleague the Vice-President sees fit to accept — also benefits from the protection of representatives of the Turkish authorities, is very similar to the case of temporary workers in Canada, who are employed in the agricultural industries and are bound to a single employer during all the months when they are in that country (Sharma (2001), *supra*, at page 423). The unique aspect of work migration to Canada is that almost all of it is based on bilateral agreements, in which the federal government is one party and the authorities of the country of origin the other. These agreements contain mechanisms that allow the two countries to supervise the enforcement of proper conditions of employment. If a foreign worker has any complaint with regard to any aspect of his work, he may bring it before the representatives of his country, and they, in turn, are supposed to

raise the matter with the Canadian authorities. In practice, those representatives of the countries of origin are faced with a conflict: on the one hand, they owe a duty of faith to the worker, but on the other hand, they have a similar duty to the interests of their country, including to its good diplomatic relations with Canada. It is not surprising to discover that in this competition of interests, the workers find themselves at a disadvantage. They are employed in very harsh conditions and with small salaries, and there is no real address for their complaints. Because they fear being deported, they are compelled to suffer conditions that would be unacceptable to local workers (Nandita Sharma, *Mexican Standoff – Canadian 'Guest Workers,'* The Globe and Mail (March 29th, 2006)). The Supreme Court of Canada discussed this in a judgment in 2001, in which it set aside a provision of legislation that forbade foreign workers to form unions (*Dunmore v. Ontario (Attorney General)* [19], at paragraphs 41, 102). This harmful reality is also described in an article that was published last year and reviewed the Canadian experience, which is so bad that some have called it 'Canada's shameful little secret.' The article states:

> '…the consular liaison officers [of the sending nation] appointed to look out for the workers suffer from a conflict of interest: maintaining good relations with Canada and the smooth operation of the scheme versus taking up the fight on behalf of individual workers.
>
> As one former contract worker from Mexico puts it, a complaint to a consular official "enters in one ear and goes out the other." It is simpler for consular officials to replace workers who raise concerns in the workplace than to address the root cause of their complaints' (Peter Mares, *Workers for all seasons*, The Diplomat (July-August, 2006). See also World Bank, *Pacific Islands At Home & Away — Expanding Job Opportunities for Pacific Islanders Through Labor Mobility*, Report No. 37715-EAP 117 (September, 2006)).

Moreover, contacting the enforcement authorities, which is often the most effective way in which workers who have been harmed can bring their case to the attention of the authorities, is not practicable in view of the concern, which is a common occurrence in the experience of migrant workers, that it will lead to the loss of their livelihood. Another report of *Human Rights Watch*, which deals with the American labour market, found that migrant workers in that country are generally reluctant to sue for legal remedies to which they are

entitled under the law, in case it leads to their being blacklisted for work. In the words of the report:

> '… found widespread fear and evidence of blacklisting against workers who speak up about conditions, who seek assistance from Legal Services attorneys, or who become active in [labor organizations]' (Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (2002), at pages 42, 202, 206).

18. To all of this we should add the recognition that despite the well-developed labour law in the country of origin of Yilmazlar's workers, the legal protection actually afforded to workers in Turkey leaves much to be desired. This was discovered by the World Bank, which said: 'Compliance with labor law is weak in Turkey. Many workers are not receiving the protection that is the intent of the laws' (World Bank report, *supra*, at page xi). In view of the aforesaid, one can only look sceptically upon the promise that the authorities will carry out enforcement measures, both in Israel and in Turkey. In the absence of any real course of action in the legal sphere, there is additional support for the conclusion that a worker who refuses to acquiesce in his being bound to one employer faces a real difficulty in protecting his rights.

To complete the picture I will add that this difficulty is aggravated by an additional element that is integral to work migration, and this is the limited ability of foreign workers to form unions and to achieve collective protection. In many places the local workers' organizations are not prepared to admit foreigners into their ranks, and there are places where the law prevents this and even forbids the creation of alternative frameworks. It is also natural that temporary workers, who come from different countries, speak different languages and sometimes have conflicting interests (for example, because of the competition over a limited number of positions or a desire to improve their work conditions at the expense of other workers), have difficulty in forming unions. To all of this we should add the well-known difficulty, which is inherent in work migration, of being removed from a familiar environment, the normative system to which the workers are accustomed and the family unit, which is capable of weakening them and preventing them from becoming organized in an effective manner.

Theoretical harm and actual harm

19. What is the concrete expression of all this in the case of the Yilmazlar workers? The parties disagree on this question. On the one hand, workers of

the company have testified, in affidavits that were attached to the petition before us, with regard to difficult conditions in which they were employed, harsh treatment that they received, being required to sign contracts whose content — which is sometime draconic — was unclear to them, prolonged delays in receiving wages, the confiscation of passports, the payment of wages that are lower than the minimum wage in force in Israel, non-compliance with the provisions of the Hours of Work and Rest Law, 5711-1951, and an absolute dependence on their employer, which prevents any possibility of improving the situation. On the other hand, Yilmazlar remains insistent that everything stated in those affidavits is false and unfounded. As proof, the company presented affidavits from other workers, in far greater numbers, that testify to fair employment conditions and the payment of wages on time. Unfortunately, these affidavits are all drafted in identical language, as if they were all dictated word for word. All that I can hope is that it is merely a false concern that someone wished to have workers sign a declaration that does not reflect their true position. In any case, these affidavits do *not* address at all the amount of the wages paid to the workers, the content of the work contract, the claim that workers were compelled to sign blank promissory notes, the question of the workers' dependence on the company including the claim that passports were confiscated, the proper housing conditions that are provided and the question of vacations and rest days.

In practice, checks that were conducted by the Ministry of Employment on the work sites where Yilmazlar operates, on 8 November 2005 and 23 November 2005, found nothing detrimental to the company. This was also the case when a visit was made by representatives of the Undersecretariat for Defence Industries (SSM) at the Turkish Ministry of Defence. On the other hand, in a legal proceeding that took place not long ago against Yilmazlar in the Ramla Magistrates Court, a case was considered in which dozens of its workers were housed with considerable overcrowding in a residential house in a village in the centre of the country. At the request of the village, the Magistrates Court ordered the company to remedy the matter immediately (CC 2992/05 (Ram) *Yagel v. Nomdar* [18]). In its decision to deny an application for leave to appeal filed by Yilmazlar, the Tel-Aviv District Court (the honourable Judge S. Dotan) held that: 'If we are dealing with the rights of the workers, there is no greater violation of their rights than housing them with inhuman overcrowding as described above' (LCA (TA) 2782/05 *Yilmazlar International v. Yagel* [17]). The same conclusion was reached by this Court, which approved the decision and added (*per* the honourable Justice E. Arbel): 'I agree with the remarks of the District Court with regard to the serious

conditions in which the workers were placed — a hundred people in one overcrowded house' (LCA 267/06 *Yilmazlar International v. Yagel* [9]).

20. Even though the facts are not entirely clear, it is sufficient that there is a real concern, which arises in this case, that the rights of the Yilmazlar workers are likely to be violated in various respects. In any case, this Court is not the appropriate framework for clarifying questions of fact (HCJ 4999/03 *Movement for Quality Government in Israel v. Prime Minister* [10], in the second paragraph of the opinion of President A. Barak). The focus of the matter, therefore, is upon the *normative* situation created by the Government Decision. This has created an opportunity, which is very considerable, for the abuse of Yilmazlar's workers, as well as other foreign workers in the future. Experience teaches us that where there is an opportunity, there will always be someone who tries to avail himself of it. I cannot acquiesce in this.

The argument concerning the imminent expiry of the arrangement

21. I should further emphasize that the respondents should not rely on the assumption that in any case the entire arrangement is soon to expire, at the end of 2007. First, I should say that I would not be surprised if someone decides to extend it. Second, even though the decision of the Ministerial Committee for Foreign Workers no. FW/3 of 7 June 2005 states that 'only the government has the power to approve, in very exceptional cases, an additional arrangement for the bringing or the employment of foreign workers as a part of reciprocal purchase transactions,' I think that I will not be mistaken in my assessment that giving legal sanction to the Government Decision in this case will result in similar decisions in the future. Indeed, the normative impropriety of the decision is the heart of the matter, and this should not be countenanced, no matter how long it is valid.

22. My colleague the Vice-President bases his position mainly on the fact that the case of the Yilmazlar workers does not involve debt bondage. This is almost the entire basis for the distinction that he wishes to make between the case before us and the ruling made in the aforementioned *Kav LaOved Worker's Hotline v. Government of Israel* [1].

Indeed, the question of debt bondage is of critical importance in the context of migrant workers, and a major factor in the cruel fate — no less — that ensnares them in host countries. In brief, the meaning of this concept is that a worker who wishes to obtain a visa to work in a foreign country is often required to pay huge sums to various agencies and middlemen, who are responsible for obtaining it. To illustrate the point, the average agency fee that a foreign worker is required to pay, when he earns in Israel an average wage of

500-1,000 US dollars a month, is 10,000 dollars and even more (*Binding Migrant Workers to Corporations*, *supra*, at page 23; *Freedom Inc. — Binding Migrant Workers to Manpower Corporations in Israel*, *supra*, at pages 12, 26). Most of the workers borrow money for this purpose in their countries of origin, and they thereby become debtors who pay high rates of interest. Often they are given a promise that they can work in Israel for several years, even though their residency permit in Israel is valid only for one year and there is no certainty that it will be renewed. Even a very small delay in receiving the wages — for example because of not turning up to work because of illness or another reason, may result in a situation in which this debt increases significantly to a point where it can no longer be repaid. This harsh reality, which threatens to bring serious economic disaster upon them, is the lot of foreign workers throughout the world. It is possible that it is the main problem in work migration in modern times. There are three petitions addressing this issue that are pending in this Court (HCJ 2405/06, HCJ 1193/07, HCJ 2768/07).

It also cannot be denied that when the two evils — debt bondage and being restricted to one employer — befall a worker simultaneously, the extent of the harm to him is greatly increased. In the absence of any bargaining power, not only does the worker have difficulty in earning the true value of his work (which is usually greater than what he is paid) and repaying his debt, but he will think twice before he dares to complain about his conditions of employment, because of the fear that he will be dismissed, which means — in the absence of an alternative possibility of employment — that he will be unable to repay the debt. Indeed, a worker who is not burdened with a debt, but is bound to one employer, is in a better position that his fellow worker who both has a debt and is also bound to one employer.

23. But all of this is not capable of combining the two — the debt and the restrictive arrangement — into one entity that cannot be separated. It should be emphasized that we are dealing here with two different factors that are independent of one another, even though each one of them may be affected by the other in its deleterious effects. *A restrictive arrangement without a debt is still a restrictive arrangement*, and the harm that it causes, as I have described above, is great.

It is therefore clear that there is no basis to the state's claim that the special position of the Yilmazlar workers, who do not leave behind them any debt to be repaid when they come to Israel, lies in the fact that the restrictive arrangement does not cause them any real harm. This harm, the essence of

which is the worker's loss of his bargaining power, does not depend — it should be emphasized once again — on the existence of a debt and does not derive from it. It is independent. Can it seriously be argued that the removal of the element of debt is sufficient to make employers willing to pay their workers wages that will reflect the true value of their work, adhere strictly to the hours of employment, stop taking passports or provide fitting housing conditions? Is the absence of a debt capable of repairing the moral flaw inherent in the restrictive arrangement mechanism? I think that the answer to these questions is self-evident.

24. Another aspect of the argument, if I have understood it fully, is that in the absence of a debt there is nothing to prevent an employee, who is not satisfied with the conditions offered to him, from leaving Israel. Once again the same error has arisen, since, as I clarified above, often the option of leaving Israel and giving up the job is a bad one, both because of the alternative in the country of origin and because of the reliance that has already taken place. If there are workers — and there are very many of these — who are prepared to work under a regime of both a debt and a restrictive arrangement, with its double evils, then *a fortiori* there will certainly be those who will be prepared to work subject to the restrictive arrangement only, while suffering the harm that it causes them. I have already discussed the weakness of the argument of consent, and I need not elaborate further.

My colleague, the Vice-President, bases his position on remarks that were written in *Kav LaOved Worker's Hotline v. Government of Israel* [1]. In this matter too I think I should make matters clear. Debt bondage was mentioned there as *one* of the factors that made the restrictive arrangement so evil, but it is not the only one, and not necessarily the dominant one. The violation of 'the foreign worker's autonomy of will' — in the words of my colleague in paragraph 10 of his opinion above — does not arise solely from the debt bondage. The following is what I wrote in *Kav LaOved Worker's Hotline v. Government of Israel* [1]:

> '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' (paragraph 29 of my opinion).

These violations, regrettably, are unaffected by the absence of debt bondage.

All of the above shows that the special characteristics of the Turkish transaction cannot undermine the basis of the claim that the restrictive arrangement seriously violates the rights of the workers. I shall now consider how this violation is consistent with the public interest.

The public interest and the purpose of the administrative act

25. The contract with the Turkish Ministry of Defence is important to the respondents. It is important to the State of Israel. Their counsel emphasized the interests that it serves, in both the economic and the political spheres. First and foremost it would appear, and I am prepared to accept this as a fact, that without the offset component, the agreement would not have been made. The Israeli economy, and especially the fifth respondent, Israel Military Industries Ltd, would then have lost substantial income in foreign currency. IMI's ability to enter into future transactions with the Turkish authorities would have been impaired. It would have to suffer the consequences of a breach of contract. The effects on workers in the security industries would have been considerable, and possibly employment in the economy as a whole would have been affected. It is possible that in the long term this would have even harmed the security of Israel. Moreover, it cannot be denied that the agreement plays a part in Israel's relationship with Turkey, a main ally without any doubt, and it is difficult to exaggerate the importance of maintaining good relations with it. In so far as the agreement, with its various elements, can benefit the interests of that country, this too is indirectly desirable for Israel, its ally. Indeed, 'the phenomenon of work migration is an inseparable part of international relations' and of 'the mutual interest of governments in developing relations' (Kemp and Reichman, *supra*, at page 10).

The realization of this interest by means of implementing the Turkish transaction imposes a duty on Israel, which is not at all a light one. It is obliged to carry out its share in the offset mechanism, and for this purpose it was required to take upon itself an undertaking with a significant financial value. A particularly creative mind gave rise to the idea that it would be possible to make use of *human beings* in order to cover a part of this liability. As the state explained in its response to the petition (in paragraph 9 of the preliminary response), of the two hundred million dollars that Israel is required to 'return' to Turkey, approximately 28 million dollars are supposed

to be derived from the employment of the Turkish workers (which is only approximately fourteen per cent of the total amount). The restriction of the workers to their employer makes it much easier to reach this target. It ensures that the majority of the wages will be transferred in an orderly manner to Turkey. It is particularly important in view of the fact that the Turkish Ministry of Defence has taken upon itself the task of supervising the implementation of the agreement and it refuses to hold discussions with several different employers but is prepared, and it has its reasons, to work only with Yilmazlar.

26. When enquiring into the dominant purpose of an administrative act such as the one undertaken by the government of Israel in the case of the Yilmazlar workers, we should of course consider those aspects that indicate, in so far as possible, the essence of the act and properly reflect the reality and the context in which it arose (see and cf. HCJ 1030/99 *MK Oron v. Knesset Speaker* [11], at page 665; CA 10078/03 *Shatil v. State of Israel* [12], at paragraph 26 of my opinion)). In view of the aforesaid, it is possible to determine without any difficulty that a main purpose of the Government Decision is to create an effective mechanism of discharging a part of the offset debt, by means of ensuring that Yilmazlar has foreign manpower available at all times.

But this is not the only purpose of the restrictive arrangement mechanism. It serves another purpose. The concern of the authorities that the floodgates will be opened, after they have been erected with considerable effort in recent years and prevented Israel from being inundated by legal and illegal migrant workers, is what led them to act so that the number of Yilmazlar's workers would be limited and watched carefully at all times, and that no use would be made of the narrow route that was provided for individual cases in order to bring hundreds and thousands of others into the Israeli economy.

These, then, are the two dominant purposes of the decision that is the subject of this petition. They seek to realize important interests, and to this end the government of Israel took the liberty of restricting the rights of the Yilmazlar company's workers. In order to determine whether the government did this lawfully, we are required to consider the matter — just as we did in *Kav LaOved Worker's Hotline v. Government of Israel* [1] — from the perspective of the formulae that we have borrowed from the limitations clauses in the Basic Laws.

Judicial scrutiny

27. The first stage in the process of scrutiny seeks to ascertain whether the purposes are proper ones. With regard to the first purpose of which I spoke

above, I think that it can be determined with the utmost clarity that it is *not a proper purpose*. Whoever looks at the facts of the case before us cannot, in my opinion, fail to be outraged at the use that has been made of these workers as an instrument and a means of furthering the interests of the Israeli government and commercial companies. After all, of what concern to the Turkish worker are international relations? What does he care for the success of the security industries in Israel? Of what interest is it to him that tanks are improved for his country's army? What is the source of the obligation, for which that worker is required to pay with his liberty, his dignity, his ability to earn a livelihood and his hopes for a better future for his family, in order to further these interests? What justification is there that he should be subjected to the binding force of the restrictive arrangement? (cf. HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [13], at para. 6 of my opinion). What justification is there that in addition to the consideration that he is required, in the usual manner, to provide within the framework of a free and fair contract with an employer, he should be required to pay an additional price, from which he does not benefit and with regard to whose nature and character he was never consulted?

28. This purpose is inherently inconsistent with the ethical foundations on which the State of Israel was established. The basic principles of liberal morality have taught us that a human being is always an end and not merely a means to an end. Kant wrote:

> '… der Mensch und überhaupt jedes vernünftige Wesen existiert als Zweck an sich selbst, nicht bloß als Mittel zum beliebigen Gebrauche für diesen oder jenen Willen… dagegen vernünftige Wesen... das nicht bloß als Mittel gebraucht werden darf... mithin sofern alle Willkür einschränkt (und ein Gegenstand der Achtung ist).'
>
> '… man and generally any rational being exists as an end in himself, not merely as a means to be used arbitrarily by this or that will…; but rational beings… are… something that should not be used merely as a means, and consequently all arbitrariness is thereby eliminated (and he is an object of respect)' (Immanuel Kant, *Groundwork of the Metaphysic of Morals*).

To this I would add that, *prima facie*, even if a person is required to take part in achieving any purpose, it should be one in which he is directly the goal of that purpose. Any other approach is tantamount to treating a human being as an object, and in our case, as the property of the employer. Justice M. Cheshin

said: 'An inanimate object and likewise an animal may be taken by its owner from place to place, transferred from one person to another, and no one will object. But man is different; nothing should be done to him against his will' (HCJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* [14], at p. 575). And Justice D. Beinisch emphasized: 'The dark ages in which a person could be regarded as the property of another person have passed' (CrimA 11196/02 *Frudenthal v. State of Israel* [7], at p. 47). Particularly appropriate here are remarks written by my colleague Vice-President Rivlin himself in *New Federation of Workers v. Israel Aerospace Industries Ltd*:

> '… We should not also include within the scope [of the employer's property rights] the power to hold onto the worker, even if 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… 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' (*ibid*., at page 595).

These remarks were admittedly written with regard to Israeli workers, but I do not know what moral basis there is for distinguishing between them and their foreign counterparts. The principle is simply that the idea that Yilmazlar's workers can be used as a tool for performing the obligation in a commercial transaction between third parties is immoral and cannot stand. The restrictive arrangement mechanism, which turns the migrant worker into an object, cannot be accepted in a normative environment that seeks to emphasize — in the course of implementing the processes of globalization and openness — the value of the human being, every human being, as a subject rather than an object (Stuart Rosewarne, 'Globalization and the Recovery of the Migrant as Subject: "Transnationalism from Below",' 15(3) *Capitalism, Nature, Socialism* 37 (2004); Ivan G. Alvarado & Hilda Sánchez, 'Migration in Latin America and the Caribbean: A view from the ICFTU/ORIT,' 129 *Labour*

Education 101 (2002), at page 104). Such an environment, which raises the banner of the autonomy of the human will and the dignity of the human being, cannot stand idly by when it sees, in the words of the poet Yehuda Amihai: 'How people who went out whole are returned in the evening to their homes like pocket change' (Yehuda Amihai, 'Out of three or four in a room,' *Poems 1948-1962* (2002), at page 97).

29. I might have ended here, since the impropriety of the dominant purpose of an administrative act is sufficient in order to annul the act itself . But since a similar conclusion — that the act should be set aside — also arises from a consideration of the *second purpose* of which I spoke, I should also add the following: admittedly, preventing a possibility that the employment market in Israel will be flooded with migrnat workers is likely, as a rule, to be regarded as a proper purpose, and therefore it will pass the first part of the test of judicial scrutiny. But my opinion is that the measures that were adopted to realize this purpose do not satisfy the second part of the test of judicial scrutiny, by which I mean the principle of proportionality.

30. I have difficulty in imagining what motive may induce a migrant worker who enjoys fair conditions of employment that are compatible with his market value to stop working for his employer. If the picture is so rosy, and reflects — in the words of counsel for Yilmazlar — the 'huge advantage given to the Turkish workers in the offset agreement' without which 'they would not be able to come and work in Israel at all' (pages 708 of the statement of reply), why is there any need for a restrictive arrangement? One is compelled to wonder why this 'huge advantage' is not capable of ensuring loyalty to the employer. Is it perhaps because the main advantage is actually enjoyed by the Yilmazlar company, which, because of the power of control given to it by the restrictive arrangement mechanism, must be an object of envy to other employers?

It is precisely the restrictive arrangement that threatens to deprive the worker of fair conditions that is likely — and this is the heart of this case — to provide an incentive for workers to leave their employers, and to result in an increase in the market of unlicensed workers and the breakdown of control over what happens in this sphere. As I said in *Kav LaOved Worker's Hotline v. Government of Israel* [1], figures that were compiled by the Ministry of Industry, Trade and Employment indicate that there is such a connection between a restrictive arrangement and illegal work, since the latter is 'a rational act necessitated by reality' in the efforts of the migrant worker to improve his conditions (Yoram Ida, *Factors Influencing Foreign Workers to*

Revert to Illegal Employment (Research Department of the Ministry of Industry, Trade and Employment, 2004), at page 57). That research found that the phenomenon of foreign workers in Israel resorting to illegal employment was not usually the result of a worker receiving a better financial offer, nor of the expiry of his residency permit. It was mainly the result of the worker's desire to extricate himself from the difficulties that he experienced in consequence of unfair employment conditions enforced by the employer (*ibid*., at pages 64, 74; see also Malsiri Dias & Ramani Jayasundere, 'Sri Lanka: Good Practices to Prevent Women Migrant Workers From Going Into Exploitative Forms of Labour,' 9 *GENPROM Working Paper* 26 (ILO, Geneva, 2000)). From this we can see the lack of a rational connection between the purpose and the means adopted to achieve it, since the restrictive arrangement not only does not reduce the illegal employment market *but it is one of the factors creating it*. An additional conclusion is that the restrictive arrangement is a more harmful measure than other measures that could be adopted in order to realize the purpose under discussion, especially the measure of ensuring that workers are given their rights.

31. The proportionality test in the 'narrow' sense is also not satisfied, since in my opinion, as I explained above, the impropriety in the restrictive arrangement is greater than the benefit that it provides. In this respect I should add the following: it is hard to dispute the contribution of work migration to economic success in the host country and to ensuring the existence of industries in which it would otherwise be difficult to recruit workers, by which I am referring especially to the construction and agriculture industries. This can be shown clearly by Germany after World War II, the markets of the United States and Canada today and what is happening in additional countries (see, for example, Michael J. Piore, 'Illegal Immigration to the U.S.: Some Observations and Policy Suggestions', in *Illegal Aliens: An Assessment of the Issues* 26 (1976). But the foreign work market does not only make a positive contribution. The public interest is not monolithic, and some aspects of it may be harmed — even from a narrow economic viewpoint of the interests of the economy — as a result of acquiescing in a reality where migrant workers are deprived of their rights. Thus, *inter alia*, there is a concern that unemployment may be increased among local workers and the level of their salaries may be adversely affected by being 'dragged' down by a whole sector of migrant workers whose salary is inconsistent with what is required by law. The willingness to ignore the value of having fair employment relations in the economy is a two-edged sword, which will ultimately harm local workers. Cheap labour also removes the incentive to develop new technologies and hi-

tech industries, and it leads instead to an excessive focus on manual labour industries that impede the development of the economy. There are other negative aspects as well (see and cf. O. Yadlin, 'Foreign Work in Israel,' *Menachem Goldberg Book* 337 (2001), at page 342). All of these, which are strengthened when the restrictive employment mechanism operates, should not be ignored. We should also consider the possible risk of harm to the international standing of the State of Israel as well as its image in the eyes of the exploited community of workers, who ultimately return to their country of origin and share their impressions with others.

On membership of the community of civilized nations

32. In this last context, I would add another significant aspect that may have remained, unjustifiably, in the background of the discussion of the technical aspects of the restrictive arrangement. I am referring to the responsibility that the State of Israel is obliged to take upon itself as a member of the community of civilized nations and on the basis of its commitment to universal values of justice and morality (CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [15], at p. 206). In my opinion, these do not allow the continued implementation of the restrictive arrangement. Even if the migrant worker does not have an inherent right to work in Israel, the state has a duty not to harm him once he comes within its borders, especially after the state has itself invited him to do so. The spirit of the twenty-first century, a spirit of openness and transnational cooperation, cannot allow this. A strange and questionable combination of globalization on the one hand, and adherence to old laws of serfdom and bondage on the other, is unacceptable. Indeed, in the first part of my remarks I gave many disturbing examples of the harm that restrictive employment arrangements inflict on foreign workers all around the globe, including in progressive and enlightened western democracies. I do not think that the conclusion that follows from this is that we should regard restrictive arrangements as a necessary evil or — worse still — as a desirable and acceptable phenomenon. We can learn from the bad experience of others, and we should not hasten to adopt into our legal system anything other than what should be adopted. In the words of Justice A. Witkon: 'It is possible that in one question or another the [Israeli] public will have an outlook of its own that is different from the outlook of other peoples, and it need not be said that in such a case we will be guided solely by the outlook of our public' (CA 337/62 *Riezenfeld v. Jacobson* [16], at page 1026 {113}). The rights of the weak are naturally not the subject of great popularity and enthusiasm, but they are rooted in a solid and well-founded ethical

outlook. This is the direction in which our social conscience leads us, and we can only hope that its light will also shine on others.

With regard to work migration in Europe in the 1970s, the Swiss novelist and playwright coined a phrase that many quote. 'Wir riefen Arbeitskräfte, und es kamen Menschen' ('We called for workers, and human beings came'). Indeed, the Yilmazlar workers, before they are workers, are human beings. We should recognize this. This should be reflected in our legal arrangements. This is how we should treat the migrant worker who enters into our gates.

Justice E. Hayut

My colleague Justice E. Levy has once again set out in his comprehensive opinion the basic principles that this Court addressed not long ago in HCJ 4542/02 *Kav LaOved Worker's Hotline v. Government of Israel* [1]. By virtue of these principles, the decision in *Kav LaOved Worker's Hotline v. Government of Israel* [1] set aside a procedure that was practised in the agriculture, nursing and manufacturing industries, according to which the residency and work licence of foreign workers was conditional upon being bound to a specific employer. With regard to this procedure, my colleague Justice E. Levy said in that case (in para. 29 of his opinion):

> '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 the individual's human dignity and liberty in the most basic sense.'

These pertinent remarks were adopted by President A. Barak and by Vice-President Emeritus M. Cheshin who added some remarks of his own in that case, and as a result the arrangements that bound foreign workers to their employers were set aside. It seems that there is not, nor can there be any dispute between my colleagues with regard to the basic principles underlying the ruling made in Kav LaOved Worker's Hotline v. Government of Israel [1], but my colleagues are in disagreement with regard to the implementation of this ruling in the special circumstances of the case before us. In this dispute, I agree with the opinion of my colleague Vice-President E. Rivlin, and like him I too am of the opinion that the offset arrangement is an exceptional arrangement with special characteristics that justifies the exclusion of the Government Decision under consideration in this petition from the rule that invalidates restrictive arrangements. Notwithstanding, I would like to emphasize that in my opinion it is possible to allow this arrangement as an exception inter alia because it is limited in time. But if the concern that my colleague Justice E. Levy raises is realized, and the denial of the current petition 'will result in similar decisions in the future,' then it will be necessary to re-examine the legality of those decisions and it is not improbable that a different conclusion will be required in those cases. I would also like to emphasize that in view of the restriction imposed on the Yilmazlar workers when they are in Israel that prevents them from changing over to another employer, there is in my opinion an extra and special duty to protect the rights of these workers, and it is to be expected that the respondents will take care to do this and will continue to carry out regular and strict supervision of their conditions of employment.

Petition denied, by majority opinion (Vice-President Rivlin and Justice Hayut), Justice Levy dissenting.

7 Tishrei 5768.

19 September 2007.