HCJ 232/16

Petitioner: Movement for Quality Government in Israel

v.

Respondents:
1. Prime Minister of Israel
2. Government of Israel
3. Attorney General
4. Aryeh Machlouf Deri, Minister for the Development of the Periphery, the Negev and the Galilee
5. Knesset

Attorneys for the Petitioners: Eliad Shraga, Adv; Daniel Duschnitzky, Adv; Tomer Naor, Adv; Tzruya Medad Luzon, Adv.

Attorney for Respondents 1-3: Dana Briskman, Adv.

Attorney for Respondent 4: Navot Tel Zur, Adv; Elinor Alex, Adv.

Attorney for Respondent 5: Dr. Gur Bligh, Adv.

The Supreme Court sitting as High Court of Justice

Before: Justice S. Joubran, Justice Y. Danziger, Justice N. Hendel

Petition for orders nisi and interlocutory orders

Abstract

This was a petition challenging the decision to appoint Knesset Member Rabbi Aryeh Machlouf Deri (hereinafter: Deri) to the office of Minister of the Interior in the Israeli Government. The petition was submitted against the background of Deri's conviction of corruption offences, among them offenses of bribe taking and breach of trust, committed in the period during which he held several senior positions in the Ministry of the Interior at the end of the 1980s. It should be noted that pursuant to Deri's appointment as Minister of the Economy and Minister for the Development of the Negev and the Galilee, the Petitioner challenged Deri's appointment to any ministerial office in light of his criminal record. That petition was recently denied (HCJ 3095/15 – *HCJ Deri*). The current petition challenges his appointment specifically to the office of Minister of the Interior.

In a majority decision (*per* Justice S. Joubran, Justice Y. Danziger concurring, Justice N. Hendel dissenting), the High Court of Justice denied the petition for the following reasons:

The criminal record of a candidate for public office is undeniably a factor that the appointing authority must take into account among its considerations in deciding upon an appointment. This obligation derives from a public authority's role as the public's trustee. However, the Court has explained on more than one occasion that a candidate's criminal record is only one of the considerations that an appointer must weigh in deciding upon an appointment to a public office. It has been held that in assessing the criminal record, appropriate weight must be assigned to a number of factors that must be balanced: a. the severity of the offenses ascribed to the candidate and their relationship to the office he is intended to fulfill; b. the character of the offenses; c. the duration of the offenses; d. the time that has elapsed since the commission of the offenses, and the public interest in the rehabilitation of criminals; e. the moral turpitude of the offenses; f. the candidates expression of contrition; g. the necessity of the candidate for the position. In balancing these considerations, the Court examines whether the candidate's actions testify to a normative-value flaw in his conduct that would influence his fitness to serve in the intended office, and that would affect public confidence in the civil service. In striking the balance, each consideration must be assigned its appropriate, relative weight in accordance with the circumstances of each individual case. Assigning relative weight must be performed in a material manner, bearing in mind its underlying purpose, which is the examination of the normative fitness of the candidate for the office, and the effect of the appointment on public confidence in the governmental regime.

In *HCJ Deri*, the Court implemented those rules, and in balancing the relevant factors in their entirety – the severity of the Deri's criminal record; the moral turpitude of his acts; his lack of contrition; and the time that had elapsed since the commission of the offenses – found that Deri's appointment to the office of Minister of the Economy did not fall outside the boundaries of the margin of reasonableness. That was the case in view of the character of the appointment – the appointment of a minister in the course of forming a government by the Prime Minister and obtaining the confidence of the Knesset – which broadens the margin of reasonableness granted the Prime Minister.

The judgment in *HCJ Deri*, and the balance struck therein, served as the starting point for the proceedings in the current petition. The question before the Court was, therefore, whether the fact that Deri was now being appointed to the specific office of Minister of the Interior should change the result arrived at in *HCJ Deri*. In the opinion of Justice Joubran, in which Justice Danziger concurred, the answer was in the negative, and the appointment of Deri as Minister of the Interior – despite its inherent problems – did not deviate from the margin of reasonableness.

As had been held in the past, where there is a clear, direct relationship between a person's criminal past and the public office for which he is a candidate, it is possible to conclude that the criminal past entirely disqualifies him from serving in the particular office. In examining whether there is a direct, material relationship, the Court must examine, *inter alia*, whether the public office served as a means for the perpetration of the offense, and whether there is a moral flaw that derives from the relationship between the office and the attributed offense. In the opinion of Justice Joubran, the acts attributed to Deri did not ground a direct, material relationship to the office of Minister of the Interior that would entirely disqualify Deri's fitness to serve in that capacity. In accordance with the approach of Justice Joubran, the offenses of which Deri was convicted were not unique to the position of Minister of the Interior, and they were not committed by means of Deri's authority as Minister of the Interior, or by means of the exploitation of that position in a manner unique to that office that would not be possible in the framework of a senior position in another ministry. The connection between the offenses of which Deri was convicted and the Ministry of the Interior primarily consisted of the fact that Deri served as Minister of the Interior and in other positions in the Ministry of the Interior at the time of the commission of the offenses.

Indeed, Deri's appointment might be viewed by part of the public as the return of an elected official who strayed to the same position in the framework of which he abused his role as a public trustee. The appointment might also be interpreted as the granting of a Government and Knesset seal of approval that there was no flaw in the manner that Deri acted in committing the offenses while serving in senior positions in the Ministry of the Interior. That is a circumstance that must be given appropriate weight in examining Deri's fitness to serve as Minister of the Interior, but it is not sufficient to create a clear, direct relationship between the offenses that he committed – by their character and substance – and the office of Minister of the Interior of a type that would create a moral blemish that time could not mitigate.

The Court rejected the Petitioner's argument that the role of Minister of the Interior requires a special level of ethical conduct that entirely negates the possibility of appointing a person who has been convicted of political corruption. As a rule, in the absence of a clear, direct relationship between the offenses a person committed and the position for which he is a candidate, there are no grounds for establishing special fitness and ethical requirements for different government ministries. Moreover, there is nothing about the specific office of Minister of the Interior that, by its character and nature, would require stricter standards in regard to a candidate's criminal record than those required for appointment to the office of minister in any other ministry.

Although the Court did not find a clear, direct relationship between Deri's criminal past and the office of Minister of the Interior, Justice Joubran was of the opinion that Deri's criminal record

posed two unique problems. One was that the offenses were committed in that ministry, and the appointment of Deri as its head bore symbolic significance that could further harm public confidence in governmental authorities. The second was the fact that the offense of which Deri was convicted in what is referred to as the "Public File" was committed in the course of exercising his authority as Minister of the Interior. However, after examining the balance struck among the various considerations in *HCJ Deri*, it was held that the said problems were insufficient to move Deri's appointment as Minister of the Interior over the boundary of the margin of reasonableness. This conclusion was primarily based upon the fact that countering these additional problems was a mitigating factor in the form of the Knesset's ratification of Deri's specific appointment to the office of Minister of the Interior, following a debate that addressed, *inter alia*, his criminal record, whereas the ratification of Deri's appointment as Minister of the Economy was given in the framework of the Knesset's general vote of confidence in the Government as a whole. In this regard, it was emphasized that ratification by the Knesset in the course of voting confidence in the Government – wherein the appointment of a particular minister is "subsumed" – is not the same as ratifying the specific appointment of a minister following a debate on the various aspects of the matter.

Therefore, in the opinion of Justice Joubran, with Justice Danziger concurring, under the circumstances of the case, and in view of the broad margin of discretion granted to the Prime Minister in regard to decisions related to the appointment of ministers, Deri's appointment as Minister of the Interior remained a "borderline case" that, despite the difficulties that it raises, does not provide legal grounds for intervention. The Court emphasized that in deciding to uphold the appointment, the Court was not granting moral endorsement of the appropriateness of the appointment, or expressing its approval.

In the opinion of Justice Hendel (dissenting), the decision to appoint Deri as Minister of the Interior could not stand, inasmuch as it was unreasonable to a degree that justified the annulment of the appointment. According to the approach of Justice Hendel, there was a clear, direct relationship between the office of Minister of the Interior and the offenses committed by Deri. In addition, the appointment inflicted severe harm, particularly to the overarching values of ethical conduct, good governance, and public confidence. The three pillars of that relationship are: the nature and uniqueness of the office, the character of the offenses, and the concrete circumstances of their commission. Each of those pillars is of significant, independent weight. Each directly affects the relationship among them and reinforces it in such a manner that Deri's appointment as Minister of the Interior could not be permitted to stand.

Judgment

Justice S. Joubran:

1. The petition before the Court challenges the decision to appoint Respondent 4 – Knesset Member Rabbi Aryeh Machlouf Deri (hereinafter: Deri) – to the position of Minister of the

Interior in the Israeli government. The Petitioner argues that the decision to appoint Deri to that position is tainted by extreme unreasonableness in light of his criminal record from the period when he held several senior positions in the Ministry of the Interior at the end of the 1980s. In the Petitioner's opinion, that unreasonableness requires that the Prime Minister exercise his authority to remove Deri from his position.

Relevant Background

2. The factual background of the Petition, insofar as it relates to Deri's criminal record, was detailed at length in paras. 1-8 of the opinion of Justice E. Hayut in HCJ 3095/15 *Movement for Quality Government in Israel v. Prime Minister of Israel* (Aug. 13, 2015) (hereinafter: *HCJ Deri*). In brief, it should be recalled that Deri was criminally convicted in two affairs known as the "Personal File" and the "Public File", which concerned the period between the years 1984 and 1990, during which Deri rose through the ranks of the Ministry of the Interior. He first served as a senior adviser to the Minister of the Interior, was then appointed Director General of the Ministry of the Interior, and was ultimately appointed to the office of Minister of the Interior in the twenty-third Government.

3. In the "Personal File", Deri was accused of receiving money bribes while serving in the aforesaid offices, which comprised payment for foreign travel, help in purchasing apartments from an association named "*Lev-Banim Levanim Shavim*" (hereinafter: the Lev Banim Association) – in which he had previously served as administrative director – and that he exploited his said public positions to advance its interests in a number of affairs. In 1999, the Jerusalem District Court convicted Deri of accepting bribes in a total amount of $155,000, three counts of fraud and breach of trust, and one count of obtaining something by deceit, but acquitted Deri on an additional count of bribe taking and of the offense of making a false entry in documents of a body corporate. Pursuant to his conviction, the District Court sentenced Deri to four years of imprisonment and a fine, and held that the conviction was one of moral turpitude. Deri's appeal of that conviction to this Court was granted in part (CrimA 3575/99 of July 12, 2000 (hereinafter: *CrimA Deri*)). In *CrimA Deri*, the Court held that a causal connection was not proved between the bribes that Deri received and his actions on behalf of the association, and also acquitted Deri of one of the counts of breach of trust. However, the Court stressed the

severity of Deri's offenses, which were committed in the course of his senior public functions, and sentenced him to three years imprisonment. Deri served his sentence, and was released in July 2002, after a reduction of one third of his sentence.

4. In the "Public File", Deri was accused that as Director General of the Ministry of the Interior and as Minister of the Interior, he deviated from the rules of good governance by earmarking budget-balancing grants intended for local authorities for the use of institutions that were connected to him or his political party. Deri was ultimately convicted on one count of breach of trust, for his actions in 1989 while serving as Minister of the Interior, for arranging NIS 400,000 in support for an association run by one of his brothers, and in which his wife's brother-in-law served as treasurer (CrimC (Jerusalem Magistrates Court) 1872/99 *State of Israel v. Deri* (Sept. 24, 2003) (hereinafter: the decision in the Public File)). On Nov. 20, 2003, Deri was sentenced to three months imprisonment and a fine for this conviction. Since that time, Deri has not been convicted of any further criminal offenses.

5. Deri returned to the political arena in the elections for the 19th Knesset, held in 2013, and was elected to the Knesset as a representative of the Worldwide Sephardic Association of Torah Guardians (hereinafter: Shas). In the run up to the elections for the 20th Knesset, held in 2015, Deri was returned to the leadership of Shas, and was again elected to represent the party in the Knesset. In the framework of the coalition agreement between Shas and the Likud party for the formation of the 34th Government, it was agreed that Deri would serve as Minister of the Economy and as Minister for the Development of the Negev and the Galilee in that Government. The Petitioner challenged the reasonableness of that appointment in a petition to this Court in *HCJ Deri*. The petition was denied on Aug. 13, 2015 (Justices E. Hayut, H. Melcer and U. Vogelman). In view of the importance of that decision for the case before us, I will address its main points presently. In the interim, Deri's appointment to the position of Minister of the Economy and Minister for the Development of the Negev and the Galilee was ratified by the Knesset on May 14, 2015, as part of the Knesset's voting confidence in the Government. This was carried out, *inter alia*, on the basis of the legal opinion of Respondent 3 (hereinafter: the Attorney General) of May 11, 2015, which found that Deri's criminal record did not legally preclude his appointment.

6. On Nov. 1, 2015, Deri submitted his resignation from the position of Minister of the Economy, against the background of disagreements between him and Respondent 1 (hereinafter: the Prime Minister) in regard to the Government's decision known as the "Gas Outline".[1] Deri continued to serve only as Minister for the Development of the Negev and the Galilee. After the resignation of the previous Minister of the Interior, Mr. Silvan Shalom, a recommendation for the appointment of Deri as his replacement was presented to the Government on Jan. 7, 2016. The recommendation noted that in the opinion of the Attorney General there was no legal obstacle to Deri's appointment to the position of Minister of the Interior. The Government ratified the appointment of Deri as Minister of the Interior on Jan. 10, 2016, and the petitioner submitted the petition at bar on that day, praying an order to annul the Government's decision to appoint Deri as Minister of the Interior. Along with its petition, the Petitioner also requested an interlocutory order that would prevent presenting Deri's appointment for ratification by Respondent 5 (hereinafter: the Knesset). The request for an interlocutory order was denied by this Court on Jan. 11, 2016 (Justice N. Sohlberg).

That very day, Jan. 11, 2016, the Knesset ratified Deri's appointment to the office of Minister of the Interior by a majority of 54 in favor and 43 opposed. Deri formally took office that same day. Pursuant to that, on Feb. 8, 2016, the Petitioner submitted a request to amend its petition to include a request for an order nisi ordering the Prime Minister to explain why he should not exercise his authority to remove Deri from the office of Minister of the Interior, and for an order nisi against the Attorney General, requesting that he explain why he should not retract his legal opinion according to which there is no legal impediment to the appointment. The request to amend the petition was granted at the consent of the Respondents in the course of the hearing of the petition on Feb. 9, 2016, and the hearing proceeded on the basis of the amended petition.

The Decision in HCJ 3095/15 – HCJ Deri

7. As noted above, in *HCJ Deri*, the Petitioner challenged the very fact of Deri's appointment to a ministerial post in view of his criminal past, and the petition was denied. In its

[1] Translator's note: On the "Gas Outline", see: http://versa.cardozo.yu.edu/opinions/movement-quality-government-v-prime-minister

decision in the *HCJ Deri*, the Court addressed the considerations relevant to the reasonableness of appointing a person with a criminal record to public office, and established the appropriate method for balancing those considerations in the circumstances of the Deri appointment. Inasmuch as both sides refer to and rely upon *HCJ Deri* to some extent, I will first review the main points of that decision before presenting the arguments of the parties in the current petition.

8. In *HCJ Deri*, this Court emphasized that in appointing a person to a public office, it is not sufficient that the candidate meet the formal conditions of competence. It was noted that the person making the appointment must exercise reasonable discretion in examining the propriety of the appointment, and must consider whether the appointment is consistent with the principles of fairness, integrity, and the public's confidence in governmental authorities. The Court explained that when we are concerned with the candidacy for public office of a person who has been convicted of criminal offenses, the severity of that criminal past and the moral blemish attendant to the candidate's commission of those acts must be weighed against considerations that soften the blow of that criminal record – among them the period of time that has elapsed since the commission of the offenses, and the candidate's conduct since his conviction.

9. In evaluating the relevant considerations, the Court noted that the crimes of which Deri was convicted were clear examples of political corruption that impart a severe moral taint to those who commit them. The Court also noted that these were serious crimes that undermine the integrity of government and public confidence therein. On this point, the Court made reference to *CrimA Deri*, which characterized Deri's conviction as a slap in the public's face, which was exposed for the first time to the possibility that the governmental system was being conducted in a subculture of bribe taking. In addition, the Court noted that Deri had not expressed regret for the conduct of which he was convicted. On the other hand, the Court referred to the substantial period of time that had elapsed since the commission of the crimes (between 25 and 30 years), and since Deri had completed serving his sentence (some 13 years), and found that to be a significant consideration in evaluating the reasonableness of the appointment. The Court also found that the fact of the Knesset's ratification of Deri's appointment to the ministerial post constituted a factor that weakened the argument in regard to undermining public confidence in government, in view of the Knesset's status as the body that represents the public will.

10. The Court noted that balancing the above considerations was complex, and that the appointment was not problem free, and even added that one might say that "Deri's appointment to a ministerial post stands at the edge of the margin of reasonableness" (para. 23 of the opinion of Justice E. Hayut). Nevertheless, in view of the broad discretion granted the Prime Minister in constituting the Government, and in view of the rule that the Court will only intervene in that discretion in rare, exceptional circumstances – the Court held that there were no grounds for it to intervene in the appointment of Deri as a minister. Justice Melcer added that in "borderline cases", the Court should respect the margin of discretion granted to the Government, and not intervene in its decisions.

The Main Arguments of the Parties

The Petitioner's Arguments

11. In the opinion of the Petitioner, Deri's appointment to the position of *Minister of the Interior* shifts the equilibrium point established by this Court in *HCJ Deri*, and moves the appointment over the edge of the margin of reasonableness. The Petitioner relies upon the Court's holding that Deri's appointment to a ministerial post was a "borderline case", and in the Petitioner's view, Deri's appointment to the office of Minister of the Interior – the office in which he went astray and perpetrated the crimes – realizes the circumstances that make the appointment manifestly unreasonable. In essence, the Petitioner reiterates the main points of its arguments in *HCJ Deri* in regard to the severity of Deri's conduct, the blemish and turpitude that attached to him in their wake, and his lack of contrition – to which the Petitioner now adds two sets of arguments that, in its opinion, tip the scales against Deri's appointment.

12. *The first set of arguments* concerns the special nature of the Ministry of the Interior and the powers granted to the Minister of the Interior, which according to the Petitioner, require that the Ministry be headed by a person of unblemished character. The Petitioner explains that the Minister of the Interior is responsible for regulating local government in Israel, which is the point of contact between the State's residents and the government. The Petitioner notes that local government is the "backyard" of Israeli government, a place that it sees as characterized by growing corruption, unjustified waste of public funds, and extraneous considerations. In its view,

the Minister of the Interior is the person entrusted with enforcing the criminal law, disciplinary rules, and the principles of good governance upon those bodies, as well as for ensuring their honesty. The Petitioner is of the opinion that in light of his criminal record, Deri cannot fulfil those duties and serve as a moral compass for the elected officials of local government, particularly when – in its opinion – he bears some of the responsibility for that poor functioning of the local councils from his days as Minister of the Interior. The Petitioner adds that the Minister of the Interior is granted other powers of consequence, among them monitoring the elections of the local authorities, the authority to make appointments to the various planning boards, the authority to sign bylaws, and the authority to appoint representatives to local public-tender committees. In the opinion of the Petitioner, those powers require that a person with a criminal record that includes offenses of corruption not be appointed to the office of Minister of the Interior.

13. *The second set of arguments* concerns the relationship between the offenses for which Deri was convicted and the Ministry of the Interior and the role of the Minister of the Interior. The Petitioner refers to this Court's decision in HCJ 4668/01 *Sarid v. Prime Minister Ariel Sharon*, IsrSC 56 (2) 265 (2001) (hereinafter: the *Yatom* case), in which it was held that when there is a clear, material, direct relationship between the crimes committed by an individual and the office to which he seeks to be appointed, it is possible that the time factor may not have a corrective or mitigating effect upon the reasonableness of the appointment. The Petitioner is of the opinion that such a relationship exists in the case before us, inasmuch as Deri was convicted of committing crimes while serving in public positions in the Ministry of the Interior and as Minister of the Interior. The Petitioner further argues, relying on the State Comptroller's Report, *Examination of the granting of Support to Local Authorities* (1991) (hereinafter: the *State Comptroller's Report 1991*), that Deri turned the Ministry of the Interior into a fertile pasture for personal and public corruption. In the Petitioner's view, the existence of such a relationship between Deri's criminal past and the public corruption attributed to him in the Report, and the public office that he currently seeks, requires the granting of no weight to the passage of time in the context of the specific appointment. Therefore, the Petitioner argues that the circumstances of the case before us are different from those of *HCJ Deri*, and the balancing of the different considerations requires the conclusion that Deri's appointment as Minister of the Interior is manifestly unreasonable.

The Respondents' Response

14. The *State* (responding in the name of Respondents 1-3) argues that the Petition should be dismissed. First, the State argues that the Petitioner's arguments from the *State Comptroller's Report 1991* are inadmissible under sec. 30(a) of the State Comptroller Law, 5718-1958 [English: http://www.mevaker.gov.il/En/Laws/Documents/Laws-Compotroller-law.pdf] (hereinafter: the State Comptroller Law), which provides that the *State Comptroller's Report* cannot serve as evidence in a legal or disciplinary proceeding.

15. On the merits, the State is of the opinion that there is no legal impediment to Deri's appointment to the office of Minister of the Interior, in light of the opinion of the Attorney General of Jan. 7, 2016, which approved the appointment. While the Attorney General expressed his view that Deri's appointment to the office of Minister of the Interior was of special symbolic significance that somewhat increased the harm to pubic confidence in contrast to the harm that would be caused by his appointment to another ministry, nevertheless, the Attorney General was of the opinion that this was not a decisive consideration – in view of the balance struck in *HCJ Deri* – and found that the appointment remained with the margin of reasonableness.

16. The State further relies upon paras. 6-9 of the Attorney General's opinion, where it states in regard to the material relationship, that the case law of this Court has not as yet established clear distinctions in regard to the various suitability criteria for appointments to the various government ministries, and that there are contradictory statements in the case law in this regard. The Attorney General specifically cited HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister Ariel Sharon*, IsrSC 57 (6) 817 (2003) [English: http://versa.cardozo.yu.edu/opinions/movement-quality-government-israel-v-prime-minister-mr-ariel-sharon] (hereinafter: the *Hanegbi* case), in which the Court stated that it would be hard to explain a position by which the appointment of a person to the office of minister in a specific ministry would so severely undermine public confidence that the appointment could not be allowed, while permitting him to serve in other ministries. The Attorney General added that inasmuch as *HCJ Deri* decided that the were no grounds for intervening in the matter of Deri's appointment in general, there would be no grounds for intervention in his appointment as Minister of the Interior. Alternatively, the Attorney General found that there is no clear, direct

relationship, as defined in the *Yatom* case, between the criminal offenses of which Deri was convicted and the specific areas of responsibility of the Ministry of the Interior. In his view, the crimes of which Deri was convicted are not unique to the Ministry of the Interior, and they could have been perpetrated in the framework of any other government ministry. The State adds that there is nothing special about the office of Minister of the Interior as opposed to other ministerial offices. Thus, for example, the State points out that the Minister of Economics also exercises broad powers, both in terms of their social and public consequences, and in terms of the extent of the budgetary resources that his ministry controls.

The State is further of the opinion that there is no place for making a distinction between the requirements for ministers in the various ministries, such that the perpetration of political corruption would disqualify a person from serving as a "senior" minister, but not disqualify him from serving as a "junior" minister. In its opinion, such an approach would infringe the principle of the equality of ministers.

17. To complete the picture, the State pointed out that, as opposed to the position of the Attorney General, the State Attorney was of the opinion that there was a legal impediment to the appointment of Deri to the office of Minister of the Interior. In his opinion, the harm to public confidence in government posed by that appointment was significantly greater that the harm that would be caused by his appointment to any other ministry. He was of the view that there was a direct connection to the office, in the sense of the term in the *Yatom* case, and that the passage of time could not correct that. However, the State explains that it is the opinion of the Attorney General that obligates the Executive Branch.

18. The Knesset argues that the Petition against it should be denied *in limine*, due to a lack of any cause or prayer for relief in its regard. On the merits, the Knesset emphasizes that Deri's appointment was ratified by the Knesset plenum, and in its opinion, that fact weakens the claim in regard to the undermining of public confidence in government.

19. In his response, Deri also argues that there is no "clear, direct relationship" between the crimes that he committed and the office of Minister of the Interior. In his opinion, the relationship between the crimes and the Ministry of the Interior is entirely exhausted in the fact of their being committed while he served in various positions in the Ministry of the Interior, and nothing more. As for the "Personal File". Deri stresses that *CrimA Deri* expressly rejected the

theory that the breach of trust offenses were consideration for bribes that he received. Deri is of the opinion that in the absence of such a causal connection, there is no specific relationship between the character and substance of the offenses committed and the Ministry of the Interior, other than his holding a public office in that ministry at the time. As for the "Public File", Deri stresses that, in its decision, the Magistrates Court praised him for his appropriate efforts in eliminating the improper practice of making budgetary disbursements to institutions in the absence of clear criteria. Thus, in his view, the Magistrates Court found that he behaved properly in regard to most of the charges in the Public File. According to him, even his conviction on the fifth charge was based upon a conflict of interests in the framework in which he acted, and not upon transferring monies in breach of Ministry of Interior procedures. Therefore, Deri argues that in this case as well, there was no special relationship between the conviction and the Ministry of the Interior that would preclude him from serving as Minister of the Interior.

20. Deri is further of the opinion that his matter falls within the scope of the broad discretion granted to the Prime Minister in appointing ministers. He emphasizes that the appointment followed proper procedures – first, the Attorney General provided an opinion establishing that there was no legal impediment to the appointment; then the appointment was unanimously approved by the Government, following a long, detailed debate that was conducted without his presence; and finally, the appointment was ratified by the Knesset plenum, following a comprehensive debate in which many Knesset members expressed their views on the matter, expressly addressing Deri's criminal record and its public significance. Deri is further of the opinion that the Knesset's ratification grants parliamentary approval to his appointment, which substantially reduces the force of the argument as to the undermining of public confidence. Moreover, Deri believes that greater weight should be granted to the parliamentary ratification in this case than to the ratification addressed in *HCJ Deri*, as this time the Knesset specifically ratified his appointment, as opposed to ratification in the course of voting confidence in the entire Government.

Discussion and Decision

Preface

21. Before addressing the petition on the merits, I would like to make several preliminary remarks in regard to some of the arguments raised in the petition. It would appear to me that these remarks are already necessary at this stage in order to clarify which issues will be addressed, and what our point of departure will be in addressing them.

22. First, it may be inferred from some of the Petitioner's arguments that it seeks that we re-examine our decision in *HCJ Deri*. While the Petitioner expressly emphasized in its petition that it accepts that decision, and that it is of the opinion that there is a legal bar specifically to Deri's appointment to the office of Minster of the Interior, nevertheless, its attorney raised arguments concerning the weight that was attributed to the relevant considerations in evaluating the reasonableness of the appointment in *HCJ Deri* and the manner of their evaluation. Thus, for example, the Petitioner's attorney referred to the weight attributed to the passage of time since the commission of the crimes, to the absence of contrition, and to the moral turpitude associated with Deri's conduct, without explaining how and why their weight should be different in regard to Deri's appointment as Minister of the Interior. We should make it clear already at this point that we have no intention of revisiting *HCJ Deri*. It is a final decision of this Court, given only half a year ago, and regarding which an application for a Further Hearing was denied by my colleague Justice Hendel (decision in HCJFH 5806/15 of Oct. 28, 2015 (hereinafter: the Deri Application for a Further Hearing)) only five months ago. When a final decision of this Court was made so recently, its conclusion obliges all, and there is no room for another bench to question its correctness in the framework of a new petition of the same subject. It has already been noted that the danger inherent in deviating from that path is that "with the passage of time, this judicial institution will transform from a 'house of law' to a 'house of judges', with as many opinions as there are judges". (FH 23/60 *Balan v. Executor of the Will of the Late Raymond Litwinski*, IsrSC 15 71, 76, (1961) *per* M. Silberg J); and see: para. 1 of the opinion of E. Hayut J. in HCJ 8091/14 *Center for the Defence of the Individual v. Minister of Defense* (Dec. 31, 2014)).

23. A second comment concerns the Petitioner's arguments that rely upon the *State Comptroller's Report 1991*. As the Respondents pointed out in their response, sec. 30(a) of the State Comptroller Law establishes a rule as to the inadmissibility of State Comptroller Reports in legal proceedings: "No reports, opinions or other documents issued or prepared by the

Comptroller in the discharge of his functions shall serve as evidence in any legal or disciplinary proceeding". The purpose of that provision is to ensure independent, effective examination of State authorities, and to encourage the cooperation of the subjects of that examination without fear of a future legal proceedings (see: CA 2906/01 *Haifa Municipality v. Menorah Insurance Company Ltd*., para. 14 (May, 25, 2006); LCA 9728/04 *Atzmon v. Haifa Chemicals Ltd*., IsrSC 59 (3) 760, para. 7 (2005)). However, it should be noted that a failure to grant sufficient weight to the recommendations of the State Comptroller can be deemed unreasonable in certain cases (see, e.g.; HCJ 3989/11 *Temple Mount Faithful v. Knesset State Control Committee*, paras. 10-12 (Dec. 12, 2012)). Therefore, the courts have been willing to admit State Comptroller Reports in evidence when they were submitted in the framework of judicial review of the manner of implementation of the Comptroller's recommendations (see: HCJ 9223/10 *Movement for Quality Government in Israel v. Prime Minister*, para. 21 (Nov. 19, 2012) (hereinafter: the *Carmel Disaster* case); HCJ 2126/99 *De Haas v. Tel Aviv-Yafo Municipality*, IsrSC 54 (1) 468 (2000)).

That is not the case in the matter before us. The Petitioner wishes to rely upon the *State Comptroller's Report 1991* as independent evidence in support of its arguments in regard to the relationship between Deri's criminal past and his work in the Ministry of the Interior. Under sec. 30 of the State Comptroller Law, such independent findings cannot be established on the basis of the State Comptroller Report. Therefore, I do not find it proper to consider the Petitioner's arguments that rely upon the Report (see and compare: AAA 2851/13 *Suissa v. State of Israel – Ministry of Construction and Housing*, para. 6 (June 23, 2014); HCJ 8335/09 *Dolev Foundation for Medical Justice v. Minister of Health*, para. 19 (Dec. 16, 2012)).

24. Moreover, I am of the opinion that it would not be appropriate to refer to the *State Comptroller's Report 1991* as grounding a criminal record that might disqualify Deri from serving as Minister of the Interior, also by reason of the fact that the Report was, in practice, "subsumed" in the decision in the Public File. It is a matter of first principles that the role of the State Comptroller is to supervise the State authorities, locate flaws and failures in their work, and make recommendations for their correction. There is no question that the Comptroller's findings are of great importance in uncovering unlawful practices and activities that deviate from the ethical standards expected of the State's authorities. Therefore, the relevant bodies are required to address what is stated in the Comptroller's opinion in making their decisions. At times, the

State Comptroller's Report may serve as a catalyst for a criminal investigation and the filing of criminal charges. Nevertheless, it should be understood that the Comptroller's Reports are not judicial decisions. In this regard, it would be appropriate to quote the opinion of Justice M. Ben Porath in HCJ 152/82 *Alon v. Government of Israel*, IsrSC 36 (4) 449, 459 (1982) – which I would parenthetically note were made in regard to commissions of enquiry, but that are perhaps even more appropriate in regard to the role of the State Comptroller:

> It should be clear that without good reason, the suspicions raised in the Commission's report should not be left to float about *without legal investigation, which alone is capable of properly deciding the facts*. That also emphasizes the role of a commission of enquiry in matters of a criminal nature, which is to aid the Government in weighing whether to take actions – and which actions – pursuant to the report (emphasis added – S.J.).

25. As the Petitioner itself points out, the parts of the *State Comptroller's Report 1991* that are relevant to the case before us addressed the involvement of the Ministry of the Interior in granting financial support to institutions by means of the local councils, in contravention of the rules of good governance. The State Comptroller at the time, Justice (Emeritus) Miriam Ben Porath, saw fit to exercise her authority to question witnesses, pursuant to sec. 26 of the State Comptroller Law, with a view to presenting the findings to the Israel Police, which had initiated an independent investigation into the criminal aspects of Deri's involvement in granting the said support (see para. 22 of the petition). Ultimately, the State Comptroller's findings served as one of the grounds for the charges filed in the information in the Public File. As such, the Report fulfilled its role in exposing suspected unlawful and corrupt activity. But more importantly for the matter before us is that those findings and their significance were given final judicial expression – the judgment in the Public File – and that is the judicial examination that established the final, relevant facts and conclusions that form the basis of Deri's criminal past in these proceedings. Just as we do not rely upon the facts presented in the information to ground a claim in regard to a defect that would prevent a person from holding public office when there is a final judgment on that information, so, in my opinion, we do not rely upon a State Comptroller's Report in similar circumstances. For that reason as well, I find that no weight should be ascribed to what the Petitioner presents from the *State Comptroller's Report 1991*.

26. To summarize this section: *HCJ Deri*, with all the balances struck therein, is the starting point for these proceedings. The question for us to decide is whether the Petitioner has succeeded in showing that, under the present circumstances, Deri's appointment to the specific office of *Minister of the Interior* raises special problems in regard to the decision to appoint him to a ministerial role, which could change the equilibrium point established by this Court in *HCJ Deri*, and place that appointment beyond the scope of reasonableness. In examining this question, I will refer to Deri's criminal past solely as presented in the judgments in the Personal File and the Public File. On the basis of the above comments, I will now proceed to examine the Petitioner's arguments, but will first present the principles established in the case law in regard to judicial review of the Prime Minister's decisions in appointing ministers.

The Normative Framework

27. As is well known, a decision to appoint a person to public office is an administrative one, and as such, it is subject to the rules of administrative law, particularly the duty of the appointing authority to exercise reasonable discretion in making the appointment. That means that the party making the appointment must consider all of the factors relevant to the decision, and grant each one appropriate weight in evaluating them (see: HCJ 3059/15 *Movement for Quality Government in Israel v. Prime Minister of Israel*, para. 21 (Nov. 10, 2015) (hereinafter: the *Gallant* case); HCJ 5657/09 *Movement for Quality Government in Israel v. Government of Israel*, para. 39 (Nov. 24, 2009)). The discretion exercised by the appointer is subject to judicial review, which is restricted to the question whether the balance struck deviated from the margin of reasonableness. It has been explained on more than one occasion that there may be a number of reasonable alternatives that fall within the margin of reasonableness, and as long as the balance struck by the appointer falls within that margin, this Court will not intervene, even if it is believes that one of the courses of action would have been preferable (see: HCJ 43/16 *Ometz – Citizens for Good Governance and Social and Legal Justice v. Government of Israel*, para. 38 of the opinion my opinion (March 1, 2016) (hereinafter: the *Mandelblit* case); HCJ 8134/11 *Asher v. Minister of Finance*, para. 11 of the opinion of E. Rivlin D.P. (Jan. 29, 2012)). This Court has also explained that the scope of the margin of reasonableness is established in accordance with the identity of the appointer and the type of appointment (see: the *Gallant* case, para. 22, the *Hanegbi* case, para. 11 of the opinion of E. Rivlin J. (2003)).

28. When we are concerned with the margin of discretion granted to the Prime Minister in forming a government, as well as in adding an additional minister or removing a minister from office, the rule is that he enjoys very broad discretion in light of the special character of the authority to appoint ministers. That authority is intended to ensure the Government's ability to function effectively, and to carry out its mandate to execute its policy, and it includes parliamentary and party considerations (see: HCJ 5853/07 *Emunah — National Religious Women's Organization v. Prime Minister*, IsrSC 62 (3) 445, para 22 of the opinion of A. Procaccia J. (2007) [English: http://versa.cardozo.yu.edu/opinions/emunah-v-prime-minister] (hereinafter: the *Emunah* case)). However, such decisions are not immune to judicial review, inasmuch as the Prime Minister is part of the administrative authority, and subject to the applicable rules (and see, e.g.: HCJ 5261/04 *Fuchs v. Prime Minister of Israel*, IsrSC 59 (2) 446, para. 3 of the opinion of Cheshin J. (2005) [English: http://versa.cardozo.yu.edu/opinions/fuchs-v-prime-minister]), but the patently political character of the authority to make appointments, taken together with the fact that it is the Prime Minister who exercises it, broadens the margin of reasonableness such that the boundaries of the Court's intervention in appointments is limited to those instances in which an appointment might seriously harm the standing of the institutions of government and the public's confidence in them (see: the *Emunah* case. Para. 23; the *Hanegbi* case, para 5 of the opinion of T. Orr D.P.). Importance must also be ascribed to the Knesset's supervision over the exercise of the appointment authority, and to the existence of public-values oversight by means of the democratic process, which also lead to a narrowing of the bounds of intervention in a decision (the *Gallant* case, para. 24; the *Carmel Disaster* case, paras. 23-25).

29. The criminal record of a candidate for public office is undeniably a consideration that the appointing authority must take into consideration in deciding upon an appointment. That duty derives from a public authority's status as the public's trustee that "has nothing whatsoever of its own. All that it has, it has for the public" (see: HCJ 6163/92 *Eisenberg v. Minister of Construction and Housing*, IsrSC 47 (2) 229, para 40 (1993) [English: http://versa.cardozo.yu.edu/opinions/eisenberg-v-minister-building-and-housing] (hereinafter: the *Eisenberg* case)). It has, therefore, been emphasized that:

> …public confidence in civil servants and elected officials is an essential condition for the proper functioning of the civil service and the organs of government. All

> branches of public service rely on public confidence not only in the practical abilities of civil servants and elected officials, but also, and especially, on their standards of morality and humanity, their integrity and incorruptibility. Without this confidence, the civil service cannot, in the long term, properly discharge its functions at the required level for any length of time.
>
> When persons who have been morally compromised are appointed to public office or left in office after they have gone astray, the ethical basis on which the organs of state and government in Israel are founded may be undermined. The fundamental ethical principles on which Israeli society and government are based may be seriously compromised. Public confidence in the organs of government, whose rank and standards are supposed to reflect the basic ethical principles on which social life in Israel is based, may be weakened (the *Emunah* case, para 14 [http://versa.cardozo.yu.edu/opinions/emunah-v-prime-minister]; and see: the *Eisenberg* case, para 46).

Nevertheless, it has been said on more than one occasion that a candidate's criminal record is but one of many factors that the appointing authority must weight in deciding upon an appointment to a public office. It has been held that in evaluating the weight of a criminal record, a number of considerations must be assessed and balanced: (a) the seriousness of the offenses ascribed to the candidate, and their connection to the office he is intended to fill; (b) the nature of the offenses; (c) the duration of the offenses; (d) the period of time that has elapsed since the commission of the offenses, and the public interest in the rehabilitation of offenders; (e) the presence of moral turpitude in the offenses; (f) the candidate's expression of contrition; (g) the necessity of the candidate for the office. By means of balancing these factors, the Court evaluates whether the candidate's acts attest to a normative-value flaw in his conduct that would influence his fitness for fulfilling the office for which he is a candidate, and affect public confidence in the civil service (see: HCJ 3997/14 *Movement for Quality Government in Israel v. Foreign Minister*, para. 27 (Feb. 12, 2015); the *Gallant* case, para. 26; the *Mandelblit* case, para. 64).

30. In carrying out the balancing, each consideration must be given its appropriate relative weight, in accordance with the circumstances of each and every case (see: the *Yatom* case, para.

16; the *Emunah* case, para. 16). The relative weighting of the considerations is carried out substantively, bearing in mind its underlying purpose – evaluating the normative fitness of the candidate for the office, and the influence of the appointment on public confidence in the governmental system. As Justice Hendel explained in his decision on the Deri Application for Further Hearing:

> The quantitative number of considerations is of no significance. The decision as to the reasonableness of the appointment is not an arithmetic one that is achieved by assigning points to each consideration, and accordingly making a final calculation. Rather, the decision in such matters is derived from a material evaluation as to the extent of the harm to the candidate's ability to fulfill the office normatively, practically and ethically – including the consequences of the appointment for public confidence – taking account of the circumstances of the matter in their entirety (para. 5 of the decision).

31. Against the background of the criteria detailed above, I will now turn to the examination of the appointment of Deri to the office of Minister of the Interior. I would again note that in *HCJ Deri*, this Court implemented the principles that I enumerated, and in balancing all of the relevant factors – the severity of Deri's criminal record; the moral turpitude of his actions; his failure to express contrition; and the significant amount of time that had elapsed since the commission of the acts – found that Deri's appointment to the office of Minister of the Economy did not fall outside the boundaries of the margin of reasonableness. That was so in light of the nature of the appointment – the appointment of a minister in the framework of forming a government by the Prime Minister, and obtaining the Knesset's vote of confidence – which broadens the margin of discretion granted to the Prime Minister. As I stressed at the outset, *HCJ Deri*, and the balance struck therein, will be the starting point for this examination. The question for us to decide is, therefore, whether the fact that Deri is now being appointed specifically to the office of Minister of the Interior should change the result reached in *HCJ Deri*. I will already state that after considering the arguments of the parties, I have found that the answer to that question is no, and that Deri's appointment to the office of Minister of the Interior – despite its inherent problems – does not deviate from the margin of reasonableness, as I shall explain below.

Deri's Appointment to the Office of Minister of the Interior

32. As will be recalled, the Petitioner is of the opinion that the fact that Deri has been appointed to the office of Minister of the Interior – the same office in the same ministry in which he committed the acts for which he was convicted – suffices to change the equilibrium point established in *HCJ Deri* in regard to the reasonableness of his appointment to the office of minister in general, and moves the appointment beyond the boundaries of the margin of reasonableness. In its view, the identity of the office and the ministry create a clear, direct relationship between Deri's offenses and the office he is intended to fill. In light of that relationship, the Petitioner is of the opinion that the passage of time cannot blunt the substantive defect imparted to Deri by his criminal past, and that defect disqualifies him from serving in the specific office of Minister of the Interior.

The Petitioner further argues that a substantial part of the job of the Minister of the Interior is the oversight of the ethical conduct of local government, and therefore, in its view, a person who was convicted of corruption cannot serve in that office. To support its assertion in this regard, the Petitioner sought to submit as a document the *Report of the Team for evaluating Methods for Reinforcing the Rule of Law and Ethical Conduct in Local Government* (January 2016) (hereinafter: *The Local Government Report*), presented to Deri by the Attorney General, in his capacity as Minister of the Interior. In the Petitioner's opinion, this document serves to show that the Minister of the Interior must serve as a personal exemplar for local government, and it is therefore unreasonable to appoint Deri to the office in light of his criminal convictions. We permitted the submission of the document, and it was before us in arriving at our decision. I will now address the Petitioner's arguments in order.

A Clear, Direct Relationship

33. The subject of the clear, direct relationship between a person's criminal conduct and the public office for which he is a candidate, and its consequences for the balance of the various considerations at the time of the appointment, was addressed by this Court in the *Yatom* case. In view of their centrality to the matter before us, I will quote it in full:

> Needless to say that in striking a balance among the various considerations, each one must be given its appropriate relative weight among the complex of considerations that must be addressed (see: HCJ 389/80 *Dapei Zahav v. Broadcasting Authority*, IsrSC 35(1) 421, 445). Thus, for example, in the presence of a clear, direct relationship between the offenses committed in the past by the candidate and the office he is intended to fill, it may be concluded that his criminal record entirely disqualifies him from holding a particular office. In such circumstances, considerations that might have been weighed in support of his appointment, were he considered a candidate for a different office (like the time that has passed since the commission of the offenses, his contrition, the quality of his behavior in the course of the period since the commission of the offense, and his professional qualifications) will not avail, and his candidacy will be disqualified. In establishing the existence of such a relationship, account must be taken not only of the nature of the offenses and the circumstances of their commission, the office in the framework of which the candidate committed the offenses, and the office he is intended to hold at present, but also the severity of the moral blemish imparted to him by the commission of the offenses. In other words, the existence of a relationship that has the potential of disqualifying the candidate is not derived solely from the impact of his criminal past on his professional ability to fulfill the new office, but also from his moral fitness to fulfill it. In the presence of such a relationship between the candidate's criminal past and the office for which he is intended, his candidacy should be disqualified *(ibid*., para. 16).

In a later decision, it was noted that in examining the existence of a clear, substantial relationship, one must examine, *inter alia*, whether the public office served as a means for the perpetration of the offence, and whether a moral defect derives from the relationship between the office and the imputed offense (see: HCJ 4921/13 *Ometz – Citizens for Good Governance and Social and Legal Justice v. Mayor of Ramat Gan, Yitzhak Rochberger*, para. 37 of the opinion of M. Naor P. (Oct. 14, 2013) [English: http://versa.cardozo.yu.edu/opinions/ometz-%E2%80%93-citizens-proper-administration-and-social-justice-israel-v-rochberger]).

34. In the circumstances of the case before us, I do not find that the actions imputed to Deri ground a direct, substantive relationship to the office of Minister of the Interior that would entirely rule out his fitness to serve in that office. After reviewing and reconsidering the decisions to convict Deri, I am of the opinion that his crimes – though their severity as corruption offenses committed by a public servant and elected office holder is undisputed and cannot be taken lightly in any way – are not unique to the office of Minister of the Interior, and were not committed by means of the exercise of his authorities as Minister of the Interior, or the exploitation of that office in any unique manner that would not be possible in the framework of any senior position in another ministry.

35. First, as regards the Personal File, in *CrimA Deri* this Court addressed the fact that the bribes Deri received were not bribes "between strangers", given in consideration of a particular, specific act. The Court emphasized that it was bribery by the members of a tight group – the group that ran the Lev Banim Association – of a member of that group who had succeeded to a position of power, in order that he would use his position for the good of the group and its members (*ibid.*, p. 48). Ultimately, in *CrimA Deri* the causal connection between the bribe and the offences of fraud and breach of trust that he later committed was severed, after it was found that it had not been proved that the actions later performed by Deri to promote the interests of the Lev Banim Association and its associates were done in consideration for the bribes he received (*ibid.*, paras. 69-70). Although *CrimA Deri* found that the relationship between Deri and the members of the Lev Banim Association was sufficient to ground a *conviction* for the offense of bribe taking, nevertheless, in regard to the *relationship* between the offenses and the intended office – with which we are here concerned – the significance is that the specific functions that Deri performed at that time, among them that of Minister of the Interior, were not of importance in regard to the bribes he received. That being the case, it would seem that the State rightly argued that the offenses committed by Deri in the Personal File are of a kind that could be committed, in practice, in any government ministry. I would reiterate that we cannot take those offenses lightly, however the question before us is not the severity of the crimes, but rather whether they reflect a special relationship to the office of Minister of the Interior. Under the circumstances described, I am of the opinion that no such relationship was proven.

36. In the Public File, Deri was accused of offenses of breach of trust in the exercise of his authority and the use of his status in the framework of his offices in the Ministry of the Interior. The information charges Deri with transferring various allocations while breaching the Procedure for Granting Support to Local Authorities of 1984. However, the judgment in the Public File acquitted Deri of those offenses related to breaching the Procedure by the exercise of his authority, after finding that requirements of the actus reus for the offenses of fraud and breach of trust under sec. 284 of the Penal Law, 5737-1977, had not been met. The only charge upon which Deri was ultimately convicted in the Public File was the fifth charge, which concerned granting support to an association in Jerusalem that was headed by Deri's brother, and whose treasurer was the brother-in-law of Deri's wife (hereinafter: the Association). However, in this regard, as well, the Magistrates Court explained:

> If only the matter of deviating from the procedure were before us independently […] we would not have convicted the defendant of the offense for which he is charged in accordance with the case-law tests established in regard to breach of trust, as explained in the chapter headed "The Legal Situation", inasmuch as the said deviation from the Procedure, after the said obligations were undertaken by Rabbi Dangur and Yehuda, lacks that element of corruption that would transform it from a deviation from good governance and a public administrative defect to a criminal act (see p. 118 of the printout of the decision in the Public File).

We should note that Deri's conviction on the firth charge derived from the fact that in acting on behalf of the association, he was in a "clear, evident and severe" state of conflict of interests (*loc. cit*.). The Magistrates Court held that Deri had, therefore, breached public trust and the principle of ethical conduct to a point that fell within the scope of a criminal act of breach of trust. Indeed, in that act Deri committed an offense while exercising his authority as Minister of the Interior. However, in view of the fact that that exercise of authority, itself, was not the criminal act and did not achieve the level of a criminal offense – but rather it was his conflict of interests at the time of exercising that authority – the possible relationship that might arise from that act and the role of Minister of the Interior is not of such significance as to ground a direct, substantive relationship that would disqualify him from serving as Minister of the Interior. Note that this relationship does create an additional problem in regard to Deri's appointment, but I do

not find that that problem leads to the conclusion that the passage of time cannot mitigate the defect arising from Deri's conviction.

37. In light of the above, I am convinced that the relationship between the offenses of which Deri was convicted and the Ministry of the Interior primarily consists of the fact that Deri was serving as Minister of the Interior and in other roles in the Ministry of the Interior at the time of the perpetration of the offenses.

38. Indeed, the identity of the office and the ministry present a unique problem in regard to Deri's appointment as Minister of the Interior, as opposed to his appointment as Minister of the Economy. This appointment carries symbolic significance, as it may appear to some of the public as an elected official who strayed returning to the same office in which he abused his role as a public trustee. This appointment might even be construed as granting a governmental and Knesset seal of approval that there was no defect in the way Deri acted in committing his crimes while serving in senior positions in the Ministry of the Interior. I believe that this problem indeed increases to some degree the harm to public confidence as a result of Deri's appointment to the office of Minister of the Economy, which was addressed in *HCJ Deri*. Clearly we are concerned with a circumstance that must be given appropriate weight in evaluating Deri's fitness for the office of Minister of the Interior. However, in my opinion, it is not sufficient to create a *clear, direct relationship* between the crimes committed by Deri – by their character and substance – and the office of Minister of the Interior in such a manner as to impart a moral defect that cannot be mitigated by the passage of time.

39. Therefore, I am satisfied that the Petitioner has not succeeded in showing the existence of a clear, direct relationship specifically between Deri's offenses and the office of Minister of the Interior. Nevertheless, the foregoing examination did raise two additional problems that are unique to Deri's appointment to the office of Minister of the Interior: the symbolic significance attaching to the identity of the ministry and the office, and the fact that Deri's conviction in the Public File concerned the manner of his exercising authority as Minister of the Interior. I will discuss these problems below.

The Nature of the Office of Minister of the Interior

40. The Petitioner's assertion that the office of Minister of the Interior requires a "special" level of integrity that entirely rules out the possibility of appointing a person convicted of corruption must be rejected. In my view, as a rule, in the absence of a clear, direct relationship between the offences that a person committed and the office he is intended to fulfill, there are no grounds for establishing different rules of fitness and integrity for the various government ministries. In this regard, it would appropriate to quote the opinion of Justice E. Rivlin in the *Hanegbi* case:

> …and we would only add here that the petitioner takes issue *specifically* with Hanegbi's appointment as Minister of Public Security. As far as this line of reasoning is concerned, there is nothing to stop Hanegbi from being appointed as a minister in a different ministry – except, perhaps, the Ministry of Justice. This position raises a problem. It is hard to imagine that an individual whose appointment as Minister of Public Security would cause such severe damage to the public's trust that we must strike down the Prime Minister's decision to appoint him, would be able to head another ministry – such as the Ministry of Education or the Finance Ministry. It is difficult to accept that an individual who is so patently unfit to serve in a ministry responsible for law enforcement could, without any hindrance, serve in a ministry entrusted with the state's foreign policy or its security (*ibid*., para. 32; emphasis original – S.J.).

The significance of the position advanced by the Petitioner is that the weight of circumstances that mitigate the severity of a candidate's criminal past, like the passage of time, would entirely be ignored in regard to the specific office of Minister of the Interior. I am unable to accept that. Indeed, there are cases in which there is a clear, direct relationship between a candidate's criminal past and a specific ministerial office, and in such cases the candidate would be disqualified from holding that office or exercising certain types of authority deriving therefrom, but could serve as a minister in another ministry (compare: the *Gallant* case, para. 30). Such a relationship, the characteristics of which I addressed above, goes to the core of fitness to serve in the office, and therefore disqualifies the candidate. But in the absence of such a relationship, it is my opinion that we cannot accept the argument that serving as a minister in a particular office requires "special integrity" that would not be required in another ministry. Such

a distinction creates a substantive-normative hierarchy between "more important" and "less important" ministers, which has no basis in law or in the Israeli governmental system. In my opinion, such a distinction would also be improper, as it could itself inflict harm upon public confidence in the governmental system, particularly in regard to confidence in those government ministries regarding which it would be decided that more flexible moral standards would suffice.

41. Moreover, even in the specific circumstances of the office of Minister of the Interior, I am not convinced that the Petitioner's arguments of are of any substance. It should be recalled that in *HCJ Deri* this Court held that there is no legal bar to Deri's serving as Minister of the Economy and Minister for the Development of the Negev and the Galilee. The office of Minister of the Interior certainly grants the person holding it broad authorities that have significant social, public and economic consequences. Those authorities include, among others, the responsibility to oversee the administration of local government and its good governance. But the Minister of the Economy also enjoys extensive authorities of broad economic and social significance. The Ministry of the Economy controls large budgets, and the Minister's decisions have significant influence on the market. Various regulatory and enforcement agencies are subordinate to that ministry, along with its ancillary units that have significant contact with the public. In particular, one might point to the Ministry's responsibility for enforcing labor law and consumer protection, as well as government support of businesses. The Minister of the Economy is also is also expected to serve as a personal example to those subordinate to him in the Ministry of the Economy in exercising their authority, and to those bodies that his ministry is meant to oversee. It may well be that oversight over governmental corruption is one of the most central aspects of the job of the Minister of the Interior, as would appear from *The Local Government Report* – but it is hard for me to accept the argument that in regard to the office of Minister of the Interior, Deri is bereft of moral authority despite the passage of time, whereas in regard to his holding the office of Minister of the Economy it was held that the time that elapsed mitigated the moral impairment of his corruption offenses and permitted him to exercise various authorities that included oversight and the enforcement of the law.

42. In conclusion, I do not find that the office of Minister of the Interior, by its character and nature, requires more rigid criteria in regard to the criminal record of a candidate than those required in the appointment of a minister to another ministry.

The Reasonableness of Deri's Appointment

43. It now remains for us to examine whether the relationship between Deri's criminal record and the office of Minister of the Interior, and the additional harm to public confidence that it entails, is such as to change the equilibrium point in *HCJ Deri*, and move the appointment over the boundary of the margin of reasonableness. It should be recalled that although I found that there is no clear, direct relationship between Deri's criminal past and the office of Minister of the Interior, I was of the opinion that his criminal record raises two unique problems in regard to that appointment. One problem is that he committed the offenses in this ministry, and the appointment carries symbolic significance that might further undermine public confidence in government authorities. The other problem is the fact that the offense for which he was convicted in the Public File was committed in the course of his exercising his authority as Minister of the Interior.

44. After reviewing the balance struck among the various considerations in *HCJ Deri*, I am satisfied that the said problems are not sufficient to put Deri's appointment beyond the boundaries of the margin of reasonableness. As I earlier noted, the evaluation of the considerations is performed substantively, examining the candidate's ability to fulfill his office from a normative, practical and ethical standpoint, *inter alia*, against the background of undermining public confidence as a result of the appointment. Considering all of the circumstances of the matter before us, I am of the opinion that the special problems attendant to Deri's appointment to the office of Minister of the Interior are such that would not negate his normative fitness to fulfill the office.

45. This conclusion is primarily based upon the fact that, countering those problems I have enumerated, there is, in the circumstances of this case, a mitigating factor in the form of the Knesset's ratification of Deri's appointment to the office of Minister of the Interior. Whereas in *HCJ Deri*, Deri's appointment as Minister of the Economy was ratified as part of the Knesset's vote of confidence in the Government as a whole, under sec. 13(d) of Basic Law: The Government, in this case, *the Knesset specifically ratified Deri's appointment to the office of Minister of the Interior*. That ratification was granted following a debate in the Knesset plenum

that treated, *inter alia*, of Deri's criminal record, the consequences of his appointment on public confidence in government, and his many years of public works.

It should be emphasized that ratification by the Knesset in the framework of a vote of confidence in the Government, where the matter of any individual minister is "subsumed", is not comparable to the specific ratification of the appointment of a minister that is carried out after a debate of the various aspects of the matter (and compare: the *Hanegbi* case, para 67 of the opinion of M. Cheshin J.). It is generally acknowledged that the Knesset's ratification of a person's appointment to a public office mitigates, to some extent, the claim that the appointment undermines public confidence, inasmuch as the Knesset is the body that represents the public's opinion (see: *HCJ Deri*, para. 22; the *Emunah* case, para. 25; and *cf*. in regard to parliamentary review of subsidiary legislation: Dafna Barak-Erez, *Administrative Law*, vol. 1, 324 (2010) (Hebrew)). The claimed harm to public confidence in government is significantly mitigated when the Knesset considered the various aspects of the specific appointment, and thought it proper to ratify it after a relevant debate. In my opinion, that ratification can balance the additional harm to public confidence that results from the relationship between Deri's criminal record and the office of Minister of the Interior.

Therefore, I am of the opinion that, under the circumstances, and in view of the broad margin of discretion granted to the Prime Minister in the matter of the appointment of ministers, Deri's appointment to the office of Minister of the Interior remains a "borderline case" which, despite the problems that it raises, does not provide legal grounds for intervention.

46. Before concluding, it would be appropriate to emphasize yet again that nothing in this decision should be taken as a moral seal of approval of Deri's appointment as an appropriate one, or as an endorsement of the appointment. As Justice U. Vogelman explained in *HCJ Deri*, "the Court is not part of the ratification process, and its role is limited to examining the authority's actions on the basis of the criteria for judicial review established by law". Our decision is in the legal sphere, and in its scope we found no grounds for intervening in Deri's appointment to the office of Minister of the Interior. However, Deri's criminal record, with all its severity and the moral turpitude associated therewith, has not passed from the word, and the decision to appoint him will have to stand the test of public opinion, with all the means at its disposal.

47. On the basis of all the above, I would propose to my colleagues that the petition be denied, without any order for costs.

Epilogue

48. It should be noted that after hearing the parties' arguments, and before rendering our decision, we were informed by the parties' attorneys, on April 3, 2016, that an investigation is being conducted against Deri on a number of suspicions. After reading the parties' notices and their responses, we found that the investigation is not relevant to the petition before us. As explained above, the subject of this petition is the reasonableness of Deri's appointment to the office of Minister of the Interior against the background of his criminal record. It is our understanding that nothing in that investigation would change the result that we have reached, particularly in view of its early stage.

Justice N. Hendel:

1. I have carefully read the well-crafted opinion of my colleague Justice S. Joubran. After considering the material presented to us and hearing the arguments of the parties, and against the comprehensive picture that they depict, I cannot concur with his conclusion. In my opinion, examining the decision to appoint Rabbi Aryeh Machlouf Deri (hereinafter: Deri) to the office of Minister of the Interior in accordance with the relevant criteria leads to the conclusion – in the concrete circumstances and the on-point balance – that this appointment cannot stand, as it is tainted by a degree of unreasonableness of an intensity that requires the disqualification of the appointment.

I am aware of the fact that Deri meets the fitness criteria under sec. 6(c) of Basic Law: The Government, and that considerable time has elapsed – more than is required by that section – since he was convicted of the offenses of bribe taking and breach of trust, and served his sentence. I am further aware that Deri's appointment as Minister of the Economy and the Development of the Negev and the Galilee was recently approved by this Court, which held that despite the appointment being "on the boundary of the margin of reasonableness", there were no

legal grounds for intervention – *inter alia*, in view of the consideration of the passage of time (HCJ 3095/15, *per* E. Hayut J., H. Melcer and U. Vogelman JJ. concurring) (hereinafter: the decision in the previous petition)). I also denied a request for a Further Hearing in that matter, adopting the conclusions of this Court (HCJFH 5806/15 (hereinafter: the Decision on the Further Hearing)). I will not retract from that in the framework of my opinion below. Of course, the decision in the previous petition stands. However, it must be borne in mind that the circumstances have changed. Another factor has been added to the picture – the fact that the current appointment is specifically to the office of Minister of the Interior – and we must consider how that affects the overall picture. I am of the opinion that this factor is neither marginal nor negligible in any way. On the contrary, in the circumstances of the matter before us, it is sufficient to shift the equilibrium and turn it on its head. In other words, the holding that Deri can serve as a minister does *not* require or in-and-of-itself lead to the additional conclusion that Deri can *specifically* serve as Minister of the Interior.

I will already state, if only in brief, that I find the approach of "what does it matter if he is a minister in Ministry X or in Ministry Y" – which even found some support in the case law (see the opinion of Justice E. Rivlin in HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister*, IsrSC 57 (6) 817, 859 (2003) [English: http://versa.cardozo.yu.edu/opinions/movement-quality-government-israel-v-prime-minister-mr-ariel-sharon] (hereinafter: the *Hanegbi 2003* case)) unacceptable. The State put this argument forward in the guise of the principle of equality among ministers. I admit that there is some logic to that approach. It is undesirable, and even impossible, for the Court to precisely grade each ministry. But that is not the point of disagreement. Such cases always possess unique characteristics. What is common is to be found in the difference. We are concerned with a particular person, who perpetrated a particular offense, in particular circumstances, and who was appointed to a particular office. From that we do not infer that there are no rules. On the contrary. The relevant rules and the concrete circumstances must be merged. It is indeed possible that after the statutory period has elapsed, a person who was convicted and served his sentence will be found fit to serve as a minister in one but not another Ministry. Before addressing the instant case, I will present several examples in order to clarify this point in the most general manner. A person drove while drunk, and was sentenced to imprisonment. A long period has elapsed since serving his sentence, and he is now competent to be appointed a minister. Is it the

same if the question is whether he can be appointed Minister of Tourism or whether he can be appointed Minister of Transportation? I believe that the answer is clear. Would it be appropriate for a person who served a long custodial sentence to be appointed Minister of Internal Security and be responsible, among other things, for the Prison Service, or serve as Minister of Justice? The answer is similar here, as well. It is interesting to note in this regard that when Deri was appointed Minister of the Economy, it was agreed that despite the normal rule, he would not serve on the Committee for the Appointment of Judges and Public Representatives in the Labor Courts, which I believe was proper. The above is meant to clarify, as I shall explain below, why the decision in the previous petition – which held that Deri could serve as Minister of the Economy and the Development of the Negev and the Galilee – is not necessarily the last word in regard to the present petition.

In my opinion, under the circumstances, there is a "clear, direct relationship" between the office of the Minister of the Interior and the offenses of which Deri was convicted. That relationship consists of three parts: (a) the nature of the office; (b) the character of the offenses; and (c) the concrete circumstances of their commission. These parts create a two-sided relationship. The first is general, while the second is specific. The first relates to the normative aspect of the nature of the office, the character of the offenses, and the manner in which the relationship between them affects Deri's fitness to serve as Minister of the Interior. The second relates to the factual aspect of the offenses, and the manner in which Deri's past service as Minister of the Interior served him, in practice, in their commission. As for the *first aspect* – the nature and uniqueness of the Ministry of the Interior are characterized by the fact that it holds the authority and the responsibility to inculcate – primarily in local government – values (in the broad and the normative sense) and procedures (on the operative level) that focus upon maintaining ethical conduct and good public governance. An attendant consequence (which is a value in and of itself) is the creating and reinforcing of public confidence in government. The nature of the offenses of which Deri was convicted – particularly bribe taking and breach of trust – undermine those very values in the most clear and salient manner. Indeed, one can commit similar offenses in any ministry. However, the social harm they involve – including in regard to good governance, ethical conduct and public confidence – is more severe and cries out louder in the place that is meant to serve as the bastion of those values, and is meant to deliver the message that there are boundaries that may not be crossed. Moreover, and this is the *second aspect* – I am

of the opinion that in the concrete case, with regard to the fact that the offenses of which Deri was actually convicted, there is a relationship between those offenses and the office that he held in the past (and to which he is being reappointed at present). The posts that Deri held in the Ministry of the Interior at the time, including the post of Minister of the Interior, served, *de facto*, as means for the perpetration of the wrongful acts. Such a relationship, in all its parts and aspects, does not allow for Deri's appointment to the same office at present. That is so even though it is possible for him to be appointed to another ministerial post, at least from a legal standpoint, as was indeed held not long ago in the decision in the previous petition.

According to these criteria – of the nature and unique character of the office, the character of the offenses, and the circumstances of their concrete commission, and the relationships between these three "elements" – as I will explain in detail below, I have arrived at the conclusion that Deri's appointment to the office of Minister of the Interior cannot be maintained. My colleague's opinion detailed the pertinent facts and the arguments of the parties, as well as the main points of the previous decision. Those will serve as the platform and basis for my opinion. Before setting out my reasoning, I will begin with the starting point of our exploration of this case, but first note a final preliminary comment. This petition concerns a decision to appoint Deri as Minister of the Interior against the background of the offenses of which he was convicted in the past, and for which he served his sentence. That is the subject. The parties recently apprised the Court that Deri is under investigation for various suspicions. That enquiry is just beginning. In any case, in terms of this petition and its decision, that investigation is non-existent.

The Starting Point of the Examination – The General Rule and the Particular Finding

2. *The first starting point* for this examination is to be found in the general rules that this Court has established in regard to appointments to public office (in general, and not exclusively to ministerial office). I will note the primary ones, without exhausting the list.

First, it is a well-established principle of the case law that "fitness and discretion are independent" (see, for example: HCJ 6163/92 *Eisenberg v. Minister of Construction and Housing*, IsrSC 47 (2) 292, 259-260 (1993) [English:

http://versa.cardozo.yu.edu/opinions/eisenberg-v-minister-building-and-housing] (hereinafter: the *Eisenberg* case); HCJ 5853/07 *Emunah — National Religious Women's Organization v. Prime Minister*, IsrSC 62 (3) 445, paras. 13 ad 24 of the opinion of A. Procaccia J. (Feb. 16, 2007) [English: http://versa.cardozo.yu.edu/opinions/emunah-v-prime-minister] (hereinafter: the Emunah case); HCJ 4921/13 *Ometz – Citizens for Good Governance and Social and Legal Justice v. Mayor of Ramat Gan, Yitzhak Rochberger*, paras. 32-33 of the opinion of M. Naor P. (Oct. 14, 2013) [English: http://versa.cardozo.yu.edu/opinions/ometz-%E2%80%93-citizens-proper-administration-and-social-justice-israel-v-rochberger] (hereinafter: the *Mayors* case); HCJ 3997/14 *Movement for Quality Government in Israel v. Foreign Minister*, para. 23 of the opinion of Grunis P. (Feb. 12, 2015) (hereinafter: the *Hanegbi 2015* case) (on the application of this rule – "fitness and discretion are independent" – in Jewish law, see para. 2 of my opinion in the *Mayors* case)). The import of this rule is that "it is does not suffice that a particular candidate meet the fitness conditions prescribed by law in order to approve his appointment to the office, inasmuch as the decision to make the appointment is subject – in parallel – to the test of the reasonableness of the administrative act" (the Decision on the Further Hearing, para. 3). In this regard, the seven-year period established in sec. 6(c)(1) of Basic Law: The Government [English: https://knesset.gov.il/laws/special/eng/basic14_eng.htm] constitutes a threshold requirement. The section states:

> If a person was convicted of an offense and sentenced to prison and if seven years have not yet passed since the day he on which he finished serving his period of punishment, or since the handing down of his sentence - whichever was later - shall not be appointed Minister, unless the Chairman of the Central Election Committee states that the circumstances of the offense do not involve moral turpitude.

In other words, as long as the period has not passed, there is no discretion to appoint a person who was convicted of a crime of moral turpitude to the office of minister. However, after that period – as arises from the language of the section – there is authority to make such an appointment. However, like other powers granted to an authority, its exercise is subject to the decision being within the margin of reasonableness.

The reason for this is that alongside the fitness conditions established by the legislature, there may be additional considerations in the sensitive area of appointments that would lead to the conclusion that an appointment is not consistent with the ethical standards demanded by public service, and may undermine public confidence in government. It has even been held that "at times, reasonableness is the only cause for intervention by which an improper appointment can be prevented" (the *Hanegbi* 2015 case, para. 2 of the opinion of M. Naor D.P., and see para. 2 of the opinion of E. Rubinstein J.). As is also clear from the hypothetical examples presented above, the complexity of life in general, and of political life in particular, present a broad range of possible appointments, including those that clash with the objective of the requisite ethical conduct and public confidence. Therefore, the exercise of discretion is permitted and even required. But it must be exercised with care, and intervention will be exceptional. It should be noted in this regard that in the context of the relationship that nevertheless exists between fitness conditions and reasonableness tests, the case law has held that a candidate's fitness in terms of the relevant law may cast light upon the scope of the appointing authority's discretion, and affect the reasonableness of the decision (the *Emunah* case, para. 19 of the opinion of E. Hayut J.).

Second, the factors that the authorized person or the appointing authority must consider in appointing a person with a flawed background to a public office have also been outlined in the case law. One of them is the severity of the offenses imputed to the candidate. "In this context, the value the offense is designed to protect should be considered with special severity associated with offenses that have protected values regarding clean governance, public trust in government authorities, and ensuring the integrity of public servants at their core" (the *Mayors* case, para. 37 of the opinion of M. Naor P.). It is worth emphasizing that "the gravity of the offence is determined not by its 'position' in the Penal Law, but by its implications on considerations that underlie the appointment. Consequently, an offence should be regarded as serious where its very essence and the circumstances of its commission not only undermine law and order in general (e.g., murder, robbery, rape), but also the foundations of Government structure, e.g., bribery, fraud and breach of trust, perjury, fabricating evidence, obstructing the course of justice" (the *Eisenberg* case, para. 55 of the opinion of Barak P.).

Other factors are the duration of the offenses, and their scope, the time that has elapsed since the commission of the offenses; whether the candidate expressed contrition; whether the

offenses were committed intentionally and for the purpose of promoting his own personal interests; whether there was moral turpitude; and as opposed to these, the interest in rehabilitation of offenders and their reintegration into society (the *Hanegbi 2015* case, para 27 of the opinion of Grunis P.; the *Mayors* case, *ibid.*).

Another important, primary consideration in the context of the matter before us concerns the existence of a relationship between the offenses and the office. In the *Sarid* case, this Court noted that where there is a clear, direct relationship between the offense and the office of an elected official, the possible conclusion may be that his criminal record disqualifies from holding a particular public office:

> Thus, for example, where there is a clear, direct relationship between the offenses that the candidate committed and the office he is intended to hold, a possible conclusion it that his criminal past entirely disqualifies him from holding a particular office. Under such circumstances, considerations that may have been weighed in support of the candidacy had he been presented as a candidate for a different office (like the time that had passed since the commission of the offenses, contrition, the quality of his conduct over the period since the commission of the offense, and his professional qualifications) will be of no avail, and his candidacy will be disqualified. In establishing the existence of such a relationship, account must be taken not only of the nature of the offenses and the circumstances of their perpetration, the office in the framework of which the candidate committed the offenses, and the office he is now intended to fill, but also the severity of the moral blemish imparted by committing the offenses. That is to say, the existence of a relationship that can disqualify the candidate is not derived solely from the effect of his criminal record upon his *professional* ability to fulfill the new office, but also from his *moral* fitness to fulfill it (HCJ 4668/01 *Yossi Sarid – Opposition Chairman v. Prime Minister Ariel Sharon*, para. 16 of the opinion of E. Mazza J. (Dec. 27, 2001) (emphasis original) (hereinafter: the *Sarid* case).

As my colleague Justice Joubran noted, the matter of the relationship also arose in later case law. Thus, in the *Mayors* case we find:

> Another important consideration is *the link between the offenses of which the head of authority was accused, and the authorities accorded to him and his status as head of authority* [emphasis original]. In other words, the council must address two questions: *was the public office used in facilitating the offense, and was there moral turpitude caused by the link between the office of the head of authority and the offense?* [emphasis added] (para. 37 of the opinion of M. Naor P. And see the *Hanegbi 2015* case, para. 27 of the opinion of A. Grunis P.).

In the above, we can see an expression of the two sides of the relationship mentioned earlier: the general-normative and the concrete-factual. Thus, in the framework of examining the relationship, we must take account of "the nature of the offenses', but also of "the circumstances of their perpetration"; we must address both "the office in the framework of which the candidate committed the offenses", and "the office he is now intended to fill" (where, in the case before us, we are speaking of the same office); we must examine whether the office the candidate held at the time of the commission of the offenses served him as a means for their perpetration, and whether the relationship between the intended office and the offense gives rise to a moral defect.

Third, and of a more general nature: In the Decision on the Further Hearing, I addressed the objectives and nature of the considerations that must be weighed in examining the reasonableness of an appointment: "The considerations enumerated in the case law in regard to the appointment of a candidate who was criminally convicted, and that were quoted in the judgment, do not carry formal, independent weight. Their purpose is to provide an indication as to the potential harm that the appointment may cause to the civil service, including to public confidence in it … The decision as to the reasonableness of the appointment is not an arithmetic one that is achieved by assigning points to each consideration, and accordingly making a final calculation. Rather, the decision in such matters is derived from a material evaluation as to the extent of the harm to the candidate's ability to fulfill the office normatively, practically and ethically – including the consequences of the appointment for public confidence – taking account of the circumstances of the matter in their entirety" (para. 5). The considerations were thus intended to examine whether the candidate's actions testify to a "moral blemish" that influences the candidate's ability to fulfill the intended office, and affects public confidence (see: the

Hanegbi 2015 case, para. 27 of the opinion of A. Grunis P.). They are not the purpose but the means for its realization.

It should be borne in mind that these considerations are intended to aid the Court in establishing a position on the concrete case before it. We are not concerned with a closed list. Moreover, the considerations need not necessarily stand "in the same line", and their relative weight may certainly change from case to case. As I pointed out in the Decision on the Further Hearing, this is true not only in regard to the competition among the considerations, but even in the context of an individual consideration (see para. 7, *ibid*.). In summary, the relative weight of each of the considerations – those inscribed in the case law, and those that may yet be written in the future – changes in accordance with the circumstances of each case, and so, too, the ultimate balance among them.

3. We shall now turn to the *second starting point* for our examination, which is the decision in the previous case. So as not to belabor the point, I will say only this: in that decision, the guiding case-law considerations were applied to the concrete circumstances of the case – Deri's appointment as Minister of the Economy and the Development of the Negev and the Galilee. This Court addressed Deri's criminal record and the severity of his acts, which constituted "clear examples of political corruption that impart a severe moral blemish to the public personage who commits them" (para. 17). As opposed to that, the significant period of time that had elapsed since the perpetration of the offenses and serving the sentence was also taken into account. Two additional factors supported non-intervention: one was the fact that the Knesset had voted confidence in the Government that was presented to it, including the appointment of Deri as Minister of the Economy and Development of the Negev and the Galilee. It was held that that "could somewhat mitigate the force of the argument that the appointment undermines public confidence in the governmental system" (para. 22). The second is the Government's decision, ratified by the Knesset, to transfer to the Minister of Religion all authority granted by law to Deri as Minister of the Economy in regard to the appointment of judges and public representatives in the Labor Courts, as noted above. Lastly, it was noted that the Prime Minister is afforded broad discretion in forming the Government. The result of the weighted calculation was, as stated, that the appointment was "on the boundary of the margin of reasonableness", but that there were no legal grounds for intervention.

I will address the points that supported sustaining the appointment in the previous petition in the appropriate place. At this stage, I would like to focus upon another matter – the relationship between the decision in the previous case and the current proceedings. Like my colleague Justice Joubran, I, too, do not intend to revisit the decision in the previous petition. It is, indeed, a final judgment of this Court, given only half a year ago, and regarding which a request for a Further Hearing was denied. I do not retract what I said. However, we should recall that the circumstances of the previous petition related to Deri's appointment as Minister of the Economy and Development of the Negev and the Galilee, whereas the circumstances now relate to his appointment as Minister of the Interior – the office he held when he committed the offenses. One can be of the opinion, as my colleague held, that the relationship between the office and the offenses is limited to the time element, and that is not grounds for changing the result reached in the previous petition. According to this approach, and against the background of the previous decision that upheld Deri's appointment as a minister, no reason specifically related to his appointment as Minister of the Interior was found that would justify deviating from that decision. As stated, and as I shall explain, I hold a different view. I am of the opinion that the specific appointment to the office of Minister of the Interior – under the concrete circumstances of the case – shift the equilibrium point.

One might say that the various considerations that must be taken into account in examining the reasonableness of the appointment, and particularly in applying them to the concrete case, are not a mixture but rather a compound. That is to say that although each consideration must be granted its appropriate place in general, and in the specific circumstances in particular, the full picture must also be taken into account. This is required by the task of balancing and weighing, the result of which decides the fate of the appointment – for good or bad. When a consideration or circumstance changes, it may lead to an overall change in the balance. Support for this can be found, for example, in the *Sarid* case. As noted, that case held that where there was a clear, direct relationship between the office and the offenses, it is possible that "considerations that may have been weighed in support of the candidacy had he been presented as a candidate for a different office (like the time that had passed since the commission of the offenses, contrition, the quality of his conduct over the period since the commission of the offense, and his professional qualifications) will be of no avail, and his candidacy will be disqualified". Therefore, while the decision in the previous petition is the starting point, it is not

necessarily the end point. Along the way, we have encountered an additional variable. We must take it into account – both in and of itself, and in terms of the manner in which it may influence the other considerations. It does not add another layer to those that preceded it, but rather may effect changes in those other layers, and in the relationship between it and itself, and among them themselves.

Equipped with those tools, we shall now proceed to consider the reasonableness of Deri's appointment as Minister of the Interior, while focusing upon the consideration of the relationship and its application to the present circumstances.

The Normative Relationship – Between the Nature of the Office and the Nature of the Offenses

A. *The Nature of the Office – Authority and Areas of Responsibility of the Ministry of the Interior and the Person at its Head*

4. The Ministry of the Interior is one of the central ministries of the Government. It stands at an important crossroad between government and the daily lives of the citizen and his place of residence. As such, it is responsible for the entirety of functions of the local authorities, as well as for coordination between them and the central administration and the Government (subject to certain areas given to the responsibility of other government ministers, such as education and welfare services). I will detail some of the aspects of those fields of authority and functions, to the extent that they are relevant to the matter before is.

Section 233 of the Municipalities Ordinance [New Version] [English: L.S.I. New Version vol. I, 247] states that the fields of authority of a municipality are those established by law, subject to the instructions of the Minister of the Interior:

> 233. Unless the Minister shall otherwise order in respect of all or any of the matters concerned, and subject to any other law, the municipality shall, within the municipal area, deal with the matters specified in Article Two and do any other act which a municipality is required by this Ordinance or any other law to do, and may, within the municipal area, or in any town-planning area which includes the municipal area, deal with the matters specified in Article Three.

Similarly, Chapter 9 of the Local Councils Order (A), 5711-1950, details the authorities of a local council. Section 146 of that Chapter establishes, as a guiding principle, that "Subject to the directives of the Minister, and to the extent that it is not contrary to any law, the council is authorized to act in any matter that relates to the public in the council's area". The scope of authority granted to local councils is thus subject to the directives of the Minister, or restrictions that he may impose. In practice, the Minister of the Interior exercises this authority in order to issue general directives by means of Circulars of the Director General of the Ministry of the Interior (Shalom Zinger, *Local Government, Past and Future*, 130 (2013) (Hebrew) (hereinafter: *Zinger*).

An important aspect of the authority of the Minister of the Interior and the interface between the Ministry of the Interior and the local authorities concerns their budgets. First, the Minister of the Interior can make general grants to local authorities from the State budget in order to balance their expenditures and income, and the local authorities are granted discretion in regard to the purposes that will be served by such grants and the institutions that will receive them. After years of making such disbursements in a defective manner, and following review by the State Comptroller and the issuing of directives by the Attorney General, the Procedure for Granting Support to Local Authorities was published in 1984 (published in the *Official Gazette* 5745, p. 2275) (hereinafter: the Support Procedure). Second, the budget of a local council must be approved by the Minister of the Interior (sec. 206(b) of the Municipalities Ordinance; sec. 2A(b)(5)(a) of the Local Councils Ordinance [New Version]; sec. 81C of the Local Councils (Regional Councils) Order, 5718-1958). The Minister of the Interior is required to exercise appropriate oversight of the budgets of the local authorities, in accordance with his authorities. As this Court has held, this is not "merely a technical, formal authority, and any disregard for the requirement of approval, and any act performed under a budget line or component of the budget without the approval of the Minister of the Interior is not merely technically defective, but rather an unlawful act or omission that go to the very root of the matter" (HCJ 609/85 *Zucker v. Mayor of Tel Aviv-Yafo*, IsrSC 40 (1) 775, 780 (1986)). The approval of the budget by the Minister of the Interior is an oversight tool granted to him by law in order that he might ensure that the local authorities adapt their budgets and policy to what is necessitated and required by the general economic and social policies (*ibid.*). It would be appropriate to note that the case law on the need for fair and equal distribution of the budget exhausted many pens.

Another central aspect of the control exercised by the Ministry of the Interior over the local councils is the matter of oversight. The Ministry of the Interior is responsible for supervising the authorities in order to ensure that they operate as required, and to intervene where operational failures are detected. Such failures may relate to an authority's financial situation, the manner in which it is handled, and even improper conduct that is contrary to the rules of good governance and ethical conduct (*Zinger*, pp. 250-251). In order to fulfil that task, the legislature granted the Minister a number of supervisory tools that enable him to intervene actively in the functioning of an authority. Thus, for example, the District Commissioner (who acts as the long arm of the Minister) can order a local authority to fulfil one of its duties within a given time period, and if it fails to do so, the Commissioner may appoint an appropriate person to fulfil that duty (sec. 141 of the Municipalities Ordinance). The Minister can appoint a supervising accountant for a municipality if, among other things, the Minister is of the opinion that its budget or finances are not being managed "in a proper manner or in accordance with the provisions of any law" (sec. 142B(2) of the Municipalities Ordinance). Moreover, sec. 143 of the Municipalities Ordinance authorizes the Minister of the Interior to make structural changes in an authority – even far-reaching changes – in the presence of the situations enumerated under the section. One of those cases is when "in the opinion of the Minister, the council or the mayor, has ceased to perform the functions imposed upon it by this Ordinance or any other law, or is not properly administering the area under its jurisdiction…" (sec. 143(a)(2)), or when "A commission of inquiry has found that the council or the mayor is not capable of properly acting to fulfil their duties…and recommended to the Minister the dismissal of the mayor or the dissolving of the council" (sec. 143(a)(3). It should be noted that a commission of inquiry is appointed by the Minister in consultation with the Minister of Justice (sec. 144 of the Municipalities Ordinance)). In all of those cases (an one additional), the Minister may order the election of a new mayor or council, or both, and decide upon a date for the elections; appoint a mayor and council, or only a council, from among the persons fit to serve as council members; or appoint a committee to carry out the functions of the mayor and the council, or only the functions of the council" (referred to as an "nominated council") (sec. 143 of the Municipalities Ordinance; and see the parallel sec. 38 of the Local Councils Ordinance [New Version]). Section 22 of the Local Authorities (Election and Tenure of Head and Deputy Heads) Law, 5735-1975, which was the subject of the *Mayors* case, establishes that a local authority may remove the

Head of the Authority from his office if it find that he "conducts himself in a manner incompatible with the status of Head of the Authority", and such a decision requires the approval of the Minister of the Interior.

It has been held that those authorities "give expression to the role of the State's central government as the overseer of the proper functioning of the local government, and creates a type of equilibrium point between the fundamental right of the residents of the local authority to choose their representatives and the need to maintain a properly functioning government" (HCJ 10963/05 *Ataf Haj v. Minister of the Interior*, para 4 (Feb. 13, 2006)). As we see, the Minister of the Interior wields significant power, given that the powers granted to him are at the core of public confidence in local government, and are powerfully connected to the democratic rights of the individual, such as the right to vote. The functions of oversight, investigation, examination, directing and supervising were created to a large extent in order to increase public confidence in public institutions and authorities (Tana Spanic, *Conflicts of Interest in the Public Service*, 235 (2013)).

5. We thus see that the Ministry of the Interior has certain unique characteristics. The minister that heads that ministry is equipped with broad powers of oversight, as we saw in the examples above. Oversight of governmental corruption is a very central part of his role. That is also clear from the *Report of the Team for evaluating Methods for Reinforcing the Rule of Law and Ethical Conduct in Local Government*, which was appended to the petition. That comprehensive report shows that the phenomenon of corruption in Israeli local government is, unfortunately, not negligible, and over the years enough testimony has been amassed on the existence of corrupt behavior patterns in various local authorities (see paras. 20-21 of the *Report*). The severity of the situation reflected by the *Report* reinforces the importance of combatting the phenomenon.

It may be that the Ministry of the Interior does not have the largest budget of any ministry. It also may be that it is not considered the most "senior" or the most "important" of the ministries, to the extent that one can rank them, and in accordance with the established criteria of priority. But that is not the test for the purpose of the matter before us. The focus is on the nature of the office itself, and particularly the supervisory authorities granted it. As noted, the Ministry of the Interior is responsible, *inter alia*, for setting a normative-ethical standard for the local

government authorities, and for enforcing various aspects of the law. It is meant to serve – by analogy – as the "watchdog" of good governance and ethics in local government. The Ministry of the Interior and the person heading it are required to supervise and ensure that public confidence in the civil service not be undermined – not only because they serve the public, but because a central part of the responsibility for ensuring those values is on their doorstep. Indeed, the Minister of the Economy (and every other civil servant, certainly of a senior level) is expected to serve as a personal example (see para. 41 of my colleague's opinion). But nevertheless, I am of the opinion that the nature and character of the office of Minister of the Interior are unique. That uniqueness influences the weight of a criminal record in filling the particular office. As was held in the *Eisenberg* case:

> A minor position cannot be compared with a senior position; a position in which one has no contact with the public cannot be compared with one where there is contact with the public; *a position not involving the control, supervision, guidance and training of others cannot be compared with one involving authority over others and responsibility for discipline*. Someone who holds the office of a follower cannot be compared with someone who holds the office of a leader; *an office that in essence does not make special ethical demands on its holder and on others cannot be compared with an office that is entirely devoted to encouraging a high ethical standard* (para. 48 – emphasis added).

And it should again be emphasized: every public servant must act as the public's trustee in all that he does. As Justice H. Cohn wrote nearly fifty years ago, and remains relevant:

> The private sector differs from the public sector, for while the former acts as it pleases, giving and taking at will, the latter exists solely for the purpose of serving the public, and possesses nothing of its own. Whatever it has it owns as a trustee, and it has no rights or obligations in addition to, or distinct from, the rights of the trusteeship or those conferred or imposed by statutory provisions (HCJ 142/70 *Binyamin Shapira v. Jerusalem District Committee of the Israel Bar Association*, IsrSC 25 (1) 325, 331 (1971) (hereinafter: the *Shapira* case).

The demand of an appropriate moral standard casts its net over all of the public service and its servants, each in accordance with his role and authority. Therefore, "The appointment of

someone with a criminal past — especially a serious criminal past like someone who committed an offence involving moral turpitude — harms the essential interests of the Civil Service. It undermines the proper performance of its function. It undermines the moral and personal authority of the office holder and his ability to convince and lead. It undermines the trust that the general public has for the organs of Government" (the *Eisenberg* case, para 46). True, not every criminal record disqualifies the appointment, and there are counter considerations. Sometimes, the latter prevail. The proof – that is what was held in regard to Deri's appointment as Minister of the Economy and the Development of the Negev and the Galilee, and as stated, I do not question that holding. But now we have an additional layer. There are relevant requirements and characteristics of every public servant, whomever he may be. But there are characteristics that are more specific to the office. We are focused upon the present legal point in time. When the Minister of the Interior is meant to direct and supervise that local government is properly conducted, and ensure the protection of the values of ethical conduct and good governance, we must examine whether Deri is suitable to serve in that office with utmost care in view of his particular criminal past. It is to that that we shall now proceed.

B. *The Character of the Offenses – Bribe Taking and Breach of Trust*

6. The affair referred to as the "Personal File" concerned offences committed by Deri in the years 1984-1990, while serving in senior public positions: assistant to the Minister of the Interior, Director General of the Ministry, and ultimately, as the Minister at its head. The information filed against Deri and others charged Deri with taking bribes and exploiting his positions to promote the Lev Banim Association, in which he had previously served as administrative director, *inter alia*, by fraudulently receiving monies from the public treasury. The District Court convicted Deri of the offenses of bribe taking, breach of trust, and the aggravated obtaining of anything by deceit (CrimC (Jerusalem) 305/93 *State of Israel v. Deri* (April 15, 1999)). Deri's appeal before this Court was granted in part – he was exonerated of one of the offenses, the scope of his conviction on two other counts was lessened, and the sentence pronounced was reduced such that he was sentenced to imprisonment for three years (CrimA 3575/99 *Deri v. State of Israel*, IsrSC 54 (2) 721 (2000) (hereinafter: *CrimA Deri*). In the "Public File", Deri was convicted of the offense of breach of public trust for acts committed while

serving as Minister of the Interior, in acting to secure funding in the amount of NIS 400,000, by means of the Jerusalem Municipality, for an association run by his brother and brother-in-law (CrimC (Jerusalem) 1872/99 *State of Israel v. Deri* (Nov. 20, 2003)). To complete the picture we should note that suspicions arose against Deri in what is known as the "Baron-Hebron Affair" in regard to offenses of fraud, breach of trust, extortion, and obstruction of justice. In the end, no charges were filed in that affair, but in the opinion of the Attorney General at the time, the suspicions were not refuted, and the file was closed for extra-legal considerations (see paras. 5 and 17 of the decision in the previous petition).

The offense of bribe taking, of which Deri was convicted in the Personal File, is one of the more serious offenses in the Penal Law, and the most serious in regard to a public servant. I recently addressed this offense and the harm attendant to it in the general part of the decision in the Holyland Affair (CrimA 4456/14 *Avigdor Kelner v. State of Israel*, paras. 2-3 of the Chapter "On Bribe Taking and Blindness" (Dec. 29, 2015) (hereinafter the *Holyland* case):

> The bribery offenses are currently situated in Chapter Nine of the Penal Law, 5737-1977 (hereinafter: the Law), whose title is "Offenses relating to Public Order and Justice". Among other things, this chapter establishes offenses related to obstruction of justice (Article One), concealment of offenses (Article Two), and assault on police (Article Three). Indeed, this "geographical" location of the offense of bribe taking in the Penal Law is not accidental. It indicates *the primary values that the bribery offenses seek to protect: ethical conduct of public servants; the proper functioning of the public administration; and public confidence. Harm to these values equals harm to public order and justice.* The common denominator of these values is the public servant. He is the main player in the elements of these offenses. His presence is woven through the entire chapter that comprises the bribery offenses.
>
> *The three values are, of course, interrelated. Public servants are required to act fairly and honestly for the benefit of the general interest of the State's residents. In the desired situation, the general public believes that that is indeed how those called public servants act. That confidence is a necessary condition for a proper society, and for the proper functioning of a democratic regime. As opposed to*

> *this, bribery may lead to a public servant working to promote personal interests. The spreading of a culture of bribery leads to the deterioration – by giant steps – of the quality of the public service and the confidence of the general public in public servants.* Thus the need to establish a clear criminal prohibition of the bribery offenses in their various forms. It must be ensured that public servants perform their functions as required, and conduct themselves in accordance with the appropriate rules and criteria (CrimA 6785/09 *Zoaretz v. State of Israel*, para. 40 (Feb. 2, 2011); CrimA 3856/13 *Goni v. State of Israel* (Feb. 3. 2014); Mordechai Kreminitzer, "Do We Lack Offences? On the Penal Law Bill (Amendment No. 13)," 13 *Mishpatim* (1980), 159 (Hebrew)).
>
> *The bribery offenses are thus intended to protect public order and governance in the State. Additional offenses were established alongside it, such as fraud and breach of trust* – section 284 of the Law, and theft by a public servant – section 390 of the Law. *The general purpose is to combat the practical expressions of political corruption.* This Court has often addressed the severity of this phenomenon. It has emphasized that indications of corruption of any kind imprint a mark of Cain on the forehead of the entire civil service (emphasis added).

This great danger does not threaten the civil service and the general public alone. Bribery's influence upon the public servant is great, and it has the potential of distorting his discretion even without his awareness. As I pointed out in the *Holyland* case (para. 1 of the General Part), this is the "blindness of blindness" – "the receiver of the bribe is not always aware that his sight and discretion have been compromised. He does not see what he is required to see".

Thus we see that the offenses of bribery and breach of trust have a clear common denominator in terms of the values they are intended to protect, each alone, and all three together, as they are entwined and interrelated: the first is public confidence in public servants, which is vital to the functioning of public servants and preserving the social frameworks; the second is the integrity of civil servants, which is meant to eradicate the plague of unfairness and dishonesty that stains the civil service with immorality; and the third is the public interest, for which public servants are responsible, and which is intended to ensure the proper functioning of

the public administration (on the offense of breach of trust, see in depth, CrimFH 1397/03 *State of Israel v. Shimon Sheves* (Nov. 30, 2004).

7. From the above – regarding the nature of the offices, the areas of responsibility, and the authorities of the Ministry of the Interior and the person who heads it, and in regard to the character of the offenses of which Deri was convicted – it is clear that there is a material relationship. The prohibition upon taking bribes and breach of trust is intended to protect state governance, as is the role of the Ministry of the Interior and the person who heads it – particularly in regard to local government. The incompatibility of the offenses of which Deri was convicted and the office of Minister of the Interior is clear: a sick regime is characterized by corruption, and one of its conspicuous expressions is offenses of bribery and breach of trust. In the commission of those offenses, public servants do not serve the public interest, but their own, or other, extraneous interests. As noted, these offenses harm the interests of proper administrative governance, ethical conduct, and public confidence. As opposed to this, a healthy regime – which the Ministry of the Interior is meant to ensure, and tasked to oversee, particularly in regard to the local government that is subordinate to it – is guided by those very values. They are its beacon, which is meant to light the way for the entire public. In such a regime, public servants understand their role as agents and trustees who "possess nothing of their own" (and compare: the *Shapira* case, *ibid*.), and take care not to deviate from that role. We are therefore concerned with a head-on clash between darkness and light; between sickness and health. In my opinion, this clash amounts to a "clear, direct relationship" that disqualifies the reasonableness of Deri's appointment to the specific office of Minister of the Interior.

The Concrete Relationship – The Circumstances of the Commission of the Offenses and the Use of the Office in their Commission

8. My colleague Justice Joubran is of the opinion that there is no "clear, direct relationship" between the offenses that Deri committed and the office of Minister of the Interior (paras. 35-38 of his opinion). In my view, such a relationship does exist – both in the Personal File and in the Public File.

As for the Personal File – in my opinion, despite the severance of the causal connection between the various offenses of which Deri was convicted, a severance that my colleague correctly noted, there is a relationship between the circumstances of the commission of the offenses that were the subject of charges 1 and 2 and Deri's office and ministerial service specifically in the Ministry of the Interior. It was indeed held in *CrimA Deri* that the causal connection between the bribes that Deri accepted when serving in the Ministry of the Interior (the first charge in the information) and the offenses of fraud and breach of trust that he subsequently committed (charges 2 and 3 in the information) was severed. That is because it was not proved that his actions in promoting the interests of the Lev Banim Association and its associates were performed as consideration for the bribes (*ibid*., paras. 69-70). That is why, as my colleague emphasized, the specific offices that Deri held, including that of Minister of the Interior, were not of importance in regard to the bribes he was given. I take a different view.

It was held in regard to the first charge, treating of the bribes that he accepted, that Deri had "strong ties to the other appellants who administered Lev Banim. He was himself involved it its affairs, and in practice, he had both influence and control over the manner of its administration. The said sums were paid to him during the period when he served as Minister of the Interior, *when it was clearly known to the other appellants that he could raise monies on behalf of Lev Banim. The relationship between giving the monies and the motives of the givers is clear from the circumstances. After all, it is neither the manner nor conduct of associations like Lev Banim, which are sustained through public funding, to pay money into the private pockets of public personages without reason, and the public personages who maintain relations with such associations are also assumed to know and understand that*" (*CrimA Deri*, para. 38, emphasis added). The severity of the conduct increases in view of his authorities as Minister of the Interior. As earlier noted, those authorities include providing support for local authorities by means of general grants for balancing their budgets. From the circumstance of the first charge we learn, in the specific case, that the Lev Banim Association was close to Deri's heart, as was its financial distress. The other appellants served in various positions in the association, and knew – for their part – that in the framework of his public office, Deri could help them, as he indeed did.

The second charge addressed in *CrimA Deri* concerned fraudulently receiving monies from the public treasury, ostensibly intended for the "Jerusalem Center for the Rehabilitation of

Released Prisoners" (M.S.A.) association, and unlawfully transferring them to the Lev Banim Association. In the course of the proceedings in that affair, the court accepted the testimony of the state's witness. According to that testimony, M.S.A. was granted a sum of NIS 200,000 as support from the Jerusalem municipality, pursuant to its inclusion in a list of associations recommended for support from that source, "but in fact, it was Aryeh Deri who, *in the framework of his position as Director General of the Ministry of the Interior, arranged for Uzi Wechsler (the city's treasurer at the relevant time) to include M.S.A. in the list of institutions recommended for support from the special budget*" (*CrimA Deri*, para. 77, emphasis added). Here, too, we see Deri's involvement, in this instance exploiting his position as Director General of the Ministry of the Interior to commit the offense. The source of the support monies that M.S.A. received from the Jerusalem municipality was an extraordinary budget (T.B.R.) that the Ministry of the Interior put at the disposal of the municipality (see *ibid*.). Only "thanks" to Deri's involvement were the monies directed specifically to M.S.A., and from there to the Lev Banim Association (and see para. 96). As the court found, "Deri's status in the Shas Movement and in the Ministry of the Interior provided him the influence and ability to act in all that concerned the ensuring of budgets, and as such he became the lord-benefactor of Lev Banim" (para. 94).

The relationship of the offense that was the subject of the second charge in *CrimA Deri*, in regard to the support that M.S.A. obtained with the help of Deri as Director General of the Ministry of the Interior, is clear from the following holdings of the Court in its decision:

> We are of the opinion that Deri was properly convicted of the offense of fraud and breach of trust for his part in this affair. It is not the character or the extent of the effort that he exerted in order to ensure that M.S.A. would be included in the list of receivers of municipal support that grounds his conviction of the said offense, but rather the fact that the said effort was made by Deri against the background of his knowledge, and in spite of his knowledge, that M.S.A. was merely an "institution" for the sake of appearances, and that the budgetary allowance that it would receive would not serve to promote its declared purpose, but rather would be funneled by a devious path to the account of the Lev Banim Association to pay its debts. As a public servant *responsible for the approval of granting monies from his ministry's budget to institutions that municipalities would find suitable*,

> Deri was under an obligation "to act in trust" (CrimA 884/80 *State of Israel v. Grossman*, IsrSC 36 (1) 405, 416 (hereinafter: the *Grossman* case), the basic significance of which is to act honestly and fairly. The testimony of the municipal treasurer made it clear that *M.S.A. was included in the list of institutions that the municipality recommended for approval of support from the extraordinary budget of the Ministry of the Interior due to Deri's opinion. Once it was included in the list, the path was laid for the approval that was given by Deri, as Director General of the Interior Ministry, to implement what appeared on its face to be the municipality's recommendation.* As a party to the plan to establish M.S.A., Deri was well aware that M.S.A. was a fictitious body that was intended to serve as a funnel for extracting allocations from public funds to pay the debts of Lev Banim. Under the circumstances, that awareness is sufficient to make his actions – including M.S.A. in the list of bodies recommended for support by the municipality, and approving the municipality's "recommendation" to the Ministry of the Interior – clear expressions of Deri's breach of trust, *where the harm to the public – which is one of the elements of the offense – is expressed not only in the harm that such acts inflict upon public confidence in government* (the *Grossman* case, *ibid*., p. 419), *but also in denying or reducing support for real institutions that were entitled to the monies that were actually granted to M.S.A.* (para. 103, emphasis added).

To complete the picture, and in regard to a lack of a causal connection to the various charges, it should be noted that in *CrimA Deri* this Court further held that "the definitions of the offenses ascribed to Deri in the M.S.A. affair do not comprise a requirement that the actions grounding them specifically be 'in consideration for a bribe', and stand even without any connection to bribery" (para. 74). In other words, the lack of a causal connection between the bribe and the other offenses of which Deri was convicted does not entirely rule out the possibility of a relationship between *each one* of the offenses and the positions in which Deri served in the Ministry of the Interior. As I have demonstrated above, such a relationship actually exists.

9. We shall now proceed to the *Public File*. The information filed in this case included five charges, primarily founded upon the claim that Deri transferred monies in contravention of the

support procedure, and in restricting the discretion of the local authorities. Deri was convicted by the Magistrates Court of the offense of breach of trust only in regard to the fifth charge, which concerned granting support to the Jerusalem association headed by his brother and in which his brother-in-law served as treasurer. The conviction on this charge derived from Deri's conflict of interests against the background of his family relationship to the heads of the association. My colleague Justice Joubran noted that in this regard Deri committed an offense of breach of trust while exercising his authority as Minister of the Interior, but the exercise of authority itself did not constitute the offense, but rather his being in a situation of conflict of interests at the time that he exercised the authority. My colleague's conclusion from the above is that "the possible relationship that might arise from that act and the role of Minister of the Interior is not of such significance as to ground a direct, substantive relationship that would disqualify him from serving as Minister of the Interior" (para. 36 of his opinion).

In my view, we must recall that Deri was not convicted only in the Public File but also in the Personal File, which was the more serious. In taking an overall view, appropriate weight must also be assigned to the fact that the Public File also reveals a direct relationship between Deri's acts and his position. The Magistrates Court held that if the matter of deviation from procedure had stood alone, it would not have convicted Deri in accordance with the case-law tests for breach of trust, inasmuch as that deviation lacked "that element of corruption that would transform it from a deviation from good governance and a public administrative defect to a criminal act" (p. 118 of the printout of the decision in the Public File). In other words, the Magistrates Court held that the deviation from the procedure lacked "that element of corruption", but further held that Deri's acts, performed in a state of "sharp and severe" conflict of interests, constituted a deviation from good governance and amounted to a public-administrative defect. We should recall that those are the values for which Deri was responsible as Minister of the Interior. The Magistrates Court also found it appropriate to emphasize the "identity of the actor":

> *At the time of commission, the defendant served in the high and respected office of Minister of the Interior of the State of Israel. In the framework of his office, he acted as he did,* as described above, to make an appropriation of NIS 4000,000 to an association headed by his brother, within seven days. *The speed at which the matters were accomplished, the exceptional steps that were taken by the*

> *municipality in order to pave the way for granting the appropriation without the approval of the Jerusalem municipal institutions … all of these add to the severity of the act, and reinforce our conclusion that the appropriation was so deeply flawed as to render it corrupt …* We find no difficulty in holding that the defendant's breach of trust harms the public. As noted, harm to the public need not necessarily be material, and the harm to public confidence in government that inheres in the act is sufficient … It would appear to us that no one would dispute that this appropriation by the Minister of the Interior of the State of Israel to an association headed by his brother constitutes an act that can harm public confidence in the governmental institutions of the State of Israel. Moreover, the "budgetary pie", including that of the Ministry of the Interior, is known to be limited and defined. Every appropriation and any support for one institution necessarily detracts from the "budgetary pie" in a manner that frustrates support for another institution. It is therefore proper that support be granted on a relevant basis, in accordance with appropriate considerations, not suffering from defects such as this one proved to us under this charge, and it is proper that the one who approves the appropriation in the Ministry of the Interior be someone who is not acting in a situation of conflict of interests – so that "all the people" see the validity and transparency of the act (*ibid*., pp. 121-122, emphasis added).

We thus see that while, in theory, it is possible to commit an offense of conflict of interests in any government ministry – in the real world and under the concrete circumstances – this offense was committed by Deri by means of exploiting his specific position in the Ministry of the Interior as a body that grants financial support to local authorities. A conflict of interests is a situation in which there is a conflict between the interests for which the public servant is responsible and an interest of a different kind. This definition covers a wide range of situations. It should be emphasized that in relationships of a supervisory nature, the requirement that there be no suspicion of conflict of interests is critical. It is also incorrect to view offenses simply on the basis of their titles – bribe taking, breach of trust, conflict of interests, and so forth. One must proceed to examine the story of the offense as it occurred – the actus reus. That examination reveals that Deri's conviction on the fifth charge, due to his extreme conflict of interests, was

clearly connected to the office of Minister of the Interior that he held at the time, and that the necessary relationship exists.

Ethical Conduct, Good Governance, Public Confidence and Knesset Ratification

10. In his opinion, Justice Joubran referred to the existence of a "mitigating factor" in the form of the Knesset's ratification of Deri's appointment to the office of Minister of the Interior. My colleague further emphasized that while in the previous petition the ratification of Deri's appointment to the office of Minister of the Economy was given in the framework of the Knesset's vote of confidence in the Government as a whole, in the present case the Knesset specifically ratified Deri's appointment as Minister of the Interior, after conducting a debate on Deri's criminal record and the consequences of the said appointment for public confidence. My colleague thus inferred that the asserted harm to public confidence in governmental authorities was significantly mitigated when the Knesset – the body representing the public's opinion – considered the various aspects of the appointment and ultimately ratified it (para. 46 of his opinion).

I agree that Knesset ratification should be granted weight. High Court of Justice intervention in the appointment of a minister is a sensitive matter that should be approached with caution. This is particularly true when the appointment was brought before a broader forum, like the Knesset. This is an important consideration, but it is not decisive in every case. The importance of Knesset ratification may be especially relevant in a borderline case. As the Court held in the previous petition, Deri's appointment as Minister of the Economy was, indeed, a case "on the boundary of the margin of reasonableness" (para. 23 of the opinion of Justice E. Hayut). As opposed to that, the present case is not, in my view, on the border but beyond it. Therefore, the Knesset's ratification – given after a focused debate in regard to Deri – is insufficient.

In order to explain why the Knesset's ratification, in and of itself, is not a decisive factor in the present case, it would be helpful to address the guiding principles in the issue before us. We are concerned with the appointment of a minister who is statutorily competent to hold the office. The area of debate is that of the reasonableness of the decision, or more precisely, its degree of unreasonableness. The overarching considerations include ethical conduct, good

governance, and the maintaining of public confidence in governmental institutions; again – for the sake of precision – the scope of the harm to those values presented by the appointment. Against the background of the Knesset's ratification, we will first focus upon public confidence.

For my part, I would emphasize ethical conduct and good governance. But inasmuch as the rule concerning the maintaining of public confidence is well grounded in the case law, I will say the following: Public confidence is normative, not empirical. It is not examined by means of a "public opinion survey". The danger of such an approach can be expressed in two directions. In other words, just as public confidence in the form of a virtual survey does not require the normative conclusion of non-intervention in the appointment, the absence of public confidence, similarly inferred, does not automatically lead to intervention in the appointment. For example, it is possible that from a factual perspective, most of the public is opposed to the continued service of an elected official, but we are concerned with rumors in regard to the improper conduct of that elected official that have not been investigated, and the official has not been afforded the opportunity to be heard by an investigating authority. In such cases, it is entirely possible that although the majority of the public supports an immediate result, that should not be accepted. The reason, as has been noted, is that public confidence is not a matter of statistics. Knesset ratification, as well, and with all due respect for the debate that preceded it, is not the last word in terms of judicial review of the reasonableness of the appointment. And even the law does not so establish.

We should also not forget that we are examining three overarching consideration that are intertwined and interconnected: ethical conduct, good governance, and public confidence. Clearly, ethical conduct and good governance are normative matters that require constant improvement. Ethical conduct is meant to ensure, *inter alia*, that the decisions and actions of a public servant – both in terms of their content and the manner in which they are made or executed – are not ethically tainted. As for good governance, it is a condition without which all that is achieved is tarnished.

Indeed, preventing harm to public confidence is a primary, central consideration for the functioning of government. It is only proper that this matter be subject to judicial review and intervention in the framework of an examination of the reasonableness of the decision to appoint a government minister. Like my colleagues, I am of the opinion that it is a tool that should be

reserved for extreme cases. In light of the relationship between the act – on the general and particular levels – and the person filling the office and its nature, and the harm to the overarching considerations of good governance and ethical conduct, I am of the opinion that the matter before us is such a case.

Transferring Authorities and the Margin of Reasonableness

11. Administrative law waves the banner of reasonableness. The latter term comprises the question of whether a decision by an authority is entirely unreasonable or whether it is practically possible to uphold part of it. This may be reminiscent of the element of constitutional law concerning the examination of alternatives of lesser harm. This is also germane to the matter before us. That is, would it be possible to achieve the requisite objectives without entirely disqualifying Deri's appointment as Minister of the Interior? Is it possible to conceive of alternatives that would mitigate the harm presented by that appointment such that is might remain within the margin of reasonableness? That would seem to be the path chosen by the Government and the Knesset in the previous petition. In the Government's decision of May 26, 2015, which was ratified by the Knesset on June 1, 2015, it was decided to transfer to the Minister of Religion Deri's statutory authority as Minister of the Economy in all that regarded the selection of judges and public representatives in the Labor Courts (R/2, R/3 of the State's response to this petition). That transfer was one of the reasons given for not intervening in the appointment in the decision in the previous petition (para. 22). In the *Gallant* case, as well, one of the central considerations for not intervening in the appointment was the scope of Gallant's authority and areas of responsibility in his role as Minister of Construction, and the transfer of part of his authorities. It was thus held that "the Government's decision to transfer responsibility for the Israel Lands Authority from the Ministry of Construction to the Ministry of Finance … *weakens, in practice, the relationship between the actions imputed to Gallant and his areas of responsibility as Minister of Construction, and thus mitigates the said problem …*" (para 30, emphasis added).

In the matter before us, not only is there a significant, twofold relationship between the offenses and the office, but mitigating the problem by means of transferring authorities – as was done in the *Gallant* case, and even in the previous petition, the circumstances of which were

"lighter" than the present circumstances – is not an option here, and would not even appear possible. The reason for this concerns the nature of the office. One can serve as Minister of the Economy without serving on the Committee for the Appointment of Judges and Public Representatives in the Labor Courts. That is a relatively negligible part of the office, and is not at its core. However the role of the Minister of the Interior is strongly bound, by nature and character, to responsibility for local government. That is a central part of the office, and the person holding that office exercises many authorities in that regard (as detailed above). It would therefore appear that transferring those authorities from the Minister of the Interior would be artificial, and in any case, would not be a workable division.

The Time Dimension

12. This issue of the passage of time remains to be examined. Time has its effect in many areas of life, and the legal realm is no exception. As noted, at the time of Deri's appointment as Minister of the Interior, thirteen years had passed from the completion of his sentence in the Personal File, and twelve years since the sentence was passed in the Public File. The threshold period established under sec. 6(c) of Basic Law: The Government – seven years – had passed. It is true that our concern is with the question of the reasonableness of the decision and the discretion exercised in that framework. While the legislature did not take a stand beyond the setting of the threshold, it is clear that in such matters, and in general, a period of eight years is not comparable to a period of twenty years. To that we should add that the previous decision attributed weight – and even substantial weight – to the passage of time.

Nevertheless, I am of the opinion that in this case, the period of time that elapsed cannot serve as a response to the opposing considerations that support disqualifying the appointment – first and foremost, the relationship between the office and the offenses. As already explained, that material relationship derives from the nature of the office, the character of the offenses, and the concrete circumstances of their commission. Each factor stands firmly on its own, and is significantly strengthened by the cumulative effect. As this Court held in the *Sarid* case, there may be circumstances of a clear, direct relationship between the office and the offenses wherein considerations that would be granted greater weight in the absence of that relationship – including the time factor – will lose that weight where it exists (see para. 2 above).

Time has its own context. In other words, in my opinion, it would be incorrect to consider only the period of time that elapsed as a "dry" statistic, and what occurred in its course should also be examined. As I noted in the Decision on the Further Hearing in regard to the time dimension: "Here we have an example of how much consideration must be given to all the circumstances as a whole, and not relate to considerations listed in the case law as technical matters that limit the discretion of the appointer, and the scope of judicial review" (para. 7). That is also true in the matter before us.

Deri's appointment as Minister of the Interior was made after he served as Minister of the Economy and Minister for the Development of the Negev and the Galilee for only some 6 and 8 months respectively, and it appears that was due to various political reasons, and was a result of unforeseen developments. As that may be, the period of time is not sufficient. Under the circumstance as they developed, the first ministerial position that Deri will fill is, in practice, Minister of the Interior. That is a factor that should be addressed. In this regard I will make recourse to the words of my colleague Justice Joubran, according to whom Deri's return to the Ministry of the Interior indeed carries symbolic significance, and the appointment may even be seen as a Government and Knesset seal of approval that there was nothing wrong in the manner that Deri conducted himself in committing the offenses while serving in senior positions in the Ministry of the Interior (see para. 38 of his opinion). I would further add and emphasize that the significance is even more symbolic when, in practice, this is the first office to which he is being appointed a minister. Like my colleague, I too am of the opinion that this problem increases the harm to public confidence that resulted from Deri's appointment as Minister of the Economy, which was the subject of the previous petition. In my opinion, here too there is significance to the fact that Deri is returning – almost as a trial run – to the same office in which he strayed. It would be no surprise if I were to say that sometimes public confidence transfers a kind of burden of proof to the elected official, and the consideration of time meshes with the examination of his acts in the public arena as well. Therefore, under the concrete circumstances and against the background of my reasons, the time that has elapsed is not sufficient, by itself, to provide the key to the door of the office in the framework of this petition.

13. Is this conclusion in regard to time always correct? I prefer not to decide the fate of the distant future. The conclusion that I have reached in this petition is not the final word in regard to

circumstances that are not its own. After a long, very significant period of time has elapsed, during which Deri will have served as a minister or in some other senior public office, the time will come for reappraisal. In this sense, and in accordance with my general approach to the issue, I will refrain from "seizing the corners", as I shall explain.

In the *Hanegbi 2003* case, Justice E. Rivlin held that it is "hard to imagine that an individual whose appointment as Minister of Public Security would cause such severe damage to the public's trust that we must strike down the Prime Minister's decision to appoint him, would be able to head another ministry – such as the Ministry of Education or the Finance Ministry. It is difficult to accept that an individual who is so patently unfit to serve in a ministry responsible for law enforcement could, without any hindrance, serve in a ministry entrusted with the state's foreign policy or its security" (para. 32). In the *Sarid* case, Justice Mazza held that "where there is a clear, direct relationship between the offenses that the candidate committed and the office he is intended to hold, a possible conclusion it that his criminal past entirely disqualifies him from holding a particular office" (para. 16). As a rule, and with all due respect, I cannot agree with those positions. As I explained above, it is possible for a person who is unfit to serve as a minister in one ministry to be fit to serve in another ministry, and this case is proof. In the same manner, I would be careful not to make a blanket statement that the existence of a relationship absolutely and forever disqualifies a candidate from serving in the same position that realizes that relationship. A derivative of the well-established case-law rule that a concrete examination must be conducted is that things can change even in regard to a particular person and a particular office. I would summarize by saying that time will tell the weight of time.

Interim Summary

14. We demonstrated above that there is a "clear, direct relationship" between the office of Minister of the Interior and the offenses that Deri committed in the past. The foundations of that relationship are, as stated, three: *One*, the nature of the office. There is no "competition" here between the Minister of the Interior and other ministers, or among the scopes of the budgets of the various ministries. The focus is on the unique. It is proper to emphasize, in particular, the authorities of the minister that are of a quasi-judicial or a quasi-police character, and that concern oversight of the local government, of good governance, and of ethical conduct. In order to

perform this important task, the minister is permitted to take significant, far-reaching steps. Some of them are at the very heart of the democratic system, and concern, for example, the right of citizens to elect the mayors of their cities and the heads of their councils. In practice, the Minister of the Interior is authorized and required to act as a counterbalance to the improper conduct of elected officials. *Second*, the character of the offenses. That character must be examined in context. As a rule, there are more serious offenses, or, for example, such that carry a more significant maximum period of imprisonment. However, here too, the focus must be upon the uniqueness. We are concerned with offenses that strike at the "foundations of government structure" (the *Eisenberg* case, para. 55, *per* A. Barak P.), and undermine and subvert its pillars. The offense of bribery is rightly identified as the most serious offense among them, and I addressed its evil effects at length above (and for a detailed discussion, see the chapter "On Bribery and Blindness" in the *Holyland* case). *Third*, the concrete circumstances of the commission of the offenses, and the use of the office and authorities granted to the Minister of the Interior to commit them. As we see from the decisions in the Personal File and the Public File, Deri's unlawful acts were related to the positions that he held in the Ministry of the Interior. The acts, in all their details, were in the public and governmental arena for which the Minister of the Interior is responsible in regard to local government. There severity is also great. Deri was sentenced to three-years imprisonment for his conviction in the Personal File, and that, too, carries weight. The fact that Deri was given a custodial sentence for the significant period of three years for the serious offenses that he committed – bribe taking and breach of trust – reflects the force of each of the elements of the relationship and their interconnection. That is how the concrete matter must be examined – what is the offense, what is the penalty, and where imprisonment is concerned – what is its length. Even if Deri could theoretically have committed those acts in any other ministry and in any position – in practice, he committed them as Director General of the Ministry of the Interior and as Minister of the Interior, while exploiting his position, power, authority, and service in those very positions.

As we see from the foregoing, each of these pillars is of great independent weight, and each directly affects and reinforces their interrelationship. The character of the offenses that Deri committed conflicts with the uniqueness of the role of the Ministry of the Interior in general, and the minister at its head, in particular. The first pillar – the uniqueness of the position – waves the banner of ethical conduct, good governance and public confidence. The second pillar – the

character of the offenses – crushes those values. The structure of government is destabilized. The direct, material relationship becomes clear. Similarly, in regard to the third pillar – the specific authorities granted the Minister of the Interior, like those concerning the budgets of the local authorities – were unlawfully employed by Deri, while serving as Minister of the Interior, in a manner that conflicts with the values that the first pillar supports and the second negates.

The result is that in the concrete circumstances before us, we are concerned with a serious and different situation. Primarily, we are not concerned with a "borderline" case. Indeed, Deri meets the statutory competence requirements, and the Prime Minister enjoys broad discretion in appointing government ministers. I am also not unaware of the Knesset's ratification of the appointment, and of the time that has elapsed. All of these, of course, have bearing. Nevertheless, in my opinion, the counter considerations outweigh the particular circumstances of the case. This is particularly show in regard to the relationship between the offenses and the office, and the force of its components. It should further be recalled and stressed that the harm attendant to the appointment is not limited to the question of public confidence, which is of a normative character, but is broader in scope, and has consequences for additional, significant normative aspects like governmental ethical conduct and the maintaining of good governance. To that we must add that the offenses – which, as noted, were materially related to the office to which Deri is now being appointed – were committed by him while he was serving in that very office in the past. To return to one of the examples given earlier: not only is it problematic to appoint a person convicted of drunk driving – and certainly a more serious traffic offense – as Minister of Transportation, but in my view, it is all the more problematic if the offense was committed when that person served as Minister of Transportation, when he was meant to serve as an exemplar in that specific area, and seriously failed in doing so. As noted above, the various considerations and the different circumstances are not related as a mixture, but as a compound. The picture has changed, and in the present case, that change also leads to a different result. For these reasons, as detailed above, I have arrived at the conclusion that while Deri's appointment as Minister of the Economy was "on the boundary of the margin of reasonableness", now – upon his appointment specifically as Minister of the Interior, and *de facto* as his first trial run – that boundary has been crossed.

Jewish Law – Between Rehabilitation and Public Dignity

15. It is instructive to examine the approach of Jewish law to the issue before us. It would appear that the approach is not uniform, and that in practice, there are a variety of distinctions that influence the outcome. On one hand, we find those who emphasize the belief in the possibility that every sinner can repent any sin and every offense. On the other hand, there are opinions that highlight the recognition of the sensitive dynamic between the individual and the public, and between a person's past and his present. As is the way of Jewish law, this does not necessarily reflect disagreement, but rather a tying up of loose ends. The guiding principles of Jewish law in regard to this issue are clear, but I would preface in saying that they do not necessarily lead to a particular conclusion in the circumstances before us. My reason for bringing these sources is to highlight the tension that exists, and clarify it, while presenting tools for examining and evaluating the issue. It should be clear that not all of the examples that will be cited are appropriate to the case before us, however they, too, can serve as a resource for deriving the principles of Jewish law on this issue, which is the purpose of the survey.

Jewish law sees sin as part of every person's life: "There is not one good man on earth who does what is best and does not err" (Ecclesiastes 2:20). The sins of the biblical heroes – severe and slight – are also revealed among its folios. Moses sins in striking the stone, King David in the matter of Uriah the Hittite and Bathsheba, King Saul in the destruction of Amalek are but a few examples Along with that, the principle of repentance is one of the foundations of Judaism. The Gates of Repentance are open to every sinner, along with the promise that true repentance will wipe away his sins: "Be your sins like crimson, they can turn snow-white; Be they red as dyed wool, they can become like fleece" (Isaiah 1:18). In some ways, the sources see a penitent as being more worthy than one who has never sinned. Thus Maimonides writes in the Laws concerning Repentance:

> A repentant person should not imagine that he is distant from the status of the righteous due to the sins and transgressions that he committed. That is not the case. Rather, he is beloved and desirable before the Creator as if he never sinned. Moreover, he has a great reward for he has tasted sin and separated himself from it, and conquered his inclination. Our Sages said: where penitents stand, even the perfectly righteous cannot stand. In other words, the level of the penitent is

> greater that of those who never sinned, for they vanquish their inclination more (Laws concerning Repentance 7:4).

The centrality of repentance in Judaism did not stop, and perhaps even invited, distinctions among various types of repentance. The emphasis is that complete repentance – by which a person's sins are eradicated and become as if they never were – is possible in the relationship between man and his Creator. However, in human relations, a sin is never completely erased. In the words of the Talmud, the sin "pursues the sinner":

> They asked Wisdom, what is the punishment of the sinner? They were told "Misfortune pursues sinners" (Proverbs 13:21) [Rashi *ad loc*: "An evil person is pursued by his evil"] … They asked the Holy One, what is the punishment of the sinner? He told them, let him repent and his sins will be forgiven (Jerusalem Talmud (Vilna ed.), Makkot 2:6).

From this source it would appear that the concept of "repenting" is connected to the relationship between man and his Creator. In the words of Rabbi Akiva on Yom Kippur: "Before whom do you purify yourselves, and who purifies you? Your Father who is in Heaven" (Mishnah Yoma, 8:9). For this type of repentance, which may be referred to as "religious repentance" in the relationship between man and God, a change of heart suffices (see: Babylonian Talmud, Avodah Zara 17a: "some acquire eternity in a single hour". But in the case of repentance in relationships "between a man and his fellow", which we might refer to as "social repentance", the sinners return to the normative social order requires punishment as one of its conditions. Moreover, although the blemish fades following repentance and punishment – it is not necessarily eradicated in its entirety. While Jewish law shows great sensitivity for the repentant sinner, and forbids mentioning his past (Mishnah, Bava Metzia 4:10; Maimonides, Laws concerning Sales 14:12, Laws concerning Repentance 7:8), as a rule, the impression made by the offense does not make it easy for the page of life to return to what is was in the past.

The reason for this difference between religious repentance and social repentance concerns two different elements – logical and epistemological. It may be said that what the two share in common is human limitation as opposed to Divine ability. The *first element* can be seen in the words of Rabbi Soloveitchik, who noted that repentance before God comprises elements that humans view as illogical. Rationally speaking, we cannot change the past, and "what's done

cannot be undone". As opposed to that, a person can act retrospectively before God, and make his past spotless. Rabbi Sloveitchik superbly showed the gap between scientifically logical principles and the principle of religious repentance. By the laws of nature, a cause must always yield an effect. But repentance is an exception. That is, a person sinned, but because he has repented, he retroactively changes the situation. Repentance, which was originally the effect of sin, becomes a cause that can even change the nature of the sin from negative to positive, and to a retroactively beneficial factor. That, in the sense that where penitents stand, even the perfectly righteous cannot stand (Rabbi Joseph B Soloveitchik, *Sacred and Profane* (Gesher, 1966). To sharpen the conceptual gap between religious and social repentance, Rabbi Soloveitchik emphasized the infinite power of religious repentance. According to him, such repentance helps even the most despicable criminals who acted against our nation. On more than one occasion, he wondered whether the leaders of our most bitter enemies could benefit from repentance such that we might accept them. He concluded:

> I have no answer… But Ha-Kadosh Barukh Hu sometimes acts in a manner contrary to our human logic. We do not understand it, and the angels do not understand it either (Joseph B. Soloveitchik, *The Lord is Righteous in all His Ways*, 274 (2006)).

The *second element* is to be found in epistemology (the theory of knowledge), and is rooted in the human limitation to know and measure the sincerity of repentance, as opposed to God: "Man sees only what is visible, but the Lord sees into the heart" (I Samuel 16:7). An expression of this element can be seen in the difference between what Maimonides writes in the Laws concerning Repentance and what he writes in the Laws concerning Testimony. In the Laws concerning Repentance – which treats of the religious side of repentance before God – Maimonides writes: "What is repentance … and He who knows the hidden will testify concerning him that he will never return to this sin again" (Laws concerning Repentance 2:2). As opposed to this, in the Laws concerning Testimony, Maimonides addresses the differences among the various types of offenses, and on the need for indicators of the sincerity of repentance:

> When a person is sentenced to receive lashes, once he has been flogged by the court, he is again considered an acceptable witness. Other persons who are

> disqualified as witnesses because of money which they seized or stole must repent even if they made restitution, and they are disqualified as witnesses until it is known that they repented their evil ways (Laws concerning Testimony 12:4; and see Maimonides' *Commentary to the Mishnah, Sanhedrin* 3:3; *Shulhan Arukh*, HM 34).

16. As noted, in order for the offender to return to society, there is a need for punishment: "Anyone who sinned and was flogged returns to his fitness, as is written: 'your brother be degraded in your sight' (Deut. 25:3) – once he has been flogged, he is again your brother" (Maimonides, Laws concerning the Sanhedrin 17:7; Mishnah Makkot 3:15). However, as stated, punishment does not necessarily completely absolve the offense, and this may have consequences for a person even after serving his sentence. One of the consequences, and the one central to our discussion, concerns an offender's fitness to serve in public office.

Even in the Bible we see how sin can affect fitness for a public position. Pursuant to the sin of Moses and Aaron, they were forbidden from entering the Land: "… therefore you shall not lead this congregation into the land that I have given them" (Numbers 20:12). And similarly, in the case of Saul, although he admitted his sin, his kingdom was rent from him: "Saul said to Samuel, 'I did wrong to transgress the Lord's command and your instructions; but I was afraid of the troops and I yielded to them. Please forgive my offense and come back with me, and I will bow low to the Lord.' But Samuel said to Saul, 'I will not go back with you; for you have rejected the Lord's command, and the Lord has rejected you as king over Israel'" (I Samuel 15: 24-26).

We also find this in additional and later sources. In the Mishnah, we find a disagreement between Tanaitic sages in regard to the interpretation of the verse "the manslayer may return to his land holding" (Numbers 35:28), and on the question of whether a person who has killed unintentionally may return to a position of leadership that he held prior to his exile to the city of refuge: "He returns to the office he formerly held, these are the words of R. Meir; R. Judah says, he does not return to the office he formerly held" (Mishnah Makkot 2:8). Similarly, pursuant to the Talmud's conclusion in tractate Horayot that a High Priest who sinned returns to his office, Maimonides rules: "The head of an academy who transgresses is flogged before three, and is not reinstated to his office (Laws concerning the Sanhedrin 17:9). In other words, although serving

one's sentence permits the offender to return to society immediately – "since he has been flogged, he is your brother" – there are situations in which serving one's sentence is not the end of the story, and in order for the offender to return to his prior position, he must go through other stages. Further on in his Laws concerning Testimony, which we quoted above, Maimonides adds various conditions for the return of various offenders. The principle that can be inferred from what he writes is that even if a person has served his sentence and paid his debt to the legal system and society, that is not sufficient to entirely and immediately remove the fear that he may return to his evil ways, and therefore he cannot return to his office until he earns the public's trust.

Moreover, we also find in the sources not only a distinction among various offenses, but also among the various endeavors and offices that the offender may wish to undertake. In other words, a person may be fit for one thing and unfit for another. Thus, the Mishnah in tractate Bechorot states:

> One who is suspected in regard to the sabbatical year is not suspected in regard to tithes. One who is suspected in regard to tithes is not suspected in regard to the sabbatical year. One who is suspected of both is suspected in regard to the rules of Levitical purity. And it is possible for one to be suspected in regard to the rules of Levitical purity and yet not be suspected of the latter or the former. This is the rule: One who is suspected in regard to the matter must not judge or testify about it (Mishnah Bechorot 4:10).

We learn from the Mishnah that a person who is suspected of offenses in a particular area cannot hold a public position in the suspected area, but that does not disqualify his fitness in other areas (in this regard, also see: Babylonian Talmud, Sanhedrin 25a – 26b). As for offices that involve enforcement of the law, the Hatam Sofer [Rabbi Moses Schreiber (1762–1839)] ruled that a person who had committed an offense could not hold a law enforcement office, due to the fear of harming the authority attendant to the office: "He is not rejected, but he cannot be a *parnass* [president or trustee of the congregation] or given responsibility over the public, as we find in [Babylonian Talmud] Bava Batra 15b, 'which judged its judges. If the judge said to a man, Take the splinter from between your teeth, he would retort, Take the beam from between your eyes. If the judge said, Your silver is dross, he would retort, Your liquor is mixed with

water.'" [Rashi, *ad loc.* explains the that the Talmud is referring to a situation in which the judges were themselves corrupt, so a defendant could retort by criticizing those who criticized him, such that if the judge were to say "Take the splinter from between your teeth,", meaning that he should renounce and refrain from his minor infraction, he could retort by saying "Take the beam from between your eyes", and refrain from the serious crime that you are committing] (*Responsa Hatam Sofer, Likutim* 6:49); Nahum Rackover, *Takanat Hashavim – Rehabilitation of Criminals in Jewish Law*, 236 (2007) (Hebrew) [English summary: http://www.mishpativri.org.il/english/shavim_english.pdf] (hereinafter: *Rakover*).

Jewish legal sources point out that in regard to the trust ascribed to a person who served his sentence, the period of time that has elapsed since the commission of the offense is of importance. Thus, for example, Rabbi Hai Gaon (939-1038) ruled on the question of the return of a transgressor to serve as a prayer leader:

> The letter of the law is that nothing stands before repentance. Rather all penitents that God knows have regretted what they transgressed due to ugliness and have taken upon their hearts not to repeat anything like it, He forgives. But human beings, although they do not know what is hidden, and have nothing but what is visible, if a long time passed, and no improper thing was seen, neither openly nor covertly, and the heart believes that he repented—we accept him (*Sefer Kol Bo*, p. 15, col. 4, Fürth 1782 (Hebrew), and see in detail: *Rackover*, p. 469)

As noted, human beings are limited in their ability to measure the sincerity of another person's repentance. The element of time, and the various other conditions mentioned in the sources, help to some extent as indicators of the penitent's sincerity that enable him to reacquire the public's confidence

Nevertheless, there are offices to which even an absolutely sincere penitent cannot return. The reason for this is that they symbolize a value that may be in tension with the office holder. Thus, for example, Rabbi Moshe Feinstein explained that the reason for the rule that a Nasi [President of the Sanhedrin] who had transgressed could not return to his office was because a person who teaches Torah must be like an angel: "And Maimonides is of the opinion that one who transgressed willfully after being warned, even if he was flogged, he can no longer be thought of as an angel of God, and we should not seek Torah from his mouth" (*Dibrot Moshe,*

Gittin 23:356, and see: *Rackover,* ibid., p. 210). In the responsa of Maharshdam (Rabbi Samuel ben Moses de Medina (1505-1589)) we find that a person who repented may not return to his public office out of respect for the "dignity of the congregation" (*Responsa Maharshdam* OH 33) (Hebrew)).

We should note that this tension is not necessarily a result of the offense. Thus, for example, when King David sought to build the Temple, he was refused because he was not deemed appropriate. That was not due to some sin, but rather because of the incompatibility of his past, in which he spilled copious blood in battle – "for you have shed much blood on the earth in My sight" (I Chronicles 22:8) – and the task of building the Temple, of which the Bible says: "do not build it of hewn stones, for by wielding your tool upon them you have profaned them" (Exodus 20:21) (and see Rashi's commentary *ad loc*: "Because the altar was created to lengthen man's life, and iron was created to shorten man's life, it is not right that what shortens should be wielded over what lengthens").

To complete the point, it should be noted that despite the gap between religious repentance and social repentance, these spheres are not disconnected from one another, and a person's ability to repent is, as noted, one of the foundations of Judaism. This obligation is not imposed only upon the person himself, but society must encourage the rehabilitation of transgressors. Thus Maimonides writes in the Laws concerning Repentance: "All the wicked, and criminals and apostates, and such the like who repent, whether openly or in private, are accepted, as is written: 'Return, faithless children'" (Laws concerning Repentance 3:14). In this light, we will return to the responsum of Rabbi Hai Gaon cited above, in which he emphasizes the consideration that "if a long time passed, and no improper thing was seen, neither openly nor covertly, and the heart believes that he repented—we accept him". We learn from this that although the wheels of social repentance turn at a different speed than the wheels of religious repentance, just as we must understand and consider the public's doubt, so the public, at a certain point in time and in accordance with the circumstances, must show understanding for the elected official who transgressed and repented, and permit him to return.

In conclusion, Jewish law teaches us that there are different spheres of repentance. Repentance between a person and his Maker erases the sin and entirely eradicates it. In the social sphere, serving one's sentence returns the offender to society and the normative sphere.

However, and particularly for the purpose of holding public office, Jewish law does not suffice with the serving of one's sentence, but sets a higher threshold in accordance with the type of offense and the nature of the office. It would seem that the paths of the Israeli legislature and the case law is consistent with the principles of Jewish law in giving real weight to the time dimension and to the conduct of the elected official in the course of the period since he offended and served his sentence. Thus, in accordance with the threshold conditions established by Israeli law, and thus in the examination of the reasonableness of the appointment in the case law of this Court following the end of the statutory period. The rule that each case must be examined in accordance with its circumstances reinforces the conclusion that although Jewish law gives us tools for balancing and weighing, it would not be correct to infer only one conclusion from it in the matter before us.

The dignity of the congregation, mentioned in some of the sources as a consideration that justifies not allowing an offender to return to his public office, is important and of significant weight. Like the overarching consideration of public confidence, it comprises value-based and normative dimensions. What arises from the survey is that considerations of the nature of the office and the type of offense are taken into account in Jewish law as well, and it would seem that they can be seen as parallels to the two the central elements of the relationship that I discussed in depth above, which were referred to as the "nature of the office" and the "character of the offenses". Thus we find that Jewish law employs similar language and balances. Even if the result of the balancing in a concrete case and at the particular level may differ, the purpose of presenting the material was to point out the common guidelines.

Conclusion

17. Recently, this Court upheld the appointment of Deri as a minister of the Israeli Government. Now, we have been confronted with the question of his appointment specifically to the office of Minister of the Interior. The opinion of my colleague Justice Joubran, according to which the appointment can be upheld from a legal perspective, is well reasoned. But in my opinion, the weight of other considerations is decisive, such that the appointment should be annulled. An examination of the case-law considerations and their application to the circumstances of the case, as part of the Court's review of the reasonableness of the appointment,

lead me to the conclusion that the lack of reasonableness in the appointment of Deri as Minister of the Interior is sufficiently great as to justify and require intervention. This is so in view of the clear relationship between the acts and the office, along with the severe harm that the appointment poses, particularly in regard to the overarching values of ethical conduct, good governance, and public confidence. The force of that harm cannot be blunted, for example, by a transfer of authority that would appear to be impossible under the circumstances.

It should be noted that my opinion is not intended to "punish" Deri. This is not the relevant proceeding, framework, or consideration. However, one cannot ignore the consequences of the circumstances before us for the appointment and the manner in which the new elements change the compound and overturn the conclusion.

As should be recalled, the decision in matters such as this is guided by general rules, but is implemented and tailored to the specific case – each case in accordance with its circumstances. In other words, each case must be examined against the background of its particular factual foundations, as well as in accordance with the society, the time and the place. This, in my opinion, it the appropriate and correct legal decision in the circumstances. The required distinction under the circumstances between the reasonableness of Deri's appointment to serve as a minister in general – including in the senior role of Minister of the Economy – and the magnitude of the unreasonableness of his appointment as Minister of the Interior, lead to an appropriate balance between the various, complex parameters of the matter. That is also the case in regard to the time dimension. I would also emphasize on this point, as well, that my opinion rests upon the facts of the present petition. In other words, the door is closed but not necessarily locked. The question of whether after the passage of time – by which I mean a very long, significant period – during which Deri will serve in another public office, and in accordance with his conduct, he will be able to serve as Minister of the Interior, remains open.

Therefore, if my opinion were to be heard, I would issue an order nisi, with a view to making it absolute, and order the annulment of Deri's appointment as Minister of the Interior.

Justice Y. Danziger:

I concur in the opinion of my colleague Justice S. Joubran and with all his reasons.

I nevertheless find it appropriate to make a brief comment in response to the considered opinion of my colleague Justice Hendel. In his opinion, Justice Hendel notes that according to his approach, the prohibition upon bribe taking and breach of trust, which Deri transgressed, is intended to protect state governance "*particularly in regard to local government*" (para. 7 of the opinion). From reading the rest of the opinion, one gets the impression that according to my colleague's approach, *that uniqueness*, *inter alia*, is what justifies the distinction between Deri's appointment to the office of Minister of the Interior and his appointment to other ministerial offices, or in my colleague's words: "*The focus is on the unique*" (para. 14 of the opinion). Justice Hendel indeed emphasizes that he does not mean that the prohibition upon bribery and breach of trust is *less important* when other government ministries are concerned, and he further explains that "there is no 'competition' here between the Minister of the Interior and other ministers" (*ibid*.). But in effect, I fear that there is a certain gap between those words and the conclusions of the decision in practice. In this I refer to the fact that the result of my colleague's decision might create, if only by implication, a sense that, in practice, there is a normative scale that attributes to the type of offenses of governmental corruption a "uniqueness" or "particularity" to positions in government ministries like the Ministry of the Interior, and less so to positions in other government ministries. That conclusion arises particularly from reading paras. 6-8 of my colleague's opinion, and for my part, I think that we must be cautious in adopting it, both from the descriptive aspect, and primarily the normative aspect.

Decided by majority opinion in accordance with the decision of Justice S. Joubran

Given this 30th off Nissan 5776 (May 8, 2016).