The Supreme Court

High Court of Justice 4374/15, 7588/15, 8747/15, 262/16

The Movement for Quality Government v. The Prime Minister of Israel

Regarding the Gas Outline that was Prescribed in Government Decision 476

Summary of Judgment

Deputy President E. Rubinstein:

These petitions address felicitous discoveries of large natural gas reservoirs in Israel's exclusive economic zone, of which we have been informed in recent years. The petitions dispute the legal validity of an outline that was decided by the Government of Israel in the framework of Government Decision 476 regarding the Matter of Handling the Gas Reservoirs (hereinafter: the "**Gas Outline**"), and the State and the gas companies, the franchisees of the reservoirs, are defending the Outline. It shall at the outset be emphasized that throughout his opinion Deputy President **E. Rubinstein** emphasized that the Court is not requesting to examine the economic wisdom of the Outline and does not wish to express an opinion in this matter. The issue that is being examined thereby is a legal question – **the limits of the government's power and authority in a democratic regime**, and the extent to which its residual power and authority – its general power and authority to act – can be stretched, when the legislator did not explicitly authorize it and when the economic significance is so unprecedentedly immense.

The judgment primarily addresses three main issues that were raised in the petitions:

First, what are the circumstances in which Section 52 of the Antitrust Law, 5748-1988, which vests the Minister of Economy the power and authority to exempt a restrictive practice from the provisions of the Antitrust Law on grounds of foreign policy and security considerations, can be applied; and was the section applied with authority and in a reasonable manner in the case at hand – whereby the Prime Minister and the Minister of Economy (then as acting minister) relied on this section.

Second, was Chapter 10 of the Outline, which grants the gas companies a stable regulatory environment, and in other words, constitutes a Government undertaking not to change the Outline, including by legislative changes and objections to legislative initiatives, and which essentially serves as protection against regulatory changes in the fields of taxes, antitrust and export quotas, for the duration of a decade – prescribed with authority.

Third, does the Gas Outline, including all of its aspects, complexity and importance to the economy of Israel, not amount to a "primary regulation", which requires primary legislation, rather than a Government decision.

As to the application of Section 52: After examining the Petitioners' arguments relating to the matter of power and authority, the matter of exercising discretion and the issue of proper procedure, Justice **Rubenstein** reached the conclusion that Section 52 was applied on grounds of foreign policy and security in a reasonable manner and with authority. It was explained that in terms of authority, the Court was convinced that the foreign policy and security considerations are real considerations, which in the case at hand allow entering the scope of Section 52. This was in light of security opinions and opinions in the foreign policy field that were filed, as well as after hearing the position of senior government persons, including the Prime Minister. It was reasoned that in exceptional cases, in which there are significant security and foreign policy considerations, then, after examining the authority aspect, they should be weighed against the infringement that could be caused to competition (the purpose of the Antitrust Law) as a result of exercising the section; and the consideration is the public interest. In other words, once the "exceptionality threshold" has been overcome in terms of the authority aspect, there is the reasonableness aspect, creating a sort of "parallelogram of forces" between the interest of competition and the security-foreign policy interest. The greater the infringement of the competition interest, the stronger the security-foreign policy grounds will have to be, in order to exercise the section; and as mentioned, given these circumstances, despite the significant infringement of the competition interest, it was ruled that the security- foreign policy grounds bear heavy weight, and it follows that it cannot be said that the section was exercised in an unreasonable manner. All after having clarified that Section 52 shall only be exercised in unusual circumstances, but that the matter at hand falls within those grounds.

It was further found, although not without difficulty, that each of the taxation policy, the supervision of the prices and the export which appear in the Outline – **in and of themselves** – were prescribed with authority and in a reasonable manner, however this is not the case with respect to their aggregate impact. This shall be elaborated upon further on.

As to Chapter 10 which addresses a stable regulatory environment: Justice **Rubenstein**'s position is that the stability clause in this chapter of the Outline, in which the Government commits to a decade during which it not only will not legislate but will also object to any legislation that is against the provisions of the Outline, was prescribed *ultra-vires* and is void. This is due to the fact that it was prescribed contrary to the basic administrative law rule regrading prohibiting restricting an authority's discretion. It was explained that when an authority is granted power and authority, the power and authority also create an obligation – the obligation of exercising discretion; simply put, **the Government does not have the power and authority to decide not to decide or not to take action**. It was emphasized that this is all the more relevant when at hand is a matter that is subject to real political dispute, and when the authority wishes to restrict the discretion of its successors, the composition of which and the ideology it may hold may be different than that of the present government. Furthermore, once it was decided in the Outline that the Government shall avoid regulatory changes in the fiscal field, the antitrust field, and the export quotas that had been prescribed in Government Decision 442, for a period of a decade, the Government has, unlawfully, relieved itself from its discretion. Furthermore, it was ruled that once the Outline which is the subject of this discussion, predetermines that the Government shall object to private bills in the said fields, also

for a period of decade, then this, in effect, essentially even restricts the Knesset's discretion in light of the party discipline that is often exercised, especially when at hand are politically sensitive matters. The issue was also examined through the prism of the administrative promise doctrine, i.e. the Government's ability to give binding promises (even if in extreme cases, they can be cancelled with sanctions), this was in light of the notice by the State and the gas companies that the Outline should be viewed as such, and it was ruled that at hand is a promise that was given *ultra vires*.

As to the issue of the primary regulation: Following the above, Justice **Rubinstein** examined whether it as appropriate to regulate the issues addressed in the Outline by primary legislation, or whether one can suffice with the Government decision. After examining the justifications for all of the primary regulations – i.e. that matters of signal importance should be regulated by legislation – Justice **Rubinstein** reached the conclusion that the case at hand is a clear case, where the **aggregate entirety of aspects which require to be regulated warrant that the matter be regulated by primary legislation**, in an orderly and transparent process, which addresses the matter with the participation of the public and of the relevant entities, by the elected authority. It was emphasized that it is possible that with respect to each chapter of the Outline it could be argued that primary legislation is not required, however the essence is the overall impact, and at hand is a case where the whole is greater than the sum of its parts, since at hand is an almost primary regulation of the matter of producing and selling natural gas, and all its various aspects, that has huge economic implications, and which is the subject of deep public dispute. Thus, according to Justice **Rubinstein**, the Government deviated from the limits of its powers and authorities, when it desired – even if with good intentions – to regulate an important, sensitive, multi-dimensional systematic matter with enormous implications, not by way of legislation, and for this reason as well it was ruled that the Outline was prescribed *ultra vires*.

As to the relief – the operative outcome – according to Justice **Rubinstein**, in light of that stated above, the Outline should be ruled void, but the date of the voidness should be suspended. The State is given a period of a year during which it can act to regulate the matter of the natural gas. If at the end of a year from the date this judgment is given, there is no such, or other, regulation, the Gas Outline that was prescribed in Government Decision 476 shall be cancelled.

Justice S. Joubran

Justice **S. Joubran** concurred with Deputy President **E. Rubinstein**'s judgment and with the outcome he reached.

In the matter of the primary regulation, Justice **Joubran** emphasized in his opinion that the primary nature of the Gas Outline should be examined in its entirety and not in accordance with the specific regulatory decisions of which it is comprised. This approach is based on the process in which the Outline was adopted by the Government and the Knesset, as a single arrangement that is not separated into parts; and based on its nature and essence as a comprehensive decision that regulates the natural gas market. Justice **Joubran** emphasized in his opinion that the Gas Outline is an entire policy decision that sets priorities among various interests which relate to the

gas market, and he found that the specific regulatory decisions are only a tool to implement the entire Outline. Additionally, Justice **Joubran** noted the contractual nature of the Gas Outline, which is the outcome of negotiations between the State and the gas companies. In light of the importance of the Gas Outline, its economic implications and the public debate it raises, Justice **Joubran** joined the position of the Deputy President that the Gas Outline, in its entirety, is a primary regulation, and the regulating thereof by a Government decision requires authorization by primary legislation of the Knesset.

Additionally, Justice **Joubran** joined the position of the Deputy President that the regulatory stability provisions prescribed in Chapter 10 of the Gas Outline were prescribed without authority, since the Government was not entitled to restrict its own discretion nor the discretion of the Knesset. Justice **Joubran** added that in his opinion there is a flaw in the sweeping wording of the stability provisions, which could compromise Israel's international standing, if the State were required to renege on undertakings it had previously given.

Finally, Justice **Joubran** elaborated on flaws, which according to him, occurred in the exercise of Section 52 of the Antitrust Law. First, Justice **Joubran** found that the factual background, which served as the foundation for exercising Section 52 of the Antitrust Law, was lacking, due to the absence of an expert opinion examining the Gas Outline's impact on competition in the market. Second, Justice **Joubran** found that the timeframes which were given to the public to express its position regarding the Gas Outline in the framework of the public hearing were insufficient, such that the principle of public participation in the process of reaching the decisions, and of transparency in the political process, were compromised. However, Justice **Joubran** found that in light of the outcome he reached in the matter of the primary regulation, these matters would be addressed in the framework of the legislative procedure.

Justice N. Sohlberg:

According to Justice **N. Sohlberg**'s opinion the Petitions should be dismissed, and he disagrees with the opinion of the Deputy President on both matters:

1. The Regulatory Stability Clause – According to Justice **Sohlberg** the stability clause does not restrict the Knesset's legislative power, and the Knesset is sovereign to do as it wishes; the stability clause limits the Government's discretion, and it is indeed unusual: (a) in its duration – for many years; (b) in its scope – refraining from legislation and an undertaking to change contradicting legislation; (c) in the economic consequences that are expected to derive from the non-fulfillment thereof; However, even considering the accumulation of these characteristics, the stability clause does not constitute an absolute restriction of the Government's discretion. The restriction of discretion is a necessary consequence of the mere existence of administrative contracts and administrative promises, and the balance is expressed in the rules of rescission and in the possibility of withdrawing from an administrative promise. Thus, the Government is left with a certain room for discretion with an eye to the future, and in any event, a stability clause that is anchored in the Government decision, is more flexible than anchoring it in legislation.

The Government is granted the power and authority and has the professional tools to decide on the optimal outline for utilizing the gas resource, a decision that requires prescribing a multi-dimensional policy. The matter at hand is at the core of the discretion of the administrative authority. The Government may act in the matter to promote legislation. The regulatory stability clause is part of an entire 'package deal', which is the result of long and complex professional negotiations that were conducted by the State vis-à-vis the gas companies. In investments of this kind, an undertaking for 10 years is acceptable, and is required in order to prescribe policy and act to realize it by executing long term important projects. It will certainly be very expensive if the Government shall decide in the future not to fulfill its undertaking under the Outline. This depends on the scope of the investments, the degree of deviation from the Outline, the timing thereof, but it still may be an "efficient breach", if the scope of the profit shall exceed the amount of compensation. We are dealing with a unique matter, of a completely different order of magnitude than that to which are accustomed. At hand is a huge economic investment on the part of the entrepreneurs, at a significant risk on their part; there is an economic, political and security need for the implementation of the Outline as quickly as possible; the regulatory stability clause has signal importance within the entirety of the matter and is essential for the gas companies, as a prerequisite for the engagement; and ultimately – the enormous financial consideration which we all hope will be given from the said investment, for the benefit of the entrepreneurs, the State and its citizens. It follows from all of the above that it is only reasonable that the State shall be forced to bear a significant monetary cost to rescind from the administrative promise that is embedded in the Outline, since the greater the reward, the greater the risk. The reasonableness of the restriction of the discretion should be examined through this prism. Furthermore, according to the State Assets Law, the Government, in principle, is entitled to sell all or part of the gas reservoirs, and the actual sale is an absolute restriction of its future discretion. If the Government is permitted to perform a greater act (of selling), then, *a fortiori* it is permitted to perform a lesser one (the Gas Outline, including its regulatory stability clause).

Based on the grounds he states in paragraphs 8-39 of his opinion, Justice **Sohlberg** reached the conclusion that the regulatory stability clause is not illegal. The Government is authorized to restrict its discretion as it did, subject to the ability to rescind from the administrative promise.

2. Anchoring the Gas Outline in a Government Decision or Knesset Legislation – the entirety of the Government decision – in the field of export of the gas, taxation, antitrust, along with the regulatory stability clause – creates a primary regulation. However, contrary to the opinion of the Deputy President, Justice **Sohlberg** is of the opinion that existing legislation, by virtue of which the Government is authorized to decide on the Gas Outline, is sufficient and that there is no need for additional legislation. Section 52 of the Antitrust Law is the source of authority to grant an exemption from the antitrust laws; Section 33(a) of the Oil Law is the source of authority regarding the matter of exporting the gas. Once Justice **Sohlberg** reached the conclusion that the various components of the Government's decision are properly anchored in authorizing legislation, he raised the difficult question as to how it is possible to prohibit the Government from acting by virtue of such authorizing legislation, due only to the appearance of the 'entirety' thereof? In any event, even if the explicit authorization in the relevant laws with respect to the parts of the Outline

are not sufficient, there is also clear authorization with regard to its entirety, in Section 5(a) of the State Assets Law.

The conclusion is that the Government is authorized by law to prescribe the Gas Outline as it did; although the regulatory stability clause indeed restricts the Government's administrative discretion, it is valid; there is no need for legislating the Gas Outline; legislative regulation is expected to encounter difficulties (paragraphs 64-66); a Government decision is sufficient. The natural gas is the property of the State. The Government – as the public's trustee for the State's assets – has the obligation to exercise its power and authority in the matter at hand, which is at the core of governmental actions, in order to preserve the proprietary rights of the State in and to the natural gas, in the optimal manner. Not only was the Government permitted to decide, act and do; it was obligated to do so. This is its responsibility and its duty.

Justice U. Vogelman:

Justice **U. Vogelman** joined the greater part of Deputy President **E. Rubinstein**'s opinion, to which Justice **S. Joubran** also joined, including the determination that the regulatory stability clause in its current format cannot remain intact. In this regard Justice **Vogelman** emphasized that the scope and duration of the stability clause, as well as the "price tag" that accompanies its anticipated breach, create a *de facto* prohibited restriction of administrative discretion. Justice **Vogelman** added: "I wish to emphasize that I am not in any way ignoring the economic logic underlying the investors' demand for regulatory stability. It is obvious that in consideration for the latter's huge investments, they expect to reduce their risks, in such a manner that will enable them to return their investment and even receive appropriate yield. This interest of the investors must be properly addressed. As my colleague, the Deputy President, clarified in his detailed opinion, there are various possible models to do so. However, as mentioned above, the specific stability clause at hand is not included among such models, in light of its said unique characteristics." Alongside that, according to Justice **Vogelman**, there is nothing to preclude the Knesset from formulating a legislative arrangement that would allow the Government to anchor the three arrangements which the stability clause addressed, for a defined period of time, either by legislating a designated regulation, or by legislating a provision that would explicitly authorize the Government to do so.

On the other hand, Justice **Vogelman** did not join the position of the Deputy President and Justice **S. Joubran** that the Outline (apart from the stability clause) amounts to a primary regulation that warrants – in its entirety – being anchored by primary legislation. According to him, even if it would be appropriate, from a public aspect, that the Outline be brought before the Knesset as primary legislation, given the circumstances of the matter, there is no legal obligation to do so. According to Justice **Vogelman**'s position, the question whether the Outline is a primary regulation should not be examined based on its "entirety" but rather considering its concrete specifics while focusing on the aspects that relate to the anticipated structural changes in the gas market and the promotion of competition. In this context, Justice **Vogelman** is of the opinion that since the Outline is a framework that consolidates all of the relevant regulators in the natural gas market, each one within his own scope of authority – as a pooling of regulatory forces – it is possible, from a legal perspective – to regulate it in the framework of a Government decision.

Furthermore, Justice **Vogelman** is of the opinion that it is doubtful whether the economic-market significance of the Outline and the public dispute that has accompanied its formulation, in and of themselves warrant the ruling that the Outline amounts to a primary regulation. In any event, even if it is assumed, for the sake of the discussion, that the Outline amounts to a primary regulation, there is sufficient authorization for it to be prescribed not by primary legislation. Such authorization derives from the combination of all of the legislation provisions that explicitly authorize the authorities to prescribe each and every one of the arrangements that were prescribed in the framework of the Outline.

As for the relief, Justice **U. Vogelman** joined the position of the Deputy President **E. Rubinstein**.

Justice E. Hayut

Justice **E. Hayut** is of the opinion that only the restrictive provisions in Chapter 10 of the Outline should be cancelled, and that as long as these provisions are removed from the Outline, there is no need to cancel the rest of its provisions.

In her opinion, Justice **Hayut** states that the Outline does not completely belong to one legal framework, and it in fact constitutes a combination of legal frameworks. It was approved by a Government decision that consolidates the entirety of regulatory aspects that required addressing at that stage and some of the relevant provisions in this context were even drafted in a manner that corresponds with the traditional unilateral and imposing regulation. In this sense it can be classified as an administrative promise and this is how the State and the gas companies chose to classify it in the discussion. However, Justice **Hayut** further states that throughout the Outline there are more than a few provisions that are drafted as conditions in a contract that are a result of a meeting of the minds between the regulatory entities and the gas companies, and from this aspect, the Outline bears characteristics of a regulatory contract which is a new model of administrative regulation that bases regulatory provisions in various fields on contractual relations and cooperation with the supervised entities.

Justice **Hayut** states that it is possible that the model of a regulatory contract requires certain modification of the traditional administrative law rules in relating to restricting discretion, and she states in this context a modern variation of a stability stipulation in the form of an "economic balancing stipulation" which does not restrict the regulator's discretion and instead prescribes a mechanism of agreed compensation for the commercial corporation for possible regulatory changes. According to Justice **Hayut**, had the entire Outline been expressed in a regulatory contract that included a provision regarding a known and limited agreed compensation instead of the restrictive provisions, it is possible that that would have managed to overcome the judicial review. However, when it was discovered that in the framework of the Outline, the State was forced to satisfy the gas companies' demand for stability in a different manner, and to include restrictive provisions that do not comply with administrative law criteria, one may wonder what legal advantage, if any, was achieved in choosing the said framework.

Justice **Hayut** ruled that the restrictive provisions are extremely far reaching, *inter alia*, since they restrict the arms and legs of the Government, as the one that *de facto* controls the legislative process in the Knesset, in initiating legislation. Additionally, Justice **Hayut** ruled that the active undertaking of the Government in the framework of the restrictive provisions to frustrate any change in a law that contradicts the Outline, if and to the extent such shall be legislated further to a private bill, crosses all permissible boundaries in a parliamentary democracy and renders the restrictive provisions as clearly and blatantly illegal. Justice **Hayut** is further of the opinion that *de facto*, and despite the rules of rescission, the restrictive provisions create a legislative and regulatory freeze due to the exposure to a significant damages claim on the part of the gas companies of an unknown scope, in the event of rescission from the Outline or a part thereof.

Regarding the exercise of the power and authority of the Prime Minister and Substitute Minister of Economy, pursuant to Section 52 of the Antitrust Law, Justice **Hayut** states that giving the Antitrust Commissioner the chance to reach agreements with the gas companies in a path of an agreed order pursuant to the Antitrust Law, does not contradict the existence of considerations that relate to security and foreign policy, and she further states that it is possible that the period of time that was given to the Commissioner for the purpose of exhausting the said track was too extended and in hindsight it is definitely possible that had Section 52 been exercised earlier, it would have been possible to reach terms of agreement with the gas companies that may have been more convenient for the State in various aspects, and especially in terms of the restriction. However, once the Commissioner decided, after three years during which he negotiated with the gas companies, to renege from the agreement he had formulated therewith, and once he had decided not to present the drafting of the agreed order to be approved by the court, Justice **Hayut** is of the opinion that there is significant weight to the State's claim that at that stage, it had become urgent to reach understandings with the gas companies, *inter alia*, since the security and foreign policy considerations had not only not disappeared from the arena – but in certain aspects, it can be said that they became more pressing, and therefore Section 52 of the Antitrust Law was duly exercised at that stage.

In conclusion, Justice **Hayut** is of the opinion that only the restrictive provisions in Chapter 10 of the Outline, are to be cancelled, and that as long as they are removed from the Outline, it is inappropriate to cancel the rest of its provisions. Contrary to the opinion of Justice **U. Vogelman**, Justice **Hayut** is of the opinion that the Court should limit itself to the legal conclusion that derives from the analysis it conducted and that it is inappropriate to rush to the conclusion that once the stability clause was cancelled the entire Outline should be ruled void. According to her, the gas companies should be left to decide whether or not in these circumstances, they wish to cancel the Outline.

Epilog

A. It was decided by a majority opinion (Deputy President E. Rubinstein and Justices S. Joubran, E. Hayut and U. Vogelman) and against the dissenting opinion of Justice N. Sohlberg, that the stability clause, as drafted in **Sections** 5 and 6 of Chapter 10 of the Gas Outline, which was prescribed by Government Decision 476 and which addresses "The Existence of a Stable Regulatory Environment" (tying the

Government to the Outline, including not changing legislation and opposing legislative initiatives for a period of ten years) – cannot remain intact.

B. Moreover, according to Deputy President E. Rubinstein and Justice S. Joubran and U. Vogelman, in light of that stated in paragraph A above, and in light of the Respondents' declaration that the stability clause is a *conditio sine qua non*, the entire Outline is to be cancelled; however the State should be given a period of a year during which it can act to regulate that which is required in accordance with our judgment. At the end of a year from the date of the judgment and if and to the extent there shall be no such regulation, the Gas Outline shall be cancelled. In that sense, the order has become absolute.

In contrast, Justice E. Hayut is of the opinion that only the restrictive provisions that are in Chapter 10 of the Gas Outline should be ruled void.

C. According to Justice N. Sohlberg although the regulatory stability clause does limit the Government's administrative discretion, it can remain intact; there is no need for legislating the Gas Outline and the Government decision which was approved by the Knesset plenum is sufficient. Therefore, according to him the Petitions should be denied.

D. By a majority opinion of Justices E. Hayut, U. Vogelman and N. Sohlberg, and against the dissenting opinions of Deputy President E. Rubinstein and Justice S. Joubran, it was decided that the validity of the entire Outline (distinct from the stability clause) is not contingent upon being anchored by primary legislation.

E. The Justices of the bench, with the exception of a certain remark by Justice Joubran, did not find flaw, in the circumstances at hand, in the exercise of Section 52 of the Antitrust Law, which exempts the provisions of such law on security and foreign policy grounds.

F. The bottom line thus is as stated in sections (a) and (b) above: it was decided to cancel the Gas Outline due to the stability clause (without having found it appropriate to apply judicial intervention in other matters that were on addressed), while suspending the declaration of voidness for a year in order to allow regulation.