

HCJ 205/94

Akiva Nof**v.****The State of Israel – The Ministry of Defense**

The Supreme Court Sitting as the High Court of Justice

[19 January 1997]

Before Justices E. Mazza, T. Strasberg-Cohen, T. E. Tal

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

Facts: The petitioner, who had been growing a beard for many years, requested to exchange his protective kit and gas mask, which had been provided to him before the 1991 Gulf War, for a new kit, designed for those with beards. In order to obtain the special kit, the Civil Defense Authority required the petitioner to sign a statement that he grew a beard for religious reasons, in accordance with the applicable Civil Defense Regulations. The petitioner, who was not a religious man, refused to sign the statement. The petitioner appealed to the Supreme Court, arguing that the regulations were unconstitutional, as they discriminated between those who grew beards for religious reasons, and those who grew beards for reasons unrelated to religious conviction.

Held: The Court held that the right to grow a beard forms a part of one's human dignity, regardless of whether that beard is grown for religious reasons. As with any other right that forms a part of human dignity, the right to grow a beard is protected under the Basic Law: Human Dignity and Liberty. As such, the right can only be infringed in accordance with the conditions set out by the limitations clause of the Basic Law—that the infringement be expressly set out in a statute, that it accord with the values of Israel as a Jewish and democratic

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state, and that it not infringe the protected right more than necessary. The Court held that the applicable regulation did not meet these conditions and, as such, was unconstitutional.

Petition granted.

Legislation Cited:

Basic Law: Human Dignity and Liberty
Civil Defense Regulations (Protective Kits)-1990
Civil Defense Regulations-1951

Israeli Supreme Court Cases Cited:

- [1]□ HCJ 168/91 *Marcus v. Minister of Defense*, IsrSC 45(1) 467
- [2]□ HCJ 4919/90 *Miller v. Minister of Defense*, IsrSC 45(2) 293
- [3]□ AAP 4463/94 *Golan v. Prison Authority*, IsrSC 50(4) 136
- [4]□ HCJ 5688/92 *Wechselbaum . v. Minister of Defense*, IsrSC 47(2) 812
- [5]□ FH 10/96 *Boronovski v. The Chief Rabbinate of Israel*, IsrSC 25(1) 7
- [6]□ HCJ 4541/94 *Alice Miller v. Minister of Defense*, IsrSC 49(4) 94
- [7]□ HCJ 453, 454/94 *Israel Women's Network v. Government of Israel*, IsrSC 48(5) 501
- [8]□ HCJ 4298/93 *Jabarin v. Minister of Education*, IsrSC 48(5) 199
- [9]□ HCJ 156/75 *Deka v. Minister of Transportation*, IsrSC 30(2) 94
- [10]□ HCJ 389/80 *Dapei Zahav v. Broadcasting Authority*, IsrSC 35(1) 421
- [11]□ HCJ 4769/90 *Zidan v. Minister of Labour and Welfare*, IsrSC 47(2)147
- [12]□ HCJ 327/92 *Israel Fruit Growers' Association v. Government of Israel*, IsrSC 47(3) 387
- [13]□ HCJ 953/87 *Poraz v. Mayor of Tel Aviv-Jaffa*, IsrSC 42(2) 309

United States Cases Cited:

- [14]□ *Griswold v. Connecticut*, 381 U.S. 479 (1965)
- [15]□ *Breen v. Kahl*, 419 F.2d 1034 (1969)
- [16]□ *Farrell v. Smith*, 310 F. Supp. 732 (1970)
- [17]□ *Tinker v. Des Moines Independent School District*, 93 U.S. 503 (1969)

- [18] □ *Griffin v. Tatum*, 300 F. Supp. 60 (1969)
[19] □ *Richards v. Thurston*, 304 F. Supp. 449 (1969)
[20] □ *Westley v. Rossi*, 305 F. Supp. 706 (1969)
[21] □ *Carter v. Hodges*, 317 F. Supp. 89 (1970)

Jewish Law Sources Cited:

- [22] □ Leviticus 19:27
[23] □ Shulchan Aruch, Yoreh Deah, Laws of Shaving
[24] □ 11 Talmudic Encyclopedia 125-26 (S. Zevin ed. 1965)
[25] □ Babylonian Talmud, Tractate Baba Metzia, 84a

For the petitioner—Petitioner argued *pro se*.

For the respondent—M. Blass (Office of the State Attorney)

JUDGMENT

Justice E. Mazza

This petition, for which an *order nisi* was granted, involves a request for a special gas mask kit, designed especially for bearded persons. The petition further calls for Regulation 4B of the Civil Defense Regulations (Protective Kits)-1990 [hereinafter the Regulations], to be struck down, as they discriminate against the petitioner—in comparison to other bearded persons—by denying him the unconditional right to receive such a special protective kit. The petition was submitted and oral arguments were conducted in 1994. Although I unfortunately delayed handing down my decision for far longer than desirable, the petition, which was relevant upon its submission, remains (unfortunately) so relevant today.

The Facts

2. The petitioner has a beard, which, according to his declaration, he has worn for decades. The petitioner was supplied with a protective kit immediately prior to the 1991 Gulf War. At the beginning of 1994, the petitioner responded to a call directed towards all citizens of Israel to replace their old protective kits. Intending to replace the kit in his possession with a new one, the petitioner made his way to the Civil Defense Authority. As a bearded man, the petitioner expected to receive a special kit, which includes a special gas mask intended for bearded men.

Upon his arrival, the station's commander explained to the petitioner that, under Regulation 4B of the Regulations, receipt of the special kit was contingent upon his signing a "bearded persons' declaration," as proof of the fact that "he wore a beard for religious reasons." The petitioner was then handed the declaration, with the following wording to examine and sign, if he wished to receive the special kit:

Declaration of a Bearded Person

I, the undersigned ... hereby declare as follows:

1. Religious beliefs prevent me from shaving off my beard.
2. If and when, for any reason, I remove my beard, I agree to immediately return the protective kit designed especially for bearded persons that I have received.
3. This declaration serves as evidence of my entitlement to a protective kit under the Civil Defense Regulations (Protective Kits)-1990.
4. I undertake to keep the special protective kit in my possession and not to transfer it to any other person.

As a secular person, who wore a full beard for reasons unrelated to any religious conviction, the petitioner was unable to sign the said declaration. Having refused to sign, he was obliged to make do with a regular

protective kit, not designed to meet his needs, and which did not offer him the same protection provided to users of the special kit, which was designed for bearded persons.

The Regulations

3. The wording of the declaration, which the petitioner was requested to sign, appears in Schedule 7 to the Regulations, and the obligation to make the declaration is set out by Regulation 4B. Regulation 4B, as well as Schedule 7, were added to the Regulations in the form of an amendment in 1993. *See* Civil Protection Regulations (Protective Kits) (Amendment)-1993. The Regulation stipulates as follows:

4B – Kits for Bearded Persons

- (a) Where the Authority believes that, due to the wearing of a beard, a protective kit will not produce reliable results, the Authority shall proceed in the following manner:
 - (1) If the person proves that he wears a beard for religious reasons, he shall be issued a protective kit, specifically designed for bearded persons;
 - (2) Absent proof of the like stated in paragraph (1), the person shall be issued a protective kit according to the estimated size and shape of his face, until it becomes possible to fit him with a standard protective kit.
- (b) The aforementioned in sub-regulation (a)(1) shall be proved by submission of an affidavit in accordance with Schedule 7.

4. For a proper understanding of the circumstances leading to the enactment of Regulation 4B, we must go back to the end of 1990, immediately prior to the Gulf War. As part of the defensive preparations for a potential missile attack with chemical warheads, it was decided to supply the civilian population with personal protective kits against

chemical warfare. Initially, these protective kits were allocated exclusively to Israeli citizens, but, following the ruling of this Court in HCJ 168/91 *Marcus v. Minister of Defense* [1], the kits were also issued to residents of the administered territories in the West Bank and Gaza [hereinafter the administered territories], who were not Israeli citizens.

The principal component of the protective kit is the gas mask. The wearing of a gas mask is intended to provide the wearer with maximum protection against the penetration of chemical substances into the respiratory tract. For the mask to be effective, the wearer must breathe exclusively through the filter. Thus, for the mask to offer effective protection, care must be taken to ensure the mask is hermetically sealed over the face. The standard mask, which is suitable for the majority of the population, is not appropriate for the specific needs of certain segments of the population, such as infants, children, the sick and persons with other disabilities.

It soon became clear that bearded men also had difficulty wearing the standard mask. The beard, particularly long beards, apparently prevented hermetic sealing, and rendered the mask ineffective. This difficulty can be overcome with the assistance of an "air pump," a device that contains a miniature motor, which, when operated, blows a stream of air into the cavity of the mask, at a pressure slightly higher than atmospheric pressure. The constant stream of air released from the mask prevents the penetration of polluted air into the mask. Significantly, the price of a mask with an air pump is more than twice the price of the standard mask.

Due to budgetary constraints, the State initially refrained from purchasing special masks for bearded men. Immediately prior to the Gulf War, however, the demand for special masks began to increase, especially among the religious population where the percentage of bearded men is particularly high. Initially, the authorities, invoking budgetary considerations, rejected these requests. This refusal led to the petition in HCJ 4919/90 *Miller v. Minister of Defense* [2]. There, in the affidavit submitted by the head of the Civil Defense Authority to the Court, prior to oral arguments, it became apparent that a practical, albeit partial, solution

had been found for the special problems of those with beards. On the basis of the affidavit and the facts, the Court did not consider it necessary to intervene, and the petition was dismissed.

5. At the end of 1993, in preparation for replacing the protective kits, and having learned the lessons of *Miller* [2], the Minister of Defense decided to enact regulations governing special kits with air pumps. Drawing his authority from sections 22I and 22K of the Civil Defense Regulations-1951, and with the approval of the Foreign Affairs and Defense Committee of the Knesset, the Minister of Defense enacted the Regulations in 1994, adding three central provisions: Regulation 4A stipulated that a person who, after being measured at a "measuring station," was found to be unsuitable for a normal kit, due to the form or size of his face, was entitled to receive an air pump. Regulation 4B codified the matter of bearded persons' entitlement to special kits. Finally, Regulation 4C codified the entitlement to special kits for those who needed them due to health reasons. Relevant to this petition is the enactment of Regulation 4B and the declaration appearing in Schedule 7 to it, both of which we have already quoted verbatim.

The Petition

6. In his petition, the petitioner contests both the legality and the reasonableness of Regulation 4B. In defining the entitlement to receive special protective kits, the Regulation distinguishes between persons growing a beard for religious reasons, and those growing beards for other reasons. The petitioner claims that this distinction has no legal basis and that the Regulation blatantly and arbitrarily discriminates with respect to residents with identical needs.

Furthermore, the petitioner argues that the regulations implicitly presume that secular men with beards, unlike their religious counterparts, can be coerced, in anticipation of imminent danger, into an unwanted change in their appearance. This presumption, he contends, is arbitrary. In its current form, the Regulation is unlawfully discriminatory and, in any event, should be struck down, as it is blatantly unreasonable. The

petitioner is not unaware of the increased financial burden of making these special protective kits available to secular wearers. However, he claims that he would have refrained from filing the petition had all men with beards—irrespective of their religious convictions—been required to pay the difference between the cost of the regular kit and that of the special kit, and that only those who declare themselves financially unable to pay this fee be exempted from paying.

7. In its responding affidavit, the State denies the petitioner's claim of discrimination. The State contends that, in principle, the entire population should make due with the regular protective kit. Nevertheless, the Regulations do recognize the special needs of three sectors of the population, one of these being men prevented from removing their beard by religious reasons. The State further claims that the distinction drawn between those growing beards for religious reasons and those growing beards for other reasons is of practical necessity, as the price of a special kit is two and a half times greater than that of an ordinary kit. As such, budgetary considerations prevent the State from providing special kits on demand.

In light of the above, the State asserts that it was reasonable to limit the supply of special kits to those specific sectors of the population who truly need them and not those who, for reasons of aesthetics or convenience, choose not to shave. The existence of specific personal preferences does not warrant the expenditure of additional millions of the State budget, which are needed to finance more important and pressing needs. This distinction rests on the State's assumption that, in a situation of war and imminent threat to life, anyone who grows a beard for reasons of aesthetics or convenience will, without hesitation, "sacrifice" his beard in order to ensure his personal security. This may not be the case where the beard is being grown for religious reasons. Under those circumstances, a religious beard-wearer risks missing the opportunity to act quickly enough to save himself if, by virtue of his religious beliefs, he hesitates to shave.

The State contends that the distinction it makes between religious and other beard wearers is well-founded, and based on the *Miller* [2] decision.

There, this Court recognized that “growing a beard, for Jews who are accustomed to it, is part of their religious way of life. It is well known that many worthy Jews adhered to this custom since early times, even in times of suffering and oppression,” *Id.* at 295, and the Court urged the State to “make every possible effort to promptly procure and allocate kits suitable for that particular sector of the public.” *Id.* at 296.

Beards and Human Dignity

8. In my opinion, a person’s right to grow a beard is a part of his human dignity, irrespective of his beliefs or religious convictions. Indeed, a person’s right to dignity includes the right to fashion and maintain his appearance. Clearly, a beard often forms part of one’s self-image and very identity, especially to one who has worn it for years.

As stated above, the State claims that, for the secular, growing a beard most likely only serves needs of convenience or aesthetics. Indeed, experience shows that, in many cases, especially amongst the younger generation, the decision to grow a beard is the product of passing phases or in anticipation of a certain activity, such as enlistment into the army or a backpacking tour abroad. This is not the case with regard to those who grow their beards continually over a long period of time, and not for the purpose of experimenting with fashion trends or for practical reasons of convenience during a specific period of their lives. With respect to the latter categories, the beard is grown for the purpose of fashioning one’s personality and appearance. In so doing, a man realizes his personal and autonomous will; his right to do so is part of his human dignity.

Indeed, the psychologist’s report submitted to us by the petitioner stated as follows: “psychologically speaking, a beard is a part of a person’s self-image, even when it is not grown for religious reasons.” Furthermore, the report states, “the beard is experienced as an integral part of the person’s face, as part of the image that he presents to others, and which influences his relationships with others.” The State did not contest these conclusions. Indeed, they reflect generally known facts, based on life experience. Clearly, the beard of a man who has grown one for many years

inevitably becomes an integral part, not only of his self-image, but also of his very identity. In this sense, there is no difference between someone who grows a beard for religious reasons, and someone who does so for other reasons. The beard becomes a part of one's identity over time, irrespective of whether the individual in question is religious or secular. It becomes the way he sees himself and is the way he is perceived by his peers. In fact, it is well known that a full beard is not only part of the recognized image of many rabbis, but is also associated with other famous personalities, such as Benjamin Zeev Herzl and Yosef Chaim Brenner, whose beards were completely unrelated to religious convictions.

9. The right to grow and maintain a beard, as an attribute of one's self-image and identity, forms part of a person's human dignity in the most fundamental sense. Attempts will probably be made to examine whether this right can be classified as constituting a part of various specific basic rights, such as freedom of speech, the right to integrity of the body, or the right to privacy. Personally, I see no reason for the Court to deal with the issue. It will be noted that the United States courts, which addressed the issue in an entirely different context, chose to avoid determining the precise, normative classification of this right. There, the matter arose in the late sixties, against the backdrop of a fashion trend of growing hair long, a style popular among the youth. This fashion trend contravened the regulations of various educational institutions, which required students to cut their hair. In dealing with numerous petitions, the American courts recognized that growing a beard or long hair is an expression of personal freedom, with which, in the absence of any compelling legal justification, the authorities had no right to interfere. However, following *Griswold v. Connecticut*, 381 U.S. 479 (1965) [14], which interpreted the Ninth Amendment to the United States Constitution, the courts did not find it necessary to rule on "whether this right is designated within the penumbras of the First Amendment freedom of speech," *Breen v. Kahl*, 419 F.2d 1034 (1969) [15], or whether it was "encompassed within the Ninth Amendment as an additional fundamental right which exists alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* Either way, "the right to wear one's hair at any length and in any desired manner is an ingredient of personal freedom, protected

by the United States Constitution.” *Id.* The same applied to the right to grow a beard:

This Court also accepts the view that the right to grow a beard or to wear one’s hair at any length is an aspect of personal liberty protected by the United States Constitution.

See Farrell v. Smith, 310 F. Supp 732, 736 (1970) [16].

Similarly, in *Tinker v. Des Moines Independent School District*, 93 U.S. 503 (1969) [17], the United States Supreme Court saw no need to rule on whether the said right constitutes a part of freedom of speech in its non-verbal sense (symbolic speech). There, it was decided that students who wore black bands within the precincts of the school, as a means of protesting U.S. involvement in Vietnam, were entitled to do so as part of their constitutional right to the freedom of expression. The Court was satisfied with simply ruling that the right existed and that it warranted protection against the State:

It is sufficient that the right exists and is protected from state infringement by the Due Process Clause of the Fourteenth Amendment.

Id. at 736-37. *See also Griffin v. Tatum*, 300 F. Supp. 60 (1969) [18]; *Richards v. Thurston*, 304 F. Supp. 449 (1969) [19]; *Westley v. Rossi*, 305 F. Supp. 706 (1969) [20]; *Carter v. Hodges*, 317 F. Supp. 89 (1970) [21], all of which were decided during the same period, against the same backdrop of a fashion trend of students growing their hair long.

10. Similarly, in the case at bar, I prefer not to address the issue of the proper classification of the right to grow a beard—whether it is a right specifically enumerated in the Basic Law: Human Dignity and Liberty, such as the right to bodily integrity and the right of privacy, or not expressly specified therein, such as freedom of speech. The question of what rights are included within the concept of human dignity, as set down by the Basic Law, has sometimes been a source of dispute. *See, e.g.*, AAP

4463/94 *Golan v. Prison Authority* [3], paras. 156-57 (Mazza, J.), paras 190-91 (Dorner, J.) In the case before us, such a classification is not necessary. Human dignity, as a protected constitutional value, has a broader meaning than the sum total of all of the specifically recognized rights. See the opinion of Justice Barak in HCJ 5688/92 *Wechselbaum v. Minister of Defense* [4], at 827:

What is encompassed by the right to "human dignity" will be determined, in accordance with the views of the enlightened public in Israel, on the basis of the purpose of the Basic Law: Human Dignity and Liberty. At the basis of this concept is the recognition of the person as a free agent, developing his body and spirit according to his own will, within the social framework of which he is a part and upon which he is dependent. "Human dignity" encompasses a range of facets.

Compare also the text of Justice Barak's article in *Human Dignity as a Constitutional Right*, 41 *Hapraklit* 271, 279 (1993-94); *c.f. Protected Human Rights: Scope and Limitations*, 1 *Mishpat Umimshal* 253, 261 (1992-93). Our concern here is with a person's right to his self-image, a right that is undoubtedly part of human dignity.

Regulation 4B: Relevant Distinction or Prohibited Discrimination?

11. The right to grow and maintain a beard is a right granted equally to all men, be they religious or secular. As with any recognized right, it is by no means absolute, and may, according to the limitations clause of the Basic Law, be infringed provided the infringement is by statute (or by virtue of a statute that contains a specific empowering clause), that it befits the values of the State of Israel as a Jewish and democratic state, and is enacted for a proper purpose and to an extent no greater than required. *See* Basic Law: Human Dignity and Liberty, § 8. It is from this starting point that we will examine the provisions of Regulation 4B.

With respect to the stated entitlement, Regulation 4B clearly distinguishes between bearded men who are religious and those who are

not, or who, in any event, are not prepared to declare that they are growing a beard for "religious reasons." In other words, the right to receive a protective mask suited for bearded men is, under the Regulations, granted exclusively to religious men, while non-religious bearded men are not entitled to receive that kind of protective kit. Since the standard protective kits do not provide bearded men with the personal protection they require, in times of danger, non-religious bearded men will have to choose between two evils: either shaving off their beards or endangering their lives. In enacting Regulation 4B, the Minister of Defense assumed that, in times of danger, non-religious men would readily shave off their beards, rather than endanger themselves. This, the Minister presumed, was not the case for bearded religious men, whose beard is grown for religious reasons. Seeing as how supplying special protective kits for all bearded men would impose a heavy financial burden on the State, a burden that is irreconcilable with the Defense Ministry's order of priorities, the Minister of Defense decided to distinguish between the two sectors of the population and to supply special kits exclusively to those men who, at times of danger, would presumably not consent to removing their beards.

12. Is the distinction adopted by Regulation 4B between the two classes of bearded men lawful? The law is that distinctions may be justified by a relevant difference. Herein lies the difference between prohibited discrimination and legitimate distinctions which the law must continually make. See FH 10/96 *Boronovski v. The Chief Rabbinate of Israel* [5]; see also *Alice Miller v. Minister of Defense* [6]. Where there is no relevant difference, application of a different standard to people with identical needs constitutes prohibited discrimination. Prohibited discrimination violates the human dignity of those who are subjected to it. This, in my opinion, follows necessarily from the premise that equality too is part of human dignity. See HCJ 453, 454/94 *Israel Women's Network v. Government of Israel* at 526 [7] (Mazza, J.). The existence of a relevant distinction should be examined "with regard to the particular purpose for which the distinction is applied." This is to say:

[T]here must be a direct and concrete connection between the special characteristics found in one category but not in the

other, and the purpose for which it is permitted to prefer one category over the other.

Alice Miller [6], at 110.

13. The State's position is that the differential treatment given to religious men with beards is based on a legitimate distinction, namely, their religious beliefs. I cannot accept this contention. While it is true that a person's religious beliefs can be a relevant factor for different treatment in various contexts, *see H CJ 4298/93 Jabarin v. Minister of Education* [8], it cannot serve as a proper foundation for the distinction made in the case at hand.

The distinction made by Regulation 4B is presumably based on the premise that growing a beard is a religious commandment. Examination of Jewish law, however, reveals that religion does not require Jewish males to wear a beard. Instead, the relevant religious obligation only prohibits shaving one's beard with a razor, in accordance with the traditional interpretation of the verse "neither shalt thou mar the corners of thy beard." Leviticus 19:27 [22]. Exegesis has explained this verse to mean that "he shall not be guilty except where he destroys his beard with a blade, but with scissors it is permitted, even if they resemble a blade." *Shulchan Aruch, Yoreh Deah, Laws of Shaving* [23]. There are also other religiously permissible methods of removing one's facial hair. *See* 11 *Talmudic Encyclopedia* 125-26 (S. Zevin ed. 1965) [24]. Similarly, the presumption that the observant Jew may refuse to remove his beard, even where his life is at stake, is unfounded, as the religious obligation of "saving of life" takes precedence and, according to Jewish Law, would always prevail over the prohibition related to destroying one's beard. This having been said, it cannot be denied that growing a beard for the religious person, while not necessarily a mandatory religious commandment, nonetheless constitutes a part of his religious lifestyle. Indeed, the religious Jew's right to grow and maintain his beard is part of his human dignity as a religious Jew. Thus, even though, in cases involving "saving of life," his obligation to preserve his life would override most other religious commandments, he should not be put to such a test which may prove too

difficult for him and which would risk endangering his safety. In the words of Deputy President Elon, in *Miller* [2], at 295-96:

The principle of "saving life" is completely unrelated to the question presented for our deliberation today. For the observant Jew, growing a beard is a part of a religious lifestyle. It is well known that this custom has been widely observed, since early times, even in times of crisis. In this context, as with all other religious commandments and laws, when a person is confronted with the choice of either transgressing the law or saving his life, the saving of life takes preference. ... It is, however, clear that a person should not put himself in a situation where he must choose between transgressing and saving his life, and must make every effort not to put himself to such a test. Consequently, in the case before us, if and when that "moment of truth" arrives, the saving of life takes precedence over the growing of a beard and, if the bearded man does not have a kit that can save him from that danger unless he first removes his beard, he is under a religious obligation to remove his beard. This, however, has nothing to do with the authorities' obligation to adopt all necessary measures to ensure the supply of protective kits suited for bearded men, in order to prevent them from being confronted with such a difficult choice. The requirement to shave off the beard is detrimental to the religious public and, as such, cannot be required by the Civil Defense Program of the State of Israel. In any case, it would not be observed by the majority of the religious public. The respondents must therefore make every effort to procure the appropriate kits for this public and proceed to allocate them.

Having established that growing a beard is part of the religious man's way of life, the question now arises as to whether the secular man, who decides to grow a beard as part of his lifestyle, is any different from his religious counterpart. I have done my utmost but have not found any distinction between the two. Clearly there is a difference between the reasons motivating each of them to grow a beard, but this difference does

not constitute a relevant distinction for the purposes of distinguishing between the two. The human dignity of the religious person incorporates his right to grow and maintain his beard as a part of his religious lifestyle. Similarly, the secular person's right to grow a beard as part of his non-religious lifestyle warrants equal protection. Regulation 4B is based on the assumption that only the religious bearded man, as opposed to his secular counterpart, is liable to be confronted with the dangerous choice of whether or not to shave off his beard even in a situation of imminent danger. However, this premise, besides being empirically groundless, is also irrelevant. It is quite likely that in a life threatening situation, the religious man and the secular man will conduct themselves similarly and, if they find themselves in a situation in which their beard threatens their lives and saving their life depends on their readiness to shave off their beard, they would choose not to take the risk. In fact, the question of what constitutes a life-threatening situation is a difficult and complex one and it is improper to put either the religious man or his secular counterpart in the position of having to make that choice.

14. In his arguments, counsel for the State relied, as noted, on the *Miller* [2] decision. It bears mention, therefore, that this Court's ruling in *Miller* [2], provides no basis for the distinction between religious bearded men and other bearded men. Of course, the *Miller* [2] petition was filed by, and in the name of, religious bearded men, and concentrated primarily on the needs of bearded men from religious circles. In the judgment of Deputy President Elon, the needs of those sectors of the population received special emphasis. Nonetheless, the State's position in *Miller* [2], which led the Court to deny the petition, made no distinction between religious bearded men and other bearded men. There, the head of the Civil Defense stated in his affidavit:

The defense establishment is, as stated, aware of the needs of bearded men and does its utmost to solve their problems, as well as the problems of other sectors of the population.

It was recently decided, after consultations with the Prime Minister and the Ministers of Defense and Finance, to

approve the allocation of five million NIS towards the production and allocation of special kits for bearded men.

This allocation still does not provide a complete solution to the entire population of bearded men. The allocation of 5 million NIS reflects the limitations of the current rate of production, in consideration of the totality of the above needs.

Miller [2], at 295 (Shamgar, P.) From this affidavit, it emerges that the State cannot immediately provide special kits for all bearded men. However, the affidavit does not state that the special kits were intended to satisfy the needs of religious bearded men exclusively, or that, in the allocation of such kits, religious bearded men are or will be entitled to any preference over other bearded men.

15. In light of the above, Regulation 4B contains a discriminatory provision that infringes the principle of equality and violates human dignity. Examination of the Regulation in accordance with the requirements of the limitations clause of the Basic Law indicates that the provision does not even meet the first requirement of the Basic Law's limitations clause, as the discriminatory provision in question was not enacted by statute but, rather, by regulation. Furthermore, even if the Regulation (enacted at the end of 1993) were to be examined under section 8 of the Basic Law as amended in 1994 (which came into force in March 10, 1994, subsequent to the enactment of the Regulation), the same result would be reached. The Civil Defense Law, on the basis of which the Regulation was enacted, contains no express statutory authorization for the enactment of the regulation, as required under the amended provision of section 8 of the Basic Law. Needless to say, a regulation which adopts standards that are obviously discriminatory does not befit the values of the State of Israel. It therefore follows that questions concerning the purpose or the degree of the violation, as per a later prong of the Basic Law, do not need to be addressed.

Furthermore, having established that the Regulation violates the principle of equality, it follows that, under the principles of administrative

law, and even before consideration of the Basic Law, the Regulation should be struck down. Indeed, it may be struck down either as a result of the Minister having deviated from his substantive authority—as distinct from procedural or formal authority—under the principles of administrative law, *see* HCJ 156/75 *Deka v. Minister of Transportation* [9], at 101-02 (Shamgar, P.), or, at the very least, because the Regulation is patently unreasonable, *see* HCJ 389/80 *Dapei Zahav v. Broadcasting Authority* [10], at 436, 439 (Barak, J.). In this context, I am quite aware of the fact that Regulation 4B was enacted with the approval of the Foreign Affairs and Defense Committee of the Knesset. It is incumbent upon us to be particularly cautious with respect to secondary legislation that was approved by one of the Knesset's Committees *See* HCJ 4769/90 *Zidan v. Minister of Labor and Welfare* [11], at 172. Even so, in light of the discriminatory provision of the Regulation, there is, in my view, no way to avoid its being struck down.

Human Dignity and Budgetary Considerations

16. The State invoked budgetary considerations as a justification for the distinction made by Regulation 4B. I accept that budgetary considerations are of considerable importance in the adoption of any governmental decision. *See* HCJ 327/92 *Israel Fruit Growers' Association v. Government of Israel* [12], at 391-92. Indeed, in cases where the State authorities seek to meet a particular public need and existing resources at their disposal are less than is required to satisfy the need in its entirety, the authorities must establish criteria for the allocation of its resources. However, these criteria must be characterized by equality, and budgetary constraints cannot be invoked to justify unlawful discrimination. Furthermore, equality in our law is a social, result-orientated norm. *See The Israel Women's Network* [7], at 516. Hence, any secondary legislation that has the effect of infringing on equality is invalid, even when there was no discriminatory motive for its enactment. *See* HCJ 953/87 *Poraz v. Mayor of Tel-Aviv/Jaffa* [13] at 334 (Barak, J.)

What, then, are the acceptable criteria for allocating protective masks for bearded men? When the issue of allocation of protective kits to the

residents of the administered territories arose, this Court ruled that it was prohibited for the State to differentiate between Jewish residents and Arab residents and that, once the State decided that security considerations necessitated the allocation of protective kits to Jewish residents, it was also obliged to provide the same kits to Arab residents. *See Marcus* [1]. In the absence of any relevant basis for drawing a distinction between various groups of persons, the State was obligated to provide protective kits to all the residents. This is a standard of absolute equality. In our case, with respect to determining entitlement to special protective kits, we can be satisfied with a criterion of "relative equality"—as opposed to "absolute"—provided that the equality is substantive. In other words, the State has no absolute obligation to provide protective kits to all bearded men, and, based upon budgetary limitations, may determine that only a certain portion of the population should receive such kits. Such a distinction would respect the imperative of equality, if it was based on relevant considerations. In my view the primary consideration that should guide the State is rooted in the distinction between bearded men whose beard forms part of their identity and way of life—and for whom the obligation of removing the beard would violate their human dignity—and between other bearded men, for whom the growing of a beard was a recent initiative, taken for reasons of aesthetics or of convenience for a limited period of time.

The petition at bar proposed an arrangement in which the supply of a special kit to bearded men would be contingent upon the payment of the difference between the cost of the special kit and the cost of the standard kit. Those with limited financial resources would be exempt from this payment. Personally, I am skeptical as to whether this would be an appropriate arrangement. In my view, a better alternative would be similar to the current arrangement in Schedule 7: the declaration of the bearded man himself. Thus, for example, the Regulations could stipulate that the supply of a special kit is conditional upon the bearded person signing a declaration stating that his beard is a part of his self-image, identity and way of life, that he has no intention of shaving it off and that, in the event of his removing it, he will return the special kit. Admittedly, such declarations can not completely prevent impostors from demanding and

fraudulently obtaining special kits. However, this sort of arrangement is no less efficient than the existing one, under which the authorities are satisfied with the declaration of the applicant that he grows his beard for religious reasons. Needless to say, the arrangement proposed is but one example of a possible arrangement. The respondents are free to consider other reasonable options, including the possibility of spreading out the distribution of special kits over several months.

17. If my opinion is accepted, the *order nisi* granted for this petition will be made final. The discriminatory part of Regulation 4B and the language of the declaration in Supplement 7 of the Regulations will be declared void and the Minister of Defense shall be charged with establishing a new arrangement for the allocation of protective kits for bearded men, based upon criteria that respect the principles of equality. The new arrangement shall be determined in regulations that will be published no later than 90 days from today and the petitioner's entitlement to receive a special protective kit shall be reexamined under the new arrangement.

The petitioner, who argued his own case, is a lawyer by profession. In view of this decision, the State is hereby ordered to pay the petitioner legal fees in the sum of 10,000 NIS.

Justice T. E. Tal

I concur with the judgment of my colleague, Justice Mazza, but would like to add the following comments.

It seems to me that it would have been preferable had the petitioner refrained from turning his beard into an issue of human dignity. As it is, the public discourse in Israel is laden with tension. It would be preferable that people refrain from turning every cause of action into a campaign requiring the attention of the Supreme Court. According to the State's response, the petitioner had the option of purchasing the protective kit for bearded men for a small fee. In this way, the petitioner could have achieved his aims without imposing himself as an additional burden on

already depleted public funds. However, the claim having been phrased as a matter of principle, the Court had no choice but to address the petition.

As stated, I concur with *Justice Mazza's* view. I also believe that his conclusion is correct in terms of appropriate legal policy. Any discrimination, even where legitimate, creates feelings of injustice (even if such feelings are unwarranted). As such, it is preferable to avoid discrimination, unless such is demanded by a relevant distinction.

In the case before us, just as a religious man should not be put to the test of having to remove his beard (even in circumstances under which, according to many religious authorities, no prohibition is involved), so too, a person whose beard is for the "enhancement of his appearance" should not be put to the same test. *See* Babylonian Talmud, Tractate Baba Metzia, 84a [25], which refers to the beard as "the dignity of the face."

Justice T. Strasberg-Cohen

My colleague, Justice Mazza, provided an extensive survey of the issue of basic rights and human dignity regarding the right to grow and maintain a beard. It appears to me that the existence of this right is by no means disputed. However, no one requested that the petitioner remove his beard. The issue at bar was far more prosaic, namely, whether a special mask—a mask that one can receive by paying an additional sum, beyond the cost of a regular mask—should be allocated to a bearded man who is not religious just as they are allocated free of charge to men who grow their beard for religious reasons; In legal parlance, the issue is whether the relevant regulation is discriminatory and should therefore be struck down.

In my opinion, there is a substantial difference between the situation in which a person is *prohibited* from growing a beard or long hair, as per the cases cited in American case law—those cases presenting appropriate circumstances for claiming a violation of basic human rights, human dignity, privacy and the right to fashion one's own personality and appearance—and a situation in which a person can grow a beard freely,

but upon requesting a special mask, is asked to pay an extra sum because the State does not have the money to hand them out free. Had the State refrained from allocating special masks free of charge to anyone, and the reasons for doing so were reasonable and pertinent, it is highly doubtful that I would have seen any room for this Court's interference. However, I am satisfied that the actual regime set out in Regulation 4B constitutes discrimination, as the State has decided to allocate the special masks free of charge to bearded men only. As such, the regulation lacks any moral or legal justification and must, therefore, be struck down.

Together with my colleagues, I too am of the opinion that a final order should be issued regarding the petition.

Petition granted.

29 January 1997