HCJ 10076/02

Dr Yuri Rosenbaum

v.

Israel Prison Service Commissioner

HCJ 7840/03

Senior Prison Officer Avraham Lazrian

v.

Israel Prison Service Commissioner

HCJ 9613/03

Superintendent Rodica Gross

v.

Chief Commissioner of Israel Police

The Supreme Court sitting as the High Court of Justice

[12 December 2006]

Before President Emeritus A. Barak, President D. Beinisch,

Vice-President E. Rivlin

and Justices A. Procaccia, E.E. Levy, A. Grunis, E. Hayut

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

Facts: The respondents introduced a compulsory retirement age of 55 for all of their employees. The petitioners challenged this policy on the grounds that it discriminated between them and civil servants in other parts of the civil service, where the customary retirement age was 65.

Held: Although the law gave the respondents the possibility of retiring its employees at the age of 55, the introduction of a compulsory retirement policy at the lowest age allowed by the law resulted in discrimination in relation to the other parts of the civil service. This consideration had not been taken into account by the respondents, and the respondents were unable to show why their policy was required by the character and nature of the work in their organizations.

Petitions granted.

Legislation cited:

Civil Service (Retirement) Law [Consolidated Version], 5730-1970, ss. 18, 18(a), 73, 81.

Equal Employment Opportunities Law (Amendment no. 3), 5755-1995.

Equal Employment Opportunities Law, 5748-1988, ss. 2, 2(a), 2(c), 17.

Retirement Age Law, 5764-2004, s. 18.

Israeli Supreme Court cases cited:

[1] HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [2004] IsrSC 58(2) 358; **[2004] IsrLR 1**.

[2] HCJFH 4191/97 *Recanat v. National Labour Court* [2000] IsrSC 54(5) 330.

[3] HCJ 678/88 *Kefar Veradim v. Minister of Finance* [1989] IsrSC 43(2) 501.

[4] FH 10/69 *Boronovski v. Chief Rabbis* [1971] IsrSC 25(1) 7.

[5] HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [1981] IsrSC 35(4) 1; **IsrSJ 8 21**.

[6] HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [1998] IsrSC 52(4) 193.

[7] HCJ 6051/95 *Recanat v. National Labour Court* [1997] IsrSC 51(3) 289.

[8] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* (not yet reported).

[9] HCJ 164/97 *Conterm Ltd v. Minister of Finance* [1998] IsrSC 52(1) 289; **[1998-9] IsrLR 1**.

[10] HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* **[2006] (1) IsrLR 105**.

[11] HCJ 910/86 *Ressler v. Minister of Defence* [1988] IsrSC 42(2) 441; **IsrSJ 10 1**.

[12] HCJ 104/87 *Nevo v. National Labour Court* [1990] IsrSC 44(4) 749; **IsrSJ 10 136**.

American cases cited:

[13] *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985).

[14] *EEOC v. City of St. Paul*, 671 F. 2d 1162 (8th Cir. 1982).

[15] *Heiar v. Crawford County, Wis.*, 746 F. 2d 1190 (7th Cir. 1984).

[16] *Gately v. Massachusetts*, 2 F. 3d 1221 (1st Cir. 1993).

Canadian cases cited:

[17] *Large v. Stratford* [1995] 3 S.C.R. 773.

For the petitioners — M. Aviram.

For the respondents — D. Goldberg.

JUDGMENT

President Emeritus A. Barak

The Civil Service (Retirement) Law [Consolidated Version], 5730-1970, requires the state to retire its workers when they reached the age of 65. In addition, the Israel Prison Service Commissioner and the Chief Commission of Police are authorized to retire prison workers and policemen who have served more than ten years when they reach the age of 55. On the basis of this provision, the respondents determined the age of 55 as a standard retirement age for all workers in the Israel Prison Service and the Israel Police who have served at least ten years. Is this decision lawful? That is the question that we are required to decide in the petitions before us.

Normative background

1. Section 18(a) of the Civil Service (Retirement) Law [Consolidated Version], 5730-1970 (hereafter — the Civil Service (Retirement) Law) provides a general arrangement concerning retirement ages in the civil service. This is what the section provided when the petitions were filed in this court:

> 'Retirement pursuant to a decision of the service commissioner
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> 18. (a) If a worker has served at least ten years, the service commissioner may decide to retire him if the worker has reached the age of 60 and he is required to do so at the end of the month in which the worker reaches the age of 65; but the service commissioner may, with the approval of the service committee and with the consent of the worker, allow the worker to continue to be employed beyond the age of 65 for a period that shall not exceed the period that he will determine, if it is proved to the satisfaction of the service committee that the worker is capable of continuing to work in his job.'

This provision does not apply to the Israel Police (hereafter — the police) and the Israel Prison Service (hereafter — the prison service). With regard to

these bodies, sections 73 and 81 of the Civil Service (Retirement) Law provided the following:

'Retirement pursuant to an order

73. Section 18 shall not apply to a policeman, but if a policeman has served at least ten years, the police commissioner may order his retirement, if the policeman has reached the age of 55.'

'Application with regard to prison workers

81. The provisions of sections 70 to 80 shall apply to every prison worker with the following changes and amendments:

(1) Wherever they say "policeman," read "prison worker," and wherever they say "temporary additional policeman," read "temporary additional prison worker";

(2) Wherever they say "police" or "Israel Police," read "prison service";

(3) Wherever they say "chief commissioner of police," read "prison service commissioner";'

…

Since the petitions were filed in this court, a change has taken place in the normative position. The change took place in consequence of the enactment of the Retirement Age Law, 5764-2004 (hereafter — the Retirement Age Law). *Inter alia*, this law gradually increased the compulsory retirement age in the civil service from 65 to 67, and correspondingly it gradually increased the age at which the chief commissioner of police and the prison service commissioner may retire policemen and prison workers from 55 to 57. This change has no real effect on the matter before us, and therefore there is no reason why the proceeding may not be conducted on the basis of the law that preceded the Retirement Age Law, which is the law that applied to the cases discussed in the petitions.

2. Thus we see that whereas the civil service commissioner is obliged, other than in exceptional cases, to retire a civil servant when he reaches the age of 65 (today 67), with regard to the *police* and the *prison service* primary legislation does not provide any compulsory retirement age. At the same time, the Retirement Age Law allowed the respondents to retire a policeman or prison worker who has served for at least ten years and who has reached

the age of 55 (now 57). On the basis of this statutory arrangement, the prison service commissioner and the chief commissioner of police (hereafter — the respondents) — within the framework of police and prison service internal procedures — adopted a rule of a standard retirement age. The standard retirement age determined by the respondents both in the *police* and in the *prison service* was 55 (today 57), for persons who have served for more than ten years, other than in exceptional cases. The petitions before us challenge this decision of the respondents, which in essence differs by ten years from the compulsory retirement age in force in the civil service.

The petitions and the hearing thereof

3. The petitioner in HCJ 10076/02 is a doctor in the prison service. The petitioner was recruited into the prison service in 1992, when he was aged 47. In 2000, when he reached the age of 55, he had only eight years of seniority in the prison service. Therefore his service was extended by two more years. In 2002, when he completed ten years of service, he was required to retire from the prison service. The sole reason for this was that he had reached the customary retirement age. The petitioner in HCJ 7840/03 served in the IDF for a lengthy period. In 1998, when he was 50, he began to work in the prison service as governor of a prison. After a while, disputes arose between him and his superiors and various complaints about his performance were considered. In 2003, when he reached the age of 55 and because no suitable position could be found for him, the prison service wished to retire him. One of the reasons given for retiring him was that he had reached the standard retirement age. The petitioner in HCJ 9613/03 has served as an engineer in the logistics department of the police since 1989. In 2001, when she reached the age of 55, proceedings were begun to retire her, while limited extensions were given several times. The three petitioners petitioned the court to make an order that the respondents' policy of retiring policemen and prison workers when they reach the age of 55 is unlawful. The three petitions were first heard by a panel of three justices. Interim orders were made in HCJ 10076/02 and HCJ 9613/03. The hearing of the three petitions was deferred until judgment was given in HCJ 6778/97 *Association for Civil Rights in Israel v. Minister of Public Security* [1]. In that case it was held that determining a maximum age for being admitted to work in the police and in the prison service was discriminatory and therefore void. After judgment was given in *Association for Civil Rights in Israel v. Minister of Public Security* [1] the hearing of the three petitions was joined, the panel that heard them was expanded and supplementary statements were filed by the parties. It was also agreed that the petitions would be regarded as if an order *nisi* had been

made in them in respect of the respondents' policy of retiring workers at age 55.

The petitioners' arguments

4. The petitioners have similar arguments. They claim that the respondents' power to order retirement is only a discretionary power. This power requires the police commission or the prison service commission to exercise discretion in each individual case, and there is no duty to exercise this power whenever a policeman or a prison worker reaches the age of 55. When the respondents retire a policeman or a prison worker before he reaches the age of 65, which is the customary age in the civil service, this power should be exercised in proper proceedings and they should give reasons for their decision; moreover, each worker should be given a right to state his case and considerations should be given to his objective circumstances. The petitioners claim that the retirement proceedings were improper and the decisions in their cases were unreasonable. It is argued that the respondents, as a matter of policy, retire prison workers who have reached the age of 55 for this reason alone. This is an unreasonable policy that does not take into account human rights and the duty of the administrative authority to act in an equal manner. The petitioners further claim that by exercising their discretion in the aforesaid manner the respondents violate the prohibition provided in the Equal Employment Opportunities Law, 5748-1988 (hereafter — the Equal Employment Opportunities Law). This is because they discriminate against the respondents' workers on the grounds of age.

5. The petitioners complain that their personal circumstances were not taken into account. The petitioner in HCJ 10076/02 is of the opinion that taking his personal circumstances into account would have resulted in his remaining in his job. He immigrated to Israel at the age of 45. After two years in Israel, he found work as a doctor in the prison service, where he worked only ten years. Therefore, he has accumulated only a small amount (approximately 20%) of pension rights which is insufficient for supporting him on a regular basis. His current age will make it difficult for him to find work in his profession. His retirement at the age of 57 condemns him to severe economic hardship. The petitioner claims that he is not tired of his job, where he has worked for only ten years. He says of himself that he is a healthy and energetic person, who is interested in continuing to work as a doctor in the prison service. He adds that there are no complaints about the standard of his professional performance. He argues that his age may be an

advantage in his job as a doctor. He has professional experience and he has expertise in dealing with situations involving pressure. Moreover, working as a civilian doctor is also a fatiguing and pressurizing job. The petitioner is of the opinion that the reasons of the prison service commissioner for retiring prison workers who are doctors at the age of 55, even if they are justified as a rule, are not applicable in his case. The petitioner in HCJ 7840/03 argues that his physical condition is excellent, and the ground of age serves as a cover for other reasons that led to his being retired. The petitioner in HCJ 9613/03 claims that her state of health is good. Her superiors recommended that she should continue in her job. The petitioner has served in the police since 1989 and she has accumulated considerable experience in the professional job that she has. She also says that she was recently widowed and retiring her at this time will cause her and her family severe economic hardship. This is because she has acquired only 30% of the pension rights, because of the relatively low seniority that she has accumulated with the police.

The state's reply

6. The state discusses the importance of determining a standard compulsory retirement age in view of the deterioration in work capacity that comes with increased age. Admittedly, an individual approach that examines the retirement age according to the particulars of each worker is possible (the functional retirement model). But the state is of the opinion that compulsory retirement at a fixed age has many advantages over functional retirement. Among these the state lists solidarity in the work place; strengthening the collective power of the workers, since they do not need to conduct separate negotiations over their retirement conditions; giving employment security to workers who are not exposed to dismissal on a daily basis because of a deterioration in their work capacity; giving the state the possibility of planning the retirement budgets. The state is also of the opinion that the collective approach has been prevalent in Israel for years. This approach has been enshrined in section 18 of the Civil Service (Retirement) Law and in similar collective arrangements.

7. According to the respondents, the importance of compulsory retirement at a standard age is even greater in bodies that are involved in security operations, such as the police and the prison service. These bodies have special characteristics that justify a standard age for compulsory retirement. Workers in these bodies cannot become organized in a collective framework and therefore their protection is more important; the service in these frameworks involves continual association with problematic elements

of the population; the work is frequently carried out under conditions of psychological and physical pressure; sometimes the worker is required to work shifts 'around the clock.' In view of all of these factors, the worker's physical condition — his alertness, physical and emotional health and proper fitness — is of great importance. The state adds that in organizations dealing with security matters the need for able-bodied workers amounts to a real security interest. Moreover, service in the police and the prison service has a high attrition rate. There is therefore a need for a high level of worker replacement and a standard retirement age that is lower than the customary one. The state also argues that the standard retirement policy at an earlier age than usual in the economy constitutes a social benefit for workers in the police and the prison service. Most of the workers actually prefer to realize their retirement at an earlier age than the age stated in the Civil Service (Retirement) Law. This policy allows a worker to receive a large pension at an early age and to find work in a new job; it saves the respondents costs and allows them to plan the budgetary framework in advance.

8. In the respondents' opinion, they are entitled to adopt this policy within the framework of the Civil Service (Retirement) Law. They argue that in section 73 of the Civil Service (Retirement) Law the legislature gave the respondents broad discretion. The respondents exercised this discretion and determined that the age of 55 would be the retirement age for policemen and prison workers. According to the state, making the age of 55 the standard age for compulsory retirement is mandated by the collective approach. An interpretation of section 73 also justifies taking into account the normative environment of the section, which indicates a preference for a compulsory retirement age. Preferring the collective approach has *prime facie* received legitimacy in the report of the committee for examining the retirement age, whose recommendations were adopted in the Retirement Age Law. The state also claims that this policy has exceptions. Within the scope of these exceptions, very essential workers are given the possibility of continuing to work beyond the age of 55. These exceptions are not satisfied in the petitioners' cases.

9. With regard to the petitioners in HCJ 10076/02 and HCJ 9613/03, the state is of the opinion that the special justifications for determining a compulsory retirement age in security organizations which is lower than the usual one in the economy apply in general also to workers in non-operational jobs, such as doctors and engineers. These workers are also required to do taxing work under conditions of emotional and physical pressure. These workers are also continually in contact with problematic sectors of the

population, are a part of a hierarchical system, wear uniform and have ranks, and benefit from unique salary benefits. Sometimes workers who are not operational are required to take part in security and reinforcement operations. Even non-operational workers have arrest and search powers which they are sometimes required to exercise; there are no purely administrative jobs. Therefore the respondents reject the petitioners' demand that they should receive special treatment that reflects the different professional nature of their service. With regard to the petitioner in HCJ 7840/03 it was argued that he was retired on the basis of individual discretion, and not as a part of the general policy.

The normative framework

10. The normative framework for examining the arguments of the parties is found in the Equal Employment Opportunities Law. This law applies to the state (s. 17 of the Equal Employment Opportunities Law). In 1995 a prohibition of employment discrimination on the ground of age was added to the law (see the Equal Employment Opportunities Law (Amendment no. 3), 5755-1995; HCJFH 4191/97 *Recanat v. National Labour Court* [2], at p. 342). Section 2 of the Equal Employment Opportunities Law provides the following:

> 'Prohibition of discrimination
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> 2. (a) An employer shall not discriminate between his employees, or between candidates for employment on the basis of their sex, sexual orientation, personal status, pregnancy or their being parents, their age, race, religion, nationality, country of origin, outlook, political party or their reserve military service, their being called up for reserve service or their expected military service as defined in the Military Service Law [Consolidated Version], 5746-1986, including on the basis of its expected frequency or duration, according to the meaning thereof in the Military Service Law [Consolidated Version], 5746-1986, with respect to any of the following:
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> (1) giving employment;
>
> (2) conditions of employment;

(3) promotion in employment;

(4) training or professional studies;

(5) dismissal or severance pay;

(6) benefits and payments given to an employee with regard to leaving work.

(a1) …

(b) For the purposes of subsections (a) and (a1), making irrelevant conditions shall also be regarded as discrimination.

(c) Discrimination shall not exist under this section when it is required by the character or nature of the job or position.'

The concept of relevant equality

11. With regard to the type of cases before us, it is customary to regard discrimination as different treatment of persons who are equals in the relevant respect, or as identical treatment of persons who are different in the relevant respect (see *Association for Civil Rights in Israel v. Minister of Public Security* [1], at p. 365 {8}, and the references cited there; HCJFH 4191/97 *Recanat v. National Labour Court* [2], at pp. 343-344, and the references cited there; see also Aristotle, *Nicomachean Ethics*, book 5, par. 1131; I. Zamir and M. Sobel, 'Equality before the Law,' 5 *Mishpat uMimshal (Law and Government)* (2000) 165; HCJ 678/88 *Kefar Veradim v. Minister of Finance* [3], at p. 507). This was discussed by President S. Agranat:

> 'The concept of "equality" in this context therefore means relevant equality, and it requires, for the purpose under discussion, the equal treatment of persons who are characterized by the aforesaid characteristic. By contrast, it will be a permitted distinction if the difference in treatment of different persons is the result of their being, with regard to purpose of the treatment, in a situation of relevant inequality, just as it will be discrimination if it is the result of their being in a situation of inequality that is not relevant to the purpose of the treatment' (FH 10/69 *Boronovski v. Chief Rabbis* [4], at p. 35).

It follows that equality does not require identical treatment. Sometimes, in order to achieve equality, one must treat cases differently (see HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [5], at p. 11 {30}).

Indeed, the principle of equality does not require identical laws for everyone. It requires identical laws for identical people and different laws for different people. It demands that a different law should be justified by the nature and character of the case. Indeed, 'the principle of equality assumes the existence of objective reasons that justify a difference' (HCJ 1703/92 *C.A.L. Freight Airlines Ltd v. Prime Minister* [6], at p. 230). It is in this way that the word 'discrimination' is regarded by s. 2(a). This is also the case in s. 2(c) of the Equal Employment Opportunities Law, which does not regard as discriminatory those cases in which a distinction is made on the basis of a difference that is relevant to the job or position (see HCJ 6051/95 *Recanat v. National Labour Court* [7], at p. 313; HCJFH 4191/97 *Recanat v. National Labour Court* [2], at p. 346; *Association for Civil Rights in Israel v. Minister of Public Security* [1], at p. 366 {9}; R. Ben-Israel, 'Labour Law: Equality in Employment in the Year 2000,' *Israel Law Yearbook 1996* (A. Rosen-Zvi, ed.) 577, at p. 622). The discrimination alleged in our case is age discrimination. This discrimination is found in various contexts, such as rigid conditions for admission to employment, limited possibilities of promotion and early retirement ages. It usually reflects the entrenchment of stereotypes with regard to the limitations of the body and the mind of the older person. Usually this has no rational or objective basis. This discrimination violates the human dignity of the person who suffers the discrimination. He feels that he is being judged according to his age and not according to his talents and abilities (see HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [8], at para. 5 of the opinion of Justice E. Levy). Discrimination harms society as a whole. It perpetuates prejudices and stereotypes that have been discredited. It deprecates the contribution, creativity and productivity of many people with experience and ability. In recent years there has been a growing recognition of the seriousness of the harm caused by age discrimination and the need to change it (see in this regard the opinion of Justice Zamir in HCJ 6051/95 *Recanat v. National Labour Court* [7], at pp. 342-343; *Association for Civil Rights in Israel v. Minister of Public Security* [1], at p. 366 {9}; S. Rabin-Margaliot, 'Distinction, Discrimination and Age: A Power Struggle in the Employment Market,' 32 *Mishpatim* (2002) 131; R. Ben-Israel, *Equal Opportunities and the Prohibition of Discrimination in Employment* (vol. 3, 1998), at pp. 1043-1044; R. Ben-Israel, 'The Retirement Age according to the Test of Equality: Biological Retirement or Functional Retirement,' 43 *HaPraklit* (1997) 251; R. Ben-Israel, 'Equality in Employment Law: Whence and Whither?' 6 *Employment Yearbook* (1996) 85).

'Equality groups'

12. In order to determine whether the respondents' policy in our case constitutes age discrimination, we need to define the 'equality group,' i.e., the group of employees between whom discrimination is prohibited. Naturally, the equality group will constitute a mirror image of the definition of the 'employer' for the purpose of s. 2(a), since the prohibition of discrimination is directed at the employer with regard to all of his employees. Conflicting opinions were presented in this regard. The petitioners claimed that the relevant equality group in their case is civil servants as a whole, since they all have the same employer, namely the state, and there is no basis for distinguishing between different departments within this framework. The respondents, however, insisted that for the purpose of the Equal Employment Opportunities Law the prison service should be regarded as the employer of the petitioners in HCJ 10076/03 and HCJ 7840/03 and the police should be regarded as the employer of the petitioner in HCJ 9613/03; each employer has its special characteristics that distinguish it from the other branches of the civil service; consequently, the employer is obliged to act with equality only vis-à-vis its own employees. In my opinion, the relevant equality group in our case is civil servants as a whole. The arrangements in the Civil Service (Retirement) Law apply to all civil servants. The employees in the various parts of the civil service have a reasonable expectation of being treated equally, as employees of the State of Israel. The state owes general duties of reasonableness, fairness and equality to each citizen (see HCJ 164/97 *Conterm Ltd v. Minister of Finance* [9]), and it certainly owes these duties to all of its employees. Indeed, for the purpose of the prohibition of discrimination before us, the state is one entity. It is the 'employer' under s. 2.

13. Admittedly, the prison service and the police are special bodies within the civil service. Their functions are complex, and they are often exceptional in nature and in the demands that they make of those serving in their ranks. They are likely to require greater physical fitness, maximum alertness, long and irregular work hours, and the ability to withstand pressure and tension. Moreover, many of those who serve in the prison service and the police — and this includes persons in administrative positions or jobs requiring a special professional expertise (such as doctors or engineers) — are sometimes required to exercise their enforcement powers or to act as reinforcements for operational forces. These characteristics do indeed reflect the unique nature of the prison service and the police (and possibly of other public bodies that are not under consideration in this case), but they do not

render these bodies — which are, after all, branches of the state — immune from the duty to treat their employees in the same way as other civil servants. The special characteristics of the prison service and the police will be reflected in examining 'the character or nature of the job or position' for the purpose of s. 2(c) of the Equal Employment Opportunities Law, i.e., at the stage of examining the legality of the discrimination. These special characteristics should not be allowed to serve as a way of narrowing the 'equality group,' with the result that it exempts the respondents *ab initio* from examining the basis for their policy.

Examining the discrimination

14. The State of Israel, which is the petitioners' employer, may not discriminate on the grounds of age in matters of employment conditions. This prohibition naturally applies also to their date of retirement (see HCJFH 4191/97 *Recanat v. National Labour Court* [2], at p. 347). *De facto*, under s. 18(a) of the Civil Service (Retirement) Law, the compulsory retirement age throughout the civil service is 65 (now 67), whereas in the prison service and the police an age of 55 (now 57) was introduced as the standard compulsory retirement age by virtue of the respondents' administrative decisions. It follows that the employer treats different people differently within the same equality group, on the basis of the employees' ages. This treatment is age discrimination, provided that the distinction made by the employer on the ground of the employees' age has no basis in the different jobs or positions. The burden of proving that it does rests with the employer. In HCJFH 4191/97 *Recanat v. National Labour Court* [2] I said:

> 'As a rule, the burden of proof rests with the employee who claims that the employer has discriminated against him. The employee discharges this burden when he proves that the employer applies a norm that determines different compulsory retirement ages for different employees (direct discrimination)… It is sufficient that the rule is a different retirement age for different employees. By proving the existence of such a rule — irrespective of whether it is required by the employee's job — the employee has discharged the burden of proof imposed on him, to prove the existence of age discrimination. It need not be said that this proof is merely *prima facie*. The employee has proved *prima facie* that the employer discriminates between his employees "on the basis of… their age" (s. 2(a)). At this stage the court considers the question whether the different retirement

> age for different employees is required by the character and nature of the job (s. 2(c)). In this respect the burden of proof passes to the person claiming that it is (usually the employer: see s. 9(a) of the Equal Employment Opportunities Law). It should be noted that from the viewpoint of the substantive law, the nature of the discrimination cannot be separated from what is required by the character and nature of the job. These two are really only one. From a procedural viewpoint a distinction is made with regard to the burden of proof' (*ibid*. [2], at p. 352).

15. In order to discharge the burden imposed on him, the employer (in our case, the state) is required to persuade the court that the discrimination:

> '… is required by the character or nature of the job or position (s. 2(c) of the Equal Employment Opportunities Law).

In my opinion, the respondents have not discharged this burden. They have not succeeded in persuading us that a uniform retirement age, which is ten years lower than the usual retirement age in the rest of the civil service, is required by the 'character or nature' of all the jobs or positions in the prison service or the police. The respondents focused their main arguments on the justification for introducing a uniform retirement age in the prison service and the police, even though the Civil Service (Retirement) Law exempts them from the compulsory retirement rule in s. 18. But this does not answer the main question before us. Indeed, without deciding the matter I am prepared to assume — and the petitioners did not seek to challenge this assumption — that the respondents were entitled, within the framework of the discretion given to them in s. 73 of the Civil Service (Retirement) Law, to determine a uniform retirement age for the prison service and the police, and that such a determination in itself does not involve age discrimination. This is a very complex issue — comparative law is also not unanimous in this matter — and it should be left until a decision on this matter is required. But even if we recognize the power of the respondents to determine a uniform retirement age for their employees, this alone does not explain why the respondents chose specifically the age of 55 — ten years less than the usual age in the civil service — as the uniform retirement age in the prison service and the police. The main argument that was presented in this regard is the general one, according to which the nature of the work, the responsibility placed upon the shoulders of employees of the prison service and the police, and the increased attrition rate that they experience as a result, together with the typical decline in physical fitness of older persons, justify the

determination of a relatively low retirement age. In my opinion, these arguments are insufficient to persuade the court that the arrangement that the respondents chose — a uniform retirement age that is ten years lower than the retirement age in the rest of the civil service — is required by the character or nature of all the jobs and positions in the prison service and the police. This conclusion is based on three reasons.

16. *First*, no objective basis was presented for choosing specifically the age of 55 as the retirement age either in the prison service or in the police. The respondents presented no research or other evidence that they used when deciding that this age would be the retirement age in their organizations. From comparative law we can see that this is not a universal retirement age in internal security services (see in Canada: *Large v. Stratford* [17]; and in the United States: *Johnson v. Mayor and City Council of Baltimore* [13]; *EEOC v. City of St. Paul* [14], at pp. 1165-66; *Heiar v. Crawford County* [15]; *Gately v. Massachusetts* [16]). Even the fact that both organizations decided upon the same retirement age can show that we are not dealing with the result of independent and objective discretion. Indeed, the impression that is created is that the main reason for deciding upon the age of 55 as the compulsory retirement age from the prison service and the police is that this is the minimum age allowed by the law, in section 73 of the Civil Service (Retirement) Law. As we have said, this age was also raised recently in the Retirement Age Law to 57, and we have not heard from the respondents an explanation of how their ability to comply with this change is consistent with their insistence that it is precisely the age of 55 that is the optimal retirement age in the prison service and the police. Determining the retirement age in accordance with the minimum age permitted by the Civil Service (Retirement) Law gives rise to the suspicion that the respondents are not at all interested in having older workers in their ranks, irrespective of their abilities and their possible contributions, and therefore the first 'escape route' provided by the legislature was exploited in order to terminate the employment of workers who are no longer young. This is one of the kinds of phenomena that the Equal Employment Opportunities Law was intended to prevent. Admittedly, it is possible that the respondents' decision to choose the minimum retirement age permitted in the Civil Service (Retirement) Law derives from genuine considerations of the best interests of the policeman or the prison worker, as they see it. But this is not a proper answer to those policemen and prison workers who are discriminated against in relation to their colleagues in the civil service, who retire ten years later. 'Indeed, prohibited discrimination may also occur without any discriminatory

intention or motive on the part of the persons creating the discriminatory norm' (HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [10], at para. 18 of my opinion). Even if the repondents considered proper criteria when they adopted the minimum age permitted in the Civil Service (Retirement) Law as the compulsory retirement age, they did not consider the duty of equality and the prohibition of discrimination. The result is therefore one of prohibited discrimination.

17. *Second*, 'quantity makes a qualitative difference' (HCJ 910/86 *Ressler v. Minister of Defence* [11], at p. 505 {101}). A distinction may be permitted, provided that it does not pass a 'critical mass' that the public authority is not permitted to exceed (see HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [8], at para. 28 of my opinion). This in practice is the role of proportionality when examining discrimination. In our case it is clear that the respondents determined as the uniform compulsory retirement age an age that is ten whole years lower than the age customary in the rest of the civil service. This is a very significant difference. The result is that a doctor or an engineer who works for the prison service or the police is retired whereas a doctor or engineer with similar qualifications and experience, who does similar work in another government department, is entitled to continue working for another ten years, to enjoy the professional and social environment, the salary and benefits, and the accumulation of seniority and rights in preparation for the later retirement. Indeed, the greater the difference between the retirement ages within the same equality group, the more serious the discrimination, both in the emotional sphere, which concerns human dignity, and in the material sphere (see HCJ 104/87 *Nevo v. National Labour Court* [12], at pp. 755-756 {143-144}; HCJ 6051/95 *Recanat v. National Labour Court* [7], at p. 343). Therefore, the greater the difference between the retirement ages, the greater the burden that should be imposed on those who deviate from the usual retirement age to justify their deviation. At the same time, the greater the difference, the harder it will be for the respondents to justify determining a uniform retirement age for all of their employees, including those who do not want to retire at an early age and are capable of continuing to carry out their jobs. In view of the general nature of the explanation given for determining the age of 55 as a uniform retirement age in the prison service and the police, it cannot be said that the respondents have discharged this burden. It should be noted that this approach does not prejudice s. 73 of the Civil Service (Retirement) Law, which makes it permissible to retire policemen and prison workers at the age of 55 (if they have served for ten years). This section provided a lower limit under which

the respondents are not competent to retire their employees forcibly. The section did not compel the respondents to determine the minimum age as the uniform retirement age, nor did it permit the respondents to discriminate against their employees in relation to other civil servants. The discretion that the section gave them should be exercised by the respondents while taking into account its specific and general purposes, which include the furthering of equality and the prohibition of discrimination.

18. *Third*, the respondents have not shown any attempt to create a mechanism for retirement that is based on individual characteristics, or of any distinction of types of jobs or positions within the prison service and the police, even though the assumption is that '… when the job requirements include physical strength and the ability to withstand physical effort, the smallest possible degree of harm will be caused to job applicants if the physical examination is done on an individual basis' (*Association for Civil Rights in Israel v. Minister of Public Security* [1], at p. 367 {10}). Admittedly, in the police and the prison service there is a procedure for prolonging service in exceptional cases, which are examined on an individual basis, and these are subject to the general policy of retirement at a uniform age. In their arguments before us, the respondents discussed the disadvantages inherent in creating personal retirement procedures for each of their employees, and they emphasized the advantages of a uniform retirement age (which is set at the permitted lower limit). Mostly the respondents discussed the systemic advantages of a strict retirement mechanism in a hierarchical organization. The respondents also emphasized the opinion of many policemen and prison workers who prefer the existing retirement arrangements. But the discretion that was given to the respondents is not exhausted by choosing between a minimum uniform retirement age and retirement on the basis of an individual examination. Between these two extremes there is a wide range of retirement arrangements that the respondents could have adopted, while taking into account the prohibition of age discrimination, and without compromising the character of the prison service and the police and the professional standard of these organizations. Thus, for example, it is possible to create a classification of jobs or positions within the organizations. The respondents themselves say, for example, that the police is in the process of 'civilianizing' many jobs, and that it is possible that the persons in these jobs will be exempt from the existing retirement arrangements (see also *Association for Civil Rights in Israel v. Minister of Public Security* [1], at p. 369-370 {13}). Similarly, it is possible to create an arrangement for retirement at the age in force in the rest of the civil service,

while allowing the possible of retirement at an earlier age for those persons interested in it. These examples are only illustrative. They serve to show that the respondents have before them a wide range of possibilities, and of these possibilities it chose the most extreme and discriminatory one of all. This also shows us that the existing policy does not convincingly reflect characteristics that are required by the character or nature of the work in the prison service and the police.

19. The respondents have therefore not discharged the burden of proof that the distinction that the state made between its employees is required by the character or nature of the jobs or positions in the prison service and the police. Admittedly, the employment conditions in the prison service and the police are special in various respects. Thus, for example, the respondents emphasized to the court that there is no collective organization of workers and that there is extensive participation in emergency operations. But these are merely conditions that require the respondents to develop a complex and objective arrangement, which both takes into account the characteristics of the service, and is also sensitive to the human rights of the persons serving in it. As the court has already held, the test in this regard is ultimately a 'test of reasonableness and proportionality' (*Association for Civil Rights in Israel v. Minister of Public Security* [1], at p. 366 {10}). In this test, the respondents adopted an extreme, disproportionate and unreasonable approach. Sufficient and convincing evidence was not presented to show why the Procrustean measure of a uniform retirement age, which is ten years lower that the customary age in the rest of the civil service, constitutes the least harmful measure to human rights when realizing the goals of the prison service and the police. In these circumstances we have no alternative but to hold that the retirement policy practised in the prison service and the police is unlawful.

The result

20. The result is that the internal practice that exists in the prison service and the police, which mandates compulsory retirement at the age of 55 (now 57) for a policeman or a prison worker who has served for ten years should be set aside. As the respondents explained to us most emphatically, this decision may have serious repercussions from the viewpoint of personnel planning in the prison service and the police. It is possible that changes of legislation and regulations will be needed. The respondents will mainly be required to formulate a retirement arrangement that takes into account both the principle of equality and the nature of their activities as organizations that are responsible for public security and the rule of law. It will also be

necessary to consider the reliance interest of current employees and the conditions of employees whose retirement date occurs in the interim period. Therefore there is a basis for suspending the declaration that the arrangement is void for a period of time that will allow the respondents to prepare properly for these changes (see *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister* [10], at para. 28 of my opinion). In view of the complexity of the matter, the declaration that the arrangement is void will be suspended for eighteen (18) months from the date of this judgment. In the interim, the existing retirement arrangements will be retained, but the respondents will be entitled to determine special arrangements for the interim period.

21. With regard to the petitioners before us:

(a) The petitioner in HCJ 10076/02 (Dr Rosenbaum) was retired solely for the reason that he reached the age of 55. After he filed his petition, an interim order was made, to the effect that he should continue to be employed as a doctor in the prison service. Now the reason for retiring him has been declared invalid. His petition is therefore granted. Notwithstanding, in view of the suspension of the declaration that the arrangement is void, we must decide what will happen in his case until the new retirement arrangement is formulated. The answer is that in the absence of any objective reason justifying his retirement in the interim period, the petitioner will remain in his job until the new arrangement is formulated. When the new arrangement is formulated, it will also apply to the petitioner.

(b) The petitioner in HCJ 7840/03 (Senior Prison Officer Lazrian) was retired around the time that he reached the age of 55, but apparently for reasons that were not related solely to his age. The circumstances of his case were not made sufficiently clear in this proceeding. In any case, the order *nisi* that was issued in his petition (on 25 February 2004) only concerned the fundamental question of the uniform retirement age in the prison service. His petition is therefore granted on this ground, but this cannot decide his case. The petitioner's case should be reconsidered by the respondent, who will do this with reference to the result in this judgment. If this petitioner is not satisfied, he has the right to apply to us in a new petition.

(c) The petitioner in HCJ 9613/03 (Superintendent Gross) was supposed to be retired because she reached the age of 55. From time to time her service in the police was extended, and after the petition was filed, we were told that her employment would continue until this judgment was given. Her position, therefore, is similar to that of the petitioner in HCJ 10076/02. We therefore

also order in her case that in the absence of an objective reason her employment will continue until the new arrangement in the police is formulated. When it has been formulated, it will also apply to her case.

The respondents shall be liable for the costs of each of the petitioners in a total amount of NIS 5,000.

President D. Beinisch
I agree.

Vice-President E. Rivlin
I agree.

Justice A. Procaccia
I agree.

Justice E.E. Levy
I agree.

Justice A. Grunis
I agree.

Justice E. Hayut
I agree.

Petitions granted.
21 Kislev 5767.
12 December 2006.