H.C. 176/54

NAHOUM YEHOSHUA

v.

APPEALS TRIBUNAL UNDER THE INVALIDS (PENSIONS AND REHABILITATION) LAW, 1949, AND OTHERS

In the Supreme Court sitting as the High Court of Justice.
[April 6, 1955]
Before Olshan P., Berinson J, and Witkon J.

Certiorari - Invalids (Pensions and Rehabilitation) Law, 1949 - *Competent Authority - Refusal to recognise right to pension - Appeals Tribunal - Finality of decision - Jurisdiction of High Court of justice to review decision - Precedent - Binding force of - Doctrine of Precedent in English Law.*

The petitioner applied to the High Court for an order of certiorari against the Appeals Tribunal set up under the Invalids (Pensions and Rehabilitation) Law, 1949, and prayed to set aside the decision of the Tribunal rejecting his appeal against the refusal of the competent authority to recognise his right to a pension. He alleged that the Tribunal had ignored certain medical evidence.

Held : (by Olshan P. and Berenson J., Witkon J. dissenting) :

(1) The High Court has no jurisdiction to review the decision of the Appeals Tribunal, and the application must be refused.

Zeraubavel v. Appeals Tribunal under Fallen Soldiers' *Families Law,* 1950; (1953) 7 *P.D.* 183 followed.

(2) The Supreme Court is bound by its own previous judgments, subject to the usual conditions applying to the operation of the doctrine of precedent in English law.

Ramm v. Minister of Finance and Others; (1958) 8 P.D. 494 followed.

Per Witkon J. (dissenting) : Admittedly there was no distinction in principle between the present application and *Zeroubavel's* case, which laid down that although the jurisdiction of the High Court to control the decisions of administrative tribunals by certiorari is not ousted by a provision in the law that those decisions should be final, it is ousted when that provision is accompanied by an additional provision requiring the tribunal to give reasons for its decision. But *Zeroubavel's* case was wrongly decided and should not be followed. Despite the fact that in *Ramm's* case it had been laid down that the Supreme Court is bound by its previous decisions in accordance with the usual conditions of English law, it should be held that the doctrine of the binding nature of precedents is not applicable in Israel, both for reasons of law and for reasons of policy. Since the precedent established in *Ramm's* case itself cannot, therefore, be binding on the court, it is entitled to, and should, hold that it is not bound to follow *Zeroubavel's* case, and should grant the petitioner an order nisi and try his case on the merits.

Per Olshan P. : *Ramm's* case binds the Supreme Court to follow its own decisions. Even a judge who disagrees with the application of the doctrine of precedent should regard himself as bound by *Ramm's* case, since otherwise the opinion of the majority of the judges of the Supreme Court could be nullified by a minority. The court is therefore bound by *Zeroubavefl's* case, and the application must be refused.

Per Berinson J. : Even in England, where the court may only issue the traditional prerogative writs, the combined effect of the requirements that a tribunal must give reasons for its decision and that that decision is final, is not sufficient to oust the jurisdiction of the High Court to review the Tribunal's decisions. The more so, then, in Israel, where there is the widest jurisdiction to intervene when justice demands. Hence it would appear that *Zeroubavel's* case was wrongly decided. Since, however, a previous judgment of the Supreme Court is, as held in *Ramm's* case, binding upon it on the basis, not of law, but of policy[1)], the decision in *Zeroubavel's* case must be accepted as being conclusive. The application should therefore be refused.

[1)] It is now provided by section 33 of the Court Law, 1957 (11 L.S.I. *163)* as follows:

Palestine cases referred to:

(1) *L.A.* 52/35 - *Raji El Issa and Another v. Butros Deeb Khammar;* (1937), 4 *P.L.R.* 21.

(2) *H.C.* 21/32 - *David Krubi v. District Officer,* Jaffa*;* (1920-1933), 1 *P.L.R.,* 683.

Israel cases referred to:

(3) *H.C.* 4/53 - *Haim and Perla Chilbi v. Pensions Officer under the Fallen Soldiers' Families (Pensions and Rehabilitation) Law,* 1950: (1953), 7 P.D. 475.

(4) *H.C.* 5/53 - *Yehezkel Zeroubavel v. Appeals 'Tribunal under the Fallen Soldiers' Families Law,* 1950, *and Others:* (1953), 7 P.D. 182.

(5) *H.C. 66/54 - Haviva Vander v. Pensions Officer, Ministry of Defence and Others:* (1954), 8 P.D. 556.

(6) *H.C.* 103/54 - *Pensions Officer under the Fallen Soldiers' Families (Pensions and Rehabilitation) Law,* 1950 *v. Appeals Tribunal under the said Law for the Tel Aviv District and Others:* (1954), 8 P.D. 1391.

(7) *H.C.* 104/54 - *Tel Aviv District Taxi Service Drivers Association v. Mayor of Tel Aviv and Others:* (1955), 9 *P.D.* 100.

(8) H.*C.* 154/54 *Avraham Habshosh v. Pensions Officer under the Invalids (Pensions and Rehabilition) Law,* 1949 *and Others:* (1954), 8 P.D. 1590.

(9) *H.C.* 164/53 - *Ruth Gantz v. Pensions Officer, Ministry of Defense and Others:* (1953), 7 *P.D.* 909.

(10) *H.C. 67/54 - Raoul Frenkel v. Appeals Tribunal under Invalids (Pensions and Rehabilitation) Law,* 1949, *and Others:* (1954), 16 P.E. 450.

(a) A court shall be guided by a precedent established by a higher Court
(b) A precedent established by the Supreme Court binds every court except the Supreme Court - Editor's note.

(11) *H.C.* 50/54 - *Yehouda Shoshan v. Chairman and Members of the Appeals Tribunal under the Invalids (Pensions and Rehabilitation) Law, 1949, and Pensions Officer;* (1954) 8 P.D., 1508.

(12) *H.C.* 210/54 - *"Lakol" Furniture Centre and Others v. Minister of Commerce and Industry and Others;* (1952), 6 P.D. 775 .

(13) H.C. 287/51; 34/52; 324/52 - *Emil Ramm v. Minister of Finance and Others;* (1954), 8 P.D. 494.

(14) *C.A.* 376/46 - *Aharon Rosenbaum v. Yona Miriam Rosenbaum:* (1949/50), 2 P.E. 5.

(15) *H.C.* 21/50 - *Michael Shlomiof v. Chairman and Members of the Appeals Tribunal appointed in accordance with Emergency Regulations (War Damage Repair in Houses),* 1949, *and Others;* (1950), 4 *P.D.* 98.

(16) *H.C. 4*5/50 - *Yosef Sifri* v. *Acting Registrar,* Jerusalem *District Court and Others;* (1950), 4 *P.D.* 610.

English cases referred to:

(17) *R. v. Manchester Legal Aid Committee. Ex parte Brand & Co. Ltd.;* [1952] 1 *All E.R.* 480.

(18) *R. v. Nat Bell Liquors Ltd.;* [1922] 2 *A.C.* 128.

(19) *R. v. Wandsworth JJ., Ex parte Read;* [1942] 1 *All E.R. 56.*

(20) *R. v. Kingston-Upon-Hull Rent Tribunal. Ex parte Black;* [1949] 1 *All E.R.* 260.

(21) *Bole v. Horton;* (1673), 124 *E.R.* 1113.

(22) *R. v. Plowright and Others;* (1686), 87 *E.R.* 60.

(23) *R. v. Moreley;* (1760) 97 *E.R.* 696.

(24) *R. v. Jukes;* (1800), 101 *E.R.* 1536.

(25) *R. (Rooney) v. The Local Government Board for Ireland;* (1920), 2 *I.R.* 347.

(26) R. v. *Sill;* (1852), *Dears. C.C.* 10; 16 *Digest* 406, 2525.

American case referred to:

(27) *United States ex rel. Trinler v. Carusi;* (1948), 166F. 2d 457.

French case referred to:

(28) *Lamotte, Conseil d'Etat*, 17 *février* 1950.

Louria for the petitioner.

WITKON J. On the hearing of this petition, it was decided by a majority that "in view of the judgment in *Chilbi v. Pensions Officer* (3), *Zeroubavel v. Appeals Tribunal* (4), *Vander v. Pensions Officer* (5) and *Pensions Officer v. Appeals Tribunal* (6), this court cannot intervene". I differed from my learned colleagues, my grounds for so doing:

On the face of it, this case is of no great general importance. It concerns a man who fell seriously ill while serving in the army. He contends that he is entitled to a pension in accordance with the Invalids (Pensions and Rehabilitation) Law, 1949, but the Pensions Officer rejected his claim and the Appeals Tribunal dismissed his appeal. He has, therefore, applied to us for an order of certiorari, and his complaint is this: Before the Tribunal there was an opinion of Dr. Feldman which showed, according to him, that his illness was connected with his service. This opinion was not contradicted in the certificates produced on behalf of the Ministry of Defence. Those certificates did not determine the cause of the illness at all. Nevertheless, the Tribunal decided to dismiss the appeal without hearing Dr. Feldman, and did so in the following terms:

"On the basis of the medical material placed before us, we are not convinced that the illness from which the appellant is suffering in the nervous system of the spinal cord arose out of or was aggravated by his service. Accordingly, we dismiss the appeal."

It is doubtful whether, in those circumstances, the petitioner is entitled to any remedy. It is settled law that this court does not sit as a court of appeal from administrative tribunals and, in particular, will not intervene in questions requiring expert knowledge, such as medical and engineering questions and so on: *Association of* Taxi *Drivers* case (7); *Habshosh v. Pensions Officer* (8). It may be presumed that the two members of the Tribunal who are in fact doctors themselves were of the opinion that the illness from which the applicant is suffering could not be a consequence of his service or, at all events, that it was impossible to determine the causal connection. We do not know what induced the Tribunal to come to the conclusion it reached. But it seems to me that the Tribunal's decision calls for some explanation, and that is reason enough, in the circumstances of the case, for issuing an order nisi calling on the respondents to appear and show cause. It may be that in the present case the petitioner has little prospect of succeeding, but his arguments appear to me to call for some answer.

Nevertheless, I should not have disagreed with my learned colleagues in their decision to dismiss the application or, at all events, I should not have expressed my dissent at length, were it not for the ground briefly expressed in the majority judgment. This ground raises important problems, and I feel obliged to take a stand in relation to it.

My colleagues rely on four judgments of this court, in which it was decided that, save in cases of excess of jurisdiction, orders of certiorari should not issue in connection with hearings under the Fallen Soldiers' Families (Pensions and Rehabilitation) Law, 1950. No one denies that for the purposes of the question now before us, there is no difference between that Law and the Law under discussion here, namely, the Invalids (Pensions and Rehabilitation) Law, 1949.

That rule was first established in *ZeroubaveI v. Appeals Tribunal* (4), which is referred to in *Chilbi v. Pensions Officer* (3), though in the latter case the order was made absolute, because it was found that the respondents had exceeded their jurisdiction. In *Vander v. Pensions Officer* (5), the court followed *ZeroubaveI's* case (4), but added a point on the merits of the case as a ground for dismissing the petition. Finally, in *Pensions Officer* v. *Appeals Tribunal* (6), the court re-iterated and re-affirmed the rule as laid down in *Zeroubavel's* case (4).

What in effect is this rule ? It is well known that the court will not hesitate to grant a remedy by way of an order of certiorari, notwithstanding that in the Law establishing the administrative tribunal it is said that its decision shall be final. It has so been held in England for a considerable time, and we received the rule from there. But in the present case the Law contains two specific provisions, one being that the Appeals Tribunal shall give reasons for its decision, and the other that the decision shall be final (section 25(f) and (h)). The court in *Zeroubavel's* case (4), deduced from this that the legislature intended to deprive the High Court of Justice of its jurisdiction to interfere with the decisions of the Appeals Tribunal. This was said, more forcibly, in *Pensions Officer v. Appeals Tribunal* (6): "It has been laid down in connection with the Law now under consideration before us,

that this court is not entitled to interfere with the decisions of the Appeals Tribunal, even if it appear that the decision is based upon an error, and even if that error is apparent on the face of the decision, except where the Appeals Tribunal acts without jurisdiction in giving a decision, exceeds the limits set by the legislature." In the same judgment it was also said: "And as for the general argument, based upon orders of certiorari, which this court is in general empowered to issue in the event of a legal error appearing on the face of a decision of an inferior tribunal, the above-mentioned judgments did not lay down any rule to the effect that this court is in general deprived of such jurisdiction, but held that such a jurisdiction does not exist in relation to the Law now under consideration. Their decision was based on an analysis of the provisions of this Law, and we see no reason for differing from the rule laid down in connection with the said Law."

It appears to me that the court has not always followed that decision. I shall quote some examples:

(a) Before the decision in *Zeroubavel's* case (4). it was decided in H.C. 83/52 (unreported) that the Officer and the Tribunal did not err in rejecting the claim on the ground that the petitioner was not "bereaved" within the meaning of the Law. This implies that the court investigated the reasons.

(b) In *Gantz v. Pensions Officer* (9), the application was dismissed on the ground that the petitioner had not been prejudiced in her rights by the fact that she was not given notice of the Pensions Officer's decision. It seems to me that here, too, the court examined the proceedings to see if they were conducted properly or not. Admittedly, the question was

examined according to the test of "jurisdiction". It was held that the Officer's notification was not to be regarded as a condition precedent to the Tribunal's jurisdiction.

(c) In the case of H.C. 3/54 (unreported), an order nisi was issued on the ground that the Tribunal had confined itself to a consideration of the question whether the accident had occurred while the petitioner was on duty, and had not exercised its jurisdiction to consider and decide whether the accident arose out of his service. Only with difficulty is it possible to regard that question as one of jurisdiction, for the Tribunal did not exceed the limits of its jurisdiction; on the contrary, it did not completely exhaust it.

(d) The complaint in *Frenkel v. Appeals Tribunal* (10), was that the Tribunal had relied upon a document without giving the petitioner the opportunity of seeing it or of commenting upon it. The petition was dismissed, not on the ground that the court was not entitled to issue an order of certiorari, but because it was clear from the respondent's reply that the document had been put in in the presence of both sides.

(e) Finally, *Shoshan* v. *Appeals Tribunal* (11), where the petitioner argued that the Tribunal had not expressed its opinion on an important piece of evidence, since the evidence had, through the fault of the Officer, not been produced to the Tribunal. The court considered this argument in detail, and laid down a rule that the Tribunal is not obliged to take into account the opinions of outsiders. No reference is made in that judgment to the question of jurisdiction to issue an order of certiorari.

If not all of those decisions, at least some of them, have given rise to a doubt in my mind whether the rule laid down in *Zeroubavel's* case (4) has become firmly settled. My

colleagues are not of this opinion, and have decided to resolve the present case in accordance with the ruling in *ZeroubaveI's* case (4). I am unable to accept that ruling. With the greatest respect to the judges that decided it, that decision does not seem to me to be a correct one. That being so, I am bound to give reasons for my dissent and to examine whether I am free to question a rule which has been previously established by this court. I shall start by considering the question of our jurisdiction in the matter of the order of certiorari.

The legislator is omnipotent: he can, at will, abrogate our jurisdiction to make an order of certiorari, but it is common knowledge that jurisdiction is not taken away save by express words of ouster. A provision such as this - that the Tribunal's decision shall be final- is insufficient to take away the jurisdiction (see Halsbury, Hailsham edition, Vol. 9, page 861, and the authorities there cited, starting from the seventeenth century). This is one of the achievements that the judiciary has diligently and jealously guarded in its defence of the rights of the citizen. The scope of judicial review of administrative tribunals is narrow enough. An order of certiorari is generally of no assistance in reviewing the decision of a tribunal to see whether it is correct or not as to substance, from the point of view both of the law and of the facts. A fortiori, there is no ground for intervening when the matter under discussion is one of opinion. But this remedy has throughout served as a guarantee to the citizen against decisions that are invalid for want of jurisdiction, because they disregard the principles of justice, because they have been improperly obtained or because of error on the face of the proceedings. It should be borne in mind that not only excess of jurisdiction serves as a ground for an order of certiorari, but also denial of justice and, in particular, a defect in the proceedings. Wherever the law confers a judicial or quasi-judicial capacity on the responsible authority, the citizen is entitled to have the proceedings

properly conducted: *R. v. Manchester Legal Aid Committee* (17), at p. 489; and see *"Lakol" v. Minister of Commerce* (12), at p. 803. There have been instances where the executive was opposed to the court's jurisdiction to quesition its decisions, and sought its abolition by the legislature. The courts invariably laid down the rule that a provision such as in section 17 of the Invalids (Pensions and Rehabilitation) Law, 1949, that the Tribunal's decision shall be final, does not deprive the court of the jurisdiction to make an order of certiorari.

Now this rule is being called in question and the first steps taken for its reversal. With a stroke of the pen, the court in *Zeroubavel's* case (4) abrogated the judicial review of Appeals Tribunals, acting under the two Laws referred to, except where they exceed their jurisdiction. I find no consolation in the fact that this relates only to tribunals under those two Laws. How can I be sure that the executive will not follow this uncontrolled path in relation to other tribunals as well, if its appetite should grow and it wish to rid itself of judicial review? True, these tribunals are presided over by a professional judge. But how do we know that in other laws tribunals will not be appointed without any member of the legal profession, and with only government officials sitting on them?

And for what reason? How did the court, sitting in *Zerubavel's* case (4), arrive at such a far-reaching result? The provision that the Tribunal's decision shall be final is insufficient, as we have seen, to exclude the remedy of certiorari. But the court found a basis for its conclusion by combining two provisions of the Law in question, the one stating that the decision shall be final, and the other directing the Tribunal to give reasons for its decision. With the utmost respect to the court that sat in that case, I fail to understand how it reached its conclusion. If we accept that view, it follows that a provision, the sole purpose of which is to strengthen the citizen's rights, will prove to be

his undoing and will turn from a blessing into a curse. I should have thought that if a decision is anyway subject to review by way of an order of certiorari, all the more must this be so when there is a reasoned decision. I have discovered no foundation for the idea that the "finality" of a decision excludes an order for certiorari simply because it has to contain reasons. I am convinced that the legislator did not anticipate this result and did not intend it when he ordered the Tribunal to give reasons for its decisions.

As I have already said, I do not know whether the finding in the present petitioner's case was so defective as to justify our intervening in his matter by way of an order of certiorari. His contention was, briefly, that the Tribunal's decision was unsupported by the volume of evidence before it. Moreover, the Tribunal, which purported to decide "on the basis of the medical evidence placed" before it, ignored the opinion of Dr. Feldman, the petitioner's doctor, and could find no authority for its opinion in the medical certificates produced on behalf of the Ministry of Defence. Furthermore, according to the petitioner, the Tribunal did not want to hear Dr. Feldman as a witness, nor was it prepared to pass the question over to the Medical Tribunal for its decision, although both sides were agreeable that that should be done. Those are arguments which, if proved to be correct, may have sufficed to show a denial of justice. I express no opinion either way. Mistakes in the admission or non-admission of evidence do not constitute excess of jurisdiction: *R. v. Nat Bell liquors, Ltd.* (18), but may sometimes constitute a denial of justice (see *R. v. Wandsworth JJ.* (19); *R. v. Kingston Rent Tribunal* (20)). According to the decision in *ZeroubaveI's* case (4), the door is closed against the citizen who wishes to raise a complaint of this sort, for he is unable to argue that the Tribunal exceeded its jurisdiction. As I have already stated, even the jurisdiction to make an order of certiorari does not enable us to pass in review the Tribunal's decision, in order to test whether it is sound from

the legal point of view (apart from the case of error apparent on the face of the decision) and from the point of view of the volume of evidence before it (see Halsbury, Hailsham edition Vol. 9, p. 888). There need be no fear, therefore, lest this court turn into a court of appeal from decisions of the Tribunal. But the citizen is entitled to demand that the hearing before the Tribunal be properly conducted, and a breach by it of the basic rules of evidence may provide a ground for our intervening. To my mind, there was occasion for granting an order nisi to the petitioner and for not sending him away empty-handed for the reason expressed in *ZeroubaveI's* case (4).

That being so, I am obliged to consider the question whether we are entitled to depart from the decision that was given in *Zeroubavel's* case (4). My colleagues consider this decision to be binding upon us. To my regret, I am not at one with them even on this question. I agree that if we are to accept the principle that this court is bound by its previous decisions, then there is no way of distinguishing the present case from *Zeroubavel's* case (4), or of taking it out of the rule therein established. But that is the question: are we bound to accept the binding force of the precedent in all its strictness, or are we entitled to depart from a precedent in those rare cases where an established rule does not seem to us to be at all correct, and none of the various ways known in the doctrine of precedent available to us to strip it of its binding force?

This court, composed of five judges, sat on that problem recently, in *Ramm's* case (13), and it was there decided that the court is bound by its previous decisions. Several exceptions were listed, but it is clear and beyond all doubt that the court gave its approval to the English rule relating to the binding force of precedent in its absolute form. In the light of this decision, I must indeed seem somewhat bold openly to call in question an

opinion expressed by so exalted a forum. It need hardly be emphasized that a judge who does not recognise the binding force of precedent cannot be "bound", in the technical sense of the word, even by a precedent which recognises such binding force. A "binding rule" such as this is no more than begging the question. For all that, I am alive to the fact that it was the Supreme Court that spoke here and laid down basic policy for its action in the future, and it is somewhat difficult to deny so fundamental a principle. I am under no illusions. My voice in this matter is one crying in the wilderness, but I am convinced that the principle of the precedent is not calculated to advance and give form to the law in Israel. I am of the view that in the course of time we shall abandon that principle, and perhaps these remarks of mine may contribute towards bringing that day nearer.

I shall open, first of all, by defining the scope of the discussion. The question of precedent bears two aspects. The court itself is required to be bound by its decisions, and also every other court is subject to the rulings laid down in a higher court. For the purposes of the present case, I shall confine myself to the first question. Secondly, a distinction has to be made between the precedent as a binding authority and its power of persuading and guiding. I know of no legal system which treats a departure from rules laid down in previous cases with anything but diffidence. They are authorities to be respected, and only in rare instances will a judge be bold enough to depart from them. That is the accepted system in most of the countries on the Continent of Europe and in the United States. I have not heard that this system brings about chaos or irresponsibility. A court will always want to follow the path of authority for the sake of consistency in the law and for the sake of efficiency in work. No court will be in a hurry to depart, needlessly, from the rule already laid down. As Professor Winfield wrote:

> "To say that because a judge tries to keep the law consistent with itself, he is bound to model it on previous decisions, is to confuse judicial consistency with the binding force of judicial decisions." (Chief Sources of Legal History, p. 149).

On the other hand, the English system, which has not, as far as I have been able to discover, been adopted in any country outside the British Commonwealth of Nations, requires the Supreme Court and, accordingly, other courts, to accept a ruling as if it were the law with a divine sanction even in those cases where such a ruling does not seem to the court before whom it is brought to be sound, and even in those cases where it seems to that court to be thoroughly misconceived. But the law is the law, though the heavens fall. Only in special cases, at times very extreme cases, is the court entitled to distinguish or evade the undesirable precedent.

In the case of *Ramm v. Minister of Finance* (13), the court adopted the English principle subject, indeed, to the same reservations acknowledged in England itself and subject to an additional reservation, namely, where there is a change in social conditions; but apart from those reservations, adopted it in all its severity and strictness. The court reviewed the situation in the period of the Mandate and found, despite the dissenting opinion of Mr. Justice Manning in the case of *El Issa v. Khammar* (1), that opinion had crystallized in favour of the English principle. After that, the attitude of the Israel Supreme Court towards precedents of the Supreme Court in the period of the Mandate was examined, and it was found that it did not consider itself bound by those precedents. Finally, the court defined its attitude towards its own precedents and decided that it was bound by them. It is clear from the *rationes decidendi* - and my colleague Berinson J.

confirms this - that this conclusion is not based on any law or authority, but on considerations of legal policy alone. In the opinion of the court, a precedent must be regarded as binding because of the need for certainty in the law. Conflicting judgments are bound to confuse the citizen and prevent his consultants from being able to advise him on how to conduct his affairs. Especially in a young State, in the words of the judgment, it is imperative that principles be crystallized, though here too a moderate note was struck: "What has been said must not be taken to mean that this court will go to extremes and will decide never to re-consider its decisions."

With all due respect, it seems to me that the court did not give due weight to all the doubts and hesitations that have recently arisen with regard to the English doctrine even in England itself. There, a lively debate is being waged over the advantages of the English system and professors and learned men of authority have attacked the principle. It has been shown, first, by T.E. Lewis, in his article, "The History of Judicial Precedent" (46 L.Q.R. 207, 341; 47 L.Q.R. 411; 48 L.Q.R. 230), that the English principle has been in existence only since the beginning of the nineteenth century. It should not be regarded, therefore, as part of the substance of the common law. In each of the generations that precceded the modern period, when judgments began to be published, there arose lawyers of the highest standing who recognised the power of the precedent as an authority, but that is no proof that they regarded it as something binding. *"Non exemplis sed rationibus adjudicandum est"*, as it is said in the Yearbook of the reign of Edward II, like Justinian's rule: *"non exemplis sed legibus judicandum est'"*. There is no unanimity of opinion on the question as to when the approach altered. Holdsworth (50 L.Q.R. 180), in contra-distinction to Lewis (*loc. cit.)* and Allen ("Law in the Making", second edition p. 150), thought that the binding force of precedent was recognised as early as the seventeenth century. For that view, he

relies on the sayings of Bacon, Coke C. J., and Hale. On the other hand, Vaughan C. J., strongly opposed the doctrine of binding precedent, as is apparent from his dicta in *Bole* v. *Horton* (21):

> "If a Court give judgment judicially, another Court is not bound to give like judgment, unless it think that judgment first given was according to law. For any Court nay err... Therefore, if a judge conceives a judgment given in another Court to be erroneous, he being sworn to judge according to law, that is, on his own conscience ought not to give the like judgment, for that were to wrong every man having a like cause, because another was wrong before."

However, even Coke, who saw in the precedent evidence of a rule of law, made one reservation to this doctrine:

> "First, whatever is against the rule of law is inconvenient. Secondly, an argument *ab inconvenienti* is strong to prove it is against Law... Thirdly, that new inventions .. .are full of inconveniences."

Only in the eighteenth century, particularly as a result of Blackstone's influence, was the doctrine of binding precedent adopted in all its severity, though even he and his contemporaries, in the spirit of their age, would not accept as "law" a rule which ran counter to "natural" justice.

There is no need to multiply illustrations from English history nor to demonstrate that many of the greatest legal philosophers, among them Bentham and Austin, criticised the doctrine of precedent. The material may be found in the places cited above. It is more important, for the purposes of our case, to examine the criticism levelled in our own times against the English principle, in the main by Professor Goodhart in his well-known article in 50 L.Q.R. 40, on "Precedent in English and Continental Law." I do not want to set out here all the reasons with which Professor Goodhart repudiated the view current in England, that the English system is better than the system in *force* in other countries. In my opinion, Professor Goodhart has succeeded in showing that the doctrine of "the binding precedent" in its strict form not only does not advance the development of the law, but actually impedes it; that it is bound to render legal deduction formalistic; that it does not even possess the advantage of convenience, especially when the publication of judgments is unsatisfactory; that it is unable to preclude personal inclinations on the part of the individual judge; and last but not least, that even for the sake of certainty there is no particular need to endow a precedent with binding effect, as distinct from merely authoritative force. Passing from English to Israeli legal literature, we have before us the enlightening article of Professor Tedeski on the Rule of Precedent in Palestinian law, in his book "Researches into the Law of Our Country", 1953, with its criticism of the English system and its proposal that we should not adopt this system in *our State.*

Professor Glanville Williams, the editor of Salmond on Jurisprudence, tenth edition, at p. 196, sums the matter up in this way. He distinguishes between two meanings of the doctrine of precedent: between its loose meaning, that is to say, that precedents are published and quoted and it stands to reason that the courts will follow them; and its strict meaning namely, that precedents not only *possess great* authority, but that the courts are

obliged (in certain circumstances) to follow them. The first is the one that prevailed in England until the nineteenth century, and it is still the only sense in which it is accepted on the continent of Europe. The second meaning developed in England during the nineteenth century and was improved upon in the twentieth century. Continuing, Professor Williams says:

> "Most of the arguments advanced by supporters of "the doctrine of precedent", such as Holdsworth, will be found to support the doctrine in the loose rather than in the strict meaning, while those who attack it (such as Professor Goodhart) attack it in its strict and never in its loose meaning. Thus the two sides are less at variance than would appear on the surface. The real issue is whether the doctrine of precedent should be maintained in its strict sense or whether we should revert to the loose sense.There is no dissatisfaction with the practice of citing cases and of attaching weight to them; the dissatisfaction is with the present practice of treating precedents as absolutely binding. In favour of the present practice it is said that the practice is necessary to secure the certainty of the law, predictability of decisions being more important than approximation to an ideal; any very unsatisfactory decision can be reversed for the future by statute. To this it may be replied that pressure on Parliamentary time is so great that statutory amendment of the common law on an adequate scale is not to be looked for; also our experience of statutory amendment in the past has not been happy."

Finally, Professor Williams seeks a compromise between the two opinions. He suggests that the binding force of precedent be done away with, to the extent that it has been created by the same court or by another court of the same instance, and to maintain it only in relation to superior courts.

I feel that we, too, in this court would be well advised not to be bound by the doctrine of precedent in its strict sense. As I have said, I am not afraid that chaos and other kinds of disorder will result. The Israel judge can be expected to know how to respect an authority and not to depart from an established rule save in exceptional cases. I am not unaware of the need for certainty in the law, but I am not prepared to purchase certainty at the price of justice. Smoira P., spoke against precedents for the sake of precedent, when he said, in *Rosenbaum v. Rosenbaum* (14): "If I have to choose between truth and certainty, I prefer truth" - and not only in relation to precedents from the period of the Mandate. The doctrine of the binding force of precedent, which is not followed by the majority of peoples, is a strange importation into Israel. It has been said: "The judge has only what his own eyes see". And it seems to me that in our young State, the points of criticism that I have quoted above apply with greater force. We stand at the threshold of our development as a nation and as a society, and there is still a long road for us to tread before we reach a final form for our jurisprudence, and the shaping of the law in Israel. In such a situation one needs, sometimes, to look afresh at the rules, even if they have been but recently established and even if the conditions of our life cannot be said to have altered in the meantime. Accordingly, the doctrine of precedent, in its strict and uncompromising sense, is not only not essential at this hour, but on the contrary, is likely to hamper our progress. And let us not forget that the system of binding precedent should not be applied without all the technical means which we still lack, such as an improved system of law reporting and the

legal reporting of every precedent, thus rendering it easier for the judge and the advocates pleading before him to find all the relevant authorities. As for legislation, which the supporters of the binding precedent rely upon so heavily, it has more than once happened with us that this has been somewhat tardy in amending results which in any reckoning were undesirable, and in the result the litigant was the loser in both events. In the present case, what shall we recommend to the legislator to amend?

My colleague, Berinson J., feels that in matters of policy, the minority is obliged to march with the majority. My answer to that is that in judicial matters the judge has no allegiance save to the law. Since my colleague, too, disagrees with the ruling in *Zeroubavel's* case (4), I feel that it would have been proper to accede to the applicant's petition.

OLSHAN P. It was decided at the time of the hearing, by a majority, to dismiss the petition for an order nisi. This was decided in view of the many judgments in which the rule in the matter under review was established. After reading the reasoned judgment of Witkon J., who was in the minority, I am prompted to make certain remarks.

1. The doubt expressed by my learned colleague as to whether in fact the rule in the matter under review was finally established in the judgments mentioned in the majority decision is, with all due respect, unfounded. Since the decision in *Zeroubavel's* case (4), there has not been a single instance in which an order has been made absolute on the merits of the case, and no instance is to be found in which the court decided on the merits of the case without taking into account the ruling in *Zeroubavel's* case (4), namely, that the High Court of Justice will interfere with the decision of the Appeals Tribunal only where a

question of jurisdiction arises. If at times this court has expressed its opinion on the merits of the case and has given its opinion on the Appeals Tribunal's reasons, that was because this court was saying, "that *even* on the merits of the case, the petitioner has failed to make out a case". This has happened mainly in those cases in which a discussion might have arisen over the question whether the Appeals Tribunal's decision indirectly involves the contention that the Appeals Tribunal did not have the jurisdiction to decide what it did. It sometimes happens that it is impossible to determine whether a certain question is one of jurisdiction without "looking into the Appeals Tribunal's reasons", and such a case does not prove that the court decided to ignore the aforementioned rule.

2. My learned colleague mentions the "opinion" of Dr. Feldman and quotes the Appeals Tribunal's decision. Dr. Feldman, the doctor who examined the petitioner privately, conveyed in his letter the details given him by his patient, and the Appeals Tribunal (two of the members of which were doctors) was entitled to regard Dr. Feldman's diagnosis as based mainly on the information given him by his patient. It is very doubtful, therefore, whether the petitioner would have obtained the order nisi asked for, even were it not for the rule laid down in *Zeroubavel's* case (4), and the decisions which followed it.

3. My learned colleague raises once again in his judgment the old problem with which many lawyers in the world are grappling, namely, whether to accept or reject the principle of the binding force of precedent. There is no doubt that the problem is important, and there are two sides to it. The question is which system is to be preferred. The solution to the problem cannot, in my opinion, be universal and it depends upon the situation and conditions of the State in which this problem arises. Even in Continental countries where, from the theoretical point of view, the principle of the binding force of precedent does not

exist - even there, the principle is applied *in fact,* though its field of application is more restricted. In those countries there is a codification of laws and the need to refer to precedents is in any event more restricted than in those countries where the material law is built on something resembling the common law or the law of equity in England and where there is no codification.

I do not wish to go into any further detail on that subject because, with all due respect to my learned colleague, the weak point in his judgment is his disregard for the judgment handed down by a bench of five judges of the Supreme Court in *Ramm's* case (13). in which it was decided that the court is bound by its decisions, except in certain cases.

Of course, from the point of view of simple logic, my learned colleague is caught in a "vicious circle" and is forced to the conclusion that that judgment does not bind him either, for if no judgment possesses binding force, by what right is that judgment to be considered as binding? Is it because of the fact that the court was composed of five Supreme Court judges or because of the fact that almost every Supreme Court judge accepts the correctness of the rule laid down there?

It will be noted that my learned colleague does not attempt to bring the case under discussion within the scope of those exceptional cases, such as were laid down in *Ramm's* case (13), where the court is not bound by precedent. He refuses to follow the rule established in *Zeroubavel's* case (4), and the judgments that followed it, for the sole reason that in his opinion the rule there established is fundamentally erroneous. Instead of recommending an immediate amendment by the legislature of what he regards as "an

injustice", he goes further and sets at nought the decision given in *Ramm's* case (13), in the matter of the binding force of precedent.

With all due respect, in spite of the fact that, from the point of view of "the vicious circle", this is logical and consistent, it seems to me to be somewhat like imposing a minority opinion on the majority.

A bench of three judges sat in this case. What would have happened if on the merits of the case and also on the question of the binding force of precedent one more judge had joined him, and my learned colleague had not been in the minority but in the majority. Which judgment would have been binding: the judgment in *Ramm's* case (13) or this latter judgment?

If it be said that neither of them has binding force, in my opinion a chaotic situation would be created; for these two Supreme Court judges would acquire a preferential status, not being bound by precedent, whilst the majority, being in favour of the binding force of precedent, would have to give way to the minority opinion in this matter, for, otherwise, two systems would be in existence in the court, and the fate of cases (in which this problem arose) would be settled according to chance, according to the composition of the court, depending on whether two or three of the remaining judges were sitting.

It may be submitted that such cases, where it is necessary to depart from a ruling established by precedent, are very rare. In principle, and in view of the difficulties that may be caused to advocates and litigating parties - in particular, if the net should be cast wider and courts of other instances should find justification for maintaining my learned

colleague's principle (and what is to prevent them?) - it can make no difference whether such cases are rare or common.

The result of accepting the view of my learned colleague would be to create uncertainty, to lengthen the time of hearings and to involve the parties in heavy costs, and who will compensate the citizen for the costs and injury this uncertainty will cause him?

I do not pretend to say that a judge, be he in the smallest of minorities, is bound to keep silent over a legal decision when he thinks that it is "contrary to law", but he is bound to act in accordance with the opinion of the majority. So long as no one judge can be allowed, in a particular matter, to foist upon his colleagues his ideas of justice, that is to say, so long as there exists no way of one judge forcing his colleagues to prefer his ideas of justice to their ideas of justice - otherwise than by way of persuation - because the legislator alone is in a position to determine whose opinion is preferable, no question of acting contrary to his conscience is involved. Whenever the minority's reasons are not sufficiently persuasive to be acceptable to the majority, there is no other way, in the absence of a decision by the legislator, save to act in accordance with the majority opinion.

Insofar as there are grounds for holding that the principle of the binding force of precedent was introduced into this country through Article 46 of the Order in Council,[1])

[1] Palestine Order in Council, 1922, Art. 46:

Law to be applied

46. The jurisdiction of the Civil Courts shall be exercised applied in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted: and subject thereto, and insofar as the same shall not extend or apply, shall be exercised in conformity with

and insofar as this rule was also established in judgments from the time of the Mandate, *Ramm's* case (13), which confirms that rule, should not be regarded as a judgment serving only as a "signpost"; and so long as the legislator has not yet abolished that principle, there is an obligation to abide by it, and not to ignore it on account of reasons which in any event create an artificial vicious circle.

I would go even further: assuming that in the past the principle of "the binding force of precedent" had not yet existed in this country and that the problem arose before the Supreme Court now for the first time; and assuming that by a majority of seven against two, a rule (or let us call it even a "signpost") were established in that connection, it seems to me that such a decision ought to bind everyone in the future, so long as the legislator has not intervened in the matter, and has not altered the decision by means of a clear legislative act.

BERINSON J. On the hearing of the petition, I shared the learned President's view that we must dismiss it for the simple reason that we are bound by what was decided by this court in *Zeroubavel's* case (4).

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the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.
Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary.

The binding force of the precedents of this court on this court itself - and, it need hardly be said, on all other courts in the State - was established recently after exhaustive consideration in *Ramm's* case (13), by a bench of five judges, myself among them. Notwithstanding the dissenting and instructive opinion of my learned colleague Witkon J., my belief in the soundness of that decision is unshaken.

Obviously, one must read the judgment in *Ramm's* case (13) in its entirety. The rule that we are bound by our previous judgments is subject to several important reservations that were mentioned in that judgment, and they are not exhaustive, since they are but "signposts" for the course along which we shall march in the coming years."

However, my learned colleague does not attempt to bring the present case within the scope of one of those exceptions, and does not even attempt to create a pigeon-hole for an additional exception, but rather makes a frontal attack on the very principle of the obligation to follow our previous decisions. Although, for myself, I should not so much fear to follow the road that Witkon J. recommends, I prefer the system of binding precedent for the self-same reasons that were explained in our judgment in *Ramm's* case (13).

Furthermore, I feel that once such a decision has been reached my learned colleague, too, must harness himself to the yoke of precedent, not only because one must follow the majority, but mainly because membership of this court requires it, for it is clearly out of the question that there should be a majority policy and a minority policy in this court at one and the same time. Fundamentally, we are dealing here not with a controversy on the true interpretation of some point of law, in which each judge may decide to the best of his

conscience and legal understanding, but with a question of policy, and in such circumstances I think that, having expressed its independent view, the minority has no choice but to abide by the rule in the future, and go along with the majority.

And now, to the substance of the rule that was laid down in *Zeroubavel's* case (4). In that case it was decided that there was no jurisdiction in this court to control the activity of inferior tribunals by means of an order of certiorari in matters arising out of appeals to the Appeals Tribunal under the Fallen Soldiers' Families (Pensions and Rehabilitation) Law, 1949, because in that Law it was enacted that "the Appeals Tribunal shall give reasons for its decision" and that "the decision of the Appeals Tribunal shall be final."

At the hearing of the petition, I openly expressed my doubts as to the correctness of that ruling and the more I have examined and considered and probed into the matter since then, the more strongly am I of the same opinion. With all the respect in which I hold my colleagues, the judges that took part in the decision in that case, and all those who have since followed them without further reflection, have, in my opinion, been quick in reaching their conclusion without hearing full argument on the weighty question then under consideration - the question of the control that this court is empowered to exercise over the Appeals Tribunal acting in pursuance of the Law above referred to. Were I to regard myself as free to decide according to my wish and understanding, I should not hesitate to accept the view of my learned colleague, Justice Witkon, on this question - and these are my reasons.

The jurisdiction of the High Court of Justice to give orders to and control the activities of the various public officials and bodies is wide - I would say very wide; but it is not

unlimited. The principal limitations are of two kinds, and both are found in Article 43 of the Order in Council from which the court derives its original jurisdiction. The part of that section relevant to the present matter provides as follows:

> "The Supreme Court, sitting as a High Court of Justice, shall have jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of Justice."

The question that comes before the court in each case is, therefore, two-fold: is the court's intervention required at all in the particular case, because the petitioner cannot and his remedy in an other place? And if so, is the intervention required for the administration of justice?

The second question is fundamentally a subjective one, because it depends on the discretion of the court. True, that discretion must be exercised in accordance with law and not be arbitrary or capricious, and over the years the court has itsef made reservations and set limits to its exercise. Nevertheless, the question remains, as before, fundamentally subjective, its exercise one way or the other in each case depending in no small measure on the disposition of the court to extend or limit its control over the activities of the administration, including the various administration bodies and tribunals.

Far be it from me to ignore the limits set to the jurisdiction of this court by the law and by its own past decisions, or to minimise the importance and extent of the practical

difficulties standing in the way of the court in exercising efficient control over the detailed actions of those who perform their duties by virtue of the law of the land. I agree with what the learned President said on another occasion, that this court will not usurp the functions of Government. But at the same time, I think that it would be a mistake if this court were disposed to divest itself little by little, as if that were its intention, of the power and jurisdiction that it has taken upon itself till now, on account of some unspecific and general observation in this or that law. The High Court of Justice has, in the course of time, come to be the citizen's main, if not his sole, defence and protection in his relationship with the administration. Let us not rock and shake with our own hands the bough on which we sit and from whose heights we supervise the legality and fairness of the administration's activities, unless there is clear legislative authority to do so.

The legislator is supreme. He can give and he can take away. The jurisdiction that he has bestowed on the court in one law, he can, if he so wishes, abrogate in another law, and we must comply with his wishes. That indeed is the only question that fell to be decided in *Zeroubavel's* case (4): does the provision in the Fallen Soldiers' Families (Pensions and Rehabilitation) Law concerning finality of the Appeal Tribunal's decision reveal a clear intention on the part of the legislator that such a decision shall no longer, on the merits, be subject to the consideration and review of this court? When I read the many authorities on the matter in Israel and in England, it seems to me that the only conclusion is that no such intention appears.

It has been stressed in the past that the jurisdiction of this court is not identical with the jurisdiction of the High Court in England in controlling the activities of officials and legal and administrative bodies. But if there is no identity, there are certainly parallels to

be drawn between the two jurisdictions and though there is a difference in their origin and scope, there is no fundamental distinction in their content and nature. Accordingly, I see no reason why our jurisdiction should be curtailed in a manner different from that of the corresponding jurisdiction of the High Court in England, simply because the one - ours - is derived from written law, and the other - that of the High Court in England - is derived from the common law. It seems to me that the same rule should apply in both cases to the restriction of this jurisdiction by an enactment.

The English rule in this respect has been established and maintained for centuries, and it is that the court's jurisdiction to issue an order of certiorari is not ousted by a written Act, unless there are express words of ouster, and a mere provision in the Act that a tribunal's decision shall be final does not suffice. See Halsbury, Hailsham edition, Vol. 9, p. 861, section 1455, and the judgments there cited, starting in 1686 and continuing to our own times, for example: -

R. v. Plowright, (1686), (22);

R. v. Morely, (1760), (23);

R. v. Jukes, (1800), (24);

R. (Rooney) v. The Local Government Board for Ireland, (25), at page 354.

A Palestine case, *Krubi v. District Officer, Jaffa* (2), from the period of the Mandate decided that a legislative provision laying down that a tribunal's decision shall be final does not oust this court's jurisdiction under Article 43 of the Order in Council.

This rule is part of the heritage of the courts in England and in Israel - and, as we shall see later on, also of the courts in the United States and, above all and in particular, in France, the cradle of administrative law; and its effect is neither determined nor exhausted except by a clear and express legislative enactment. Only when the legislator reveals his intention in clear and unequivocal language, that it desires to exclude a certain administrative act from the scope of judicial review, will the court respect that intention. But the existence of such an intention is not to be presumed or implied; on the contrary, the usual presumption is that judicial review is desirable, and the legislator is taken not to intend to diminish or put an end to it in any particular matter, except where there is an explicit enactment.

Accordingly, when it is laid down in a law that a certain decision "shall be final and shall not be the subject of legal proceedings in any court whatsoever" (as is set out for example, in section 8(3) of the Registrars Ordinance, 1936), or that "no Court... shall be able to annul or alter an order made by the proper authority..." (as is set out, for example, in Regulation 18 of the Emergency Regulations (Repair of War Damage in Houses), 1949), only in such cases will a court stay its hand and decline to intervene. Even in such cases the court has retained for itself, and rightly so, the power to intervene whenever the official exceeds or the tribunal concerned exceeds the limits of its jurisdiction, or acts without jurisdiction, because a condition precedent to the exercise of jurisdiction has not been fulfilled, or because some fact, which in terms of the law is essential to the exercise of jurisdiction, has not been established (See *Shlomiof* v. *Appeals Tribunal* (15), and *Sifri v. Acting Registrar, Jerusalem District Court* (16)).

That is not all. In its justified concern for the exercise of judicial review of one kind or another of the acts of inferior administrative or legal tribunals, the High Court in England sought and found other means, approximating and similar to the writ of certiorari, whenever the traditional means of the true writ of certiorari according to the common law were taken away from it by a statutory provision. In Halsbury, Hailsham edition, Volume 9, p. 863, the following illustration is given in note (r):

> "By Statute (1827), ...it was provided that no indictment for obtaining money under false pretences should be removed by *certiorari.* By (another statute), power was given to the High Court.... to remove indictments from sessions in London or Middlesex, 'by *certiorari* or otherwise', into the Central Criminal Court..., and it was held in *R. v. Sill, supra*, that an indictment for obtaining money under false pretences might be removed, under the lastmentioned Act, into the Central Criminal Court, inasmuch as the procedure authorised by that Act was not, properly speaking, procedure by the writ of *certiorari*, but by an order in the nature of *certiorari."*

If such is the case in England, how much more so is it with us, where our hands are not tied to issuing only traditional prerogative writs, and where we possess the widest discretion to intervene in any case where justice so requires. In this respect our position is better than that of the High Court in England. Our jurisdiction is wider, and when occasion demands we are unquestionably entitled to intervene by virtue of Article 43 of the Order in Council and grant an appropriate remedy even where the High Court in England is powerless to do so. A fortiori, we ought to do so in a case where even in England the court,

in spite of a general provision in an Act that the decision of a tribunal shall be final, would grant the writ unless there is an express provision in the Act by which the jurisdiction of the court is excluded.

I fail to see in what way the position is altered by the obligation imposed on the Appeals Tribunal to give reasons for its decision. On the contrary, by its giving reasons, the court is enabled more easily to investigate the nature of the decision and to examine its legality and the legality of the proceedings that took place before the Tribunal. I should have said that the requirement to give reasons not only does not derogate from the usual powers of the court, but on the contrary strengthens its hand, and provides a firm foundation for carrying out an efficient judicial review of the Appeals Tribunal's actions and decisions. At all events, I have found no authority for the view that the obligation to give reasons by an administrative tribunal, even when accompanied by a provision that the tribunal's decision shall be final, is sufficient to take away jurisdiction from the court. I have found exactly the opposite. The very basic object of the writ of certiorari is to review judicial decisions, both of administrative tribunals and of inferior courts in the ordinarily understood sense of the word, and it is a well-founded rule written or unwritten - that a court must give reasons for its decision. In England, there is nothing to prevent a case in an inferior court, whose decision contains reasons and is prima facie final, from being brought up for scrutiny in the High Court, by means of a writ of certiorari.

As far as I am aware, the courts in the United States, and even more so, those in France, adopt the same method, as is explained in Schwarz' book, "French Administrative Law and the Common Law World"; see in particular pp. 155, 157, where two typical instances are cited, inter alia, one from the United States and one from France, and I think

it right to mention them briefly here, in order to demonstrate the approach of the courts in those countries to the problems confronting us.

In the case of *U.S. ex. rel. Trinler v. Carusi (*27), the person authorised under the United States Immigration Act 1917, issued a deportation order against the petitioner Trinler. It was provided in that Act that such a decision shall be final, 'but when the matter was brought before the court on a petition of habeas corpus, the majority of judges said, at p. 461:

> "While it night look as though judicial review were precluded by the giving to the deportation order the air of finality, in practice such finality never existed because of the availability of habeas corpus."

In France, the Conseil d'Etat, which is the supreme authority in administrative matters, adopted a similar and much more stringent attitude. In the case in question. *Lamotte* (28), it was laid down by law that the authority's decision to grant licences "shall not be the subject of administrative or legal proceedings". Nevertheless, the Consail d'Etat decided that that did not suffice to exclude its jurisdiction to examine the matter anew. The learned author adds a comment of his own, saying (ibid., p. 157):

> '"Thus, even in a system based on the absolute sovereignty of the written law, the dangers inherent in administrative conclusiveness have led the Courts to refuse to give literal effect to provisions precluding review."

In the light of all that has been said above it seemed to me that in the case before us, the petitioner's road to this court was still open. Were it not for the previous decisions of the court, which I regard as binding upon me, I should have said that the petitioner ought to be granted the order nisi he asks for.

I shall add but one word more, and it seems to me obvious. In my opinion, the decision in *Zeroubavel's* case (4) is binding only in relation to the law under consideration there, and to any other law of a similar nature in every way. I emphasize the words "in every way", and not only in the sense that it contains a provision concerning the finality of a decision and the requirement of giving reasons. I imagine that the court that sat in that case could not do otherwise than attach special signfficance to a number of specific features in that law which - so I presume - influenced, consciously or unconsciously, the attitude adopted there, such as the first that the proceedings do not end with the findings of a tribunal of first instance, and that an Appeals Tribunal exists, presided over by a professional judge. It may be that in the absence of an Appellate Tribunal and with a different composition of the tribunal of first instance, the court might well have reached the opposite conclusion.

Application refused.

Judgment given on April 6, 1955,