H.C. 210/60

RABBI SOLIMON H. ABUDI
v.
MINISTER OF RELIGIONS AND 6 OTHERS

H.C. 205/60

ABRAHAM ZEPHANIA
v.
MINISTER OF RELIGIONS AND 3 OTHERS

In the Supreme Court sitting as the High Court of Justice

Silberg J., Witkon J. and Cohn J.

Administrative law—Election Committee of Chief Rabbinate Council—Character of membership—Whether members appointed or elected—Ability to resign—Validity of removal and replacement of a member—Competence of Committee acting without full complement—Majority required for decisions—Regulations prescribing the System of Elections or Appointment of the Rabbinical Council etc., 1936 *(as amended in* 1954)*—Interpretation Ordinance.*

Upon the death of Chief Rabbi Herzog, an Election Committee of eight members was nominated under the Regulations to appoint and convene an Electoral Assembly. Half of the Committee was nominated by the Rabbinical Council in January 1960 and half by the Minister of Religions in June 1960. The first meeting of the Committee was convened by the Minister in July 1960, notwithstanding the claim of the Rabbinical Council that the invitation should be a joint one. In consequence, the four Council members refused to attend but subsequently one of them, Rabbi Abu Revia, relented. Thereupon the other three tendered their resignations to the Council which after considering the matter resolved to remove Rabbi Abu Revia from membership of the Committee and to replace him by another, calling upon the other three to withdraw their resignations. The latter refused to do so but finally such refusal was accepted as was also the refusal of the replacement to act. In the meantime, the Committee continued to carry out its tasks with the four Ministerial members and Rabbi Abu Revia, after receiving an opinion from the Attorney-General that neither the purported removal nor the resignations were of legal effect, since members were elected and only the Committee itself could accept resignations and effect removals, and even if they were appointed, the character of their duties required that the appointer became *functus officio* upon making the appointment, without any further right of interference. The Council claimed that it was competent to remove Rabbi Abu Revia, that the other three could resign if they so desired and therefore that the Committee was not properly constituted and could not lawfully act by the remaining four members.

Held: (1) That the removal of Rabbi Avu Revia was devoid of all legal effect

because on appointment a member does not become an agent of the appointer, the 'umbilical cord' between them being cut (per Silberg J.) or because even though appointed to represent some interest, his appointment may not be revoked if he becomes a 'rebel' (per Witkon J.).

(2) (Cohn J. dissenting) The resignations took legal effect and there was no need for such resignations to be accepted by the Committee.

(3) (Silberg J. dissenting) the Committee, whether consisting of five effective members (if the resignations were effective) or of eight could act by a majority of its nominal complement.

Palestine cases referred to:

(1) *H.C.* 43/46—*Adel Ibrahim El Farrah v. Chairman and Members of the Electoral Committee of Khan Younis* (1946) 13 *P.L.R.* 336.

Israel cases referred to:

(2) *H.C.* 3/58; 9/58—*Yona Berman and others v. Minister of the Interior; "Izhar" Israel Oil Industries Ltd. v. Minister of the Interior* (1958) 12 *P.D.* 1493 (*translated at p.* 29)

(3) *H.C.* 19/56—*Eliezer Brandvein v. Governor of the Central Prison, Ramla, and others* (1956) 10 *P.D.* 617.

(4) *H.C.* 221/56—*Joseph Malahi v. Chairman of the Local Council, Rosh Ha-ayin* (1957) 11 *P.D.* 925.

In H.C. 210/60

Spaer for the petitioner.
Hausner, Attorney-General, and *Terlo,* Deputy State Attorney, for the first and second respondents.
The third, fourth, fifth and seventh respondents were not represented.
Salomon and *Mizrahi* for the sixth respondent.

In H.C. 205/60

Bechori for the petitioner.
Hausner and *Terlo* for the first and second respondents.
The third respondent was not represented.
Salomon for the fourth respondent.

SILBERG J. The petitions before us and the answers in opposition were conceived and born in the disturbed atmosphere surrounding, to everyone's sorrow, the elections to the Chief Rabbinate Counci.. This is attributable in no small measure to the existence of some very

old regulations enacted by the Mandatory Power, whose usefulness is spent. These regulations were perhaps fit and appropriate for the Jewish Settlement in Palestine but are no longer adapted to the political requirements of the State of Israel. It is to be regretted that the Israel legislature has not as yet found the time and occasion radically to alter the election regulations and put them on a proper footing so that there is no longer any room for those coupling of names, speculations, forecasts and intrigues that are liable to settle around the personalities of each of the members of the committee of eight. During the course of this judgment or at the end of it will appear the practical conclusions which we must or are liable to reach as a result of the anachronistic provisions of these regulations.

2. The curtain that was raised before us in this case revealed a scene replete with rules of law but poor in facts. Not all the "guiding spirits" were represented. Thus all that will hereafter be said in respect of the factual aspect of the matter will merely be that "relative truth" which emerges from the admissible evidence adduced in court by one or other party.

3. The legal structure upon which the dispute between the two camps took shape is to be found in the regulations which bear the lengthy title "Regulations prescribing the System of Elections or Appointment of the Rabbinical Council, Rabbinical Offices and Rabbis of Local Communities 1936" (hereafter called "the Elections Regulations") as amended on minor points in 1954 (hereafter "the 1954 amendment"). Let me here set out the provisions which touch the question before us.

> "1. Not later than one month from the coming into force of these Regulations, and subsequently not later than three months prior to the expiry of the term of office of the Rabbinical Council, the Rabbinical Council shall jointly with the General Council (*Vaad Leumi*) constitute an Electoral Committee of eight members for the conduct of the election of the Rabbinical Council. One-half of the number of members of the Electoral Committee shall be elected by the Rabbinical Council and one-half by the General Council (*Vaad Leumi*). The chairman and vice-chairman shall be elected from amongst the members of the Committee; neither shall have a casting vote. Any layman (non-Rabbi) appointed to serve on the Committee shall deliver to the General Council *(Vaad Leumi)* a declaration in writing confirming his positive attitude to the Jewish religion. The Committee shall pass

resolutions by a majority of votes, and in case of an equal division of votes the Jewish Agency for Palestine shall appoint a member with a casting vote...

2. The Electoral Committee shall address a request in writing to the Rabbinical Council to compile within one month a list of officiating Rabbis in Palestine.... The list shall be submitted to the Electoral Committee which shall nominate out of the Rabbis included therein the forty-two Rabbinical members of the Electoral Assembly for the election of the Rabbinical Council. ...If the list is not compiled within the prescribed period of one month, it may be drawn up by the Electoral Committee itself. The Electoral Committee shall provide each member with a certificate confirming his nomination as a member to the said Electoral Assembly.

3. The Electoral Committee may call upon the General Council *(Vaad Leumi)* to submit within one month a list of the Local Communities and of the names of their respective delegates to the Electoral Assembly.

The General Council *(Vaad Leumi)* shall draw up a list of the Local Communities, shall prescribe the number of their respective representatives, of whom the total number shall be twenty-eight, shall call upon the Local Communities concerned to nominate the prescribed number of candidates, and shall prescribe the number of Sephardic and Ashkenazic candidates respectively. The candidates of the Local Communities shall be appointed by the committees of the Local Communities and each candidate shall deliver to the Committee of the Local Community concerned a declaration in writing affirming his positive attitude to the Jewish religion. Upon receipt of the names of the candidates of each Local Community, the General Council *(Vaad Leumi)* shall forward the list to the Electoral Committee. In the event of the General Council *(Vaad Leumi)* failing to submit the list within the prescribed period of one month, the Electoral Committee itself may draw up the list. The Electoral Committee shall provide each member with a certificate confirming his election as a member of the Electoral Assembly for the election of the Supreme Rabbinical Council."

The 1954 amendment provides in Reg. 4:

"4. The election of the Rabbinical Council shall take place in accordance with the Elections Regulations with the following variations and adjustments:

(1) Every reference to "the General Council" *(Vaad Leumi)* in the Elections Regulations shall be deemed to be a reference to the Minister of Religions who shall act with the approval of the Government.

(2) Every reference to "the Committee of the Local Community" in the Elections Regulations shall be deemed to be a reference to the members of the Council of the Local Authority who shall act jointly with the members of the Religious Council at a joint meeting to which there shall be summoned members of the two bodies in equal numbers...

(3) The Jewish Agency for Palestine shall no longer have the right to appoint an additional member to the Electoral Committee.

(4) Every question or doubt which may arise in connection with the election of Rabbinical Council shall be determined by the Minister of Religions."

4. To complete the picture and to render the incisive legal arguments of counsel more comprehensible, it is fitting to mention two further legal rules, one a ministerial regulation and the other a rule of case law.

(a) The Religious Communities (Organisation) (Extension of term of office of the Rabbinical Council of Israel) Regulations, 1960.

"1. Notwithstanding anything contained in Regulation 20 of the Regulations prescribing the System of Elections or Appointment of the Religious Council, Rabbinical Offices and Rabbis of Local Communities, published in the Official Gazette 1936, Supplement 2, No. 582, p. 198, the Rabbinical Council which was elected on 29 Shevat, 5715 (21 February, 1955) shall continue in office until 26 Tammuz, 5720 (21 July, 1960) inclusive or until the date of the election of a Rabbinical Council which shall take place prior thereto, which ever is the earlier.

2. These Regulations take effect on 23 Shevat, 5720 (21 February, 1960)."

As a result of a further extension (Official Gazette (Subordinate

legislation) 1019 of 16.7.1960) the period of office of the Rabbinical Council was extended to 21 October, 1960.

(b) The rule laid down by this court in *Berman v. Minister of the Interior* (2) (hereafter called "Nahalath Yitzhak rule").

In that case the Minister of the Interior, in accordance with sec. 5(1) of the Municipal Corporations Ordinance, appointed a Committee of Inquiry to express its views on the question whether the district of Nahlath Yitzhak should be removed from the area of the city of Tel Aviv. The committee comprised seven persons, among them Messrs. Ariav and Tabachnik, who were respectively representatives of two important sections of the population, the non-labour element and the Histadrut. During the sittings of the committee Mr. Ariav died and the question arose whether as a result of his death the committee was competent to continue its task. In this regard, I said in my judgment (with which my respected colleague, Sussman J., entirely concurred) the following:

> "6. A second argument of a formal kind, an argument common to both counsel, was that even if the commission was originally competent, it became disqualified upon the the death of Mr. Ariav. The respondent's answer to this was that the provisions of sec. 37 of the Interpretation Ordinance prescribe that when an act requires to be done by a group of persons exceeding two, it can be done by a majority of them, and he relied upon the decision of the Supreme Court during the Mandate in *El Farrah v. Electoral Committee of Khan Yunis* (1).
>
> This answer does not recommend itself to me. The majority of the members of a body are called a 'majority' when the members of the minority still exist and not when they have ceased to exist. Upon the death of Mr. Ariav, the remaining members became not a majority of the Commission but an incomplete, truncated commission, and a truncated commission cannot carry out the function with which the entire commission has been charged, particularly in the present instance in which a special role of representing the civic elements, was assigned to the deceased member. Accordingly, no parallel and analogy can be drawn from the decision of the Supreme Court in the case cited."

This is the Nahlath Yitzhak rule which has haunted the Court at every stage of the present deliberations. The reason behind it, although

not explained in that case, is that when the minority has ceased to exist, it is utterly impossible to compose one's doubt whether, if the minority had existed, it might not have succeeded in persuading the majority to accept its view, the question involved not having been canvassed in all its different aspects. This can be illustrated by taking the case of a judgement given without first hearing the arguments of *all* parties. The rule assumes special significance when a seat is allotted to one or more members in a composite body on the ground that they possess a special "character", such as, for instance, sex, race, religion, party affiliation, intellectual capacity, ideology or outlook—a condition of "parity" which also existed in the case of the committee before us.

5. Now briefly and focally to relate the facts necessary for the heart of the matter.

(a) On 19 February, 1960, the Rabbinical Council nominated as four members of the Electoral Committee, Rabbis A. Goldschmidt, S.H. Abudi, Z. Markovitz and E. Abu Revia. These members will hereafter be called "the Council appointees." In using the term "nominated" I do not thereby hold as yet that this was an "appointment" and not an "election." I shall return and devote para. 7 of this judgment to this question.

(b) Precisely four months later, on 19 June, 1960, the Minister of Religions, with approval of the Government, nominated as the four remaining members of the committee, Rabbis Y.L. Maimon, A. Waldenberg, Y. Kaafah and D. Shalush. These members are hereafter called "the ministerial appointees."

(c) Trouble began at once with the convening of the first meeting of the eight members of the committee. The Rabbinical Council argued that the invitation had to be sent out jointly by the President of the Council and the Minister of Religions, whilst the Minister argued to the contrary that he, and he alone, was authorised to convene the Committee, which he proceeded to do. Notices of the meeting, signed by the Minister alone, having been sent on 4 July, 1960, the Council appointees, including the said Rabbi Abu Revia, refused to attend the meeting of the Committee. Let it be said at once that on this point, so I think, the Minister and not the President of the Council was right, and that for two reasons.

(i) This trivial question of precedence belongs without any doubt to that class of questions which the Minister is empowered to decide by virtue of the said provisions of Reg. 4(4) of the 1954 amendment.

(ii) In earlier elections, as also in the 1955 elections, the meeting

was called by the Deputy Minister of Religions and nobody worried or protested about it.

I am not prepared to set aside the work of the Committee for this reason.

(d) Thereafter things came to a head. The dispute between the two "camps" grew sharper and more profound until the situation reached the impasse at which it remains today. We may note the following facts:

(i) The first meeting took place on 6 July, 1960, five members attending, the four ministerial appointees and Rabbi Abu Revia. According to his contention, Rabbi Revia was convinced, after receiving a letter from the Minister (Exhibit 7), that the latter indeed was alone competent to summon the members of the Committee. According to the contention of the other side, the matter sprang from the fact that in the meantime Rabbi Abu Revia had for private reasons decided to change camps. At that meeting Rabbi Maimon was chosen to be chairman of the Committee, to which at first all the Council appointees agreed, the fight between them and the ministerial appointees not yet having flared up.

(ii) On 8 July, 1960, in view of the step taken by Rabbi Abu Revia, the three Council appointees, Rabbis Abudi, Goldschmidt and Markovitz, despatched a letter to the Council (Exhibit 10) in which they asked to be released from membership of the Electoral Committee. That letter states:-

> "To our great distress and discomfiture, a serious matter has occurred which brings into question the basis of the Committee's work, at least in a public and moral sense. We have read in the newspapers that one of the Rabbinate's representatives on the Committee, Rabbi Amram Abu Revia, who was associated with us in the said consultation [the reference is to the consultation in which all the Council appointees unanimously accepted the decision that the first meeting must take place either on the initiative of the members of the Committee themselves or on the invitation of the two bodies which had constituted the Committee] and signed the letter and was of one mind with us, and also expressed his satisfaction at the end of our meeting with our unanimity of views, saying 'And Israel encamped there opposite the mountain, as one man with one mind'. Yet after all this he attended the said

meeting without previously getting in touch with us and conducted himself as he did.

Even after the event Rabbi Abu Revia did not find it proper to maintain any contact regarding the step he had taken, which it is not necessary to elaborate. It is superfluous to describe the seriousness of the matter and the offence and consternation it has caused among the Rabbinical public and the grievous impression which this event with all its consequences and repercussions has made upon the community."

(iii) On 10 July, 1960, the Rabbinical Council considered the request of the three rabbis and after a discussion adopted the following resolutions (Exhibit 11):-

"1. In view of the conduct of Rabbi Abu Revia as reflected in this meeting, it was resolved to remove him from membership of the Electoral Committee and to cancel his appointment.

2. It was resolved to appoint Rabbi Mordechai Eliyahu of Jerusalem as a member of the Committee in the place of Rabbi Abu Revia. That Rabbi is accordingly appointed.

3. In view of the above resolutions, the Chief Rabbinate Council appeals to its three representatives, Rabbis S.H. Abudi, Goldschmidt and Markovitz, that they withdraw their request to be released from membership of the Electoral Committee."

(iv) On 14 July, 1960, the three above-mentioned rabbis addressed themselves again to the Rabbinical Council and requested that they should still be released. Their reason for this was that "the members of the Committee, representative of the Minister of Religions, do not pay any regard to this resolution of the Rabbinical Council," that is, the resolution about the removal of Rabbi Abu Revia and the appointment of Rabbi Eliyahu. With this request Rabbi Eliyahu associated himself. On the same day, the Council dealt with the plea of the four rabbis and decided to accept their resignations.

(v) In the meantime the chairman of the Committee, Rabbi Maimon, continued with the activities of the Committee—further invitations were sent to the members thereof, the Rabbinical Council sought to obtain a list of officiating rabbis and so on—on receiving an

opinion from the Attorney-General that neither the removal of Rabbi Abu Revia nor the resignation of the three other rabbis had any legal effect, until on 27 July, 1960 an order nisi (in File 205/60) issued from this court including an interim order to halt the committee's work. A similar order was made some few days later in another file (210/60).

To-day Mr. Zephania and Rabbi S.H. Abudi appear as litigants on one side and the Minister of Religions and the ministerial appointees and Rabbi Abu Revia on the other side—the Rabbinical Council was summoned as respondent No. 7 in file 210/60 but has not appeared—and the proceedings revolve around the following two basic questions:

1. whether the Rabbinical Council was competent to remove Rabbi Abu Revia, and

2. whether Rabbis Goldschmidt, Markovitz and S.H. Abudi could resign from office.

The petitioners argue that the two questions must be answered in the affirmative; the respondents on the contrary reply that it is not so and that neither the removal nor the resignations are legally effective.

6. Before we turn to elucidate these questions, we must attend to one argument that runs throughout the final submissions of Mr. Spaer. The argument is twofold, that ab initio the appointment of the four Council appointees was not a lawful one either from the point of view of the composition of the Council or from that of the date of appointment.

From the point of view of composition, the late Chief Rabbi Herzog passed away on 25 July, 1959 and the appointment of the members of the Committee by the Council took place on 19 February, 1960. At that date the Rabbinical Council did not have its full complement, lacking one of its members; although some days later, as will be recalled, the council's term of office, *as it then was,* was extended (see below para. 8). This extension, as expressly stated in Reg. 2 of the extending regulations, came into force only on 21 February, 1960. Thus, when the appointments were made, the Council was not complete and inevitably in consequence of the Nahlath Yitzhak rule it was not competent to effect the appointment of the four Council appointees.

From the point of view of date, according to Reg. 1 of the Election Regulations the Rabbinical Council is obliged to participate in "the task of constituting" the Electoral Committee "not later than three months prior to the expiry of the term of office of the Rabbinical Council"; on the day of appointment, 19 February, 1960, the Council's

5 year term of office had not yet been extended and it was due to expire on 21 February, 1960. Thus, the appointment was made later than "three months before the end of the term"—it was made *two days* before—and obviously was null and void and there is no lawful appointment of the Council appointees.

This double argument was put by Mr. Spaer with great restraint—and he himself convincingly answered the first limb, as we shall see later. It merely served him as a desperate resort after all other hope had been lost, since if we accepted his argument, the very existence of the Supreme Rabbinical Council would be put in jeopardy and it was very doubtful whether his client or clients would thank him for this. There is no need to say that the Attorney-General did not rely on this argument since his main burden was to legitimate the Committee in its full composition of eight members and enable the elections to take place as soon as possible.

Nevertheless, I do not reject this argument because of the lack of importance attached to it by the parties. I reject it because it is bad.

Mr. Spaer himself found the conclusive answer to the argument of incomplete composition in the provisions of Reg. 21 of the Elections Regulations, which provides:

> "21. If a vacancy should occur in the office of Chief Rabbi or of member of the Rabbinical Council by reason of death or resignation of the holder of such office, the vacancy shall be filled by the candidate belonging to that community....If there be no such candidate, and the deceased or resigned member be a Chief Rabbi, fresh elections shall be held in accordance with these Regulations."

Now ask yourself, if a "truncated" Council cannot function, how then will the elections take place? The answer, perforce, is that Reg. 21 is a statutory provision which excludes the operation of the Nahlath Yitzhak rule with regard to the election of the Council and permits the latter to function for this purpose even with seven members alone.

As to the point of time, my view is that one should not attach too much importance to the period of three months prescribed by Reg. 1. The period was fixed for effective operation, so that the Council and the *Vaad Leumi* (now the Minister of Religions) could manage to implement the whole complicated procedure bound up with the Council elections. But if for any reason they could not constitute the Committee until after the commencement of the three months, they might do so within