H.C. 3/58.

YONA BERMAN AND OTHERS v. MINISTER OF INTERIOR

H.C. 9/58.

"IZHAR" ISRAEL OIL INDUSTRIES LTD.
v.
MINISTER OF INTERIOR

In the Supreme Court sitting as the High Court of Justice

Silberg J., Sussman J. and Witkon J.

Administrative Law—Scheme to detach district from one municipality and attach it to another—Validity of appointment of commission of inquiry—Effect of death of member of commission—Validity of proclamation—Ministerial behaviour and mode of operation—Municipal Corporations Ordinance, secs. 5(1) *and* 32*—Interpretation Ordinance, sec.* 37.

The district of Nahlath Yitzhak consisting of 250 families had for very many years been part of Tel Aviv Municipality. Since 1949 a movement to sever this connection had gathered strength and in 1950 a petition to this end, signed by 353 residents, had been delivered to the Ministry of the Interior. Tel Aviv had claimed that the petitioners were not authorized to speak for all the residents and the matter was left in abeyance until 1956, when it once more became active on the delivery of a similar petition signed by 491 persons. The Minister then appointed a commission to inquire into the question, in accordance with sec. 5(1) of the Municipal Corporations Ordinance. The commission was composed of seven individuals, including a representative of the Histadrut and the General Zionists respectively. It held five meetings at which the various interests were heard but not those residents in favour of retaining the connection with Tel Aviv. Between the last two meetings, the General Zionist member had died but the Minister did not appoint a substitute and directed the remaining members to complete the inquiry, which they did in July 1957, recommending by a majority of four in favour of the separation. In October the Minister publicly announced his decision to detach the district from Tel Aviv and attach it to Givatayim. Thereupon the opponents of the separation drew up and delivered a petition signed by 182 persons and sought an interview with the Minister. The latter refused abruptly to change his decision, observing that he had reached it after careful examination of all the data, that the petition contained names which had appeared on the earlier petitions and that the number that had signed these showed an overwhelming majority in favour. An additional petition signed by 180 other persons was then delivered, making a total of 360 in favour of the existing arrangement. In the meantime, opposition had also been voiced by the major industrial establishment in the area but had been rejected. Finally in December, the scheme was put into effect.

The petitioners now claimed that in issuing the proclamation bringing the scheme into effect the Minister had acted improperly because he had refused to hear those who

opposed it, that the commission was improperly appointed because it was a condition precedent that the Minister should be convinced of the desirability of the proposed change, that even if properly appointed, the commission had lost its competence to act upon the death of one of its number before completing its task, and that as a quasi-judicial body the commission had offended the rules of natural justice by not hearing the other side.

Held: (1) The commission was properly appointed, the documentary evidence showing that the Minister had before appointing it reached an affirmative attitude in the matter, although it would have been preferable if the Minister had made a personal statement and held himself available as a witness.

(2) Notwithstanding the death of one of its members, the commission had been unaffected in view of the direction to carry on its work. Even if a new commission had been appointed, all the evidence received by its predecessor could have been received, since its function was administrative or at most quasi-judicial.

(3) Although under the duty to hear the other side, the commission did not have to seek out the other side on its own initiative and in the circumstances the latter had to blame themselves if their views were not represented to the commission.

(4) The juridical nature of the Minister's action was not of a non-justiciable sovereign or legislative kind. Neither was it of a quasi-judicial nature to render it subject to the rule *audi alteram partem*. There was no *lis* and no finding of fact upon which he had to make his decision. But according to a long and well-established rule of the common law, despite recent divergences therefrom, the citizen must be given a fair hearing when his person, property, status and the like were liable to be affected. In this regard, the Minister's behaviour, although motivated by good faith, was here defective. True democracy calls for diligence in eliminating the bureaucratic barriers that stand between the government and the governed. The latter must be satisfied that decisions affecting their position result from a consideration of all views and interests involved.

Palestinian cases referred to:

(1) *H.C.* 43/46—*Adel Ibrahim El Farrah v. Chairman and members of the Electoral Committee of Khan Yunis* (1946) 13 *P.L.R.* 336; (1946) *A.L.R. Vol.* 2. 640.

Israel cases referred to:

(2) *H.C.* 65/51—*Eri Jabotinsky and another v. Prof. H. Weizmann, President of the State of Israel* (1950) 4 *P.D.* 399; 1 *S.J.* 75.

(3) *H.C.* 103/49—*Yitzhak Toren v. Prime Minister (D. Ben-Gurion) and others* (1950) 4 *P.D.* 704.

(4) *C.A.* 125/53; 126/53—*Income Tax Assessing Officer for Tel-Aviv District v. David Topper and Yitzhak Zuckerman* (1953) 7 *P.D.* 786.

(5) *H.C.* 70/49—*"Tavlin" Ltd. v. Minister of Rationing and Supplies and others* (1951) 5 *P.D.* 1613.

(6) *H.C.* 1/49—*Solomon Shlomo Bejerano and others v. Minister of Police and others* (1949) 2 *P.D.* 80.
(7) *H.C.* 40/50—*Abraham S. Elkayam v. Director of Customs and Excise,* (1950) 4 *P.D.* 340.
(8) *H.C.* 24/56—*Abraham Rotstein v. Herzliya Local Council* (1956) 10 *P.D.* 1205.

English cases referred to:

(9) *Board of Education v. Rice* [1911] *A.C.* 179.
(10) *Local Government Board v. Arlidge* [1915] *A.C.* 120.
(11) *R. v. Electricity Commissioners. Ex parte London Electricity Joint Committee Co.,* (1920), *Ltd., and others* [1924] 1 *K.B.* 171.
(12) *R. v. Northumberland Compensation Appeal Tribunal. Ex parte Shaw* [1951] 1 *K.B.* 711; 1 *All E.R.* 268.
(13) *Errington and others v. Minister of Health* [1935] 1 *K.B.* 249.
(14) *Buchanan v. Rucker* (1807) 170 *E.R.* 877.
(15) *R. v. The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 93 *E.R.* 698.
(16) *Capel v. Child* (1832) 149 *E.R.* 235.
(17) *James Bagg's Case* (1615) 77 *E.R.* 1271.
(18) *Parr v. Lancashire and Cheshire Miners' Federation* [1913] 1 *Ch.*366.
(19) *Innes v. Wylie* (1844) 174 *E.R.* 800.
(20) *Wood v. Wood and others* (1874) *L.R.* 9 *Ex.* 190.
(21) *Abbot v. Sullivan and others* [1952] 1 *All E.R.* 226; (1952) 1 *K.B.* 189. 1 *K.B.* 189.
(22) *Nakkuda Ali v. M.F. De S. Jayaratne* [1951] *A.C.* 66.
(23) *R. v. Metropolitan Police Commissioner, Ex parte Parker* [1953] 2 *All E.R.* 717.

Moyal for the petitioners in H.C. 3/58.
Gorney for the petitioner in H.C. 9/58.
Kwart and *Terlo,* Deputy State Attorneys, for the respondent.

SILBERG J. On January 16, 1958, the following two notices were officially published on the authority of the respondent (Collection of Regulations, 763)

a. Proclamation of Tel-Aviv-Jaffa (Change in municipal boundaries) (Amendment), 1958,

b. Local Councils (A) (Amendment No. 6) Order, 1958,

These were made on December 25, 1957, and it appears from the

Land Registers, showing additions and withdrawals, that the district of Nahlath Yitzhak was thereby removed from the municipal area of Tel-Aviv and annexed to the Local Council of Givatayim. Clearly if the proclamation of removal were set aside, the order of annexation will *ipso facto* become void, since a district cannot be under the control of two authorities or an integral part of two distinct municipal areas. On the other hand, if the relief sought were not granted and the proclamation of removal not set aside, counsel for the applicants have stated before us that they will not appeal to set aside the order of annexation to Givatayim, because their clients are not interested in restoring the independent existence possessed by their district up to the end of March 1948. Thus, notwithstanding the sharp criticism levelled by the applicants' counsel against the order of annexation in point of law, the only question before us concerns the validity of the proclamation of removal.

There is a single question but the arguments for and against put by counsel for the parties are numerous. I do not say this disparagingly, for the question is indeed difficult, going to the very roots of Administrative law. Its solution is likely to affect, directly or indirectly, many important aspects of the relationship and chain of authority between the Government and the citizen.

2. The statutory provisions governing the proclamation we are dealing with are found in sec. 5(1) of the Municipal Corporations Ordinance and it is proper that these should first be considered in order to find the means to sift the grain from the chaff, to put things in their legal focus and enable us to find our way through the mass of detail which has accumulated during the course of the hearing. If we do not follow this course, the confusion of facts will tend to conceal from us precisely what is relevant. That section is in the following terms:

> "If for any reason it should appear to the Minister of the Interior that by reason of the wishes of the majority of the townsmen or otherwise, the area of any municipal corporation set out in the first schedule to this Ordinance...should be altered, extended or diminished, he may order an enquiry to be made concerning such area, regard being had to any undertaking or development which is being carried out by the municipal corporation, by a commission upon which there shall be at least one member who is not an official of the Government of Israel, and after considering the report of such commission may, at his discretion, by proclamation, alter, extend or diminish such area."

The effect is that the Minister is not bound to comply with the request of those who seek to reduce the area of a municipality—in our case, to reduce the area of Tel-Aviv by cutting off the district of Nahlath Yitzhak—but he may reject it summarily without giving it any consideration whatsoever. If for any reason, however, he should feel that prima facie it is desirable to comply with the request, he cannot reserve the matter to himself or act of his own accord but must appoint a commission of inquiry of a certain composition to inquire into the matter, regard being had to any undertaking etc., and then consider the report of such commission. When the report of the commission has been submitted to the Minister, he is again free to decide, and he may reduce the municipal area although the commission had recommended that this should not be done. In brief, he may at any time refuse to grant a request to reduce an area and may equally grant the request but only after the commission has considered the matter and arrived at a decision either way.

The provisions of this section are prima facie very strange. A *negative* decision or recommendation of the commission clears the way for the Minister and permits him to reach a *positive* decision contrary to the recommendation of the commission. Nevertheless, there is much logic in this arrangement, which it is not difficult to grasp. The legislature does not permit the Minister to enlarge or reduce a municipal area, although it appears to him to be desirable, unless a particular public commission has first carefully examined the different aspects of the problem and has submitted to him a report thereon. It is presumed that the Minister will reflect attentively upon the views expressed by the members of the commision, including those of the non-official member who is quite independent and not to be suspected at all of any inclination to support the "preliminary" wishes of the Minister, and that having done so he will have a wider and less personal picture of the question involved, that he will be better informed and better equipped to exercise the right of decision vested in him by the legislature, even if ultimately, and as a result of the arguments on both sides of the case, he should decide contrary to the opinion of the commission. He would at least then know why he differs and what are the implications or the complications likely to follow from his decision.

3. Against this background of the law, let us proceed to examine the arguments and counter-arguments of counsel for the parties, after a concise and cohesive presentation of the relevant facts adduced before us, which are as follows:

a) The question of the severance of the district of Nahlath Yitzhak—

today a district of 250 families consisting of about 1000 persons—has for some years been in dispute among the residents. We do not know precisely when this dispute among the different factions of the population first began, but it should be noted at once that it was not inspired by political propaganda or partisanship. There are enthusiastic advocates and keen opponents of the separation in the ranks of all the big parties, and only local or even quite personal interests demarcate the two camps. Many instances of "desertion" from one camp to the other have also occurred—the instance of the first petitioner in case No. 3/58 is one of them—and of "friend turned foe" or vice versa, as the result of some or other consideration.

Since the middle of 1949 the chief spokesmen who have favoured the idea of separation and have gained adherents, both inside and outside the district, were members of the committee of the independent district before it was attached to Tel Aviv, and in their dealings with the municipal authorities and others they have endeavoured, and often succeeded, to create the impression that they represent the views and desires of *all* the inhabitants of the neighbourhood. On March 19, 1950, the Ministry of the Interior received a letter from them, to which was attached a petition signed by 353 residents asking for the district to be taken out of the jurisdiction of the Municipality of Tel Aviv. The central theme of their grievances against the Municipality of Tel Aviv was, after the manner of the Israelites in Egypt, "Services are not provided for your humble petitioners but taxes we are asked to pay." The Municipality denied all these allegations, announced that no one except itself was authorised to speak for the residents, and the matter was left in abeyance for a period of four years.

b) The question of separation again arose in 1956. At the end of June of that year, the members of the Committee above-mentioned dispatched a letter to the Minister of the Interior, attaching a petition signed by 491 persons, in which the demand was renewed to be separated from the Tel Aviv Municipality and to be brought under the aegis of the local council of Givatayim.

c) Consequent upon this petition, the Minister of the Interior came to the conclusion that "the residents of Nahlath Yitzhak", that is, all or the overwhelming majority, demand separation from the Municipality of Tel Aviv (cf. the first paragraph of Government Exhibit 22 in case No. 3/58) and he decided to appoint a commission of inquiry according to sec. 5(1) of the Municipal Corporation Ordinance. A commission consisting of seven members was accordingly appointed by him

on January 22, 1957, which was given the task of "conducting an inquiry concerning the said area", that is, the area of the Municipality of Tel Aviv. The Minister would have fully discharged his duty under the law had he appointed only one member who was not a government official, but he went beyond the minimum requirement of the law and appointed two such members, a member of the Knesset representing the General Zionists, the late Mr. Hayim Ariav and a member of the secretariat of the Municipal Division of the Histradut, Mr. D. Tabachnik, the reason being—as the Director of the Ministry of the Interior, Mr. Shevo, explained to us in evidence—that the Minister wished to associate with the commission the representatives of the two principal sections of the country's population, namely, the non-Labour and the Labour elements. The appointment of this commission was not published in the Official Gazette, and indeed the appointment of commissions of inquiry of this kind does not require public announcement by virtue of the provisions of sec. 132 of the Municipal Corporations Ordinance.

d) The commission held five meetings, three of which were devoted to hearing witnesses on February 28, March 21 and April 14, all in 1957. The witnesses who testified included for the advocates of separation—the members of the committee above referred to, and for the opponents—the Mayor of Tel Aviv, Mr. Hayim Levanon, and the Municipal Engineer, Mr. Amiaz. Two additional meetings, devoted to discussions in camera and summing up, took place on June 7 and July 15, both in 1957. Between the last two meetings, Mr. Ariav, one of the two non-government members of the commission, passed away. The Minister did not appoint a substitute for the deceased but instructed the remaining members themselves to complete the work of the commission. The commission did as it was directed and on July 25, 1957 signed its report and delivered it to the office of the Minister. Three different proposals were voted upon by the members of the commission, but a majority of four votes was cast for the proposal "to separate immediately the district of Nahlath Yitzhak from Tel Aviv", and it was in this form that the recommendation of the commission was adopted and signed as one body by all surviving members.

4. At this point I shall interrupt for a moment the recital of the facts and consider the arguments urged by counsel for the petitioners with regard to the appointment of the commission and its method of inquiry. *Certiorari,* it is true; has not been claimed against the commission, but I do not regard this a defect, for if indeed the arguments of counsel for the petitioners are sound, then the report of the commission, which is a condition precedent for the Minister's decision, is a nullity. The pro-

clamation of separation would *ipso facto* have no legal basis, and this court would be able, and even under a duty, to set it aside.

5. The first in this group of arguments, first in point of internal order, is the argument advanced by Mr. Gorney, representing the petitioner in case No. 9/58. The opening words of sec.5(1) are: "If for any reason it should appear to the Minister of the Interior that...the area of any municipal corporation...should be altered, extended or diminished etc." This means that as a condition precedent, and the only one, to the very appointment of the commission the Minister must be positively convinced, and in the present case there is no evidence that this essential condition was satisfied, since the Minister himself did not give evidence in court and Mr. Shevo who testified for him expressly stated that he himself did not know the reason for the appointment of the commission, because he was not at that time the director of the Ministry of the Interior.

This argument is not valid, but in rejecting it I wish to observe that in a case where the personal action of the Minister is being attacked and his subjective motives are questioned and scrutinized, it is proper and prudent for the Minister to make a personal statement and hold himself available for examination in the witness box, because this task cannot always be accomplished properly by others and it is likely to turn out to his disadvantage when the court examines the propriety of his action. However, the answer to the foregoing argument is that at the beginning of the letter appointing the commission occur the words: "Whereas it appears to me that there is need to change the area of jurisdiction of Tel Aviv-Jaffa, etc.", and we have no grounds at all for doubting the correctness of the recital despite the absence of oral evidence to this effect. The appointment of the commission is itself abundant proof that the Minister, indeed, entertained at that time an affirmative attitude to the petition for separation, since under the law he might have rejected it summarily, as we saw above, without devoting any thought whatever to it. Why then did he see fit to go to all this trouble? One may complain of the Minister—and more will be said about this later—that at a certain stage he was excessively zealous for separation, but under no circumstances can it be said that at the time of the commission's appointment he was not personally inclined, even if only tentatively, to granting the request for separation. As I explained previously (para. 2), this is just the proper test for the condition laid down at the beginning of sec. 5(1).

6. A second argument of a formal kind, one common to both counsel, was that even if the commission was originally competent, it became

disqualified upon the death of Mr. Ariav. The respondents' 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 become 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.

But the argument itself also does not appeal to me, and the answer to it is as follows. Although the Minister did not reappoint the commission upon Mr. Ariav's death, he did, as will be recalled, direct that they should themselves complete its work. Is there any difference between the two? I think not. The commission of inquiry was not on any view a purely judicial body. It was either merely administrative or quasi-judicial, and as such authorized in the absence of countervailing provisions of law to draw its information from any source whatsoever: *Board of Education v. Rice* (9). The rules as to hearsay or oral evidence by witnesses are certainly not applicable to bodies such as these, cf. *Local Government Board v. Arlidge* (10). It follows that even if the commission had been reappointed, consisting of the six members after the death of the seventh, it would have been permitted to utilize all the evidence previously produced to it and to complete, as it did, its investigations. What the members of the commission personally heard is certainly not inferior to hearsay evidence. If that is so, what is the difference whether the Minister wrote "I appoint you to be by yourselves the members of the commission" or "I order you to complete by yourselves the work of the commission". The actual task is identical in both instances. It seems to me that there is no practical or substantive difference between the two versions, at least not so as to make it obligatory for us, as a High Court of Justice, to set aside the report of the commission on that account.

7. The third material submission of the petitioners' counsel differs in its character. The argument is that the commission which in their

view was a quasi-judicial body did not conduct itself according to the rules that apply to bodies of this kind. Quasi-judicial bodies must, as is known, observe the "principles of natural justice", one of which is *audi alteram partem,* the duty "to hear the other side". Who was "the other side" in the present case? Obviously not the Municipality and its representatives who reside in Tel Aviv, but those immediately affected, the people of Nahlath Yitzhak, who were personally involved and opposed the separation of the district. The observations of the latter never reached the ears of the commission because their leaders and spokesmen were not invited to appear before it. The respondents' main reply to this was to deny the basic premise; the character of the commission was not quasi-judicial but only administrative, because there can be neither judicial nor quasi-judicial proceedings where there is no "lis" between parties with conflicting interests. The rebuttal of the petitioners' counsel was that the lack of a "lis" does not in the least negative the quasi-judicial character of the investigation body as long as conflicting interests exist for it to decide upon.

This is not the place to enter upon an elucidation of this interesting question—this will be done at a later stage of this judgment (para. 10, 11) —because the argument of the petitioners' counsel ultimately fails upon the facts, even if its juridical premises are acceptable. The rule of *audi alteram partem* originates, as already intimated, in the principles of natural justice, and therefore the test of its application is also that of justice. The commission was under a duty to hear the other side, the opponents of separation, but it was under no duty to investigate and inquire on its own initiative where the centre of this other side rested and whether it had supporters outside municipal circles as well. The members of the committee in favour of separation, who succeeded in creating the impression that they exclusively were the representatives of the district, gave evidence before the commission. If this impression was deceptive the opponents of separation may lay their grievances at the door of the committee and not the commission. Perhaps, they may even blame themselves for not being skilful enough in "catching the eye" of the members of the commission. On behalf of the petitioners it has been contended before us that they and their followers knew nothing about the existence of the commission, that its appointment was not published in the official Gazette—an omission which indeed does not contravene sec. 132 of the Municipal Corporations Ordinance— and that they had no other information except for the press reports which appeared after the commission had completed its investigations (after the third meeting of April 14, 1957, referred to in para. 3(d) above).