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).

I find this difficult to believe, since the matter concerned a small district, the entire population of which does not exceed one thousand souls. But, even if it be really so, then just as they were unaware of the commission's existence, the commission likewise did not know of their existence, for these circumstances are mutually dependent. Therefore, I take the view—not without hesitation—that there has been no infringement by the commission of the principles of justice.

8. At this point I return to the facts. I will continue from the point where I stopped at the beginning of para. 4, and will describe the events that occurred after the report was submitted in order to examine, in the light of such facts, the validity of the final act of the Minister in proclaiming the separation. These facts are:

a) On October 2, 1957, the spokesman of the Ministry of the Interior announced to the press the Minister's decision to annex Nahlath Yitzhak to Givatayim. The opponents of separation now began to organize themselves, their active members began to collect signatures in public and on the 18th of November, 1957, a petition signed by 182 persons voicing opposition to the separation was sent to the Ministry of the Interior. In an accompanying letter, the Minister was requested to receive representatives of the signatories in interview for the purpose of explaining the reasons for the opposition. The Minister did not reply to this and on November 24, 1957, the director of his office sent on his behalf a long letter addressed to Mr. Berman, the husband of the first petitioner in case No. 3/58, stating that "In the opinion of the Minister this form (i.e., the signatures of the petitioners) does not prove the justice of the request"; that several names appear both on the list of those who support separation as well as on the list of its opponents; and that "the decision which the Minister reached after most careful examination of all the data was based on the facts themselves."

The letter added that "the list which was then submitted by the committee of the district [this means quite obviously the petition bearing 491 signatures of June 21, 1957, referred to in the next preceding paragraph of the letter] was signed by 90 *per cent of the residents of the place.*" These remarks cannot be understood unless the *adult residents of the place* are intended to be referred to, since it is a reasonable assumption that school children are not asked to sign petitions, and that these adults—a further assumption based apparently on knowledge of local conditions—constitute somewhat more than half of the 1000 persons of the district, let us say approximately 550.

b) In that brief interval between November 18 and November 24

of that year, another parallel exchange of letters took place between the Minister personally and Mr. Moyal—Mr. Moyal requested the Minister on November 21 to postpone publication of the decision of separation for a short period, so that he might in the meantime have a personal interview with the Minister. In return he received a short sharp reply from the Minister dated November 2, in the following terms:

"Mr. A. Sh. Moyal, Advocate,
Tel Aviv
Sderot Rothschild 27

Dear Sir,

I do not see what interest a lawyer can possibly have in this matter, unless you appear as an applicant in the High Court of Justice; but even then you must address yourself not to me but to the judiciary.

Yours respectfully,
Y. Bar-Yehuda
Minister of the Interior"

c) On December 12, 1957, a second petition was lodged with the Ministry of the Interior, signed by 180 persons, requesting that the district be not separated. Mr. Shevo agreed that these signatures were not identical with those on the first petition of the opponents, and that the number of the petitioners opposing the separation was 360. If we here employ the same rules of computation and reasoning which we applied earlier to the petition of those who supported separation, the result will be that in the interval between June 1956 and November-December 1957, there was a substantial "desertion" from the camp of the supporters of separation to that of its opponents, and that the number of adults among the latter now stood at about *two-thirds* of the total number of adults in the district (approximately 360/550), unless there has been wholesale forgery of the signatures on the opponents' petition, since no one would contend that in so short a space of time so many had reached adult age in so small a district.

d) The Yitzhak Company, petitioners in case No. 9/58, also opposed separation. They wired the Minister on September 24, 1957, that "the plan for annexation to Givatayim will seriously affect the company's property and endanger its future development", and urgently requested a stay of the decision and an interview for its representatives, adding that a special memorandum would be forwarded by it within the next few days. To this it received a reply dated September 30, 1957, from the Minister's secretary to the effect that "when the memorandum

is received, it will be considered" and that the Minister saw no need for a meeting since officers of the company had already spoken to the Director-General on the matter. Only two days elapsed and on the 2nd of October the press announcement referred to above was made.

e) On the 25th day of December, 1957, i.e. more than a month after the beginning of the numerous representations to him on behalf of the opponents of separation, the Minister put his scheme into effect and gave his final official seal of approval to his decision by signing the proclamation of separation.

On the basis of these facts counsel for the petitioners submit that the action of the Minister was improper. He had not heard the "other side" in a manner consonant with one reaching a quasi-judicial decision; he did not even wish to listen to the opponents' argument but assumed a rigid position not open to appeal even before his *final* decision, the signing of the above-mentioned proclamation; and conduct such as this was defective and rendered the proclamation itself invalid.

9. Here again arises the question of the "lis" which we touched upon in passing in para. 7 above, but the wider question behind it is: What is the juridical nature of the Minister's action? It is certainly not purely judicial, but apart from this what is it? Quasi-judicial (according to counsel for the petitioners) or merely administrative (according to counsel for the respondent), or is it perhaps a sovereign governmental act with which the courts are forbidden to deal, not justiciable, as counsel for the respondent submitted in the alternative.

We have rejected summarily and forcefully the last alternative of the sovereign governmental character of the act. The distinction between the present case and *Jabotinsky v. The President* (1) is clear to everyone and does not require amplification. Nor do words need to be wasted on another argument feebly advanced by counsel for the respondent, that the Minister acted in this instance in the capacity of a legislator, as it were, and that his act was a legislative act. There remains therefore only the choice between the two other views, merely administrative or quasi-judicial.

10. What are the features of a quasi-judicial act and how is it distinguishable from an administrative act? The answer is that it is not easy to make things out in this twilight zone of the law. No one has as yet succeeded in defining with decisive or even lesser precision the meaning of the prefix "quasi" (cf. *Toren v. The Prime Minister* (3); *The Assessing Officer v. Topper* (4); Professor Klinghoffer, Administrative Law,

p. 94). There is the old story of the quasi-judge who makes quasi-orders in the course of a quasi-trial heard by him. It has even been suggested that the expression "quasi" be translated by the mere phrase "not exactly" (Committee on Ministers' Powers Report 1932, at p. 73). Indeed, one gets the impression that as the result of the lack of clear definition, the courts not infrequently behave like the marksman who draws the target rings round the point of impact *after* the shot has been fired. I mean that the adjective "quasi-judicial", which constitutes a condition precedent for setting aside an act for violating the principles of natural justice, is attached by the court after it has finally recognised that for reasons of *justice* the act should be set aside. Actually there is no great harm in this because ultimately the test is one of justice. But the question remains, is the existence of the distinction generally justified or has the term "quasi-judicial", which was never charged with much content, meanwhile turned into one completly devoid of content? Should we, perhaps, discard the nuances of the entire distinction? I think not. The epithet is both necessary and dispensible. Necessary—to the extent that the strictures against the act impeached is that it violates the well-known principle of justice: "Let the other side also be heard", with emphasis on "the other". It is dispensible because it is immaterial when the violation in question concerns other rules of justice, less well defined but no less important, the duty to observe which *ex debito justitiae* rests upon all state authorities in their various branches. Applied to the matter before us, the party pleading that the Minister did not hear "the other side" must first convince us that there were indeed *two* contending sides; failing this, there is no "other side". But if the plea is, and it must be proved, that the Minister *struck at the status* of some group without giving it every opportunity to defend and try "to avert the evil decree", then the question whether his act was quasi-judicial or merely administrative loses all practical importance, because the duty to give the party which will be adversely affected an opportunity to defend itself before being attacked is—as we shall see subsequently—a duty imposed upon *every* government or other authority, judicial, quasi-judicial or merely administrative.

11. Let me explain. The English remedy of *certiorari* is an ancient one and its origins lie in the known attempt of the Royal court—the King's Bench—to constitute itself the patron and master of all the lower courts. At first, this court would issue an order—later a writ—only to such lower courts as were Courts of Record, but subsequently it extended its sway over lower courts which were not of this kind and finally over government or local administrative bodies which are not judicial institutions.

(See Atkin L.J. in *R. v. Electricity Commissioners* (11) and Goddard L.C.J. in *R. v. Northumberland* (12); cf. H.W.R. Wade, The Twilight of Natural Justice, 67 L.Q.R., 106)

Since this legal device has from its inception been employed for the supervision of judges by judges, it is in the nature of things that justification for extending its authority was sought and found in the fact that the acts of administrative bodies also possess something of a judicial quality. Thus there emerged the concept "quasi-judicial" (or "almost judicial" or "not exactly judicial"), which we stumble across so often in the long stretches of English jurisprudence. Still the question remained: How far must the act of an administrative body be judicial in order to merit the adjective "quasi-judicial" and be amenable to interference by the High Court? There is after all something "judicial" in every act. The judges have therefore gradually elaborated the concept, and after all manner of tests one idea has crystallized, which can be put in the form of the following formula. A quasi-judicial administrative act is one required for a preliminary finding of fact or law, the decision on which—the mandatory or constitutive order—is a "function" of that finding, that is to say, depends upon the correctness of the finding. Where this condition exists, the administrative body in formulating its finding must act almost like a judicial tribunal and observe the rule of *audiatur et altera pars*, "let the other side also be heard."

We have said that it must act *almost* like a judicial tribunal, but not exactly like one, because there is still a difference between the two authorities. The "almost" expresses itself in the fact that in the absence of express provisions in the law the hearing does not actually need to be by way of taking oral evidence with cross examination and re-examination and all the other incidents which accompany court proceedings. It is generally sufficient that the administrative body should, before making its decision, give each of the "litigating" parties present a reasonable opportunity to adduce evidence or make submissions in support of his case, or to refute the other side. Thus in the leading case, *Board of Education v. Rice* (9), Lord Loreburn L.C. said (at p. 182):

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind, but sometimes it will

unions, clubs, societies and associations have been invalidated by English judges over a period of more than three hundred years, because such dismissals, deprivations and expulsions were made without affording the person affected an opportunity to defend himself before actually taking the adverse action. Authorities for this, in the order of the above-mentioned topics, are:

Capel v. *Child* (16); *Bagg's Case* (17); *R.* v. *The Chancellor etc. of the University of Cambridge* (15); *Parr v. Lancashire and Cheshire Miners' Federation* (18); *Innes v. Wylie* (19); *Wood v. Wood* (20); *Abbot v. Sullivan* (21).

It is beyond the scope of this judgment to recite in detail the facts of all these cases. I wish merely to emphasize that the invalidation by the court of these dismissals and expulsions, in the vast majority of instances, was not effected against the background of the threefold concept: judicial, quasi-judicial and merely administrative. From the language used and the spirit informing these judgments, it is manifest that the judges regarded this obligation of hearing the person adversely to be affected before he is actually so affected as an obligation imposed upon all who are empowered by virtue of office to make decisions, whatever their character and position in the above triangle. The manner in which the defect in the decision made in violation of this principle is formally cloaked is of no importance; for want of another, it is sometimes cloaked in the very ample mantle of "excess of authority" or "ultra vires". Because of the injustice involved, the official exercising power is not "authorized" to strike at anyone without first hearing him, since the legislature *obviously* did not intend to confer upon him such power. This premise operates even in respect of the private "legislator", such as the contituent body of an association or society which settles its own constitution.

There is some artificiality about this explication but it seems that there is no alternative, on account of the traditional restriction upon the grounds for which perogative writs are available.

The combined effect of it all is that, according to the rule adhered to by the common law for some hundreds of years, an administrative body—even one that is purely administrative (not quasi-judicial)—will not be permitted to attack the citizen in his person, property, occupation, status and the like, unless he is given a reasonable opportunity to be heard in defence against the contemplated act. The scope of the duty and the form of the opportunity will, of course, depend upon the concrete circumstances of any given matter.

13. I am not oblivious of the "other side of the coin", namely, the fact that in very recent years there have been two English decisions which diverge considerably from the above principle, but it seems to me that precisely because of the wide divergence this is only a temporary and passing phase and when the occasion arises the courts will return to their traditional line. I have here in mind two cases, *Nakkuda Ali* (22), and *Ex parte Parker* (23) which were decided in 1950 and 1953 respectively.

These, we know, have been the target of very sharp criticism, which it will not be easy to meet in the future. (See H.W.R. Wade, The Twilight of Natural Justice, 67 L.Q.R. 103; Gordon, The Cab-Driver's License, 70 L.Q.R. 203.)

These decisions which have relieved the authorities from the restraint of review by *certiorari* or from the duty of affording a hearing to the person affected by official action, are in truth based upon notions which are very difficult to "digest".

For example, there is the startling proposition that when the controller in Ceylon cancels a licence to trade in textiles because he is of the opinion that the licensee is unfit, he is not deciding any question at all but merely withdrawing a privilege previously granted by him *(Nakkuda Ali* (22) at p. 78*)*. Is not the fact whether a person is fit or not a question to be decided and is the grant of a licence to engage in a lawful business merely a privilege?

Or again, a driving licence is only a permission, and if a person is given permission to do something, it is natural that he who gives the permission can also withdraw it (*Ex parte Parker* (23) per Lord Goddard, at p. 1154).

Or further, the Commissioner of Police when he cancels a driving licence acts as a "disciplinary authority", and when the authority exercises disciplinary powers "it is most undesirable, in my opinion, that he should be fettered by threats [!] of orders of *certiorari* and so forth" (ibid. at p. 1155).

These ideas are certainly foreign to the spirit of Israel case law. It has been said by this court: "It is a cardinal rule that every person possesses the natural right to engage in any work or occupation which he chooses, as long as engaging in this work or occupation is not prohibited by law" *(Bejerano v. Minister of Police* (6)). As for pursuits which require a special licence, it has been stated elsewhere: "In the absence of a statutory duty to renew the licence, the Director of Customs

may not refuse its renewal without good cause" *(Elkayam v. Director of Customs* (7); and see *Rotstein v. Local Council of Herzliya* (8) where, in my understanding, the emphasis was not particularly on the quasi-judicial character of the decision). We do not therefore have here a matter of a "privilege" as in the *Nakkuda* (22) case, or of the "the Commissioner giveth and the Commissioner taketh away" as stated in the *Parker case* (23). Accordingly I am of the opinion that these recent decisions notwithstanding we must continue to give effect to the long-established principles which have been enshrined for centuries in English justice.

Briefly to sum up, I think that we must not retreat from the ancient and deeply-rooted rule that an administrative body may not strike at the citizen by virtue of any given order unless he is first afforded a reasonable opportunity to be heard. This duty clearly does not apply to legislative acts of a sovereign character in the true meaning of this term.

It is very possible, although I am not prepared to be dogmatic about it, that today, since the enactment of the Courts Law 1957, this rule can be derived directly from sec. 7(a) of this Law, without relying at all upon the English authorities mentioned.

14. Having reached this point, let us proceed to examine in the light of the rule the validity of the Minister's mode of action.

Without doubt a very important change, for better or for worse, occurred in the status of the residents of the district when it was detached from Tel Aviv and attached to Givatayim; they ceased to be shielded by the Tel Aviv Municipality and came under the aegis of another council. Many welcomed the change and even endeavoured to bring it about, whilst others did not find it so acceptable and resisted it. It is not for us to inquire which of these were right from an objective standpoint, since we are not the guardians of the residents of Nahlath Yitzhak. What is of decisive importance for the needs of this case is the subjective point of view of the residents themselves. A new master was appointed or was about to be appointed over them, whom the opponents of separation did not desire. Because he was not desired they were *truly* affected, affected in their *status,* even if someone else, a Minister or judge, might think that there was nothing at all in clinging to Tel Aviv "citizenship".

The question then is whether the Minister proceeded as one should who is about to affect the status of the citizen. I think not. After becoming fully aware of the existence of the opponents, the prospective victims,

i.e. at least from October 18, 1957, not only did he not invite them to state their case (which perhaps he was under no duty to do) but expressly *opposed* their being heard, even after they had literally knocked at the doors of his office (see the facts stated in paras. 8(b) and (e) above). This active resistance is especially apparent from the letter of November 22, 1957, cited in para. 8(c) above, in which the Minister replied to Mr. Moyal who had sought to see him about the decision to detach the district:

> "I do not see what interest a lawyer can possibly have in this matter, unless you appear as an applicant in the High Court of Justice; but even then you must address yourself not to me but to the judiciary."

This letter is difficult to understand. Why all the sound and fury? Who should occupy himself with a matter such as this if not a lawyer? Would it have been more desirable or more practical had all these hundreds of petitioners personally besieged the Minister? Both the content and style of the letter testify that for more than a month before putting into operation the final act, the Minister's mind was already completely closed to any explanation, factual or legal, by the opponents of separation and regarded—if one may say so—as a heresy to which one is forbidden even to hearken. Only from such an *a priori* approach is it at all possible to understand—but not to justify—the forceful refusal of the Minister to hear the arguments of the opponents of separation.

Here I wish to emphasize particularly that I am far from saying that the Minister had any personal bias in this matter or showed any partiality towards the advocates of separation. I assume and believe that his intentions were pure, but this fact changes nothing. In the report of the Committee on Ministers' Powers Report, 1932, referred to in para. 10 above, there is a very fine passage which, while it relates directly to judicial (or quasi-judicial) acts, is applicable with some modification to other acts as well, because it expresses a notion based upon profound general psychological insight:

> "Indeed we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest. No honest man acting in a judicial capacity allows himself to be influenced by pecuniary interest: if anything, the danger is likely to be that through fear of yielding to motives of self interest he may unconsciously do an injustice to the party with which his pecuniary interest may appear to others to identify him. But the bias to which a public-spirited man is subjected if he

adjudicates in any case in which he is interested on public grounds is more subtle and less easy for him to detect and resist" (at p. 78).

That is to say, even bias as such out of sincere and proper views is still bias, even more dangerous because more common, as the authors of the above Report recognized and noted. Anyone empowered to make "affective" decisions must be more than careful that his mind is not sealed but open and receptive up to the very moment of the final official execution of the act.

15. Finally, one general observation on government methods.

We live in the middle of the 20th century. We have travelled very far from the Manchesterian State, the State of laissez-passer and laissez-faire of the 19th century. Today, even democratic government has a hand in everything and extends its sway over all aspects of life. It does not even hesitate and may not hesitate from penetrating into the private domain of the individual, except that under a democratic regime the invasion does not come from the outside or from above, because government itself is of the very essence of the citizen's life, residing with him in the same spiritual climate. This association dulls the edge of interference and atones for "the evil edict" affecting the interests of the individual. For "faithful are the wounds of a friend". Therefore, and in order to encourage this close relationship, the democratic state must be diligent in eliminating all external bureaucratic barriers separating the government from the governed so that the citizen knows and feels that any sacrifice demanded of him does not emanate from a "position of strength" but is the result of careful consideration of the conflicting interests between the community and the individual. In a nutshell, this is the entire theory of democratic rule—the rest is mere commentary. All else is encompassed in this basic maxim.

16. For the reasons stated, I am of the opinion that the proclamation of separation must be set aside, and the status quo as it existed before the proclamation restored.

SUSSMAN J. I concur.

WITKON J. I too am of the opinion that the order must be made absolute, and I will state my reasons briefly.

It seems to me that the root of the trouble lies in the failure of the commission of inquiry to investigate and ascertain the identity of the residents of the district who opposed its separation from the Municipality

and the reasons which they wished to advance. There is no doubt that the desire of the residents for or against separation is a most important factor, among others, likely to influence the Minister's decision. Sec. 5(1) of the Municipal Corporation Ordinance does indeed speak of the wishes of the "majority of the townsmen", meaning the entire city and not only that part which is to be separated from it. But even if the law does not expressly say that the opinion of those who reside in such part is to be considered, it is certain that in a democratic administration one may not ignore the opinion of that group which is primarily affected by the separation. It is possible that in some cases the Minister will have other considerations, more important than the wish of the majority, but this is not so in our case. Here, the Director himself of the Minister's office, in his letter of November 24, 1957, relied upon what appeared to him to be the opinion of the overwhelming majority of the residents, which indicates that in the present case the Minister did not want to decide without regard for the wishes of the residents.

In these circumstances, it is to be regretted that the opponents of separation were not invited to appear before the commission to state their case. In my opinion, this is a fault which lies at the door of the commission. I am not prepared to absolve the commission from guilt upon the grounds that it was at liberty to regard the residents' committee which supported separation as representative and spokesman of all or at least a majority of the residents. It seems to me that its principal task was to find out the state of public opinion and not be satisfied with hearing persons who presumed to speak in the name of all. It was much easier for the commission to reach the residents than for the unorganized residents who knew nothing of its appointment and existence to reach the commission. The number of the residents of the district is not large. We heard of about only 250 householders. Why did not the commission send a note to each householder inviting anyone who wished to avail himself of the opportunity to come and be heard? Certainly, the respondent's argument that the views of the opponents were in fact presented to the commission by the representatives of the Municipality of Tel Aviv, is unacceptable. The opponents are *sui juris* and they have the right to speak for themselves and not to be dependent upon champions who have no power or authority to speak for them. If this is true of the residents generally, how much more so of a large and important enterprise such as the Yitzhar factory which has interests of its own.

I said that it is to be regretted that the opponents of separation were not invited to appear before the commission. Even if one were to say that the commission's deliberations are not to be invalidated on

account of this initial irregularity, the refusal of the Minister to receive the opponents' representatives is cumulative to the original omission. As a result, the opponents were not able to be heard at any stage of the proceedings. Had they been invited to appear before the commission and made such submissions as they chose, it is very possible that I would have found no fault with the Minister's refusal to enable them to repeat their pleas to him. He is under no duty to receive and hear personally everyone who applies. Here it seems to me that the legislature made provision for the question, and in requiring an investigation by a commission, it prescribed the appropriate way for hearing the views of the public. The Minister's refusal gives cause for complaint, mainly because the commission did not discharge its task and did not serve as a channel for bringing public opinion in all its aspects to the Minister's attention. In these circumstances the refusal (by the Minister) closed the only forum which still remained where the petitioners could voice their opposition to separation. I do not know what moved the Minister to take this step. Particularly in view of his expression of annoyance at the intervention of the legal representative of one of the petitioners, it is sufficient for me to hold that the petitioners were here denied their elementary right to protect their interests properly.

Accordingly, I conclude by saying that in the circumstances of the case before us, it was not lawful to reject the petitioners' request to be received in interview by the Minister or another on his behalf. For this reason—and without expressing any view on the general questions which have been raised in this case—I agree that the rule should be made absolute.

Order nisi made absolute.
Judgment given on October 30, 1958.