HCJ 5261/04

Advocate Yossi Fuchs

v

Prime Minister of Israel, Ariel Sharon

HCJ 5262/04

Advocate Naftali Gur-Aryeh and another

v

Prime Minister of Israel and another

HCJ 5263/04

Yitzhak Vazana and others

v

Prime Minister of Israel and another

HCJ 5264/04

Advocate Ben-Zion Gispan

v

Prime Minister of Israel, Ariel Sharon and others

HCJ 5317/04

Minister of Tourism, Binyamin Elon

v

Prime Minister of Israel, Ariel Sharon

The Supreme Court sitting as the High Court of Justice

[26 October 2004]

Before President A. Barak, Vice-President E. Mazza
and Justices M. Cheshin, J. Türkel, D. Beinisch, A. Procaccia, E.E. Levy

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

Facts: The prime minister wished to promote a political plan, known as the 'disengagement plan.' In order to ensure that a majority of the Cabinet would support

the plan when it was brought to a vote, the prime minister removed two ministers from office two days before the vote was scheduled to be held.

The petitioners attacked the constitutionality of the prime minister's action on both technical grounds and substantive grounds. They argued, *inter alia*, that it was improper for the prime minister to remove two ministers from office because they opposed his plan, in order to create an artificial majority in the Cabinet in favour of the plan.

Held: The Supreme Court held that the discretion of the prime minister when exercising his power to remove ministers from office was very broad, and that the removal of ministers from office in order to further a political plan that the prime minister regarded as essential for the welfare of the State of Israel fell within the zone of reasonableness for his action in removing the ministers from office.

Petitions denied.

Legislation cited:

Basic Law: the Government, 5728-1968, s. 21A.

Basic Law: the Government (Amendment no. 3) (5741-1981).

Basic Law: the Government, 5752-1992, ss. 35(b), 35(c).

Basic Law: the Government, 5761-2001, ss. 1, 3, 4, 5(a), 7(a), 13(c), 13(d), 14(d), 15, 16(a), 19, 20, 22, 22(b), 24(b), 25, 28, 29(a), 31, 31(f), 39, 40, 40(c).

Basic Law: the Knesset, ss. 1, 4.

Government Law, 5761-2001, ss. 1(a), 2, 9(6).

Interpretation Law, 5741-1981, s. 10(c).

Transition Law, 5709-1949, s. 11(g).

Israeli Supreme Court cases cited:

[1] HCJ 621/76 *Segal v. Government of Israel* [1977] IsrSC 31(2) 8.

[2] HCJ 1384/98 *Avni v. Prime Minister* [1998] IsrSC 52(5) 206.

[3] HCJ 6741/99 *Yekutieli v. Minister of Interior* [2001] IsrSC 55(3) 673.

[4] HCJ 3267/97 *Rubinstein v. Minister of Defence* [1998] IsrSC 52(2) 481; **[1998-9] IsrLR 139**.

[5] HCJ 1601/90 *Shalit v. Peres* [1990] IsrSC 44(3) 353; IsrSJ 10 204.

[6] HCJ 1080/99 *Duek v. Mayor of Kiryat Bialik* [2001] IsrSC 55(2) 602.

[7] HCJ 3094/93 *Movement for Quality Government in Israel v. Government of Israel* [1993] IsrSC 47(5) 404; **IsrSJ 10 258**.

[8] HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister*

[2003] IsrSC 57(6) 817; **[2002-3] IsrLR 311**.

[9] HCJ 5131/03 *Litzman v. Knesset Speaker* [2005] IsrSC 59(1) 577; **[2004] IsrLR** Error! Bookmark not defined..

[10] HCJ 4267/93 *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [1993] IsrSC 47(5) 441.

[11] HCJ 2533/97 *Movement for Quality Government in Israel v. Government of Israel* [1997] IsrSC 51(3) 46.

[12] HCJ 1635/90 *Jerzhevski v. Prime Minister* [1991] IsrSC 45(1) 749.

[13] HCJ 502/99 *Cohen v. Prime Minister* (unreported).

[14] HCJ 5167/00 *Weiss v. Prime Minister* [2001] IsrSC 55(2) 455.

[15] HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [2001] IsrSC 55(4) 800.

The petitioner in HCJ 5261/04 represented himself.

For the petitioners in HCJ 5262/04 — N. Gur-Aryeh.

For the petitioners in HCJ 5263/04 — A. Nof.

For the petitioners in HCJ 5264/04 — S. Samina, B.Z. Gispan.

For the respondents — O. Mendel, A. Helman, High Court of Justice Department at the State Attorney's Office.

JUDGMENT

President A. Barak

The prime minister wishes to promote a national-political plan. He considers this plan to be vital to the future of the State of Israel. It has serious ramifications in terms of the foreign and defence policies of the State of Israel. The prime minister gives instructions that the plan should be submitted to the Cabinet for its approval. Shortly before the time of the vote, the prime minister decides to exercise the power given to him in s. 22(b) of the Basic Law: the Government, and to remove from office two of the Cabinet ministers who oppose the plan and are working to prevent its approval. He does this in order to obtain a majority vote in the Cabinet. Is this decision lawful? That is the question before us.

The facts

1. During 2004, the prime minister, Mr Ariel Sharon, began to promote a political plan that is called the 'disengagement plan.' The plan includes the evacuation of all of the settlements in the Gaza Strip and several settlements in Samaria. The prime minister decided to submit the plan to the Cabinet for approval. A discussion of the matter was scheduled for Sunday, 6 April 2004. On Friday, 4 April 2004, the prime minister sent letters to two Cabinet ministers, MK Avigdor Lieberman (the Minister of Transport) and MK Binyamin Elon (the Minister of Tourism), both from the National Union faction, removing them from office. The removal from office was carried out by virtue of the prime minister's power in s. 22(b) of the Basic Law: the Government. The grounds for the decision to remove the ministers from office were the fact that both of the ministers had said and made it clear that they were vehemently opposed to the 'disengagement plan' and that they would do everything they could to prevent it from being approved by the Cabinet, and the assumption that, in view of this opposition, the two ministers would in any case not remain in the Cabinet, if the plan were approved. The prime minister was of the opinion that this was a political plan 'of historic significance' (s. 2 of the Attorney-General's response), that it was essential for 'ensuring the future welfare of the State of Israel' (*ibid.*) and that it was of decisive importance in the context of international relations between the State of Israel and other countries' (*ibid.*). For this reason, in the prime minister's opinion, 'the rejection of the plan by the Cabinet would have had very grave implications for the foreign relations of the State of Israel' (*ibid.*). Therefore, the removal of the ministers from office was intended to ensure that the 'disengagement plan' would be approved by a majority of the Cabinet and would be implemented.

2. The letters removing the ministers from office were signed as aforesaid on Friday, 4 June 2004. When they had been signed, but before they were delivered to the ministers who were removed from office, the members of the Cabinet were notified by telephone of the prime minister's decision to remove the Minister of Tourism and the Minister of Transport from office. The letter to the Minister of Transport was delivered by a messenger from the prime minister's office on the same morning. The prime minister informed the Minister of Tourism of his removal from office in a telephone conversation between them. Meanwhile, the efforts that were made to ascertain the physical location of the Minister of Tourism in order to deliver the letter removing him from office were unsuccessful. The Minister of

Tourism refused to divulge his location to the Cabinet secretary in conversations that they had during that day. A messenger, who was sent to the home of the Minister of Tourism as well as to his office, did not find him at those locations. Finally it was decided — after the Cabinet received guidelines from the Attorney-General in this respect — that in the circumstances it was sufficient to send the notice by facsimile and by messenger to the home and office of the Minister of Tourism, together with notice by telephone. Notice as aforesaid was given to the minister's assistant, but the attempt to speak with the minister himself was unsuccessful. Equally unsuccessful was the attempt to send the notice by facsimile to the minister's home. A driver was sent to the minister's home, and he tried to leave the letter concerning the removal from office in the mailbox, but, according to what the Cabinet secretary was told by the security officer at the Ministry of Tourism, the sentry on duty had received orders from the minister himself not to accept the letter. Finally, on Friday afternoon the letter removing him from office was placed on the reception desk of the office of the Minister of Tourism.

3. On Sunday, 6 June 2004, petitions were filed in this court, asking that we make an *order nisi* and an interim order, to the effect that the letters removing the ministers from office should be suspended and not come into effect. In the decision of this court (the honourable Justice E.E. Levy) on 6 June 2004, it was decided to deny the application for an interim order, and it was held that, at this stage of the proceedings, it appeared that the procedure that was followed for delivering the letters to the ministers was *prima facie* lawful, as was the notice to the Cabinet ministers of the prime minister's decision in this regard.

4. The Cabinet meeting took place as planned on 6 June 2004. The Minister of Tourism came to this meeting, but when it became clear to him that the application for an interim order was denied by this Court, he left the meeting. It was decided in the Cabinet meeting to approve the 'disengagement plan' that the prime minister presented, by a majority of seven for and four against.

The arguments of the parties

5. In the five petitions that were filed in this court, two main arguments were raised against the legality of the action of the prime minister, with respect to the removal of the Minister of Tourism and the Minister of Transport from office. The *first* argument was mainly a procedural one, according to which the procedure for removing the Ministers from office was

unlawful, in view of the provisions of s. 22(b) of the Basic Law: the Government, for the following reasons: the period of forty-eight hours until the letters came into effect as intended included the hours of the Sabbath; the letter was not delivered to the Minister of Tourism himself; the telephone notice of the prime minister's decision that was given to the ministers did not, according to the petitioners, comply with the conditions prescribed by law. The *second* argument argued before us — and this is the main one —was that the decision to remove the ministers from office was not in itself a lawful one. The petitioners argued that the prime minister is not authorized to remove a minister from office in circumstances where the reason for this decision is a political position that is held by that minister and that is opposed to a position or plan of the prime minister. This is especially the case in view of the fact that the Cabinet had not yet reached a decision on the matter, and there had been no claim that the minister concerned lacked the necessary abilities or qualifications, or had run his ministry improperly. A minister should not be dismissed merely for political reasons. This is especially so when the government and its basic principles won the confidence of the Knesset and also when the prime minister does not have unlimited powers but is *primus inter pares*. Alternatively, it was argued before us that even if the prime minister was authorized to remove a minister from office because his positions conflicted with the positions and plans of the prime minister, the decision to remove the ministers from office was extremely unreasonable, in the circumstances of the case, and therefore the court ought to intervene therein, since the purpose of the removal from office was to ensure an 'artificial' majority in the vote at the Cabinet meeting, and the use of the power to remove a minister from office merely in order to obtain a majority by uprooting the position of that minister *ab initio* is improper and extremely unreasonable. It was further argued that the removal from office was unlawful, since the ministers of the National Union faction had not departed from what was agreed in the coalition agreements and in the basic principles of the Government.

6. In their response, the respondents asked us to deny the petitions. According to them, the prime minister's decision was lawful, both from a procedural point of view and on the merits. With regard to the procedural aspect, the letters of dismissal were lawfully delivered to the two ministers, and the failure to deliver the letter physically to the Minister of Tourism did not undermine the validity of the removal from office, both in view of the reasons in the Attorney-General's guideline in this matter, and in view of the

purpose of the Basic Law: the Government and the fact that the minister knew that he had been removed from office. There was also no defect in the fact that the period of time from the decision to remove the ministers from office until it came into effect included the Sabbath, nor in the fact that the notice of the removal from office was given to the other Cabinet ministers by telephone. On the merits, the respondents argued that the prime minister's discretion pursuant to the Basic Law also includes circumstances in which he is seeking to promote an important political plan to which one of the ministers is opposed and wishes to frustrate. The prime minister may remove a minister from office for this reason even when there is no argument with respect to the qualifications of the minister or the manner in which he carries out his job. This can also be seen from the purpose of the Basic Law: the Government and from the broad discretion given to the prime minister by virtue of his special status in the system of government in Israel. Moreover, the decision to remove the Ministers from office, in the circumstances of this case, does not warrant the intervention of this court, since it is reasonable on the merits. We are speaking of an important and essential political plan, whose approval by the Cabinet was of extreme importance, in defence and policy contexts. The removal of the two ministers from office was reasonable and even necessary, and it certainly does not warrant the intervention of this court, particularly in view of the broad discretion that the prime minister has in this context.

7. On 20 June 2004 a hearing took place on the petitions. Two days later (22 June 2004), it was unanimously decided to deny all of the petitions, with a stipulation that the reasons would be given separately. The following are our reasons.

8. As can be seen from the dispute between the parties, there are two issues before us. *One* is whether the removal from office was lawful, in the procedural sense. The *other* is whether the decision to remove the ministers from office was lawful on the merits. The question of the intervention of this court will be determined by these. Let us begin with the first question.

The procedural aspect

9. Consideration of the petitioners' arguments and the procedural issues that they raised has led us to the conclusion that they are insufficient in order to undermine the validity of the decision to remove the ministers from office. Section 22(b) of the Basic Law: the Government provides that 'The prime minister may, after notifying the Government of his intention to do so, remove a minister from office; the office of a minister ends forty-eight hours

after the written notice of his removal from office has been delivered to him, unless the prime minister changes his mind before that.' There is no dispute that the written notice of dismissal was delivered to the Minister of Transport. With respect to the Minister of Tourism, we accept the position of the respondents that it is possible, in the circumstances, to regard the Minister of Tourism as someone to whom written notice of removal from office 'has been delivered,' within the meaning of this term in the Basic Law: the Government. There is no dispute that the Minister of Tourism was, in fact, aware of the prime minister's decision, since the prime minister himself notified him of this by telephone. Messengers were sent both to the home and the office of the Minister of Tourism. At the same time, the Minister of Tourism refused to divulge his physical location and so in practice he frustrated the possibility of physically delivering the written notice of removal from office. There is no dispute that the requirement of delivery in s. 22(b) of the Basic Law: the Government must be satisfied in accordance with the letter of the law, not only because of the rule of law (and the rule of the constitution), but also in order to preserve the status of a Cabinet minister, his ability to know with certainty whether it has been decided to remove him from office, and the ability to calculate the forty-eight hours from the time of delivery of the written notice of removal from office until the removal from office comes into effect. As we shall clarify below, this period has an importance of its own, particularly in the context of the prime minister's power to remove a minister from office, but the requirement of delivery 'to' the minister who is being removed from office must be interpreted not only 'in accordance with the letter of the law,' but also 'in accordance with its purpose.' This purpose concerns, as aforesaid, clarity and certainty, and a clear allocation of forty-eight hours from the moment of delivery until the removal from office comes into effect. We are satisfied that, in such circumstances where the minister was notified of his removal from office by telephone, messengers searched for him at his home and his office, and mainly where the Minister himself refused to divulge his location, the written notice of removal from office may be regarded as having been 'lawfully' delivered, within the meaning of s. 22(b) of the Basic Law: the Government.

10. An additional argument of the petitioners concerned the period of time between the delivery of the letter of removal from office and the coming of the removal from office into effect. According to s. 22(b) of the Basic Law: the Government, the removal from office comes into effect forty-eight hours after it has been delivered to the minister. In the case before us, the delivery

took place on Friday morning and the Cabinet meeting was on Sunday, a little more than forty-eight hours later. The argument is that the Sabbath should not be included within the framework of these forty-eight hours, and therefore when the Cabinet voted the removal from office had not yet come into effect. The Attorney-General asked us to reject this argument, so we must ask whether the Sabbath should be included in the case before us in the calculation of the forty-eight hours. Our answer to this question is yes, and therefore the petitioner's argument in this regard should be rejected.

11. This position of ours is based on the interpretation and purpose of the provision according to which the removal from office comes into effect only forty-eight hours later, as stated in s. 22(b) of the Basic Law: the Government. Indeed, this provision has a double purpose: *first*, the right to change one's mind. Removal from office is not an insignificant matter; it is a special step that has broad ministerial and political implications. The forty-eight hours are therefore intended to allow the person who decided upon the removal from office — the prime minister — to change his mind (see and cf. HCJ 621/76 *Segal v. Government of Israel* [1], at p. 12). *Second*, giving time to the various parties and institutions to act — should they wish to do so — with respect to the decision of the prime minister. A decision to remove a minister from office does not merely affect the minister himself: it affects the party on behalf of which he was appointed, and the faction of which he is a member; it concerns the entire government and its internal balance of power; it concerns the relationship between the Knesset — which expressed confidence in the government and its composition — and the government, as well as the relationship between the Knesset and the prime minister. Therefore the forty-eight hours constitute a kind of balancing mechanism, which is intended to suspend the removal of office from coming into effect to allow other parties and institutions to take action. At the same time, this period was set at forty-eight hours only, in order to allow the prime minister to make effective use of this power and to carry out his role as head of the government. Upon examination of the circumstances of the case, and in view of this double purpose, we have reached the conclusion that the Sabbath, which fell in the middle of the forty-eight-hour period, is a part of the period and therefore the removal from office became effective on Sunday morning, before the Cabinet meeting. As to the right of changing his mind, we have not heard any argument that the prime minister wished to change his mind or that he was unable to do so because of the Sabbath. As to ensuring sufficient time for the action of other parties and institutions, there was in fact sufficient time for this purpose. The prime minister's decision concerning the removal from

office was conveyed to the two ministers on Friday morning. There were several hours before the Sabbath began. An additional twelve hours passed from the end of the Sabbath until the time when the removal from office came into effect. During this time, petitions were filed in this Court and even an application to grant an interim order was heard. Admittedly, we are not speaking of a long or significant period of time, but it is a sufficient period of time for the purpose of realizing the various purposes underlying s. 22(b) of the Basic Law: the Government.

12. We could have reached a similar conclusion not only on the basis of the purpose of s. 22(b) of the Basic Law: the Government, but also in view of s. 10(c) of the Interpretation Law, 5741-1981. This section provides that 'when calculating a period of time, rest days, court vacation or statutory holidays shall also be included, unless they are the last days of the period.' It follows that according to this provision, the calculation of the period should also include the Sabbath. I should mention, in passing, that even if this is the case, it does not constitute a basis for the interpretation of s. 22(b) of the Basic Law: the Government. The Interpretation Law is an ordinary statute, whereas s. 22(b) of the Basic Law: the Government is a constitutional super-legislative provision. There is a basis for the argument that this provision cannot — in the absence of another provision in the basic law itself — define terms in the basic law (see HCJ 1384/98 *Avni v. Prime Minister* [2], at pp. 210-211). This provision can, of course, assist in the interpretation, but it is not binding within the framework of interpreting the term 'forty-eight hours' in s. 22(b) of the Basic Law: the Government.

13. The last argument — from the procedural viewpoint — that was presented to us was that the notice to the Cabinet of the removal from office was not delivered to the Cabinet ministers lawfully. Indeed, it is provided in s. 22(b) of the Basic Law: the Government that the removal of a minister from office takes place 'after the [prime minister] has given notice to the Cabinet of his intention of doing so.' The petitioners argue that the notice must be given by the prime minister personally and certainly not by telephone. Therefore the alleged defect is that the notice was given by the Cabinet secretary, on Friday morning, by telephone, to the Cabinet ministers and not to the Cabinet itself at its meeting. We have found no merit in this argument. Indeed, notice to the Cabinet of the intention of removing a minister from office is a condition for carrying out the removal from office lawfully. This is not merely a formal requirement, but it reflects the status of the whole Cabinet as a collective entity and the balance between the status of

the Cabinet and the Cabinet ministers on the one hand, and the status of the prime minister on the other. But we have not found in either the language or the purpose of the section a requirement that the notice should be conveyed specifically in writing, or by the prime minister personally. What is important is the notice and the knowledge, and in this context no claim has been brought before us that any of the Cabinet ministers was not notified of the intention or that the manner in which the notice was given was unlawful. We have found no basis for the argument that the notice must be given to the Cabinet, as distinct from the ministers, and specifically at a Cabinet meeting, particularly in view of what is stated in the Basic Law: the Government, according to which the government is composed of the prime minister and other ministers (s. 5(a)). It follows that this argument too should be rejected.

14. The conclusion is therefore that there were no procedural defects in the decision to remove the Minister of Tourism and the Minister of Transport from office that justify its being set aside, and it follows that there is no ground for our intervention on this basis. Consequently, it becomes necessary to examine the main argument in the petitions before us, that the prime minister unlawfully exercised the power given to him under s. 22(b) of the Basic Law: the Government. Let us therefore turn to examine this aspect, which is the substantive one.

The normative framework

15. The power of the prime minister to remove a minister from office is found in s. 22(b) of the Basic Law: the Government:

> 'The prime minister may, after notifying the Cabinet of his intention to do this, remove a minister from office; the office of a minister is terminated forty-eight hours after the written notice of removal from office has been delivered to him, unless the prime minister changes his mind before that time.'

The provision gives the prime minister power to remove a minister from office. It does not set out the scope of the discretion that the prime minister has when making a decision of this kind. We learn from the basic principles of our legal system that the discretion is not absolute. 'Israeli law does not recognize "absolute" discretion' (*per* Justice M. Cheshin in HCJ 6741/99 *Yekutieli v. Minister of Interior* [3], at p. 682). There is no public official in Israel who has absolute discretion. This is the rule, and it also applies to the prime minister. All executive discretion is limited, by its very nature. What are the limits that apply to the discretion of the prime minister when

removing a minister from office? The decision in this regard is based on the purpose of s. 22(b) of the Basic Law: the Government (see, for example, *Avni v. Prime Minister* [2]). Within this framework, we should take into account the basic principles of the structure of government in Israel, as reflected in the relevant provisions of the various Basic Laws and the fundamental principles of our legal system.

16. The power of the prime minister to remove a minister from office is founded upon two conflicting aims. The *first* aim concerns the strengthening of the status and the independence of a Cabinet minister and the Cabinet as a whole, as these derive from the system of government in Israel, the relationship between the Knesset and the Cabinet and the relationship between the prime minister and the Cabinet as a whole and the ministers in it. The *second* aim concerns the strengthening of the status, authority and powers of the prime minister, vis-à-vis the other members of the Cabinet, vis-à-vis the Cabinet as a whole and vis-à-vis the Knesset. The prime minister's power to remove a minister from office — just like the scope of this power and the discretion underlying it — are the product of a balance between these two conflicting aims.

The status of a Cabinet minister and of the Cabinet as a whole

17. Several fundamental principles that can be seen from the Basic Law: the Government in particular and from the Israeli legal system in general indicate the status of a Cabinet minister and of the Cabinet as a whole. *First*, Israel is a parliamentary democracy. This is a system of government in which the executive authority — which is the government (s. 1 of the Basic Law: the Government) requires the confidence of the Knesset in order to hold office (s. 3 of the Basic Law: the Government). Moreover, the Knesset can pass a vote of no confidence in the government and thereby terminate its office (s. 28 of the Basic Law: the Government). According to s. 5(a) of the Basic Law: the Government, 'The government is composed of the prime minister and other ministers.' Admittedly the prime minister is the person who forms the government (s. 7(a) of the Basic Law), but once the government has been formed, it must appear before the Knesset and notify it of its basic principles, its composition and the distribution of portfolios between the ministers, and ask for the confidence of the Knesset (s. 13(d) of the Basic Law). These provisions, when taken together, show that the Knesset votes confidence in a particular composition of the government. A minister who has been included as a member of the government at the

beginning of its term of office has received the confidence of the Knesset. This is of special importance. The Knesset is the legislature of the State (s. 1 of the Basic Law: the Knesset) and the representative organ of state that is elected by the sovereign, which is the people (HCJ 3267/97 *Rubinstein v. Minister of Defence* [4], at p. 508 {172-173}). The Knesset expressed confidence in a particular composition of the government, including the holding of office by every minister therein. In addition, if a minister is included in the government after confidence has already been expressed, although the renewed confidence of the Knesset is not required and a Cabinet decision is sufficient, nonetheless the notice of this decision must be given to the Knesset and the office of the minister becomes effective only when the Knesset has approved the notice (s. 15 of the Basic Law). The significance of this is that the Knesset is involved in the formation of the government, and is concerned therein both at the beginning of its term of office — within the framework of the vote of confidence — and subsequently — within the framework of the approval of the government's notice about the addition of a minister to the Cabinet. *Second*, the government in Israel is a collective entity. The Basic Law: the Government distinguishes between powers given in the Basic Law to the government and those given to the prime minister (see, for example, ss. 24(b), 31 and 39 of the Basic Law). Thus, for example, the Basic Law: the Government provides that 'the Cabinet shall determine the procedures for its meetings and work, the manner of its deliberations and the way in which it makes its decisions, whether on a permanent basis or for a particular matter' (s. 31(f) of the Basic Law). The powers given to the government are given to the prime minister and the other ministers jointly, since 'the government is composed of the prime minister and other ministers" (s. 5(a) of the Basic Law: the Government). Cabinet decisions are therefore decisions of the government as a whole, i.e., a decision of the various ministers who comprise it. A Cabinet minister —like the Cabinet as a whole — is in this sense a 'constitutional organ.' The collective responsibility of the Cabinet before the Knesset (s. 4 of the Basic Law: the Government) also establishes the status of the Cabinet as a collective entity, as well as the status of each of the ministers who comprise it. *Third*, the proportional method of elections in Israel (s. 4 of the Basic Law: the Knesset) usually leads to the governments in Israel being coalitions of various factions that represent several parties that contested the election for the Knesset (see HCJ 1601/90 *Shalit v. Peres* [5], at p. 363 {218-219}). In general, appointing someone as a minister does not merely reflect the ministerial aspect of his position. It also reflects the party political aspect of giving executive power

to representatives of the various factions that are members of the government (cf. HCJ 1080/99 *Duek v. Mayor of Kiryat Bialik* [6], at p. 612). 'A minister who sits at the Cabinet table as a representative of a party or a movement undoubtedly fulfils a political function. He expresses opinions and outlooks, a political and social approach, that are espoused by the public that elected him and by the movement that regards him as its representative in the government' (*per* Justice D. Levin in HCJ 3094/93 *Movement for Quality Government in Israel v. Government of Israel* [7], at p. 426 {289}). This coalition aspect establishes and strengthens the status of a Cabinet minister as well as the status of the government as a whole as a coalition of factions, which wields executive power in Israel.

The status of the prime minister

18. The prime minister is a minister (s. 5(a) of the Basic Law: the Government). Any law that derives from the status of a minister derives also from the status of the prime minister. Notwithstanding, the prime minister is a special kind of minister. He is first and foremost among the ministers. This is the case because of several provisions in the Basic Law: the Government. *First*, it is the prime minister who forms the government. The President of the State gives the task of forming the government to a member of the Knesset (s. 7(a) of the Basic Law: the Government). When the government has been formed by that member of the Knesset, he becomes the prime minister (s. 13(c) of the Basic Law: the Government). '… The prime minister has the main power with respect to forming the government, determining the identity of the ministers who hold office in it and the positions that they hold…' (*per* Justice E. Rivlin in HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister* [8], at p. 833 {326}). *Second*, the Cabinet owes collective responsibility to the Knesset, but the ministers are personally responsible to the prime minister for the offices to which they are appointed (s. 4 of the Basic Law: the Government). This is personal responsibility of each minister to the prime minister in respect of his carrying out his office as a minister. *Third*, it is the prime minister who conducts the Cabinet meetings (see and cf. s. 16(a) of the Basic Law: the Government). *Fourth*, the resignation or death of a prime minister means the resignation of the government as a whole (ss. 19 and 20 of the Basic Law: the Government). Moreover, the prime minister has the power, in certain circumstances and with the consent of the President of the State, to bring about the dissolution of the Knesset (s. 29(a) of the Basic Law: the Government). *Finally*, if a minister ceases holding office, or he is temporarily incapable of carrying out his office, the prime minister or

another minister designated by the Cabinet deputizes for him (s. 24(b) of the Basic Law: the Government). It follows that the prime minister is a member of the Cabinet, but his status is a special one. He is the head of the government. It is he who forms it. It is he who decides its composition and who will hold the various offices in it, and it is he that directs its main activities and objectives.

The authority to remove a minister from office

19. These conflicting aims — both the one concerning the status of the government and its ministers and the one concerning the status of the prime minister — are manifested in a series of arrangements that all serve to balance the importance of upholding the status of the prime minister and his ability to lead the government, on the one hand, and the recognition of the status of the Cabinet ministers and the government as a whole, on the other. The Basic Law: the Government recognized the status of a Cabinet minister and of the government as a whole, but at the same time it recognized the special status of the prime minister. It created various mechanisms that are intended to preserve both the status of a Cabinet minister and the government as a whole, and the status of the prime minister. Thus, for example, the confidence of the Knesset upon the formation of a government is given to the government as a whole, and not merely to the prime minister (s. 13(d) of the Basic Law). The prime minister cannot appoint a minister to the initial composition of the government without this appointment receiving the confidence of the Knesset; should there be a need to add a minister to the Cabinet after its initial formation, this is done in accordance with a proposal of the prime minister, but the decision in this regard is within the purview of the entire Cabinet, and notice of this must be given to the Knesset, which has the power to approve the notice or not (s. 15 of the Basic Law: the Government); the appointment of deputy ministers is made by the minister in charge of the ministry, but the consent of the prime minister and the approval of the Cabinet as a whole is required for this (s. 25 of the Basic Law: the Government). Indeed, the common factor in these and other provisions is the desire to ensure that the prime minister is able to fulfil his role as the head of state, including his ability to direct and manage government business, while at the same time preserving the status of the government as a whole and the other ministers who compose it.

20. Section 22(b) of the Basic Law: the Government, which concerns the power of the prime minister to remove a minister from office should be interpreted against this background. Indeed, the Basic Law: the Government

gives the prime minister the power to remove a minister from office. This is a special power that indicates the power of the prime minister to decide the composition of his government. It reflects the special status of the prime minister and preserves his ability to manage the government and to allow it to achieve its goals (see and cf. W.I. Jennings, *Cabinet Government* (1947), at p. 163). The Basic Law: the Government could have provided a different arrangement with respect to this issue of the authority to remove a minister from the government after its formation. In systems of government such as the presidential system that exists in the United States, it is accepted that the status of the president as the head of the executive branch is much stronger. The ministers ('the secretaries') are appointed and dismissed by the president without any *de facto* intervention on the part of the legislature (see B. Schwartz, *A Commentary on the Constitution of the United States — The Powers of Government*, vol. II, (1963), at p. 39). By contrast, the Basic Law: the Government, in its original 1968 version, did not include any provision with respect to the removal of a minister from office and a removal of this kind could only take place upon a vote of no confidence in the government as a whole or the resignation of the whole government. In 1981, the Basic Law: the Government was amended by adding a provision that allows the prime minister to remove a particular minister from office without any connection to the question of a vote of confidence in the Knesset (section 21A of the Basic Law: the Government; the Basic Law: the Government (Amendment No. 3). 5741-1981). The Basic Law: the Government of 1992 included two arrangements concerning the removal of a minister from office. The *first* gave the prime minister the power to remove a minister from office (s. 35(b)) and the *second* gave the Knesset the power to remove a minister from office, with a majority of seventy members, after a majority of the members of the Knesset Committee so recommended and the minister in question was given a right to state his case before the Knesset Committee and before the Knesset (s. 35(c)). In the current version of the Basic Law: the Government, the arrangement that was finally chosen is that the power to remove a minister from office is given to the prime minister. The Knesset no longer has the power to dismiss an individual minister, but only the power to vote confidence or no confidence in the government as a whole. Alongside all these, s. 11(g) of the Transition Law, 5709-1949, has remained in force, and this provides that the government can remove a minister from his office if the minister or his faction votes against the government (see A. Rubinstein, *The Constitutional Law of the State of Israel*, vol. 2, (fifth edition, 1996), at pp.

742-743). So we see that the various arrangements, both in Israel and in comparative law, are all based upon different balancing points between the status of the prime minister and the status of a minister in his government. Therefore the question before us is what are the parameters of the prime minister's discretion when exercising his power to remove from office one of the ministers in his government, as stated in s. 22(b) of the Basic Law: the Government.

The parameters of the prime minister's discretion when removing a minister from office

21. The prime minister is a part of the administrative authority and the principles that apply to the administrative authority and its employees apply also to the prime minister. It follows that, like any public official, his discretion is not absolute. He must act reasonably and proportionately; he must consider only relevant considerations; he must act without partiality and without arbitrariness; he must act in good faith and with equality. Therefore the power to remove someone from office should be exercised '… fairly, without irrelevant considerations and for the public good' (*per* President Shamgar in *Movement for Quality Government in Israel v. Government of Israel* [7], at p. 417 {276}). Like any power involving discretion, the prime minister also has a zone of reasonableness, within the framework of which he can select one of several reasonable options. In so far as each option is legal, this court will not intervene in this decision nor will it replace the prime minister's discretion with its own (see *Movement for Quality Government in Israel v. Prime Minister* [8], at pp. 840-848 {336-348}). But the prime minister's discretion is not unlimited; it is delineated by those situations of extreme unreasonableness. If a decision of the prime minister to remove a minister from office is extremely unreasonable — or a decision not to remove a minister from office is extremely unreasonable — it would be an unlawful decision, and the court would exercise its power of judicial review. Indeed, the grounds for judicial review and the substantive law are united (see and cf. HCJ 5131/03 *Litzman v. Knesset Speaker* [9]).

22. When will there be grounds to hold that the removal of a minister from office is unlawful, that it is unreasonable in the extreme? The answer to this question can be derived from the balance between the two different goals that underlie the purpose of the Basic Law: the Government. On the one hand, it is clear that the Basic Law: the Government did not give the prime minister unlimited power that would negate the status of a government minister, and the role of the government as a whole, as a collective entity with powers of

its own. It follows that we should interpret the power of the prime minister in such a way that reflects the role of the government as a whole, with its various members, the fact that the appointment of the minister won the confidence or the approval of the Knesset, and the coalition-based form of government that is practised in Israel, where, in effect, the ministers — especially those who are not from the prime minister's party — are chosen by their parties and not by the prime minister. It is natural that 'when he is required to exercise his discretion, the prime minister may also address party-political considerations…' (Justice D. Levin in *Movement for Quality Government in Israel v. Government of Israel* [7], at p. 427 {291}). On the other hand, it is clear that the Basic Law: the Government sought to maintain the status and the independence of the prime minister, as well as his ability to change the composition of the government in accordance with various needs that may arise during its term of office, while giving expression to the ability of the prime minister to manage and lead the government, and the responsibility of the ministers to him (s. 4 of the Basic Law: the Government). What is the proper balance between these two conflicting goals?

23. In our opinion, the proper balance is reflected in the approach that the prime minister is authorized to remove a minister from office only if the prime minister is convinced that this will promote the ability of the government to function properly as the executive branch of the State and to realize the policy goals which have been set. 'The powers granted to the prime minister to appoint ministers and removing them from office are therefore a means for advancing the aforesaid purposes of improving the government's image and functioning and public confidence in it' (Justice E. Rivlin, in *Movement for Quality Government in Israel v. Prime Minister* [8], at p. 846 {345}). This balance properly reflects the status of the government as a collective body that has won the confidence of the Knesset, on the one hand, and the prime minister's need to adapt the composition of the government to various changes and developments, while preserving its ability to function properly, on the other. This criterion provides a proper solution in those cases where a minister is at odds with government policy or acts contrary to the principles of collective responsibility (see *Movement for Quality Government in Israel v. Government of Israel* [7], at p. 423 {282}, and Z. Segal, *Israeli Democracy* (1991), at pp. 130-131). It also includes an assessment of the minister's functioning and his success in his office (see and cf. HCJ 4267/93 *Amitai, Citizens for Good Government and Integrity v.*

Prime Minister [10], at p. 463). Furthermore, this criterion includes those cases in which removal from office is required in order to maintain public confidence in the government, which is an important and relevant consideration within the framework of the ability of the government to function as the executive branch of the State. Indeed, maintaining public confidence in the government is a substantial and important consideration when scrutinizing the discretion in the removal from office (see *Movement for Quality Government in Israel v. Prime Minister* [8], at p. 898 {419}; Rubinstein and Medina, *Constitutional Law of the State of Israel,* at p. 708). Therefore, the criterion that removal from office will be deemed lawful only if the prime minister is persuaded that it is capable of promoting the government's ability to function properly as the executive branch of the State and to realize the policy goals that have been set, properly addresses the cases where a member of the government is involved in a grave incident that affects the standing and image of the government, public confidence in it and its ability to lead and serve as an example, as well as its capacity to inculcate proper forms of conduct (see *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at pp. 460-461; *Movement for Quality Government in Israel v. Government of Israel* [7], at p. 423 {282}). This criterion — according to which the removal of a minister from office will be lawful if it is based upon the prime minister's belief that it will promote the government's ability to function properly as the executive branch of the State and to realize the policy goals that it has set — allows the prime minister to take account of 'political' considerations, which include the 'need to preserve a coalition and to ensure the continued confidence of the Knesset…' (my remarks in *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 463). It also includes situations where the conduct of a particular minister may '… cause irreparable national harm,' because it impairs '… the proper functioning of the government and increases the chance that an erroneous decision may be made, which may have disastrous consequences for the State' (Justice E. Goldberg in HCJ 2533/97 *Movement for Quality Government in Israel v. Government of Israel* [11], at p. 65).

24. Indeed, this criterion reflects the special standing of the prime minister as the person responsible for the proper and effective management of the work of the government as a whole. It emphasizes the idea that 'the main consideration in exercising the powers of the government and the prime minister is the public interest' (my remarks in HCJ 1635/90 *Jerzhevski v. Prime Minister* [12], at p. 848). It expresses the principle in the Basic Law: the Government, that the ministers are responsible to the prime minister for

the performance of their office. This criterion focuses on the prime minister's discretion and assumes as its premise that the prime minister must have this discretion. It reflects the prime minister's ability to remove a minister from office, even though the minister may have won the confidence of the Knesset when it expressed its confidence in the government as a whole, and irrespective of the fact that usually he will be the representative of a faction and party that contested the elections. It gives the prime minister a tool that allows, in certain circumstances, a change in the composition of the government. 'The power, under this section, is unique both because of the standing of the prime minister concerning the composition of the government and because of the political nature of the government' (*per* Justice Y. Zamir, in *Movement for Quality Government in Israel v. Government of Israel* [11], at p. 58). It is therefore a criterion that reflects the need to prevent '… "disruptions" to the functioning of the government' (*Movement for Quality Government in Israel v. Government of Israel* [11], at p. 59).

25. But at the same time this criterion reflects the caution that the prime minister must show when removing a minister from office. The government and its ministers are not subordinate to the prime minister. They constitute a collective, constitutional organ. The executive branch of the State is the government, not the prime minister. When a minister has been appointed, and certainly when this appointment has won the confidence or the approval of the Knesset, it is not possible to remove him from office over a trifling matter. The decision to remove him from office must be supported by a basis of fact, as well as an objective reason that is capable of furthering the government's ability to function properly and to fulfil its constitutional role as the executive branch of the State (s. 1 of the Basic Law: the Government). An objective reason of this kind is also required in order to preserve public confidence in the government and its actions. Since a minister is responsible to the prime minister (s. 4 of the Basic Law: the Government), when the prime minister is considering whether the minister should continue to hold office, it is appropriate that he should take into account the manner in which he has carried out his office. This criterion therefore reflects a proper balance between the status of a minister in the government and the government as a whole, and the need to preserve the ability of the government to function and to be managed by the prime minister, while realizing its constitutional role.

Removal from office on political grounds

26. Can the prime minister remove a minister from office because of his political opinions and because of his opposition to a political initiative that the prime minister is advancing? The answer to this question must be examined in accordance with the aforesaid criterion. The answer is yes, if the prime minister is persuaded that the removal from office will further the ability of the government to function properly as the executive branch of the State, and to realize the policy objectives that it has set. Therefore political considerations *per se*, within the framework of the prime minister's decision to remove a minister from office, are not improper. They should be examined within the framework of all of the circumstances. It has been held that '… regarding a matter involving party politics, one cannot rule out taking into account considerations that are the product of political circumstances… party political considerations may be legitimate, in certain circumstances, but they should be examined with a proper balancing of the other considerations…' (*per* President Shamgar, in *Movement for Quality Government in Israel v. Government of Israel* [7], at pp. 420, 423 {280, 285}; see also *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 463). It has also been held that '… no one will dispute the fact that the variety of considerations that the prime minister may take into account with respect to the appointment of a minister or his removal from office may include, *inter alia*, political considerations concerning the stability of the government, forming a lasting coalition and other considerations of a political nature, which are legitimate, and even essential, considerations in the process of forming a government and appointing ministers' (*per* Justice D. Beinisch, in *Movement for Quality Government in Israel v. Prime Minister* [8], at p. 939 {469}). These political considerations can also include policy issues. '… the constitutional authority for the appointment and removal of ministers is mainly intended to realize policy objectives, and even policy objectives of a political nature — including the need to appoint ministers with the proper skills and experience —which is the responsibility of the prime minister' (*per* Justice D. Dorner in *Movement for Quality Government in Israel v. Prime Minister* [8], at p. 949 {482}). It follows that the mere fact that the removal from office was based upon policy opinions of that minister does not invalidate the removal from office, just as it does not validate it. We must examine whether, in the circumstances of the case, the prime minister was persuaded that the removal of the minister from office — because of the policy positions of that minister and because of the difference between them and the government's positions — might further the government's ability to

function properly as the executive branch of the State, and to realize the policy goals that have been set.

Removal from office before a Cabinet vote

27. Some of the petitioners' arguments were devoted to the question whether the prime minister can remove a minister from office in order to obtain a majority for a Cabinet vote. Their answer was no, on account of the importance of the principle of majority decision and preserving the independence of the discretion of Cabinet ministers. We cannot accept this position. If it is determined that the prime minister has indeed removed a particular minister from office, because he thought that the removal from office was required in order to further the ability of the government to function properly as the executive branch of the State and to realize the policy goals that it had set, this should not be prevented merely because it was done before a Cabinet vote and in order to influence the outcome of the vote. This is because the proper functioning of the government is manifested, *inter alia*, in its ability to make decisions that reflect policy objectives and national interests. What therefore is the point of waiting to see how things turn out, if the purpose of the removal from office is to further the activity of the government? It is possible that the impropriety in the minister's actions — for which the prime minister wishes to remove him from office — is his actual vote and opposition to the policy that the prime minister wishes to advance. In these circumstances, if it is accepted that the removal from office was carried out by the prime minister after he was persuaded that this was required in order to further the activity of the government and its ability to meet the policy challenges that face it, it should not be held that the prime minister's decision is lawful if — and only if — it was made after that minister expressed his opposition to a proposal within the framework of a Cabinet meeting or its decisions. Not only is such an interpretation not implied by the Basic Law: the Government itself, which merely requires notice to the government of the removal from office (s. 22(b) of the Basic Law) — but it also conflicts with the purpose of the Basic Law: the Government and the need to give the prime minister, as required by his special position, a tool to adapt the composition of the Cabinet to the constitutional role of the government.

The status of the basic principles

28. Is the prime minister bound by the basic principles of the government when he wishes to exercise his power under s. 22(b) of the Basic Law: the

Government? Our response to this question is no. Indeed, the basic principles of the government have importance. This is not merely because they generally express the outcome of various coalition agreements that were signed and so, *de facto*, they constitute the government, but mainly in view of the constitutional role of these basic principles, as can be seen in s. 13(d) of the Basic Law: the Government, according to which 'When the government has been formed, it shall appear before the Knesset, give notice of the basic principles of its policy, its composition and the distribution of portfolios between the ministers, and seek a vote of confidence…' Therefore the confidence of the Knesset in the government is not merely personal but it also addresses the basic principles of its policy. This means, in practice, the realization of the concept of the confidence of the Knesset in the government, as well as the right of the public to know the principles and the objectives of the government, as it has been formed (cf. s. 1(a) of the Government Law, 5761-2001, and *Shalit v. Peres* [5]). But this importance of the basic principles does not limit the prime minister's discretion when he is about to decide a question of removing a minister from office. There are two main reasons for this. *First*, we have discussed the fact that the Basic Law: the Government gave the prime minister, rather than the Knesset, the power to remove a minister from office. Restricting the prime minister to the basic principles of the government means *de facto* restricting him to the Knesset's vote of confidence as it was expressed when the government was first formed (s. 14(d) of the Basic Law: the Government). As we have seen, this is not the arrangement that was chosen in the Basic Law: the Government, with respect to the power of the prime minister and his relationship with the Knesset. *Second*, it is inappropriate to regard the basic principles as boundaries of the prime minister's power under s. 22(b) of the Basic Law: the Government. This power — according to the provision in the Basic Law itself — is a power involving discretion. The basic principles — like a political or coalition agreement that establishes them (see s. 2 of the Government Law, 5761–2001, and *Jerzhevski v. Prime Minister* [12], at pp. 846-848) — are incapable of limiting this discretion, not merely because the aforesaid discretion is stipulated in the Basic Law, but also because of the nature of goals and objectives, which require modification with the passing of time. Limiting the discretion of the prime minister to the basic principles means uprooting his ability to steer the government as the executive branch of the State, in accordance with changing needs. This is not what the Basic Law: the Government says, nor is it its purpose. Therefore we cannot accept the petitioners' argument in this context, and we do not need to decide the

question whether the prime minister did, in fact, act contrary to the basic principles or not, either in his policy or in his decision to remove from office ministers who acted in accordance with what is stated in the aforesaid basic principles.

The scope of the intervention of this court in the decision of the prime minister

29. Indeed, it is natural that the spectrum of cases, in which the prime minister may be persuaded that the removal of a minister from office may further the ability of the government to function properly as the executive branch of the State and to realize the policy goals that it has set, is very broad. This is especially so in view of the fact that we are speaking, in the final analysis, about a tool that has been given to the prime minister so that he can guide the ship of State to safety, while maintaining its cohesion and its ability to rise to the various goals and challenges that it faces. This breadth of the spectrum of cases, just like the purpose of giving discretion precisely to the prime minister, sheds light on the scope of the discretion entrusted to him. This is very broad discretion (*Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10], at p. 460; HCJ 502/99 *Cohen v. Prime Minister* [13]), or 'broad in the extreme' (*per* Justice E. Rivlin, in *Movement for Quality Government in Israel v. Prime Minister* [8], at p. 846 {345}). This cannot be restricted in a sweeping manner that will undermine the position of the prime minister, as it appears from the provisions of the Basic Law: the Government. This broad scope of the discretion in the Basic Law also determines the scope of the intervention of this court in the decision of the prime minister to remove a minister from office or not to do so. It should be noted that the scope of judicial review of the decisions of the prime minister concerning the removal of a minister from office is a mirror image of the scope of the power of the prime minister. The judicial review is narrow in nature because of the broad spectrum of considerations that the prime minister may take into account within the framework of the discretion given to him when deciding to remove a minister from office. This broad spectrum is what determines the question when removal from office is lawful and when it is not lawful. Its breadth is what limits the scope of judicial review. In this sense, it is true that 'the zone of reasonableness is as broad as the power itself' (*per* Justice M. Cheshin in *Movement for Quality Government in Israel v. Prime Minister* [8], at p. 916 {439}; *Litzman v. Knesset Speaker* [9]; and cf. *Movement for Quality Government in Israel v. Government of Israel* [11], at p. 68). Moreover, we should remember that the parliamentary system of

government in Israel means that review of the actions of the government and the prime minister is usually the purview of the Knesset, which votes its confidence in the government and also has the power to vote no confidence in it. This review of the Knesset — and the political establishment as a whole — also affects the breadth of the prime minister's discretion and consequently the degree of intervention of this court (see and cf. HCJ 5167/00 *Weiss v. Prime Minister* [14]; HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [15]). Notwithstanding, it should be recalled that the power of the prime minister is not absolute. There are situations in which he is not entitled to make use of the power that is given to him, and in any case there exists judicial review — as distinct from parliamentary review — if he has exercised his power and removed a minister from office. Does the case before us fall within this framework?

From the general to the specific

30. The prime minister wished to advance a national political plan, and in his opinion this is a plan 'that is vital for the future of the State of Israel, a plan that has serious implications, *inter alia*, for foreign affairs and the security of the State of Israel' (para. 62 of the response of the Attorney-General). No one denies that the prime minister clearly exercised his power on the basis of national political considerations, namely his desire to advance the 'disengagement plan.' In these circumstances, we are persuaded that the removal from office falls within the scope of considerations whose main purpose is to further the ability of the government to function properly as the executive branch of the State and to realize the political goals that it has set, while maintaining public confidence in the government. The existence of political negotiations, while addressing international and defence issues of the State, certainly falls within the framework of the role of the government in Israel and is included in the framework of its policy goals. The prime minister thought that the positions and the opposition of the Minister of Transport and the Minister of Tourism would frustrate this process, and for this reason it was correct to remove them from office. The response of the Attorney-General also shows the importance of the timing that was chosen. A vote of no confidence in the government was scheduled for 7 June 2004, because of the failure to approve the 'disengagement plan.' On 8 June 2004, the prime minister was obliged to take part in a political debate in the Knesset. These reasons were added to the position of the prime minister, that there was special importance to the timing of the government's decision (on 6 June 2004) with respect to the approval of the 'disengagement plan,' because

of serious aspects of foreign affairs of the State of Israel and undertakings that the prime minister had given in the international arena. It should be further noted that Justice Levy proposed, when he heard the application for an interim order in this case, that the Cabinet meeting should be postponed to a later date, but the prime minister was unwilling to postpone the date of the meeting, for the aforesaid reasons. It need not be said that we are not expressing any position on the question whether the political plan is an appropriate one or not. The only issue that we are discussing is whether the removal of the ministers from office by the prime minister, for the purpose of facilitating the adoption of the plan by the government — at the time and in the circumstances when it was done — is constitutional or not. In this respect, we are satisfied that the removal from office falls within the prime minister's zone of reasonableness, as stated in s. 22(b) of the Basic Law: the Government. In any event, and in consequence thereof, there are no grounds for our intervention in this decision.

31. For these reasons, we have decided to deny the petition.

Justice M. Cheshin

Section 22(b) of the Basic Law: the Government (5761-2001) tells us the following:

'Termination of the office of a minister

> 22.(a) …
>
> (b) The prime minister may, after notifying the Government of his intention to do so, remove a minister from office; the office of a minister ends forty-eight hours after the written notice of his removal from office has been delivered to him, unless the prime minister changes his mind before that time.
>
> (c) …

The question relevant to our case is this: what considerations may the prime minister take into account when he decides to remove a minister from office? More precisely, what considerations may the prime minister *not* consider as a basis for removing a minister from office? The law does not tell us either the former or the latter considerations, and, as is our wont, we will learn and discover the nature of those considerations from the matter at hand. We are speaking of the composition, structure and management of the

government, and everyone knows and understands that we are dealing here with an issue that is replete with policy and politics. The material is the material of policy and politics; the substance of which the government is made is the substance of policy and politics; the atmosphere is an atmosphere of policy and politics; everywhere you turn, the environment of the government is policy and politics, and the prime minister and the Cabinet ministers live and breathe policy and politics from morning to evening, every day, continuously. And just as issues of policy and politics lead to the formation of a government, the same is true with regard to the continuation of the government's existence and management, both outwardly and inwardly. All of this implies, and it can be understood from the context, that when removing a minister from office the considerations of the prime minister will mainly be considerations of policy and politics.

2. What is the scope of the prime minister's discretion when removing a minister from office? Indeed, 'absolute' discretion is neither known nor found in our legal system. No one holds unlimited office or power. An authority that holds power by law — any authority — holds its power in trust for the public, and there is no trustee whose power knows no limits. But it is also true that we will find it difficult to describe an example from life — from our life — where by removing a minister from office the prime minister's discretion will overstep its limits. The power of the prime minister extends far and wide, as far as the eye can see; his power is so broad — 'broader than broad' — that it resembles a 'black hole' which sucks in almost all considerations. This does not include or justify considerations based on corruption, God forbid, or considerations bordering on corruption. But apart from these considerations of a corrupt nature, we will have difficulty in finding considerations that are irrelevant. This is true of national considerations and political considerations, as well as of personal considerations.

So much for the scope of the discretion.

3. As to the scrutiny of the court with regard to the removal of a minister from office — and this is the other side of the coin — it has been said that the discretion of the prime minister in this regard moves in the stratosphere, where the legal atmosphere is weak and rarefied. Such is the legal atmosphere, and such is the scrutiny of the Court. Indeed, the strength of the court's scrutiny is determined, *inter alia*, by the breadth and the depth of the power of the competent authority, naturally in inverse proportion. And since we know that the power of the prime minister to remove a minister from

office is all-embracing, we also know that the strength of the court's scrutiny is small. Admittedly, it is possible that in certain circumstances — for example, because of overwhelming national considerations — the court will compel a prime minister to remove a minister from office. See, for example, *Movement for Quality Government in Israel v. Government of Israel* [7] (the Deri case); *Amitai, Citizens for Good Government and Integrity v. Prime Minister* [10] (the Pinhasi case); *Movement for Quality Government in Israel v. Prime Minister* [8] (the Hanegbi case, minority opinion at pp. 881 {393} *et seq.* and 939 {468} *et seq.*). But our case is one where the prime minister himself wishes to remove a minister from office, and in this context we will find it difficult, as aforesaid, to find a consideration that will escape from the gravitational force of the prime minister's authority.

4. When the prime minister decides to remove a minister from office, and all the preliminary conditions required by statute are fulfilled, we will have difficulty finding a court that will order him — contrary to his decision — to sit at the Cabinet table with a minister whom he does not want. Indeed, the solution to the issue of the removal of a minister from office is not to be found in the court. The solution is to be found in the standing of the prime minister in his party, in the mutual relationships between the parties, in the standing of the government in the Knesset, in public opinion. Just as the power and the strength of the prime minister derive from his party, from the coalition agreements, from the confidence of the Knesset and from public support, so too that party, those agreements and with them the confidence of the Knesset and public support will also determine the limits of his power to remove a minister from office. In other words, when we consider the nature of the material, we will know — in principle — that the authority and power of the prime minister to remove a minister from office stops with his party, the coalition agreements, the confidence of the Knesset and public support. In general, it may be said that considerations that lead to the formation of a government are also the ones that will determine the government's path, and they are considerations that a prime minister can and may take into account when he decides to remove a minister or ministers from office. I repeat that this is the case when the prime minister wishes to exercise his power to remove a minister or ministers from office. It is not the case when the prime minister refuses to exercise his power and thereby harms a value of great importance in national life.

5. Finally, my colleague President Barak says in his opinion that when the prime minister wishes to remove a minister from office, it is incumbent

upon the prime minister to act reasonably and proportionately, to consider only relevant issues, to act without partiality and without arbitrariness, to act in good faith and with equality. Within the limits of rhetoric, I agree with my colleague, but pitfalls await us in these guidelines. Take, for example, the principle of reasonableness. How will this principle further us if we believe — as I do — that with the exception of considerations that can be regarded as considerations of a corrupt or quasi-corrupt nature, the prime minister is entitled and authorized to consider (almost) every consideration that exists: national considerations, political considerations, personal considerations? And if this is the case with respect to reasonableness, it certainly applies to proportionality. The same applies with respect to the guideline of relevant considerations, the guideline prohibiting partiality and arbitrariness, etc.. In fact, as I have expressed my opinion above, with the exception of considerations of a corrupt or quasi-corrupt nature, I will have difficulty seeing a court intervene in the proceeding of removing a minister from office. This proceeding is for the Knesset and the coalition partners to judge, for their judgment — in the main — and not for the judgment of the court.

Vice-President E. Mazza

The reasons of my colleague, the President, explain well the constitutional outlook that served as a basis for our decision, on 22 June 2004, to deny the petition.

Justice E.E. Levy

1. I accept the approach of my colleague, Justice M. Cheshin, that the power of the prime minister to remove a minister from office 'is all embracing,' and this determines, inversely, the scope of the power of review of this court. Therefore I have joined in denying the petitions, but I found it necessary to add several comments.

2. Amendment no. 3 of the Basic Law: the Government, which gave the prime minister the power to dismiss a minister who holds office in his government and was incorporated in the Basic Law: the Government of 2001, was preceded by a draft law in the same spirit, which was debated in the Knesset in 1981 and was intended, according to the explanatory notes, to help the prime minister contend, *inter alia*, with what were defined as 'small, extortionist parties' (see the draft Basic Law: the Government (Amendment

no. 3)). During the debate on the draft law, MK Amnon Rubinstein grimly described the status of the prime minister at that time, as someone who '… is leading a strange alliance of independent, semi-feudal ministers, each of whom has his own domain that may not be touched… the result, of course, is that it is impossible to put any real national policy into effect, there are no priorities, there is no possibility of shaping economic policy, which clearly, primarily and absolutely requires national priorities' (*Divrei HaKnesset* (Knesset Proceedings) (5741) 2693, session dated 13 May 1981, at p. 2694).

Similar remarks were made by Knesset Member Moshe Shahal: '… It is impossible to replace ministers, and they have almost taken possession of private estates. From the moment that a minister is appointed to the position, it is difficult, almost impossible, for the prime minister to do his job and to say to a particular minister: you have not succeeded in your job, I want to replace you with someone else' (*ibid*., at p. 2695). Later on in his remarks, Knesset Member Shahal did not conceal the main target of his criticism:

> 'The problem of the prime ministers is with the ministers in their party, with whom they cannot work and whom they cannot dismiss, and this power, which the law intends to give to the prime minister is a power that will allow him power inside his party, which will enable him to conduct the business of his government in an orderly manner.'

3. The picture that emerges from the debate in the Knesset, to someone who tries to understand the purpose of Amendment no. 3 of the Basic Law: the Government is that the Amendment greatly extended the power of the prime minister in the relationship between him and his ministers, mainly in the following areas:

a. The creation of direct accountability of each minister to the prime minister, for the performance of the special portfolios given to him (s. 4 of the Basic Law: the Government (2001)). It follows that a failure of a minister in carrying out his job can serve as a ground for removing him from office, by virtue of the power that was given to the prime minister in s. 22(b) of the Basic Law.

b. Preventing 'extortion' by small parties.

c. Giving the prime minister tools to deal also with the lone minister who 'casts off all restraint' and makes it difficult for the government to implement its policy.

Let us examine the conduct of the prime minister in the current case, and how it fits with the purpose of Amendment no. 3 of the Basic Law: the Government.

4. No complaints were made against Ministers Elon and Lieberman, with regard to their personal conduct, nor were there any objections to their performance as ministers. Moreover, they did not take action against Cabinet decisions that had already been made and that were effective before their dismissal, and consequently they had not caused any difficulties for the implementation of government policy. On the contrary, the positions of the two ministers with respect to the withdrawal from the territories held by Israel and with regard to the evacuation of Jewish settlements were known to the prime minister from the day when the government was formed, since the National Union faction made it clear in the coalition agreement that it objected to the establishment of a Palestinian state west of the Jordan, regardless of its borders. It follows that it is also clear that Ministers Elon and Lieberman in particular, and the National Union faction in general, did not breach the coalition agreement and therefore they are not to be included among those rebellious ministers or among the 'small, extortionist parties' that led to the amendment to the law, so that the prime minister would be able to deal with them. In these circumstances, we cannot fail to reach the conclusion, which in practice is agreed by all, that the gulf that was created between the two ministers and their faction and the prime minister arose from the decision of the latter to adopt a new political policy, which was different from the one that formed the basis of the coalition agreement, namely the advancement of the plan that he conceived and that is known as the 'disengagement plan.' Here it should be clarified that the prime minister is certainly entitled to abandon one political policy and to adopt another policy, when he thinks that the change in circumstances and the welfare of the State of Israel require this. But to the same extent it is also the right of the ministers, if not their duty, to state their opinion in the Cabinet and to give expression to the outlook of their voters, for if one says otherwise, only persons who blindly follow the proposals of the prime minister and are prepared on a permanent basis to abandon their own opinions and espouse his will hold office in the government. I think that it is unnecessary to say how distant such a scenario is from the practice of democracy of which we are proud.

Notwithstanding, the new outlook of the prime minister is, with all due respect, primarily his own outlook, and it remains such, as long as the

government has not adopted it and given it validity in one of its decisions. In view of the aforesaid, logic dictates that the decision to remove ministers from office on the ground that their beliefs will make it difficult to implement *government policy* cannot be made *before* the Cabinet vote on that policy, *but only thereafter*. This leads to a further conclusion, that the prime minister acted as he did because of a concern that the vote of the two ministers against his plan would, when joined with the vote of additional ministers who opposed it, lead to the creation of a majority against his plan. He decided to prevent this outcome by dismissing two of the opposing ministers and in this way he intended to bring about a change in the balance of power in the Cabinet. And if further evidence is needed of the fact that the dismissals were intended solely in order to obtain a technical majority, it is sufficient to point out the fact that once the majority in the Cabinet was assured, the prime minister saw no further need to raise the threat of removal from office against other ministers who opposed his plan, including ministers from his own party.

This is an example of how the objectives that Amendment No. 3 of the Basic Law: the Government was intended to achieve (namely, dealing with rebellious ministers and with 'small, extortionist parties') were entirely abandoned, and how that amendment was used for purposes that the initiators of the amendment probably never imagined.

5. I saw fit to make my comments because I fear that even in the fifty-sixth year of Israel's independence, the parliamentary democratic system and especially the culture of government that requires restraint, even when the legislature has given the executive branch a broad power whose limits have not been clearly defined, have not yet been fully developed. The government has been given fields of operation that are very broad in scope, and their effect on the State in general, and on each of its citizens in particular, is great, and sometimes fateful. An example of this is the power to declare war (see s. 40 of the Basic Law). Imagine the possibility that a prime minister, for objective reasons or for improper internal considerations, initiates a move of the latter type (a declaration of war), in which it is apparent from the outset that he will not win a majority in the Cabinet. But the prime minister can circumvent this obstacle easily, just as it was done in the case before us, by dismissing ministers and creating an artificial majority. It need not be said that the ramifications of such a decision are likely to be fateful, and I ask myself whether this is merely an illusion that the Israel system of government

is sufficiently resilient to prevent. Regrettably, I find it difficult to answer this question in the affirmative.

6. Therefore, I think that it would be proper if the legislature formulated more efficient means of control over powers of the type that s. 22 of the Basic Law addresses. I am not unaware of the fact that the actions of the government are already subject to the scrutiny of the Knesset. Thus, for example, s. 40(c) of the Basic Law requires the government to notify the Foreign Affairs and Defence Committee of the Knesset of its decision to declare war. Moreover, the prime minister himself has a duty to give notice to the plenum of the Knesset in this regard. However, the time framework for giving the notices was defined in s. 40(c) of the Basic Law to be 'as soon as possible,' and one may wonder what the benefit of such a notice would be, even if in consequence the Knesset passes a vote of no confidence in the government, when that war, with all its horrors, is already being waged with full force (in this respect, cf. s. 9(6) of the Government Law).

7. The appointment of ministers is the final link in the lengthy process of forming a government. This process ends only when the government and the person who heads it appear before the Knesset and win its confidence, after they present to it the basic principles of their policy. A similar process is also involved in bringing a new minister into the government. He too does not enter into his office until the Knesset approves the notice of the prime minister about his joining the Cabinet. It follows that both the government as an entity and the individual minister derive their power from the Knesset (s. 13(d) of the Basic Law). Against the background, I wonder whether it would not be appropriate that the process of removing ministers from office should be done in the same manner and with the same seriousness, since we are speaking of removing from office persons in whom the Knesset has expressed its confidence, and who are members in the central executive body, and there is no need to elaborate upon the decisive impact of its decisions on each of us. The removal of Ministers Lieberman and Elon from office — in a hasty proceeding, on the eve of the holy Sabbath, when the purpose was that the forty-eight hours required for the dismissal to come into effect, as stated in s. 22(b) of the Basic Law, would pass by the time that the Cabinet meeting convened on Sunday, thus creating a majority for the proposal of the prime minister — is, in my view, far from being a process that should exist in a democracy.

8. However, and this is the main point, notwithstanding my reservations as to the proceeding that was carried out and my concerns as to its future

repercussions, we should also emphasize the following: the prime minister did not make use of a provision of law that he created for his own needs, but of a power that the Knesset gave him. This power in s. 22(b) of the Basic Law: the Government is broad in the extreme, and the lacuna in the work of the legislature — defining the limits of the power and determining processes for controlling the use thereof — cannot be filled by the court in case law. This is particularly the case when dealing with a Basic Law. Therefore as long as s. 22(b) of the Basic Law continues to exists in this form, it seems to me that the approach of my colleagues, that the prime minister acted within the scope of the power given to him, is correct, and there is no basis for the intervention of this court.

Justice D. Beinisch

I agree with the opinion of my colleague, President Barak.

Justice J. Türkel

The question before us is whether the decision of the prime minister to make use of the power given to him in s. 22(b) of the Basic Law: the Government and to remove from office two of the government ministers who oppose the plan that he wishes to promote in order to obtain a majority in the Cabinet vote is lawful. My answer to the question is this: it is *lawful*, but it is not *right*. In other words, according to the language of the section, as it has been interpreted by my honourable colleague, President Barak, the prime minister was *competent* to do it, but he *ought* not to have done it.

In this respect, I agree with the comment of my honourable colleague, Justice Levy in his opinion, that 'logic dictates that the decision to remove ministers from office on the ground that their beliefs will make it difficult to implement *government policy* cannot be made *before* the Cabinet vote on that policy, *but only thereafter*.' I also accept his recommendation that the Knesset should have control mechanisms over the use of the power. I further feel myself obliged to point out that this case deals with the dismissal of only *two* government ministers; would this apply to a decision to dismiss a larger number of ministers? I am not certain, and we will leave this question until its time comes.

Notwithstanding, for the reasons set out by my colleague the President, I am of the opinion that there is no alternative to denying the petitions.

Justice A. Procaccia

I agree with the opinion of my colleague, President Barak.

I wish to add the following comment.

The basic principles of democracy in Israel govern, *inter alia*, the procedural rules of decision-making in the various collective administrative bodies. Underlying these rules is the principle that decisions are made by a majority of those participating in the vote, that a member of the body making the decision is free, and even obliged, to express his opinion in matters being discussed, according to his outlook and conscience, and that in general he need not fear dismissal or removal as a result of an objective position that he holds with respect to an issue that is being discussed and decided. This process of freedom of expressing an opinion in a decision making body is vital for reaching a decision after considering a wide variety of points of view, relevant information and different ways of weighing conflicting interests and values. Freedom to express an opinion in the decision making process is also consistent with general values of freedom of expression, which run through every facet of life and human activity. This procedure of decision-making is accepted in executive institutions of various public bodies, local authorities, boards of directors of statutory corporations, planning and building authorities and, to a large extent, also on boards of directors of commercial enterprises. This mechanism of decision making is accepted, in the main, also in the government. The ongoing activity of the government is founded upon decision-making that is preceded by a discussion among the government ministers, in which the positions of the participants are raised, and the decision is made by a majority of the participants in the vote, while abstainers are not included in the count. This is the case in the Cabinet as a whole, as well as in Cabinet committees. This proceeding is expressed in the Cabinet Work Rules (ss. 19 and 35 of the Rules, revised as of 27 July 2003). The freedom to express an opinion and the free flow of objective positions and outlooks of the members of the decision-making body advance the decision-making process and shape its content, and they constitute a central and vital component of the way in which every administrative body operates, including the Cabinet. This is the case when we are referring to a professional issue that is to be decided by the administrative body, and also when we are referring to a minister who has a political role in the government, and expresses within this framework political opinions and

views with respect to the political and social path that he deems fit. Strict adherence to this procedure of decision-making is vital for the proper functioning of public administration, including the government. Moreover, it promotes an important public interest.

Against this background, the power given to the prime minister under s. 22(b) of the Basic Law: the Government to dismiss a minister is far-reaching when it is exercised in the context of an objective position that the minister espouses with respect to a matter that is to be decided by the Cabinet, even when it is related to a matter that lies at the heart of a political issue that the prime minister wishes to promote. The interpretation of President Barak extends the power of the prime minister to dismiss a minister on the basis of a political opinion that he expresses in good faith on an issue of policy, where this opinion conflicts with the policy that the prime minister wishes to promote. This power is unparalleled in other collective bodies, and it is inconsistent with the procedure of decision-making that is commonly practiced therein, nor should it be applied in any way to their work procedures. It is also unacceptable and undesirable in the day-to-day, routine work of the government. It is a unique power that should be exercised only when it is absolutely essential to promote, in the words of the President, the proper functioning of the government as the executive branch and to realize the policy goals that it has set.

The exceptional and unique nature of this power of dismissal that is given to the prime minister with respect to a minister in the government requires that it is exercised very rarely, and only in special and exceptional contexts where the public interest, which requires the furthering of the government's ability to function properly, and the realization of the national policy goals that it has set, clearly overrides the conflicting public interest that aims to protect the stability of the government and the integrity of its accepted decision-making process, including the right of every minister to express his objective opinion freely, without fear of dismissal or removal. I agree therefore with the position of the President, that the spectrum of cases in which the prime minister may exercise this power is broad and varied. Nonetheless, in my opinion the broad variety of grounds for exercising this power does not derogate from the duty to refrain from adopting this measure except when, in the prime minister's opinion, there exists a need of supreme national importance that justifies it, even at the price of harming the stability of the government and the accepted and proper decision-making process, and this assessment falls within the zone of reasonableness according to the

accepted criteria of public law. The strength of the need justifying the dismissal of a minister because he holds a controversial opinion must be clear, unique and of very great weight, when considered against the conflicting interest that seeks to protect the stability of the structure of the government, the propriety of its actions and the maintenance of its work routine in accordance with its procedures. When applying this criterion to the exercising of the prime minister's power, the control mechanisms that exist in the sphere of political forces and parliamentary scrutiny of government activity are insufficient. The rules of public law apply and have their say.

In the case before us, the prime minister wished to promote a political plan to which he attributes fateful significance for society and the State. The promotion of the plan necessitated, in his opinion, the dismissal of the two ministers who opposed it, in order to obtain the majority that was required in order to adopt it as a government decision. In view of the centrality of the plan underlying the matter, the measure that was adopted in order to promote it, by way of dismissing the opposing ministers, did not depart, in this case, from the extreme and rare criterion that is required in order to exercise the power of dismissal, and in the balance of conflicting public interests, the action of the prime minister does not fall outside the zone of reasonableness, in accordance with the rules of public law.

On this basis, I agree that the petitions against the prime minister should be denied.

Petition denied.

11 Heshvan 5765.

26 October 2004.