IN THE

SUPREME COURT OF THE STATE OF ISRAEL

SITTING AS THE

HIGH COURT OF JUSTICE

HCJ 6226/01

Before: **Hon. Justice D. Dorner**
Hon. Justice E. Rivlin
Hon. Justice A. Grunis

Petitioner: **Meir Indor**

v.

Respondents: **1. Mayor of the City of Jerusalem,**
2. The City of Jerusalem,
3. Member Knesset Yossi Sarid,
4. The Attorney General

Decided: **30 Shevat 5763 (February 2, 2003)**

The Supreme Court sitting as the High Court Of Justice
[February 2, 2003]
Before Justices D. Dorner, E. Rivlin, A. Grunis

Facts: The Petitioner requested from the city of Jerusalem a permit to post signs around the city, as required by Section 20 of the 5740/1980 Jerusalem Bylaws (Signage). The signs criticized MK Yossi Sarid, who, according to the Petitioner, had attacked the government's policy of targeting terror leaders in Nablus]. The proposed signs initially stated "Yossi Sarid is Arafat's collaborator". The City denied the permit because of an ostensible violation of the 5725/1965 Slander Act and a breach of public policy. Counsel for the Petitioner subsequently proposed an amendment to the sign, to read "Yossi Sarid is Arafat's attendant", but this was also rejected by the City, with the support of the Attorney General.

Held: The High Court of Justice ruled that the Bylaw authorized the City to limit freedom of speech; however, as with any administrative body, its discretion was limited by the standards set forth by Section 8 of the 'Basic Law: Human Dignity and Liberty' (the limitation clause). The considerable weight of the right to free speech entails a stringent balancing test according to which free speech cannot be limited unless the competing interest is very compelling, and the probability of harm, resulting from disallowing the limitation, is almost certain. Of the various forms of speech, political expression enjoys an elevated measure of protection, as it is a precondition for the existence of democratic discourse. The Bylaw permitted the Mayor to deny a request to post a sign if it explicitly offended public sensibility. However, the nature of such a sign must be such that it is so offensive that it would clearly be intolerable by Israeli society, which is considered to have a rather high tolerance level. The Bylaw also allowed the City to deny a request to post a sign which was criminal in nature. This provision should be interpreted narrowly, granting the right the widest latitude possible. Therefore, it was held that such a sign might only be prohibited when publicizing it would amount to a clear criminal act. The nature of the medium in question should be also taken into account. The Court found that in this case, there was no reason to disqualify the amended sign, even though it might be crude and offensive, as it is well established that freedom of speech protects expressions that are offensive, aggravating and even false. Justice *Rivlin* added that the fact that the expression was forced upon listeners or viewers (as a "*captive audience*") should also be taken into account; but this consideration alone was not enough to tip the scale. The Petition was accepted and the City was ordered to permit the amended sign.

On behalf of the Petitioner: Adv. N. Wertzberger

On behalf of the Respondents 1-2: Adv. D. Libman

On behalf of the Respondent 3: Adv. D. Holz Lechner

On behalf of the Respondent 4: Adv. U. Corinaldi Sirkis

JUDGMENT

Justice D. Dorner

Facts, Procedure and the Claims

1. The Petitioner wishes to denounce the position of MK Yossi Sarid, who, according to the Petitioner, attacked the government's policy of targeting terror leaders in Nablus. The Petitioner wishes to do this by posting signs around Jerusalem on behalf of terror victims bearing the phrase, "Yossi Sarid is Arafat's collaborator" (the original sign). The request filed by the Petitioner with the City of Jerusalem for a permit to post the sign, as required by Section 20 of the 5740/1980 Jerusalem Bylaws (Signage), was denied pursuant to Section 21(c)(2) of the Bylaws because the request ostensibly violates the 5725/1965 Slander Act and is unlawful

pursuant to the 5737/1977 Penal Code and because it violates public policy.

[The City's] refusal [to grant the permit] is what led to this petition against the Mayor of Jerusalem and MK Yossi Sarid. We have decided to add the Attorney General also as a respondent. The Petitioner asks that we require the Mayor and the City to permit the sign, and a conditional order was issued on behalf of the Petitioner.

The Petitioner claims that the Bylaw authorizing the Mayor to deny a request to post a sign because of its content, except where the content amounts to a severe crime, is outside the City's ambit under the Municipalities Ordinance, and that therefore, Section 21(c)(2) of the Bylaws is illegal. The Petitioner further argues that the sign is within the boundaries of political discourse and that the proper balance between freedom of expression and conflicting interests requires that a permit be granted.

In its response, the City notes that the Bylaw was enacted pursuant to Section 246 of the Municipal Ordinance which authorizes it to prohibit certain advertisements. The Attorney General, who supports this position, added that a distinction must be made between signs held at a demonstration and those posted on city billboards. He argued that the City may refuse to allow signs carrying explicit, harmful or offensive expressions even if the content is not illegal because under the Municipalities Ordinance, the City is authorized to limit free speech and enact Bylaws as to the content of signs posted.

In his response, MK Sarid states that he has been threatened in the past and prior experience has shown that threats against him have increased after signs demeaning him were publicized. He added that in the past, the Israel Security Agency has notified him about threats against him. However, he is no longer privy to such information because he is no longer entitled to a security detail.

In a memorandum submitted by the Israel Security Agency, we were informed that during the time when MK Sarid was entitled to a security detail, there were a number of threats made against him which were primarily articulated through expressions of hate however, at the current time, the Israel Security Agency does not have any concrete information regarding whether publicizing the signs will endanger MK Sarid. Nevertheless, they noted that in the past, right wing extremists have used the terms "collaborator" and "*mosser*" [A term taken from

Jewish Halacha, referring to a Jew that informs on other Jews to non-Jews (*Goyim*), and puts their physical wellbeing or their possessions in jeopardy] together, and to these people, a "collaborator" is considered a *mosser* whom it is permitted to kill.

During the hearing, the Petitioner limited his petition to the refusal of the City to allow him to post his signs. In light of the memorandum submitted by the Israel Security Agency, counsel for the Petitioner, Adv. Naftali Wertzberger, suggested that instead of the original sign, he will ask the City to approve a sign stating, "Yossi Sarid is Arafat's attendant," (the amended sign). Adv. Wertzberger explained that his suggestion is similar to lanugauge the Mayor of Jerusalem has himself, on more than one occasion, used with regard to MK Sarid in television debates. However, with the support of the Attorney General, the amended sign was rejected by the City.

Therefore, the question before us is whether the City may legally refuse to allow the Petitioner to post the amended sign.

Normative Background

2. Section 21(c)(2) of the Bylaws states that the Mayor is permitted to:

> Refuse to permit or revoke permission, so long as the sign violates this Bylaw or any other law or the Mayor believes that the sign violates public policy or is offensive towards the public.

The Bylaw authorizes the City to limit free speech; however, as any administrative body, its discretion is limited by the standards set forth by Section 8 of the Basic Law: Human Dignity and Liberty (the limitation clause). In order for an administrative body to limit a right, the limitation must meet four requirements: (1) It must have statutory authority to do so; (2) the limitation must be consistent with the values of the State as a Jewish and democratic state; (3) the limitation must serve a legitimate purpose; and (4) the limitation must not exceed that which is required.

The limitations clause of the Basic Law applies to rights established by the Basic Law and to legislation enacted after its passage. However, the standards can also be applied to the interpretation of any legislation, even those enacted prior to the enactment of the Basic Law, and

to the application of discretion by any government authority to limit basic rights, even those not enshrined in the Basic Laws. *See* HCJ 4541/94 *Miller v. Defense Minister*, IsrSC 49(4) 94, 138; HCJ 5016/96 *Horev v. Transportation Minister*, IsrSC 51(4) 1, 42 - 43.

Pursuant to Section 246 of the Municipal Ordinance, the City has the authority, under its Bylaws, to "… supervise the posting of signs… or prohibit the sign from being posted." The question of whether the City was authorized to enact Section 21(c)(2) of its Bylaws on this basis is not the question presented and we will therefore leave it for further review.

3. Given the circumstances of the case, the authority to limit freedom of expression is consistent with the values of the State of Israel and has a legitimate purpose, namely, protecting public policy and the public sensibility. All we need to examine is whether the limitation does not exceed what is required to achieve the interest in question. While the City has discretion in deciding whether to infringe someone's right to free speech, it must be proportional and must not infringe upon the right any more than is necessary, and the infringement must be reasonable relative to the interest at stake. Before this test, caselaw recognized other tests based upon the likelihood of an infringement and its severity. These tests take into account the character and the weight of the right in question and the interest at stake.

Because of the considerable weight of the right to free speech, caselaw has established a rather stringent balancing test according to which free speech cannot be limited unless the interest is very compelling, and the probability of harm resulting from disallowing the limitation is almost certain. *See* HCJ 337/81 *Mitrani v. Transportation Minister*, IsrSC 37(3) 337, 358 – 59; HCJ 399/85 *Kahana v. Board of Directors of the Broadcasting Authority*, IsrSC 41(3) 255, 286 – 90; HCJ 953/89 *Indor v. Mayor of Jerusalem*, IsrSC 45(4) 683, 689 – 91.

Of the various forms of speech, political expression enjoys an elevated measure of protection as it is a precondition for the existence of democratic discourse. *See* HCJ 606/93 *The Advancement of Entrepreneurship and Publication Ltd. v. Broadcasting Authority*, IsrSC 48(2) 1, 13; HCJ 6218/93 *Cohen v. Bar Association*, IsrSC 49(2) 529, 551. In another case regarding this topic, I have written:

> Generally, political expression cannot be limited only because it is offensive; any such limitation may harm the foundation of democracy. Thus, political expression which uses

crude language to harshly criticize the government or even racist political expressions that is offensive to the public enjoys full protection.

HCJ 606/93 Advancement, at 13.

See also, HCJ 206/61 *The Communist Party of Israel v. Mayor of Jerusalem*, IsrSC (15) 1723; HCJ 399/85 Kahana, at 286 – 90.

4. As previously mentioned, the Bylaw permits the Mayor to deny a request to post a sign if the sign explicitly offends the public sensibility. However, the nature of such a sign must be that it is so offensive that it would clearly be intolerable by Israeli society. It is well known that political dialogue in Israel is characterized by harsh expressions that may even be offensive, thus, the tolerance level in [Israeli] society is rather high. *Cf*. HCJ 651/03 *Association of Civil Rights in Israel v. Chairman of the Central Election Committee for the 16th Knesset*, IsrSC 57(2) 62, 74 – 75.

Section 20 of the Bylaws forbids signs from being posted in the City without the appropriate permit. Refusing to grant such a permit prevents the applicant from utilizing a means of fulfilling his right to free speech. When the sign in question is of a political nature, the test applied is whether it poses a near certain risk of severe and substantial harm. However, we also need to take into account the nature of the medium in question, namely, posting signs on message boards throughout the City, which increases the probability of conflict with the competing interest. *See* Lahav, *Freedom of Speech in Supreme Court Caselaw*, 7 Mishpatim 375, 404 (5736 – 5737).

5. The Bylaw also allows the City to deny a request to post a sign which is criminal in nature. However, in light of the superiority of the right to free speech, this provision, which limits free speech, is to be interpreted, as Justice Shamgar stated in CA 723/74 *Haaretz Newspaper Ltd. v. Israel Electric Company, Ltd.*, IsrSC 31(2) 281, 295, "narrowly, granting the right the widest latitude possible, without limiting it any more than the explicit limitations of the legislature…" Therefore, such a sign may only be prohibited when publicizing it would amount to a clear criminal act.

With this background we now examine whether the City acted appropriately in making its decision.

Applying the General Principles to this Case

6. The freedom of speech harmed as a result of the City's refusal is specifically political speech, and is thus entitled to the highest protection. Although the competing interest is defined by the Bylaw as "public policy or the public sensibility," it is in fact [in this instance] the wellbeing of MK Sarid. Whatever the status of the original sign, in light of the memo provided by the Israel Security Agency explaining the connotation of the term "collaborator," there is no reason to disqualify the amended sign. While the content of the amended sign is indeed crude and offensive, it is well established that freedom of speech protects expressions that are offensive, aggravating and even false. The amended sign, which does not purport to present facts, expresses a political opinion and, therefore, does not meet the required legal standards or evidentiary threshold necessary to prove a crime either under the Slander Act (*Cf.* CA 323/98 *Sharon v. Benziman*, IsrSC 56(3) 245, 262 – 70) or any other law. Furthermore, it has not been proven that the sign will harm MK Sarid or public order in a manner which would require intervention.

On this basis, I accept the petition and order the City to permit the amended sign. Additionally, I obligate the City to pay the Petitioner his legal fees in the amount of NIS 10,000.

Justice A. Grunis

I agree.

Justice E. Rivlin

1. I agree with the decision and reasoning of my colleague, Justice Dorner, and I would like to add two points. One, regarding the authority given over to the City to limit advertisements posted on city message boards, and second, regarding the nature of the expression in question, specifically because it invokes the issue of a "captive audience."

The Authority in Question

2. The Bylaw authorizes the Mayor to deny a permit to post a sign whenever the sign in question "is in violation of… any law" or "if it offends public policy or the public." In his

petition, the Petitioner challenges the City's decision to disallow a sign calling the then-opposition leader "Arafat's attendant" and the validity of the Bylaw. He claims that the City exceeded its statutory authority by enacting such a Bylaw. In light of our decision in this case, and taking into account the position of the Petitioner, there is no need to address the latter claim. However, there have been cases in which we have assumed that this Bylaw is valid (without making it the focus of the case). *See* HCJ 6396/96 *Zekin v. Mayor of Be'er Sheva*, IsrSC 53(3) 289; HCJ 631/86 *"National Circle" Movement v. The City of Jerusalem*, IsrSC 40(4) 13; HCJ 102/87 *Rothbard v. The Authority for Posting Advertisements*, IsrSC 41(3) 503; *see also*, CA 105/92 *Re'em Engineering Contractors, Ltd. v. The City of Upper Nazareth*, IsrSC 47(5) 189, 217, 219. Indeed, the Bylaw, which includes a limitation upon free speech, is broadly written and ostensibly grants the Mayor the authority to decide whether certain messages can be given over to the residents of the City by means of posted signs. Caselaw has set forth parameters for the mayor's exercise of discretion in determining whether or not to allow the posting of a particular sign. These parameters are guided by the building blocks of our [legal] system which are the basic principles by which we properly interpret legislation, such as freedom of expression, public policy, maintaining order, the public sensibility and other interests both specific and general. *See* HCJ 953/89 Indor. Through this, we can, on one hand, appropriately supervise the form and content of the signs posted on City message boards, and, on the other hand, ensure that limitations upon free speech will be balanced and only take relevant considerations into account. Any other interpretation of the Bylaw would position it outside the realm of the City's authority. *See* Saumur v. The City of Quebec [1952] 2 S.C.R. 299 (Can.). (For a similar approach to a Bylaw interpreted within the context of a statute, *see also*, A. Bendor, *Freedom of Speech and Message Boards*, 17 Mishpatim 171 (1987) (explaining freedom of expression by means of a message board and the issue of the "captive audience")).

Freedom of expression on message boards and the "captive audience"' issue

3. Freedom of expression applies to all types of expression. This even includes slander and expressions that are hard to hear, because, often, what is obscene to one person may be poetic to another. *Cohen v. California*, 403 U.S. 15 (1971). Each [person] has his own [method of expression]; however, when determining the level of protection to be granted to an expression, we

take into account the nature of both the expression and the conflicting interest. HCJ 806/88 Universal City Studios, Inc. v. The Film and Theater Board of Review, IsrSC 43(2) 22, 33; HCJ 399/85 Kahana, at 283; F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 89 (Cambridge 1982).

In this case, the Petitioner wishes to exercise his right to express his political beliefs about a public figure. *See Cf*. CA 214/89 Avneri v. Shapira, IsrSC 43(3) 840, 863; CA 334/89 Michaeli v. Almog, IsrSC 46(5) 555, 570; Rehearing 9/77 Israel Electric Company, Ltd. v. Haaretz Newspaper Ltd., IsrSC 32(3) 337; CA 1104/00 Appel v. Hasson, IsrSC 56(2) 607; CA 6871/99 Rinat v. Rom, IsrSC 56(4) 72. He wishes to do so by means of publicizing a sign on the city message board. This message board is a "stage," so to speak, for public debate. It provides the City's residents with an effective way to convey messages, opinions and news that are personal, political or commercial, and at the same time protects the look and aesthetics of the City. *See* HCJ 570/82 Naama Signs, Ltd. v. Mayor of Tel Aviv, IsrSC 37(3) 772, 776; CA 105/92 Re'em, at 200.

Regarding the importance of announcements and advertisements as an effective means of conveying messages, opinions and news the Supreme Court of the United States has stated that, "Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages" *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981). Similarly, the Canadian Supreme Court has said:

> Posters have communicated political, cultural and social information for centuries...
>
> 'After the invention of modern printing technology, posters have come to be generally used as an effective, inexpensive means of communication...'
>
> '...In order to be effective, posters of course must be affixed to a surface and publicly displayed. Posters are traditionally used by minority groups to publicize new ideas or causes. Posters are both a political weapon and an educational device... one measure of the openness of a democratic society has been the willingness of the authorities to allow postering...'

Peterborough (city) v. Ramsden [1993] 2 S.C.R. 1084, 1096, 1101 – 02 (Can.).

City message boards are a means for an individual to express his right to free speech. *See* Toronto (city) v. Quickfall [1994] 111 D.L.R.687 (Can.) (Abella, J.). They allow him to convey messages to others in an effective, organized and supervised manner. Message boards belong to the city, who maintains them on behalf of and for the welfare of its residents, and by doing so, the City acts as a public guardian. *See* Administrative Petition (Tel Aviv) 1282/02 Hess v. Mayor of Tel Aviv, Administrative Decisions (5762) 481. Municipal supervision of the message boards is to ensure that they remain an appropriate forum for the entire public. Their purpose is to allow for the expression of opinions and ideas, even if they are revolutionary, discordant or unpopular while maintaining the boundaries of public discourse worthy of a democratic regime. *See also*, Com. Commonwealth of Canada v. Canada [1991] 1 S.C.R. 139 (Can.) (on freedom of speech in public forums).

4. In his response to the petition, the Attorney General argues that the message board can be characterized in two ways. First, a sign posted on the municipal message board is perceived as a message sponsored by the City itself, making it a partner, so to speak, in the message conveyed. Second, the public is widely exposed to what is posted on the message board, which makes the City residents a "captive audience" to what is posted on these boards.

While there is support for the first claim of the Attorney General that the City is a "partner" to the message conveyed by the signs posted on the city message boards (*see* CA 105/92 Re'em, at 217 (Levin, J.)), the significance is overstated. It seems to me that there is no real concern that the public will perceive the signs as notices sponsored by the City. The message boards provide a variety of, among other things, information and news of commercial, political and personal nature. The message boards serve public figures as well as private individuals from across the spectrum as a means of advertising their products and publicizing their positions on various issues. I see no real danger that the public will perceive that the City – who owns the message boards, and, at times, posts their own signs – is patronizing the various ads and publications posted on its message boards.

5. The second claim of the Attorney General is that the public is a "captive audience" to the municipal message boards. This reason, in his opinion, justifies stricter standards towards deciding what may be posted. *See* Bendor, at 32. It has been held that when determining the extent of an injury caused by an expression, the fact that the expression is forced upon listeners

or viewers and the audience does not have the option to decide for themselves whether they want to be exposed to the information should be taken into account. CrimA 697/98 Sositzkin v. State of Israel, IsrSC 52(3) 289, 307 - 08. However, it has been held that this consideration alone is not enough to tip the scale. HCJ 606/93 Advancement, at 16 – 17 (Dorner, J.).

I think the claim that in certain circumstances the public is a "captive audience" to the expression in question is something that has lost significance over time. Nowadays, there are endless sources of information that are all encompassing and most people are exposed to large amounts of information on a daily basis. From inside one's own home to wherever one may go, a person is bound to partake, some more than others, in the "information industry" surrounding him, and, to a certain extent, he is "captive" to it. In the "realities of today" as Justice Dorner puts it, "listening to the radio is something people do on a random basis, and the assumption must be that the listener will hear all that is aired." *Id*. at 16. The same applies to the endless other mediums of dispersing information. Just look at the media, both electronic and print, the internet and advertisements posted on every wall. In such a reality, the term "captive" is very broad and message boards are no different from other information outlets in terms of coerciveness. However, we must constantly remember that the ability to express is the "watchdog" of democracy, and it is preferable for a person to be a "captive" to free speech than to be captive in the pit of ignorance.

Everyone is entitled to a certain amount of autonomy, privacy and the right to decide for themselves what types of information they wish to be exposed to, but we must be careful to avoid allowing too much administrative protection against the flow of information, especially when it is of the political nature. Everyone has their own mechanisms of filtering information provided to them. Message boards are part and parcel of the flow of information placed before a person, and if one does not like it, he may turn away from it. On the opposite side of one's right to not be exposed to random information, stand other rights, among them the right of free speech, which allows a person to convey messages to the public. No less is the right of people to decide for themselves what expressions they like, what to stay away from and what they believe should be admonished.

6. As my colleague, Justice Dorner, notes, when balancing free speech with opposing interests such as the public policy and public sensibility and other public policy reasons we need

to apply a test that checks the probability of injury (almost certain) and its seriousness (severe, serious and grave). This test examines the tolerance level of offensive statements in a democratic society. My colleague rightly suggests that the Bylaw limiting free speech because of the concern that the sign contains criminal content must be narrowly interpreted. We must distinguish between preventing [speech] from the onset and punishing [an offender] after the fact. Thus, in a case where permitting a sign may predispose someone to criminal liability, one has the option of refusing to allow such a sign to be posted. *See* HCJ 399/85 Kahana, at 297. However, so long as there is no such danger, as a general rule, it is preferable to sanction the advertiser after the fact if it is indeed proven that he broke the law. We must also consider that the limitation is set within a Bylaw and that it gives administrative authority over to a single individual (*see* Bendor, at 177). Therefore, a mayor may, in my opinion, deny a request to post a sign only where the sign is definitely a criminal act which will almost certainly bring actual harm to public order. *See also*, HCJ 399/85 Kahana, at 298 – 300.

I agree with the decision of my colleague, Justice Dorner, that when applying the balancing test to this case there is no reason to disqualify the sign that the Petitioner wishes to post. Therefore, I also hold that the conditional order be made permanent.

The decision of Justice *Dorner* is accepted. Decided today, 30 Shevat 5763 (February 2, 2003).