HCJ 5936/97

1. **Dr. Oren Lam**

2. **Amutat Amal – Organization of Learning Disabilities Diagnosticians**

3. **Nira Noi**

v.

1. Mr. Ben Tzion Dal, Director-General Ministry of Education, Culture and Sport

2. Minister of Education Culture and Sport

The Supreme Court Sitting as the High Court of Justice

[2 September 1999]

Before President A. Barak and Justices D. Dorner, D. Beinisch

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

Facts: Diagnosticians of children's learning disabilities and a nonprofit organization representing them challenged a decision by the Ministry of Education to cease recognizing diagnoses of learning disabilities, generally conducted for students seeking eligibility for special governmental conditions and services, unless the diagnoses are conducted by educational psychologists. Petitioners alleged that the decision violated the Basic Law: Freedom of Occupation.

Held: The decision to cease recognizing diagnoses conducted by the petitioners violates the freedom of occupation and does so neither by force of a statute nor or in accordance with any statute, by virtue of express authorization therein, as required by the Basic Law. The Education Ministry is the primary consumer of educational diagnoses and as such, its decision to stop recognizing the diagnoses effectively prevents the petitioners from working in that field, constituting an infringement on the freedom of occupation. This infringement is not authorized by statute, as the relevant statutes make no mention of the diagnosis of learning disabilities or of the standards by which they are to be recognized. The decision is also invalid because it did not include transitional provisions required in light of the reliance and legitimate expectation interests of the petitioners and others.

Legislation Cited
Basic Law: Freedom of Occupation, ss.2, 4.
Basic Law: Human Dignity and Liberty, s.4.
National Education Law, 1953, s.34.
Interpretation Law, 1981, s.17 (b).
Land Brokers Law, 1996, ss.20 (a), 20 (b), 21.
Bar Association Law, 1961, 2.112.
Dentists Ordinance (Amendment), 1951, s, 1.
Dentists Ordinance (Amendment) (No.2), 1992, s.7.
Dentists Ordinance (New Version), 1979.

Israeli Supreme Court Cases Cited:

[1] HCJ 6300/93 *Institute for Qualification of Rabbinical Advocates v. Minister of Religious Affairs,* IsrSC 48 (4) 441.
[2] HCJ 726/94 *Clal Insurance Company Ltd v. Minister of Finance,* IsrSC 48(5) 441.
[3] CA 294/91 *Chevra Kadisha v. Kestenbaum*, IsrSC 46 (2) 464.
[4] HCJ 4541/94 *Miller v. Minister of Defense,* IsrSC 49(4) 94.
[5] HCJ 5016/96 *Chorev v. Minister of Transportation,* IsrSC 51(4) 1.
[6] HCJ 1/49 *Bzarno v.Minister of Police,* IsrSC 2 80.
[7] HCJ 337/81 *Mitrani v.Minister of Transport,* IsrSC 37(3) 337.
[8] HCJ 3267/97 *Rubinstein v. Minister of Defense,* IsrSC 51 (5) 481.
[9] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa,* IsrSC 42 (2) 309.

[10] HCJ 1715/97 *Bureau of Investments Directors in Israel v. Minister of Finance,* IsrSC 51(4) 367.
[11] HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labor and Welfare,* IsrSC 52(2) 433.
[12] HCJ 2832/96 *Banai v. National Council of Advocates,* IsrSC 50(2) 582.
[13] HCJ 3930/94 *Gizmavi v.Minister of Health,* IsrSC 48(4) 778.
[14] FHCJ 3299/93 *Vixenblaum v.Minister of Defense,* IsrSC 49(2) 195.
[15] FHCJ 3872/93 *Mitral Ltd. v. Prime Minister and the Minister of Religion,* IsrSC 47(5) 485.
[16] HCJ 1452/93 *Igloo Contracting Company for Building Installation and Development v. Minister of Industry and Trade,* IsrSC 47(5) 610.
[17] HCJ1 703/92 *K.A.L. Consignment Airways v. Prime Minister*, IsrSC 52(4) 193.

JUDGMENT

Justice D. Dorner

The facts, the procedure and the claims

1. Petitioners 1 and 3 (hereinafter – the petitioners) work as diagnosticians of children's learning disabilities. Petitioner 1 is a doctor in neuro-psychology. He lectures in Haifa University on learning disabilities, their diagnosis and their treatment. For the last eight years he has been the owner of a diagnostic clinic, dealing, *inter alia*, with the diagnosis of learning disabilities. Petitioner 3 has worked in special education for about twenty years. She completed a special course dealing with learning disabilities, under the aegis of the Education Ministry, and also specialized in field-work for two years. After passing the examinations, she received her license from the Education Ministry authorizing her to diagnose learning disabilities. Petitioner 2 is a nonprofit organization currently in formation, which will amalgamate the diagnosticians of learning difficulties, among them petitioners 1 and 3.

Learning disabilities, including a broad range of learning difficulties, generally result from defects in cognitive processes, presumably of neurological origin. They are distinct from learning difficulties, which occur in the natural cross section of the population, consummate with each person's talents, motivation, and environment.

Even those with above average intellectual capacities experience difficulty in achieving basic learning skills, e.g. reading

(dyslexia) writing (dysgraphia) and arithmetic as a result of a learning disability. People with learning disabilities also suffer from disturbances in cognitive functions: language conceptualization, memory, concentration and the like. Treatment of learning disabilities includes, among other things, adapting syllabi and tests to the specific disability from which each particular pupil suffers, to enable students to exploit their capacities and intellectual talents to the fullest extent.

Since the beginning of the 1990's, there has been an increased demand for trained, professional diagnosticians of learning disabilities. This is the result of the educational system becoming increasingly aware that students at all levels, including universities, suffer from learning difficulties. Between 1992 and 1994, the Ministry of Education encouraged the training of diagnosticians in courses conducted in the colleges it supports. Graduates of these courses (hereinafter – the diagnosticians) received a license from the Ministry of Education as "didactic diagnosticians", after completing a period of supervised practical work and passing examinations. Until September 1996, the Ministry of Education officially recognized the diagnoses given by diagnosticians.

2. In September 1996, the Ministry of Education issued a circular, signed by its Director-General Ben-Tzion Dal, and distributed it in educational institutions at all levels. The circular provided that the Ministry of Education would only recognize a diagnosis of a learning disability (differential diagnosis) if given by an expert educational psychologist (as defined in the Psychologists Regulations (Approval of Degree as Expert), 1979).

Once the Ministry of Education stopped recognizing the diagnoses of the diagnosticians, there was no longer any reason for students in need of a diagnosis to request their services, and the demand for their services declined significantly.

In November 1996, a number of diagnosticians whose livelihoods had suffered, including Petitioner 1, applied to Mr. Dal by way of their attorney. Protesting the circular, they argued that it was the Education Ministry that had encouraged them to undergo training for work in diagnosis; that diagnosis of learning disabilities demands special training, which educational psychologists do not have; and that in any event there was no ground for limiting such diagnosis to educational psychologists.

In January 1997 the Minister of Education and the Minister of Science appointed a committee of experts, headed by Prof. Malka Margalit, to examine how to help students suffering from learning difficulties to realize their potential fully. The letter of appointment directed the committee to submit its recommendations within six months, in other words, by June 1997.

Prior to the due date, on 26 February 1997, the Education Ministry issued a second director-general circular, in which it once again provided:

> "As of the publication date (of the director-general's circular of September 1996), the definition of learning disabilities shall only include those which have been diagnosed as such by an expert educational psychologist".

On the other hand, in the committee's report submitted in June 1997 (hereinafter –the Margaliot Committee Report), it expressed its opinion that diagnosis of a learning difficulties requires special academic training, not offered within the framework of the regular training of educational psychologists. Its conclusion was that recognition of diagnoses should not be reserved for educational psychologists who had not been specially trained for that purpose.

The committee therefore recommended that diagnosis of learning difficulties be performed by an interdisciplinary committee of psychologists, teachers and educational consultants who had received training for that purpose in a Master's level program specializing in learning difficulties. The members of the committee would divide the tasks involved in diagnosis among themselves. In other words, in order to approve a student's educational framework, the psychologist, who was an expert in learning disabilities, would conduct a differential diagnosis, examining the disparity between function and intellectual capacity as measured by intelligence tests, the gap which defines a learning disability. At the same time, the teacher would assess the components of the learning disability in order to construct an appropriate didactic program.

The diagnosticians again applied to the director-general of the Ministry of Education, relying on the Margalit Committee's report. The Ministry of Education responded that educational psychologists undergo courses under the auspices of the Psychological Service in the Pedagogical Center of the Ministry of Education (P.A) in which they also learn about learning difficulties. In the Ministry's view, these courses provide the expertise required under the recommendations of the Margalit commission. Consequently, the Ministry of Education saw no reason to amend its guidelines.

3. The petition before us challenged this decision. The petitioners asked that the Ministry of Education be directed to annul the guidelines prescribed by the director-general of the Ministry of Education. Alternatively, they asked that we determine reasonable and egalitarian criteria for recognizing diagnoses of a learning disability when performed by persons specifically trained for that purpose. As an alternative to the alternative, they requested that transitional provisions be enacted until the new guidelines came into force.

In their petition, the petitioners claimed that preferring educational psychologists untrained in the diagnosis of learning disabilities, over diagnosticians who were experts in the field, violates the diagnosticians' freedom of occupation and therefore violates the provisions of the Basic Law: Freedom of Occupation. In this context, they claimed that the director-general's circulars have no basis in Knesset legislation. They further claimed that the director general's circulars were not issued for an appropriate purpose, as they are based on irrelevant considerations. Furthermore, they submitted that the director general's circulars violated their freedom of occupation to an extent greater than necessary. In that context, the petitioners appended to their petition the expert opinion of a psychologist who had specialized in the area of learning difficulties. The gist of the opinion is that a psychologist's training does not include specialization in diagnosis of learning disabilities and of those suffering from such disabilities; that the tools used by psychologists for assessing intellectual ability (I.Q tests) are inappropriate for assessing examinees suffering from learning disabilities; and that the entire area of diagnosis constitutes a distinct discipline necessitating specific and basic professional training.

At the petitioner's request, an interim order (order nisi) was issued.

In their response to the petition, the respondents claimed that the director-general's decision reflected the professional stance of the competent authorities in the Ministry of Education and that there was no cause to annul it. In that context, they too submitted the expert opinion of an educational psychologist, the thrust of which is that educational psychologists are best equipped to diagnose learning difficulties and that their required courses train them for that purpose. The respondents further contended that the director-general's circulars do not, in any way, abridge the

petitioners' freedom of occupation, because they do not prevent them from working as diagnosticians of learning disabilities. Nor do the circulars restrict their work in any manner, for example, by requiring a license. The only thing decided by the circulars was that the Ministry of Education would no longer accept their diagnoses. This, they submitted, does not infringe upon their freedom of occupation. Moreover, the circulars themselves still provided the petitioners with plenty of work, given that the entire realm of the specific diagnosis of particular disabilities (as opposed to the diagnosis in principle of a learning disability) remained open to them. And so, absent a violation of the freedom of occupation, there is no need to enact transitional provisions that enable diagnosticians previously engaged in diagnosis of learning disabilities to continue working in their professions. In any event, regarding the transitional provisions, the respondents further claimed that they were unnecessary with regard to the petitioners. A transitional provision is intended for persons occupied in a field who must, in order to continue working in the field, make adjustments in light of new conditions. The transitional provision allows them to continue their work in that field while simultaneously adjusting to the new conditions. In the case before us, there was no intention to require the petitioners to satisfy certain conditions in order to qualify for diagnosis of learning disabilities. Rather, the intention was that their diagnoses would not be accepted by the Ministry of Education. Finally, the respondents claimed that continued diagnoses by diagnosticians who are not psychologists would harm the pupils and therefore should not be allowed, even during a short transition period.

4. My view is that the petition should be granted. I say that for two reasons: first; the decision challenged violates the freedom of occupation and does so neither by force of a statute nor or in accordance with any statute, by virtue of express authorization

therein. Second; the decision does not establish the necessary transitional provisions required, in light of the reliance and legitimate expectation interests of the petitioners and others.

In view of these conclusions, we need not rule on the question of whether the decision violated the freedom of occupation to a greater extent than necessary.

The decision violates the freedom of occupation

5. As stated, the respondents claimed that the director-general's circulars do not involve any infringement on the freedom of occupation, because they do not prohibit the petitioners or others from continuing to work in their occupations.

This claim cannot be accepted.

Whether or not an administrative agency's decision violates the freedom of occupation is a question that must be examined substantively and not formally. The freedom of occupation is violated not just where an agency directly restricts the right to engage in any work or vocation, for example, by imposing a prohibition on the occupation or the requirement of a license. Effectively preventing the possibility of engaging in particular work or a particular profession also constitutes a violation of the freedom of occupation.

For example, we have held that imposing limitations on studies necessary to qualify for work in a particular profession constitutes a violation of the freedom of occupation. *See* HC 6300/93 *Institute for Qualification of Rabbinical Advocates v. Minister of Religious Affairs* (hereinafter – *Rabbinical Advocates Institute),* [1]). Even when an agency grants a subsidy to only a portion of those engaged in a particular area, while denying the same subsidy to others, it

violates the freedom of occupation (*see* HC 726/94 *Clal Insurance Company Ltd v. Minister of Finance* [2] at 471).

Similarly, an agency violates the freedom of occupation by agreeing to receive exclusively the occupational product of those with particular training, even without prohibiting the actual engagement in the occupation for those with different training. An agency practicing this kind of policy will be regarded as having violated the freedom of occupation if in practice it prevents, or seriously restricts, the possibility of working in the occupation. An agency violates the freedom of occupation if it imposes restrictions on the employment of those engaged in a particular profession or occupation, or upon the use of their products, when it has a monopoly over the employment of persons engaged in that profession or occupation, or it is the sole consumer of their products. The agency's monopoly status enables it to prevent engagement in an occupation without imposing a formal prohibition. *Cf*. C.A. 294/91 *Chevra Kadisha v. Kestenbaum* [3] per Shamgar, P. at 484. Under those circumstances, the exclusive utilization of the service of particular sources grants them monopoly status as a matter of fact, if not formally. This too violates the freedom of occupation of the other sources, whose services the agencies decline to utilize. *Cf* A. Barak *Interpretation in Law,* vol.3 "Constitutional Interpretation" [18] at 613 – 614. On the other hand, if engagement in a particular occupation is open to a person despite the agency's refusal to accept the products of his occupation, that refusal will not be regarded as a violation of freedom of occupation.

This conclusion is dictated by the underlying goals of the freedom of occupation. Freedom of occupation is a particular instance of the general principle of human dignity and liberty. "It is by way of his occupation that a person shapes his personality and his social status. When you take away a person's freedom of occupation you take away his human image. Take away a person's

freedom to choose a profession and you have taken away his reason for living" (see Barak, *supra* [18] at 583). Freedom of occupation also has an economic aspect. It is intended to protect peoples' ability to pursue their livelihoods. These goals are frustrated not only when the State prohibits engagement in a particular profession or occupation or makes the engagement therein conditional upon receiving a license; they are also frustrated when the State, enjoying monopoly status over employment in a particular profession, refrains from employing particular people, or imposes restrictions on their employment.

Indeed, as a rule, the freedom of occupation does not compel the State or its authorities to employ. Freedom of occupation means the freedom to employ or not to employ. *See* A. Barak "The Economic Constitution of Israel" [20] at 369. In all instances, the State must exercise its power as an employer and as a purchaser of services on the basis of equality, and on the basis of reasonable, relevant considerations. The State may refuse to employ certain persons or refuse to purchase their services, and may even refuse to use their products. Generally speaking, however, none of these actions denies people the ability to engage in their profession, and therefore they do not constitute a violation of their freedom of occupation. The situation changes, however, when the State enjoys a monopoly over employment in an occupation, or over the use of the products of an occupation, and its refusal to employ precludes the possibility of engagement in the occupation. This kind of violation is substantively an infringement on the freedom of occupation.

6. In the case before us, the State has not only refrained from employing the petitioners and their colleagues as diagnosticians of learning disabilities, but it has also refused to recognize their diagnoses, even when their services are procured by others.

The Ministry of Education's failure to recognize the petitioners' diagnoses bars the entire profession to them. The Ministry of Education is the only institution in the country that requires these diagnoses and controls the large part of the education network of the entire country. The Ministry requires the diagnoses in order to create special educational frameworks for pupils suffering from learning disabilities, mostly in order to determine special conditions for taking various examinations, especially the university matriculation examinations. The directives of the Ministry of Education guide universities, too, which also use these diagnoses to determine special conditions and concessions for paths of study and examinations. The refusal of the Ministry of Education to recognize the petitioners' diagnoses means they are excluded from that realm of occupation and that their freedom of occupation has been violated. Essentially, there is no real difference between non-recognition and the establishment of a condition under which only those trained as educational psychologists can be occupied in the diagnosis of learning disabilities.

7. As stated, the respondents claimed that even after the petitioners are excluded from the field of diagnostics, plenty of work is available for them in other related fields (such as the diagnoses of specific disabilities and formulating programs of study for those suffering from learning disabilities). This, however, does not vitiate the infringement on the petitioners' freedom of occupation, which is expressed by their exclusion from the occupation as diagnosticians. The diagnoses themselves are of critical importance and of great economic value, for they determine the entire course of treatment, and most importantly - the pupil's entitlement to concessions and special conditions in his studies. We therefore cannot belittle the importance of the diagnostic process in the overall treatment of learning disabilities.

The decision is subject to the limitation provision

8. Having determined that director-general's circulars infringe upon the petitioners' freedom of occupation, we must examine whether this violation comports with the conditions prescribed by the limitation provision of section 4 of the Basic Law: Freedom of Occupation, namely, that it be by statute, or in accordance with a statute, by virtue of express authorization in that statute; that it befit the values of the State; that it is enacted for a proper purpose; and that the freedom is violated to an extent no greater than necessary. These criteria, prescribed in the limitation provision of the Basic Law, also apply to cases in which an administrative agency violates a person's basic rights (*see* HC 4541/94 *Miller v. Minister of Defense* [4] at 138; HC 5016/96 *Chorev v. Minister of Transport*).

The violation was neither by statute nor in accordance with a statute

9. Under section 4 of the Basic Law: Freedom of Occupation, a violation of the freedom of occupation is legal only if effected by a statute or in accordance with a statute, by virtue of express authorization therein. This principle was already incorporated into our legal system in the early days of the State, in HC 1/49 *Bzarno v. Minister of Police* [6]. Years passed, and the Supreme Court reiterated its holding, per President Shamgar:

> "…the starting point accepted in a free society is that a person is permitted to engage in any work or occupation, as long as no restrictions or prohibitions have been determined in respect thereof, and the latter cannot be enacted and maintained except pursuant to a specific legislative provision." (HC 337/81 *Mitrani v.*

> *Minister of Transport* (hereinafter – *Mitrani* [7]) at 353, emphasis added – D.D).

This principle was entrenched in 1994, even receiving constitutional force in section 4 of the Basic Law: Freedom of Occupation. Its basic rationale is that a norm violating the freedom of occupation, like any norm that violates a basic right, constitutes a primary arrangement. In accordance with the principles of separation of powers, the rule of law and democracy, primary arrangements must be statutorily prescribed by the legislative branch. See HC 3267/97 *Rubinstein v. Minister of Defense* [8].

> ":…violation of human rights, even when it promotes the values of the State, even when for a worthy purpose, and even when not exceeding the required degree, must be established in a law that prescribes primary arrangements and the formal delegation of legislative agency to the executive branch is insufficient. Hence, the requirement that primary legislation establish primary arrangements and that administrative regulations, or administrative provisions, should deal exclusively with arrangements for its implementation, derives from the imperative of protecting individual liberty. Indeed, in a democracy it may happen that the violation of individual rights is necessary for the realization of the general interest. Even so, the requirement is that such a violation even where justified, must be established in primary legislation and not be delegated to the executive branch itself…"

Conceivably, violating the freedom of occupation via administrative regulations, and *a fortiori* in the director general's circulars or other forms of administrative directives, would be more efficient. The reason is that, generally speaking, the legislative

process in the Knesset is more complex, protracted and expensive than the administrative process. Nonetheless, efficiency is not necessarily an advantage where there is a question involving infringement of the freedom of occupation. It is precisely the "cumbersome" nature of primary legislation and the requirement of a majority of the people's representatives in order to pass a statute which provide a kind of institutional guarantee that basic rights will not be violated except where necessary.

10. In our case, the relevant statutes – the National Education Law, 1953, and the Special Education Law, 1988 – make no mention of the diagnosis of learning disabilities or of the standards by which the Education Ministry is to recognize these and other diagnoses.

It might be argued that these matters fall within the framework of the general authorization provisions in these statutes, which establish the Minister of Education as supervisor over their implementation. See section 34 of the National Education Law and section 23 of the Special Education Law. That is to say: these provisions empower the Minister to adopt all measures necessary for the efficient implementation of the laws and the realization of their goals, and this is sufficient to satisfy the principle of administrative legality. See A. Gazal, "Violation of Basic Rights 'by statute' or 'in accordance with a statute'" [21] at 384 – 385.

We reject this claim. As a rule, a law will not be construed as violating or as granting power to violate the freedom of occupation unless it is explicitly determined therein. This was stressed by President Shamgar in HC *Mitrani*, *supra* [7] at 358 – 359:

> "authorization for this purpose, means *express* authorization, and for my part, I refer exclusively to a case in which the primary legislator states clearly and expressly

> that he authorizes the secondary legislator [the administrative agency – ed.] to enact regulations that establish prohibitions or restrictions on occupation in a particular profession.
>
> …
>
> When dealing with subjects touching upon the restriction of basic freedoms, the secondary legislator cannot, in my opinion, act in the particular realm, unless the primary legislator has clearly conferred it clear, visible and express authority to deal with the matter by way of restriction or prohibition, whichever is relevant…"

This is the rule for administrative regulations adopted by virtue of express authority to enact regulations, and the same applies, perhaps even *a fortiori,* with regard to administrative directives of the kind being challenged in this petition, which purport to have been enacted by force of the general executive authority under the law.

This is also the law governing the scope of the auxiliary powers under section 17 (b) of the Interpretation Law, 1981. The provision that "any empowerment [authorization – trans.] to do or enforce the doing of something, implies the conferment of auxiliary powers reasonably required therefore" - does not authorize an administrative agency to violate human rights". See Y. Zamir, *Administrative Authority* (vol. 1) [19] at 253.

Admittedly, there is a less stringent approach, also with some basis in our case law, under which the administrative agency is empowered to violate basic rights even without specific legislative empowerment, provided that such empowerment is required for the realization of the particular purpose of the law. See HC 953/87 *Poraz v. Tel-Aviv Jaffa Mayor,* [9]. Yet it is doubtful whether this approach is applicable to a violation of freedom of occupation, in view of the requirement of section 4 of the Basic Law: Freedom of Occupation, which provides that any violation of the freedom of occupation must be either by statute, or in accordance with a statute, by virtue of *express* authorization in that

law. Either way, even under the second approach, the director-general's circulars challenged here are illegal, inasmuch as nothing in the purposes of the relevant laws compels the Ministry of Education to withhold recognition from diagnoses of learning difficulties performed by diagnosticians.

The diagnosticians' freedom of occupation to engage in the diagnosis of learning disabilities cannot therefore not be negated exclusively on the basis of the director general's circulars, which were issued within the framework of his general executive powers as prescribed in the Education Laws. This kind of violation of the freedom of occupation, regardless of its substantive justification, must be determined by statute, and at the least requires express authorization therein.

Consistency with the values of the state, an appropriate purpose, and no greater a violation than necessary.

11. As stated, the values of democracy provide a central justification for the requirement that the violation of the freedom of occupation be by or in accordance with a statute, by virtue of express authorization therein. In a democratic state, violations of human rights must receive the approval of the nation's representatives. Hence, a violation of human rights exclusively by force of an administrative guideline is inconsistent with the values of the State of Israel, which, as stated in section 2 of the Basic Law: Freedom of Occupation, are the values of a Jewish and democratic state.

12. On the other hand, the purpose of the decision upon which the petition is based is proper. It purports to ensure that the diagnosis of learning disabilities is performed correctly, by appropriately qualified professionals. A mistaken diagnosis can harm those being diagnosed and even cause disruptions in the

educational system. Measures should be taken to prevent cases of mistaken diagnoses or prevent them from being given consideration. Should the Knesset decide to enact a law on the matter, it would certainly be entitled to regard this as one of its goals. Accordingly, for example, one could not challenge the legitimacy of a statute prohibiting unqualified persons from engaging in the diagnosis of learning disabilities.

13. Does the decision being challenged infringe upon the freedom of occupation to an extent greater than necessary? The question has a number of dimensions.

On the one hand, when gauged by the parameter of proportionality, which, for violations of freedom of occupation, is a relatively broad parameter, the tendency is not to interfere in the assessment of the competent authorities regarding the professional training required for a profession or trade, even if there are divergent views. See my comments in HC 1715/97 *Bureau of Investments Directors in Israel v. Minister of Finance* (hereinafter - *Bureau of Investments Directors* [10], at 419 – 423 and HC 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labor and Welfare* [11], especially where the administrative authority determines that the employment of those who have not received specific training is liable to cause damage.

On the other hand, the inadequacy of a particular kind of training is generally insufficient grounds to justify violating the freedom of occupation. The Margalit committee determined that the ideal training for this occupation is the study of educational psychology together with specialization in the area of learning disabilities as part of an academic masters program. Nonetheless, because of practical constraints, the respondents did not adopt its recommendation. The respondents were content with diagnoses been performed by educational psychologists, even those who

lacked the appropriate specialization. Nor have the respondents themselves even attempted to prohibit diagnosticians who are not educational psychologists from working in the diagnosis of learning abilities. Their failure to do so raises doubts as to whether they really believe - as they contend - that diagnoses performed by diagnosticians who are not educational psychologists are potentially harmful. As stated, the diagnosticians were trained and specialized under the supervision, and even with the encouragement, of the Ministry of Education. This too raises doubts as to whether there is any justification for violating the freedom of occupation, even within the relatively broad parameter of proportionality.

In any event, and whatever the result, because we invalidate the decision on the grounds that it lacks a legislative basis, we need not decide the question within this particular case. Should the issue be presented for its consideration, the Knesset will assess the different options and ensure that any legislative arrangement does not violate the freedom of occupation to an extent greater than necessary.

The decision is invalid because no transitional provisions were enacted.

14. The decision challenged in the petition is also invalid because it took effect immediately, with no transitional provisions.

Transitional provisions are necessary to protect the interest of reliance, which is a legitimate interest of the individual, the protection of which forms the basis of a number of rules in constitutional and administrative law. See D. Barak-Erez "Protection of Reliance in Administrative Law," [22]. Administrative authorities have an obligation to protect reliance, and to a certain extent, anticipation as well, and to establish transitional provisions where reasonably required for their protection; this obligation is grounded, *inter alia*, in the rules of

fairness, estoppel, reasonability and proportionality. See HC 2832/96 *Banai v. National Council of Advocates* (hereinafter – *Banai* [12]) at 594. Where a governmental norm violates the freedom of occupation (or one of the rights established in the Basic Law: Human Dignity and Liberty), the obligation to enact transitional provisions is particularly important, in order to meet the requirement of proportionality. Justice Zamir stressed this point in the *Banai* case, in which we granted a petition challenging a decision that violated the freedom of occupation without enacting transitional provisions. Justice Zamir wrote:

> "The immediate commencement (of the decision), considering the need and its expected result, constitutes a violation in excess of what is necessary. This is especially true when the violation is upon the freedom of occupation, because the Basic Law: Freedom of Occupation (in section 4) bars it from being violated, unless, *inter alia*, the harm is to no greater extent than necessary.

The obligation to refrain from violating the freedom of occupation without enacting appropriate transitional provisions is therefore a constitutional obligation which is binding upon the Knesset itself in its adoption of laws. Indeed, to date there has been just one case in which this Court invalidated a legislative arrangement for violating the Basic Law: Freedom of Occupation, on the basis of the inadequacy of its transitional provisions, which violated the freedom of occupation to a greater extent than necessary. See HC *Bureau of Investments Directors*[10].

15. In the case before us, the respondents argued that, with respect to the petitioners, there was no need for transitional provisions, because there was no intention to make their engagement as diagnosticians dependent upon conditions to which

they would need to adjust; the intention was rather to deprive them altogether of the opportunity to work in the field, vis a vis the Ministry of Education.

The Court rejects this claim.

There are a number of reasons for enacting transitional provisions, when a new normative arrangement takes effect. They may also find expression in a variety of forms, depending on the specific circumstances of each particular arrangement. See *Banai* [12] at 594. This is true of transitional provisions regulating an arrangement restricting work in a particular occupation.

Indeed, transitional provisions may be enacting for those currently working in a particular occupation, granting them time to adapt and prepare to meet the requirements established by the new normative arrangement. In those cases, the new arrangement generally takes effect only at the end of a specific period, or it is applied to those already working in a particular occupation only at the end of a specified period, during which they can adjust to the new arrangement. See e.g. Land Brokers Law, 1996, section 20 (a):

> "…a citizen or resident of Israel who immediately prior to the acceptance of this Law dealt in land brokerage, may continue to deal in land brokerage – even without a license – for two additional years following the enactment of this Law".

See also section 21 of the law which states:

> "This Law shall come into force six months after the date of its publication".

However, transitional provisions may exempt certain people altogether from the the provisions of the new normative arrangement, rather than just grant them an adjustment period.

Provisions of this kind are usually prescribed for people who have worked in a particular occupation for many years and gained extensive experience; as a result, either there is no need to subject them to the new qualifying conditions or doing so would be unjust. For example, when a statute barred drafters of certain kinds of requests who did not hold a lawyer's license from engaging in certain occupations, it included a transitional provision. The provision held that a person who had been continuously engaged in drafting requests beginning prior to 1949 and until the adoption of the Bar Association Law 1961 could continue doing so with the approval of the Minister of Justice, even without a license to practice law. See section 112 of the Bar Association Law. Similarly, when persons without an academic degree in dentistry were excluded from the occupation of dentistry, a transitional provision was enacted which, *inter alia*, permitted persons above the age of 35 to continue working in dentistry without academic qualification, provided that dentistry had been their main occupation for at least fifteen years, See section 1 of Dentists Ordinance (Amendment), 1951.

A similar provision appears in section 20 (b) of the Land Brokers Law, 1996, which states:

> "Where a person is over the age of 60, or has a complete academic education and has proven to the Registrar's satisfaction that he was engaged in land brokering for a period of three years prior to the commencement date of this Law, the Registrar may exempt him from the examination."

Transition provisions completely exempting certain persons from a normative arrangement regulating a particular occupation sometimes also apply to persons who relied upon the previous qualifying conditions for the occupation and qualified themselves accordingly, sometimes devoting extensive resources to that purpose. For example, section 7 of the Dentists Ordinance (Amendment) (No.2), 1992 states that the previous provisions of the Dentists Ordinance (New Version), 1979 concerning professional examinations and granting of license "will continue to apply to a person who on the commencement date of this Law was studying in a dentistry course." This Court ruled in a High Court case, *Institution for Training of Rabbinical Advocates* [1], that the new conditions for recognizing an institution for training rabbinical advocates, which were applied without transitional provisions for those currently studying, were unreasonable. Similarly, the Court ruled that amendments in the rules governing the recognition of comprehensive grades awarded in preparatory courses for medical specialization would not apply to those who had already participated in the courses. *See* comments of Justice Tova Strasbourg-Cohen in HC 3930/94 *Gizmavi v.Minister of Health* [13] at 789:

> "The desire to maintain an appropriate academic level motivates all experts responsible for the subject to establish criteria for success in examinations, and such desire is understandable and appropriate. But this goal does not relieve the authorities from their obligation to adopt suitable and appropriate measures to avoid violating individual rights or limiting the options of medical interns without appropriate advance notice".

In another case in which this Court adjudicated the issue of the immediate effect of amendments to the conditions regulating qualifying examinations for lawyers, it ruled:

> "Under the circumstances, the goal of maintaining the standards of the profession did not justify applying the new rules immediately … the immediate effective date of the rules, considering the justification and the anticipated result, constitutes a violation greater than is necessary" (*Banai, supra* [12] at 603).

Furthermore, sometimes, even when it is not possible to allow those not complying with new conditions to continue permanently in their occupations, there must still be a period of adjustment to enable them to adjust to the changes or to find another livelihood.

16. And yet, according to the response they filed to the petition, the respondents did not so much as consider the question of transitional provisions. This omission *per se* justifies invalidating the decision on grounds of failure to consider relevant considerations (*see* FHC 3299/93 *Vixenblaum v.Minister of Defense* [14]).

In any case, the total absence of any transitional provisions in the director-general's circulars demonstrates a violation of the freedom of occupation beyond the extent necessary. I am not convinced that the balance between the violation of the petitioners' rights and the need to regulate the area of diagnoses justifies applying the new normative arrangement immediately. As stated, the petitioners have worked in diagnosis for years, and no persuasive argument was given for the necessity of immediately discontinuing their performance of diagnoses. The respondents' claim that the petitioners must immediately stop performing diagnoses, in view of the potential damage to pupils diagnosed in a manner that they consider unprofessional, is unfounded. As stated, the persons concerned were trained in diagnosis by the Ministry of Education itself, and they engaged in the practice for many years. No evidence has been submitted showing that diagnoses performed

by them have thus far caused any damage. As stated above, apparently the respondents themselves do not ascribe tremendous weight to the claim of damage, because they did not attempt to prevent the diagnosticians continuing in their occupations. Furthermore, even if there was any fear of damage, the transitional provisions by definition strike a balance between the danger of potential damage and the other pertinent considerations, and they do so even for occupations where the potential damage is far more serious. See, for example, the above-noted transitional provisions regarding medicine, dentistry and law.

17. I therefore propose that the petition be granted and that the director-general's circulars at the heart of the petition be annulled.

The respondents will pay the petitioners' expenses in the sum of NIS 30,000.

President A. Barak

I concur with the judgment of my colleague Justice Dorner. I wish to add a few comments regarding the scope of the freedom of occupation.

1. The key question in the petition before us is: does the provision in the circular issued by the director-general of the Ministry of Education, under which the Ministry will only recognize the diagnoses of learning disabilities performed by an expert educational psychologist, infringe upon the freedom of occupation of those engaged in diagnosing learning disabilities? Should the answer be yes, then that provision is valid only if it satisfies the requirements of the limitation provision (section 4 of the Basic Law: Freedom of Occupation) and of administrative law. If the answer is

no, then the director-general's directive does not raise any constitutional question but must still comply with the requirements of administrative law. These two tests (constitutional law and administrative law) mostly overlap. This is certainly true of an administrative provision which is not part of primary legislation. The case before us is such a case. Both the constitutional analysis (under the limitation provision) and the administrative law test require that a norm which is not part of primary legislation but which violates the freedom of occupation be enacted by virtue of express authorization in primary legislation. Indeed, this is the stipulation of the limitation provision itself ("by virtue of express authorization therein" in section 4 of the Basic Law: Freedom of Occupation). This is also dictated by general principles of administrative law (*see* HC 337/81, *supra* [7] at 358, holding that the freedom of occupation may be violated only if "the primary legislator clearly and expressly proclaims that he has authorized the administrative authority to enact regulations that establish prohibitions or restrictions on engaging in any particular profession" (Deputy President, Shamgar J)).

2. Does the provision in the director general's circular violate the freedom of expression of those engaged in the diagnosis of learning disabilities? The answer would seem to be no, for two reasons. *First*, freedom of occupation is not freedom of employment. A diagnostician of learning disabilities is not entitled to ask the education system to employ diagnosticians of learning disabilities. Conceivably, general principles of administrative law, such as the requirement of reasonableness, may compel the employment of diagnosticians of learning disabilities. Even so, this kind of obligation to employ cannot be derived from the diagnostician's right to freedom of occupation. Freedom of occupation is the individual's freedom to be engaged (or not be engaged) in an occupation which he regards as appropriate. In

essence it is a "defensive" right, a right against governmental infringement. Freedom of occupation does not, as a rule, confer an "active" right which compels the government to act (for this distinction, *see* Barak, *supra* [18] at 597). Nevertheless, that kind of "active" right may stem from other freedoms granted to the individual, for example, human dignity ("every person is entitled to protection of his life, body and dignity", section 4 of the Basic Law: Human Dignity and Liberty). In fact, freedom of occupation is a Hofeldian freedom, which only materializes when violated and which then creates a "duty" (HC 3872/93 *Mitral Ltd. v. Prime Minister and the Minister of Religion* [15] at 514; HC 1452/93 *Igloo Contracting Company for Building Installation and Development v. Minister of Industry and Trade* [16] at 614). Even so, situations arise in which the freedom of occupation becomes the right to an occupation. For example, this would be the case when the state is the sole venue for a particular occupation, and refusal by the state to employ would effectively mean barring the occupation itself. Under those circumstances, when the state functions as a monopoly, the freedom of occupation should be translated into the right to occupation. Further examination of this point is beyond the scope of the case before us, since it is not the state (Ministry of Education) which employs those engaged in the diagnosis of learning disabilities but rather the parents themselves.

3. *Second*, freedom of occupation is violated if conditions (subjective or objective) are established for entering an occupation, profession or craft; or if conditions are established which regulate the freedom to engage in the occupation, profession or occupation. Accordingly, a determination by the director-general that only an expert educational psychologist may diagnose learning disabilities would certainly violate the freedom of occupation of the diagnosticians of learning disabilities (who are not educational psychologists). This is not the case before us. The director-

general's circular does not prescribe requirements for engaging in the diagnosis of learning disabilities. Diagnosticians of learning disabilities are permitted to pursue their occupations even if they are not educational psychologists. The Ministry of Education limited itself to saying that it would not recognize the results of their diagnoses.

4. But what is the rule where a governmental decision, as a practical matter, affects a person's ability to engage in his occupation with respect to others? As we noted, the extreme example of this is when the State enjoys monopoly status in the particular occupation. But what if the State is not the employer, yet its decisions, as a matter of fact, affect the possibility of actualizing the freedom of occupation? It seems to me that, in principle, the freedom of occupation can be violated not just directly (for example, prohibiting a person from working as a lawyer or doctor unless he or she meets certain conditions). It can also be violated indirectly, where a governmental decision indirectly impairs the freedom of occupation in practice. A person's freedom of occupation is indirectly violated where a government's decision affects the willingness of individuals to enter into a contractual engagement with a certain person. A person's freedom of occupation is violated where the government grants a subsidy to his competitor (see HC 1703/92 *K.A.L. Consignment Airways v. Prime Minister* [12]). A decision that violates the freedom of competition violates the freedom of occupation (see HC 726/94 at 471). Furthermore, in that case, the decision was not intended to infringe upon the freedom of occupation. Its aim was different (e.g., to restrict competition in a certain realm or grant subsidies to another realm). Even so, the decision may have a consequence that violates the freedom of occupation. Indeed, freedom of occupation is the freedom of an individual to express his or her personality and make his or her contribution to society by investing efforts in that

occupation, work or vocation. This freedom is violated if arrangements (normative or physical) directly or indirectly prevent him or her from acting according to his or her desire and ability.

5. The director-general's circular does not directly restrict the freedom of occupation of the diagnosticians of learning disabilities. Nevertheless, it does restrict their freedom of occupation in an indirect manner. The restriction is expressed by the fact that they are, as a matter of fact, excluded from a significant portion of their occupation – contracting with parents to diagnose the learning disabilities of their children. In a law-abiding state which honors human rights, a violation of that nature cannot be permitted by way of a director-general's circular, absent a basis in primary legislation or by force of an express authorization therein. As my colleague Justice Dorner showed, such authorization does not exist. Accordingly, there is no choice but to rule that the directive of the director-general was illegal and thus invalid. To be precise: had there been a legislative act which authorized violating the freedom of occupation, it would be necessary to examine whether the violation was for a proper purpose and whether it was justified. We did not conduct these examinations because the director-general's circular did not pass the test of acting by force of legislation or authorization therein.

For these reasons I concur with the opinion of my colleague, Justice Dorner.

Justice D. Beinisch

I concur with the judgment of my colleague, Justice Dorner, and with the President's comments regarding the scope of the freedom of occupation.

I will only add that, in my view, it is doubtful that the director general's circular absolutely excludes the petitioners from the occupation of diagnosis of learning disabilities.

I am prepared to assume that the diagnosticians of learning disabilities still enjoy significant occupational range of freedom, even in light of the director-general's circular. This assumption, however, does not resolve the question of whether their freedom of occupation was illegally abridged.

I accept the President's observation that even an indirect violation of the freedom of occupation, expressed by the abridgment of their ability to actualize the freedom of occupation, is nonetheless invalid unless it is based in a statute or expressly authorized therein.

Even so, and without taking a stand regarding the nature and the scope of the protected right to freedom of occupation, it could be argued that not every administrative act which may affect a person's occupation in fact violates the freedom of occupation in the constitutional sense.

Given the circumstances of the petition before us, I am convinced that the harm caused to the diagnosticians, albeit indirect, causes substantial damage to their ability to engage in their profession. The damage is the restriction of the need for professional services in an area that was open to them prior to director-general's decision. As such, the restriction cannot remain intact absent express statutory authorization.

In any event, I will add that even if the violation does not relate to exclusion from the profession as such or to the possibility of being employed in the profession, the circular should be invalidated for the additional reason which my colleague cites in her opinion.

An act by an administrative agency may affect the occupations of those who have attained professional standing. If they had a substantial expectation that their standing would be maintained, based on a representation made by the administrative agency, any act by the administrative agency which affects such standing must take into account the reliance interest and legitimate expectations of those it harms.

Prior to the issuance of the circular, the diagnosticians worked in diagnosing learning disabilities for the purposes of recognition by the Ministry of Education. No transitional provision was enacted regarding the continuation of their work. The absence of such provision is inconsistent with the standards of reasonability and fairness binding upon any administrative agency.

I therefore concur that the petition should be granted.

Decided in accordance with the judgment of Justice Dorner

September 2, 1999