H.C.J 144/50

SHEIB

v.

MINISTER OF DEFENCE;

DIRECTOR OF DEPARTMENT OF EDUCATION, MINISTRY OF EDUCATION AND CULTURE; AND

ASHER COHEN, PRINCIPAL OF THE REALI MONTEFIORE SCHOOL

In the Supreme Court sitting as the High Court of Justice
[February 8, 1951]
Before: Olshan J., Cheshin J. and Witkon J.

Contract - Employment of teacher in private school - Circular by Education Department to principals of schools - Employment made conditional upon consent of Inspector of Secondary Schools - Unauthorised interference by Department of Education in internal affairs of teaching profession – Mandamus - Powers of Competent Authority - Right to receive *advice - Competent Authority must itself make final decision.*

A teacher, Dr. Sheib, applied to the Principal of the Reali Montefiore School, Haifa, for employment as a teacher and was accepted subject to confirmation by the Department of Education in the Ministry of Education and Culture.

Pursuant to a general request contained in a circular sent to the principals of all classes of schools by the Director of the Department of Education, that teachers should not be employed save with the consent of the Inspector of Secondary Schools, the acceptance of Dr. Sheib as a teacher had been made conditional by the Principal upon such consent being obtained. Dr. Sheib in due course received a letter from the Principal according to which the Inspector of the Department of Education had written to him that "The Director of the Department of Education has requested me to inform you that the Ministry of Defence objects to the appointment of Dr. Israel Sheib as a teacher." Enquiries by Dr. Sheib elicited that the Principal, acting in accordance with the circular, had approached the Ministry of Education which in turn had consulted the Ministry of Defence, and that that Ministry had objected to his appointment as a teacher because he had

urged the use of arms against the Defence Army of Israel and the Government of Israel. There was no evidence that the Director of Education had applied his own mind to the matter.

Held, (Witkon J. dissenting) that the order nisi should be made absolute. Per Cheshin J. (a) There was nothing to prevent the Director from seeking advice on questions relating to his Ministry from other Ministries and officials, but he was neither directed nor entitled to carry out the will of others in matters in which he was the final arbiter.

In this case, however, the Director - even assuming that he was authorised by law to object to the employment of Dr. Sheib - had not applied his own mind to the question but had acted solely on the direction of the Ministry of Defence which itself had no authority in the matter. His decision, therefore, was not properly given.

(b) As the Reali Montefiore School was an entirely private school the only power under which the Director could act was that contained in S. 8 (3) of the Education Ordinance[1], which authorised him in certain cases to dismiss a teacher after the holding of a judicial inquiry. In the present case no such inquiry had been held and even if, as he alleged, Dr. Sheib had begun to work in the school before the objection had been notified - which was not clear - the Director had acted without authority.

(c) Although the Director of Education had no authority to issue the circular or to object to the employment of Dr. Sheib and the Principal was therefore entitled to disregard these acts, in view of the de facto relationship between schools and the Ministry of Education, and having regard to the nature of a writ of mandamus, the court should make the order nisi absolute and set aside the notice of objection.

Per Olshan J. Even if the circular were to be regarded as a simple request, in this case it constituted an interference in the internal affairs of the teaching profession without lawful authority.

Per Witkon J. Even if an order setting aside the Inspector's opposition to the employment of Dr. Sheib as a teacher were to be made, such order would not operate as a consent the giving of which was made a condition (albeit unlawful) to the employment of Dr. Sheib. Notwithstanding, therefore, that the Director had exceeded his authority, the order nisi should be discharged.

Israel cases referred to:

(1) *H.C.* 1/49 - *Solomon Shlomo Bejerano and another v. Minister of Police and others,* (1948/49), 1 *P.E.* 121.

(2) *H.C.* 9/49 -*Yehuda Blau v. Yitzhak Gruenbaum, Minister of Interior and others,* (1948/49), 1 P. E. 225.

(3) *H.C.* 22/49 - *Michael Sab*o *v. Military Governor, Jaffa,* (1949), g *P.D.* 701.

(4) *H.C. 4*7/49 - *Matossian v. Dr. A. Bergman, District Commissioner of Jerunsalem and others,* (1950), 4 *P.D.* 199.

1) see infra p. 22.

(5) *H.C.* 108/49 - *Bouchman and Shoulyan v. Ya'acov Bergman. District Commissioner of Haifa,* (1950). 3 *P.D.* 182.

English case referred to:

(6) *R. v. Barnstaple Justices,* (1937) 4 *All E.R.* 263.

Weinshall, for the petitioner.

H. H. Cohn, Attorney-General, for the *second respondent.*

CHESHIN J. This is the return to an order nisi calling upon the second respondent - the Director of the Department of Education in the Ministry of Education and Culture - to show cause why he should not withdraw his opposition to the employment of the petitioner as a teacher in the institution conducted by the third respondent.

2. The facts disclosed in the affidavits of the petitioner and the second respondent are as follows:

The petitioner, Dr. Israel Sheib, a teacher by profession, has taught in various schools both in this country and abroad. He acquired his general education and professional qualifications in the Rabbinical Seminary of Vienna and in the Faculty of Philosophy in the University of that city. Before the outbreak of the Second World War the petitioner was a teacher in the Hebrew Teachers College of Vilna and after his immigration to Israel, in 1941, he was accepted as a teacher in the Ben-Yehuda Gymnasium in Tel Aviv. In April, 1944, he was arrested by the British Criminal Investigation Department on suspicion of underground activity, and was sent to the detention camp at Latrun. After two years, however, he managed to escape from the camp, and from then until the conclusion of the Mandate and the evacuation of the British forces from the country he continued to engage in activity in the "Lechi"[1] organization which was operating underground at that time. When the underground movements were disbanded after the establishment of the State, the petitioner desired to resume his occupation as a teacher, and he approached various educational institutions for this purpose. His efforts, however, were of no avail - a fact

1) The full name was "Fighters for the Freedom of Israel"

attributed by him to his underground activity in the past and his political opinions which stood as an obstacle in his way. The petitioner, however, did not despair but continued his efforts to obtain employment as a teacher, and during the school year, 1950/51, he managed to secure a contract with the third respondent, the Principal of the Reali Montefiore School in Tel Aviv. This contract, however, was conditional upon confirmation by the Department of Education of the Ministry of Education and Culture and it would appear that the third respondent approached the Ministry in order to receive the confirmation required. On September 17, 1950, the petitioner received a letter in the following terms from the Principal of the Montefiore School : -

> "I regret to inform you that according to a letter dated September 8, 1950, which I have received from the Department of Education, you may not be accepted as a teacher in our institution. A copy of the letter referred to is enclosed herewith."

The copy of the letter referred to from the Department of Education, reads:

> STATE OF ISRAEL
> Ministry of Education and Culture,
> Jerusalem
> Department of Education.
>
> September 8, 1950
>
> The Directorate of
> the Montefiore School,
> Tel Aviv.
>
> Dear Sir
>
> The Director of the Department of Education has requested me to inform you that the Ministry of Defence objects to the appointment of Dr. Israel Sheib as a teacher. I conveyed this information to the secretary of the school yesterday.
>
> Yours faithfully,

(Sgd.)
Dr. M. Hendel
Inspector of
Secondary Schools."

According to the version of the petitioner, this letter of the Inspector of Secondary Schools arrived two weeks after the petitioner had already started teaching at the Montefiore School, but this version is specifically denied by the second respondent. Since neither the petitioner nor the Inspector was cross-examined, I cannot decide this point, and must deal with the matter on the basis that the contract between the petitioner and the third respondent was cancelled as a result of the objection of the second respondent, before the petitioner started working at the school.

In view of this situation, the petitioner addressed a letter dated October 23, 1950 to the first respondent, the Minister of Defence, and to the Minister of Education and Culture - who was not joined as a party to these proceedings - requesting them to inform him of the reasons and grounds upon which he had been disqualified as a teacher. No reply to this letter was received from the Ministry of Education and Culture, but the Minister of Defence replied as follows:

STATE 0F ISRAEL

Jerusalem, November 25, 1950

Dr. Israel Sheib,
124, Dizengoff Street,
Tel Aviv.

Dear Sir,

Your letter of October 23, 1950.

The Ministry of Defence objected to your appointment as a teacher because in your book and your newspaper you urge the use of arms against the Defence Army of Israel and the Government of Israel in cases where this seems to you desirable.

Yours faithfully,
David Ben-Gurion
Minister of Defence."

This then is the background which led to the issue of the order nisi against the second respondent (though not against the other respondent, to whom only copies of the papers were sent by order of the court). With this background in mind, and in the light of the facts which I have already cited together with some other facts which will be mentioned later, the court must now decide upon the application of the petitioner.

3. The nature of the petitioner's complaint - as was emphasised by his counsel at the beginning of his argument - is that the petitioner is being persecuted because of his personal opinions and his political activity. I take the liberty of expressing on this occasion and from this Bench my wish and my hope which, I am sure, are shared by thousands of the citizens of this State, that it will not be long before the Knesset passes a Law imposing a strict prohibition on teachers and educators and all those who are concerned with education, in theory or in practice, from indulging openly or secretly, and whether within a school or outside school, in politics, or in any form of occupation which has a political flavour. The education of our children is a sacred task which may not be sullied by alien influences. Those who engage in politics and those who engage in education must remain within their own respective domains and one should not trespass on the field of the other. And if a teacher and educator wishes to enter the cauldron of politics, let him cast aside the teacher's robe. and engage in politics to his heart's content. But let him not enter a school again, and poison the minds of his pupils with the violence of politics and party differences. To our regret, however, no such Law has yet been placed upon the statute book of our State, so all who wish to combine teaching and politics may do so and no one can stand in their way. Since this is so, the one may not be prevented from doing what the other is permitted to do; and a teacher - or one who is preparing himself to be a teacher - is not to be disqualified merely because of his political opinions or activity.

4. It was said that no complaint can be made against the second respondent for two reasons: first, that the third respondent, the Principal of the school, and the petitioner both made the acceptance of the petitioner as a teacher in the school conditional upon the securing of the

prior confirmation of a third person - in this case the second respondent - and if that third person refuse to give the required confirmation, what recourse can the petitioner have against him? Will the court compel him to confirm the appointment just in order to give effect to the contractual relationship between the parties to the agreement - he himself being a stranger to them and they being strangers to him? It was argued in the second place that when the second respondent was asked his opinion about the petitioner, he was under no "legal duty . . . to give the Reali Montefiore School . . . a dishonest reply". The meaning of these words - which are quoted from the affidavit of the second respondent - as I understand them, is this: the second respondent had made up his mind to oppose the employment of the petitioner as a teacher. but the law imposed on him no obligation to reply to the question of the Principal of the Montefiore School as to the reasons for his objection to such employment, and since that is so the court will not order him to give such a reply contrary to his opinion and his conscience.

5. These reasons appear to be two, but are in fact only one. I, for my part, would incline to accept them as sound and decide against the petitioner had the third respondent in fact acted on his own initiative and opinion and if without any pressure from outside he had approached the second respondent and asked his opinion of the petitioner. Had this been the case I would have said that he sought good advice from the second respondent and the confirmation of a man who was an expert. The approach of the third respondent to the second respondent, however, was not a mere chance approach, nor was it made for the purpose of seeking advice - it was made in consequence of something which had happened beforehand. What had taken place was as follows: on June 13, 1950, the second respondent - as appears from his own affidavit - had addressed a circular to the directors of secondary schools in the country in which he requested them not to employ teachers in their schools without the consent of the Government Inspector of Secondary Schools. This Inspector is the assistant and principal aide of the second respondent. The legal effect of this circular, and the manner in which the third respondent was obliged or able to perform his own duties - had he wished to do so - in the light of its provisions, are questions with which we shall deal later. At this stage, and for the purpose of the twofold argument to which I have referred, it is sufficient to point out that a condition which a man lays down himself has not the same effect as a condition which he lays down upon the orders or suggestions of a higher authority. In the first case he will express his own untrammeled will, while in the

second case he will give effect to the wishes of his superiors. From this point of view, considerable interest attaches to the letter of the Inspector of Secondary Schools to the third respondent, and the third respondent's letter to the petitioner, for these two letters are apt to throw a good deal of light on the internal relationship between the schools - even private schools - and the Department of Education and those who stand at its head, as well as upon the nature of the condition laid down in the agreement between the third respondent and the petitioner. It should be noted that the Inspector does not say in his letter that the second respondent - in accordance with his own opinion or upon the advice of the Ministry of Defence - is not prepared to confirm the contract between the third respondent and the petitioner, but expresses specific and clear objection to the employment of the petitioner. The letter does not merely express an absence of a friendly attitude to the petitioner, but takes up a definitely hostile attitude. And how did the third respondent understand the attitude of the second respondent? The Principal does not write, in his letter to the petitioner, that the contract is cancelled because of non-receipt of confirmation or words to that effect, but that in accordance with the letter of the Department of Education the petitioner may not be accepted as a teacher. In short, what was designed - as has been submitted to us - to be just good advice, became opposition; the opposition became a serious prohibition; and it was this prohibition, real or assumed - which led to the suspension, or, to put it more accurately, to the non-acceptance of the petitioner as a teacher. The non-fulfillment of the contract between the petitioner and the third respondent was not, therefore, the fruit of the third respondent's free choice, but the product of compulsion which was imposed upon them by a person- a public official - upon whom depended the fulfillment or non-fulfillment of the condition referred to. It cannot be said, moreover, as was submitted before us, that this person expressed only his own opinion, and since the law imposes no duty upon him, he cannot be compelled to pervert his opinion, and the petitioner, therefore, has no recourse against him.

6. It was also submitted that the second respondent acted according to law, and that the court will therefore not interfere. The justification of his action is expressed by the second respondent in his affidavit as follows:

> "In view of the finding of the Minister of Defence and his Ministry - who are responsible for matters relating to the defence of the State - that the

> petitioner is not suitable to be a teacher, I, as the person responsible for the educational organization in the State am obliged to do everything I can to prevent the petitioner from being accepted as a teacher in the Reali Montefiore School or in any other school in the State."

From this language we draw conclusions : first, that it was the Minister of Defence and his Ministry who disqualified the petitioner from being a teacher in the schools of the country; secondly, that the second respondent regarded the decision of disqualification referred to as a decision binding upon him. It seems to me, however, with all respect to the second respondent, that even if we assume that the matter in question falls within the scope of his authority - a question to which we shall return later - we are confronted here with a confusion of issues and an overstepping of jurisdiction on the part of certain government authorities.

7. In my opinion there was no reason for the petitioner to concern himself with the first respondent and join him as a party to these proceedings and the second respondent's reliance upon this powerful support in order to justify his actions will not avail him. The respect due to the Minister of Defence is not open to question and there is no one in the State who underestimates the onerous nature of his duties and the extent of his responsibilities. Matters of education, however, were not entrusted to him. nor do they fall within the limits of his authority. It was to deal with such matters that the second respondent was appointed, and the duty of dealing with them has been imposed upon him, and upon him alone. It is obvious that the division of the work of government between various ministries and branches requires frequent consultation between the ministries, to ensure efficiency of work and coordination of activity. From this point of view there is, of course, nothing to prevent the Director of the Department of Education, in the same way as any other public official in the State, from seeking advice on questions relating to his ministry from other ministries and officials, so that those engaged in one field of activity way learn from those acting in another field. He is not directed, however, nor is he entitled, to carry out the will of others in matters that fall within the jurisdiction of his own ministry. In such matters he is the final arbiter, and when he reaches a decision the decision must be his own decision and not the result of an instruction which he has received from another. He is neither obliged nor permitted to do an act suggested by someone else, unless he gave his

own opinion on the matter and made the suggestion his own, and then too the considerations which weighed with him must he considerations of education and not extraneous considerations. In this case it is admitted by the second respondent that it was not he but the Minister of Defence who decided that the petitioner is not suitable to be a teacher in Israel. Had he said. for example, that on the basis of the decision of the Minister of Defence he, the second respondent, is also afraid that the petitioner may incite and mislead the children in Israel; or that the fact that the Minister of Defence regards the petitioner as dangerous from the point of view of the security of the State disqualifies the petitioner in the principal's own eyes, too, from being a teacher; had the respondent made this the ground of his objection to the appointment of the petitioner as a teacher. J would not have found any fault with his action, for then I should have said that his opposition was based upon educational considerations. But the second respondent neither said this nor acted in this way. He carried out the will of the first respondent; and in the same way as the first respondent was not competent to give the decision, the second respondent was not entitled to give effect to it.

8. It has been submitted to us, however, that considerations of security are to be regarded differently, that the petitioner is a dangerous person, that he speaks against the Israel army and undermines the security of the State. The reply to this submission would seem to be that such a man is not only unsuitable to act as a teacher, but should be kept out of an office, a shop, a workshop, kept off the streets and not allowed to mix even with adult persons. Not only is it permissible to take away his livelihood, but also to deprive him of his personal liberty. Anyone who preaches today that one should take up arms against the Defence Army of Israel - the most precious possession which has come into our hands since the establishment of the State - or should take up arms against the Government of Israel, robs the soul of the people and must pay the penalty for his actions and his deeds. Our State, however, is based upon the rule of law and not upon the rule of individuals. And if the censorship has passed over in silence the publication of the petitioner and has not prevented him - strange as it may seem - from preaching rebellion, law still rules in Israel. The authorities will take such action against the petitioner as the law allows and he will then, at least, enjoy the right given to every citizen in the State, the basic right of a man to defend himself before the courts. If the opinions of a citizen are rejected, that is not to say that his life is at the free disposal of anyone; the ways of earning a living are not closed before him,

nor is his life to be embittered by administrative action. This court has already dealt with this subject in *Bejerano v. Minister of Police,* (1) :

> "When a person petitions this court for an order directing a public official to do a particular act . . . the petitioner must show that there is some law according to which the public official is under a duty to do that which is demanded of him. This principle will not, in our opinion, apply where a person seeks - not the performance of a particular act, but the restraining of the performance of an act which injures him, that is to say, a negative order. In such a case it is for the petitioner to show that he has the right to do that which he seeks to do, and, as against this, it is for the public official to prove that his action, intended to prevent the exercise of that right, is lawful. In other words, where a petitioner complains that a public official prevents him from doing a particular act, it is not for the petitioner to prove the existence of a law which Imposes upon the public official the duty of permitting him to do the act. On the contrary, it is for the public official to prove that there is some justification for the prohibition which he seeks to impose." (ibid. page 124, (1).)

And in *Blau v. Minister of Interior,* (2) the court following *Bejerano's* case, (1), repeated the same principle in these words: -

> "Where the petitioner asks this court to issue a writ of mandamus against the authorities, he will not succeed in his application unless he shows that the law imposes upon the authorities a duty to do what is demanded of them. If, however, the authorities do an act which injures the rights of the individual, it is for the authorities to show that the law gives them the right to do that act." (see *Bejerano's* case, (1) at page 228).

9. It should be pointed out at this stage that in spite of the clear intimation by the Minister of Defence of the reason for his objection to the petitioner, that is to say, his unlawful

activities, and in spite of the indication of the sources in which the language objected to, which was used by the petitioner, is to be found, no article or copy of an article written by the petitioner, reflecting these inciting opinions, has been brought before us, either in the affidavit of the second respondent or as an annexure thereto. I do not mean to say that this fact enables us to review the conclusion of the Minister of Defence. We are not competent to do so. As is well known, however, a writ of mandamus is designed to serve as a means of enforcing compliance with the law and not as an instrument to help in its evasion. It is for this reason that a writ of mandamus will not issue where it appears that it will lead to unlawful acts, or that it is contrary to the public interest. Similarly no relief is granted to a person who approaches this court with unclean hands. If, therefore, any proof at all had been produced before us that the petitioner by his words and articles had in fact broken the law, we should have said that it was these acts on his part which had caused the difficulties in which he has now found himself, and that it is no duty of ours to give him assistance. This, however, as I have said, has not been proved or even argued. It is true that counsel for the second respondent, in the course of his argument, did say that the petitioner was at one time a member of "Lechi"-a fact admitted by the petitioner, as I have said, in his fact words to this court - and submitted that it is a legal presumption that the petitioner has continued to remain a member of "Lechi" so long as it has not been proved to the contrary. These matters, however, are not relevant to the argument, for neither the Minister of Defence in his letter to the petitioner nor the second respondent in his affidavit. based their objections to the petitioner on his past membership of the "Lechi" organization. It is too late at this stage to put forward this submission.

10. It is appropriate at this point to refer to section 8 of the Education Ordinance, which was enacted to meet a situation similar - though not in every particular - to the situation with which we now have to deal.

According to that section the Director may require the dismissal of any teacher, whether in a public or private school, or in an assisted or unassisted school. Before he may do so, however, a judicial enquiry must be conducted by a judge or magistrate appointed for the purpose and it must first be shown, to the satisfaction of the Minister of Education, that the teacher imparted teaching of a seditious or disloyal character. It is true that this section only applies to a teacher who has already entered upon his duties. And we are dealing with

the case of a person who has not yet started working as a teacher. We must also not disregard the important first, however, that the institution of the third respondent is not a government institution, but an entirely private one. The Government is perhaps entitled to employ in State institutions only those persons of whom it approves and may refuse to employ persons whose opinions do not conform with its own views. I say "perhaps" since this question, in its concrete form, does not arise here. The second respondent admits that for the reason stated above - and correctly so - s. 8(3) has not yet been applied to the petitioner, and the question that now arises is as follows: Whence did the second respondent derive the authority to send to the principals of school a circular of the nature of the one sent to the third respondent? This brings us to a subject of which some indication has been given in my previous remarks.

11. The second respondent acts under the provisions of the Education Ordinance and the Education Rules, in which the rights and powers of the Director of Education in his relationship with schools, principals, teachers and local authorities are set out in detail. There is, however, no mention in the Ordinance or Rules referred to of any right or power to demand of the principals of schools, government or private, not to employ a teacher in their schools save with his prior consent. It seems to me, therefore, that from this point of view the second respondent exceeded his authority, and that the circular which he sent to the principals of schools as well as the notice of his objection to the employment of the petitioner which followed that circular, have no validity. They constitute an interference - albeit with the good, though mistaken, intention of fulfilling a public duty - with the right of citizens to enter freely into contracts of service. This interference is legally objectionable for two reasons. In the first place, it creates the impression that the Minister of Defence, and not the second respondent, is the final arbiter in the question of who is and who is not suitable to be a teacher - in any event it would appear that that was the case here. In the second place, the petitioner was administratively disqualified from being a teacher without having been given the opportunity of appearing before a tribunal or public board in order to defend himself against his accusers. (No board exists because the legislature did not think of establishing one). A procedure such as this is not permissible.

12. Now there arises the important question whether this court is obliged, or even competent, to direct the second respondent to cancel the notification of objection which he

sent to the third respondent in regard to the petitioner. J must confess that at first I found great difficulty in deciding this question and found myself confronted with what appeared to be a twofold difficulty. In the first place, so I thought, what is the necessity of formally; canceling the notice of objection? This notice, so it would seem. is in any case void since it was sent without authority. The third respondent, therefore, may regard it as a worthless piece of paper ; and if he does not wish to, will not be bound to act in accordance with its terms. In the second place, since the law did not authorise the second respondent to send notices of objection such as these, it is obvious that it did not concern itself with this problem at the outset and imposed no duty upon the second respondent, nor conferred upon him the right, to cancel such notices. Will this court assume authority in these circumstances to direct the second respondent to cancel the notice of objection which he issued in this case? In doing so, under what principle would it be acting ?

13. I said that I found difficulty in deciding at first, but I have eventually reached the conclusion that it would be proper in a case of this kind for the court to act and issue the writ of mandamus. It is true that principals of schools were fully entitled to regard the circular - and the third respondent was also entitled to regard the notice of objection - of the second respondent as invalid and were entitled not to act in accordance therewith. Had they done so there could have been no complaint against them, and it is unnecessary to add that they would not have been penalised for failure to obey instructions of the competent authority. We must not, however, disregard the internal relationship between the second respondent and the principals of schools. He is the Director of the Department of Education of the Government, and they are the principals of educational institutions in the State. There are many bonds which bind the schools to the Ministry of Education. The schools - even private and non-subsidised - are dependent upon the goodwill and often also upon the help of officials of the Ministry of Education in matters of guidance, advice, recommendations, and similar matters. I do not mean to say that if another public official, who was a complete stranger to matters of education, expressed opinions and gave decisions in maters of education, this court could not interfere with his conclusions and decisions. This question does not arise before us in these proceedings and does not demand an immediate solution. In the present case, however, it is beyond all doubt that because of the relationship between schools and the Minister of Education the second respondent exercises indirectly a most powerful influence over principals of schools, even in regard to matters which are beyond

the scope of his limited authority, and that such directors will not always see their way clear to disregard such instructions even if they are entitled to do so. A very real piece of evidence which shows that this is so is the fact that, in the case before us, the third respondent actually applied to the second respondent for instructions, although he was under no obligation to do so. In these circumstances, in order to avoid the doing of injustice and with the object of ensuring that the bounds of the authority of public servants are adhered to, this court will certainly express its opinion in the matter.

14. The answer to the second difficulty, namely, how this court can order a public officer to do something which he is under no obligation to do, may he gathered from the very nature of a writ of mandamus. There are three elements in such a writ, namely:

(1) a clear legal right in the petitioner to receive the relief which he claims;
(2) a public duty upon the officer to do what the petitioner asks the court to compel him to do;
(3) the absence of an alternative remedy.

The petitioner in the case before us, as has been said in his affidavit which has not been denied by the second respondent, has fulfilled the requirements of the Education Ordinance which qualify a person to follow the occupation of a teacher. In the light of what was said in *Bejerano v. Minister of Police,* (1), the petitioner has acquired a legal right to engage in the occupation of a teacher and to insist that public officers will not interfere with him in earning his living by carrying on his profession. The second respondent acted under the completely mistaken impression that he had the right to direct the third respondent at the outset not to employ a teacher otherwise than with his consent. and to object to the candidature of the petitioner thereafter. These acts, which were done without authority, are not only calculated to prejudice a particular class of citizens but actually do prejudice one of them, namely, the petitioner. In the circumstances such as exist in this case, a public officer has failed in his public duty and the officer must make good the harm done by setting aside the act which he did without authority. The mandamus to he issued by this court will direct the second respondent to fulfil this public duty towards the petitioner. So far as the third element referred to is concerned, it is not disputed that the petitioner has no alternative

remedy. In my opinion it would be appropriate in these circumstances that a writ of mandamus be issued.

15. The court cannot of course direct the second respondent to cancel the circular which he sent to principals of schools, including the third respondent, since no prayer for such relief has been included in the application of the petitioner. The reason for this is that the petitioner had no knowledge of this circular when he filed his application. It only came to his knowledge from the affidavit of the second respondent. The notice of objection, being as it is a natural and necessary consequence of the circular, cannot remain in force, and the writ of mandamus will apply to it alone. It is clear that the setting aside of the notice of objection of the second respondent does not mean the giving of consent to the employment of the petitioner as a teacher in the educational institution of the third respondent. The setting aside of the notice of objection is based on the fact that the issue of that notice was from its inception an act which fell beyond the authority of the second respondent. That is all, and no more.

OLSHAN J. It is my opinion that were we to refuse to accede to the application of the petitioner, we would be a party to turning the principle of "the rule of law", which prevails in our State, into a sham. The fundamental meaning of that principle is that if there are to be restrictions on the liberty of the individual it is because such restrictions are essential for preserving the real liberty of the subject or the public interest. These restrictions must be laid down by the law, that is to say, by society which reflects its opinion in the laws which are enacted by the parliament which represents it, and not by the executive authority, whose duty it is merely to carry into effect these restrictions, in accordance with such laws.

The rule inherent in this principle shows that the rights of the individual may not be restricted or removed by an official or Minister just because he thinks, perhaps correctly, that to do so will be of benefit to the State. It is for him to satisfy the legislature that such restrictions are essential or necessary, and it is only after the legislature has authorised them that the official or Minister may carry them into effect.

It is true that in our time, with the increased intervention of the State in the life of the individual, the task of the legislature has become more difficult and complex. It is not

always easy to foresee every circumstance which may arise and to meet it by a reference to it in the statute. A tendency therefore exists to confer powers of subordinate legislation, in such statutes, upon the administrative authority, or of leaving the decision in each case to the discretion of the administrative authority in the light of the general principle laid down by the legislature in the statute. When the legislature leaves the decision as to the imposition of restrictions to the discretion of the executive authority, it follows that the legislature, while laying down the general principle, does not concern itself with the detailed circumstances in which the restrictions should be imposed, but leaves the determination of those circumstances to the discretion of the executive authority. This tendency, which is increasing, presents a serious obstacle to the application of the principle of the "rule of law". It does not, however, destroy it completely, for the transfer of such power in a particular statute to the executive authority still does not enable that authority to act as it pleases, even in regard to areas not covered by the statute. In other words the executive authority is not free to impose restrictions just because it regards them as desirable, unless the statute which deals with the particular matter gives it the power to impose such restrictions if it deems them necessary. If a power such as this is not included in a particular statute, it is for the executive authority to satisfy and induce the legislature to confer such power upon it. For so long, however, as such power is not accorded to the authority, it may not assume such power itself. Were the position otherwise, the whole principle of the "rule of law", one of the guarantees of democratic rule in the State, would be turned into a meaningless concept, and all the statutes which deal, for example, with the regulation of the employment of citizens in various professions, would become of secondary importance.

Let us take as an example the Medical Practitioners' Ordinance. That Ordinance lays down a number of conditions for the issue to a person of a license to practice the profession of medicine. If the Minister of Health, without being authorised by the Ordinance so to do, were to instruct private hospitals not to employ doctors without his prior consent, he would thereby, in fact, add a further condition to those laid down in the Ordinance for the employment of doctors in their profession - a condition not laid down by the legislature. The citizen, therefore, although he fulfilled the requirements of the law, would find himself dependent upon the favour of the Minister.

Returning to the matter before us, it is not disputed that the petitioner is qualified to engage in teaching in accordance with the Education Ordinance; and there is no provision in that Ordinance by which his right to act as a teacher in a private school is made conditional upon the confirmation or consent of the Minister of Education or of the second respondent. This case is not concerned with a government school, or a school subsidised by the Government, in regard to which different considerations may perhaps apply. Nothing in the Ordinance suggests that there is a right in the Minister of Education or any other Minister to impose a restriction such as this, s. 8(3) of the Education Ordinance is the only section which confers the right upon the Minister of Education to intervene in the question of employment of a teacher by an educational institution and to demand his dismissal; and even this section applies only if such teacher has been proved, as a result of a judicial equiry, to be guilty of a criminal act or to have been engaged in incitement against the State.

The question before us is not whether it would be a good or a bad thing if the petitioner were to be a teacher at the Montefiore School in Tel Aviv. The complaint of the petitioner is in fact confined to a prayer for an order directing the second respondent to cancel his objection to the employment by the third respondent of the petitioner as a teacher. Counsel for the petitioner rightly urged upon us that, before he need deal with the prayer, it was incumbent upon the Attorney-General to show on the basis of which law, or by what legal authority, a restriction has been imposed upon him, as upon all other teachers, preventing his appointment as a teacher in any institution, even a private institution, save with the consent of the Minister of Education. The learned Attorney-General was unable to direct our attention to any such law or authority.

It is very possible that if a person "urges the use of arms against the Defence Army of Israel and against the Government of Israel" he should be disqualified from teaching in any school in the State. It is for the Knesset, however, to express its opinion on the matter, and should it decide that such a disqualification should be introduced, it will also direct by what method it is to be determined whether a particular person has in fact urged the use of force, and who is authorised to make such a finding.

2. It is quite possible that a person who approaches us with a complaint against the authorities that they have placed obstacles in his path in connection with his employment as

a teacher, will not obtain the relief which he seeks if it is shown that he urges the use of violence against the Defence Army of Israel and against the Government of Israel, because the granting of relief by this court in cases of that kind is a matter within its discretion. The only material before us, however, on this point, is the letter of the Minister of Defence to the petitioner in which he makes this charge against him, and the reaction of the petitioner is to be found in paragraph 18 of his affidavit in which he says : "more particularly as the allegations contained in annexure E are not based on fact". I am, moreover, of the opinion that it is of far greater benefit to the community that the principle of "the rule of law" should be strictly maintained in this case than that we should refuse to accede to the application of the petitioner because of the suspicion that he urges the use of violence against the army If, after all, this suspicion is well-founded, the petitioner is guilty of a criminal offence and the authorities are free to deal with him as with any other offender.

3. The learned Attorney-General attempted to present this case as one of the utmost simplicity. With the consent of the petitioner, he submitted, a condition was introduced into the contract between him and the third respondent that his acceptance as a teacher in the school would be dependent upon the consent of the Ministry of Education. Because of this condition the second respondent was requested to furnish the consent required, that is to say, to express his opinion. In reply to this request the second respondent furnished to the third respondent the opinion of the Minister of Defence that the petitioner was unsuitable to act as a teacher. Even if this should be interpreted as a refusal to give the confirmation requested, the Attorney-General submitted that it involves no unlawful act or one in excess of authority.

Were it possible to regard the contract between the petitioner and the third respondent as the starting point of this affair, I would not hesitate to recognize the correctness of the submission of the learned Attorney-General. This argument, however, overlooks the contents of paragraph 8 of the petitioner's affidavit, that is to say, that the condition referred to was introduced into the contract by the third respondent "pursuant to instructions". Some support for this allegation is to be found in paragraph 1 of the second respondent's affidavit in which it is said that in the circular which he sent to the principals of secondary schools in the country in 1950 he, the second respondent, requested them "not to employ teachers in their schools save after the receipt of the consent of the Inspector of Secondary Schools."

4. It is clear that the condition referred to was introduced into the contract because of the circular which was sent by the second respondent to the principals of schools. That this is so I conclude from what is said in paragraph 8 of the petitioner's affidavit which was not specifically denied by the second respondent, but who did not admit it because he had no knowledge of it (see paragraph c (2) of his affidavit). The second respondent did not annex to his affidavit the circular which he sent and we cannot examine the language of the "request" which is included in the circular with a view to ascertaining whether it is the language of a mere request, or an instruction which has the form of a request. For the words "you are requested" may sometimes be interpreted as "you are required". The second respondent was also not summoned for cross-examination on his affidavit.

This is important, for I would not think it possible to lay down a general principle that a Government Ministry is prohibited from addressing requests to the public or to particular institutions unless specific authority therefore exists in the law.

I have no doubt that if the meaning of the circular referred to is to instruct owners of private schools not to accept teachers without the authority of the Ministry of Education, it was issued without authority, lacks all legal validity, and is of no binding force.

Even if we regard the circular, however, as a simple request, I cannot escape the conclusion that in the particular case before us the sending of the circular constituted an interference in the internal affairs of the teaching profession, or a portion of it, without lawful authority. There is no doubt that in sending the circular the second respondent had reason to believe or to expect that the principals of schools would accede to his request. As a result, a new situation was created for the teaching profession or a portion of it. It is not sufficient that teachers possess the qualifications required according to the Education Ordinance, but there is now an additional condition - the confirmation of the Ministry of Education. Not only this, but the Ministry of Education has also failed to set up some body to which a teacher may turn and defend himself against a refusal of the Ministry to confirm his appointment as a teacher. We have not been told that the matters to be taken into account in giving the confirmation were set out in the circular. It follows that the second respondent arrogated to himself the power of preventing the appointment of teachers by his

own fiat, without any right of redress. We do not doubt the good intentions of the second respondent and that he did not issue the circular with the object of exercising authority. Such a circular, however, cannot afford authority for discriminating against a teacher or limiting his rights, in the absence of legal power to do so. Bad the condition relating to the giving of authority by the Ministry of Education been introduced on the initiative of the principal of the school, we should not have been able to interfere. Since, however, the necessity for this consent was created on the initiative of the Ministry of Education, we must decide that it was issued without authority.

5. As I have said, were I able to regard the "reply" sent to the third respondent in regard to the petitioner as an independent link and not as a consequence of the circular, I should not have been able to find a legal basis for the complaint of the petitioner in this court. In order to clarify my approach to the problem before us, I also wish to point out that had I not found that the circular was legally ineffective by reason of its having been issued without lawful authority, I am not sure that it would have been possible to set aside the letter because of its contents. It is true that had the law conferred upon the second respondent the power of disqualifying teachers at his discretion, he would have had to act according to his discretion and not on instructions of the Minister or any other person. This does not prevent him from consulting or taking the opinion of another person, and accepting that opinion so far as it appeals to him. If the matter is one which involves the question of security, I am prepared to go even further. Had it been known to the second respondent that the Minister of Defence opposes the appointment of the petitioner as a teacher for reasons of security and that the facts forming the basis of such reasons are secret in character, the second respondent might have given weight to the very fact of the opposition of the Minister of Defence, even if the reasons referred to were not clear to him.

In my opinion, however, all these problems have no relevance here, since in Day view the circular was issued without authority.

6. The prayer of the petitioner before us was for an order against the second respondent to show cause why he should not withdraw his opposition to the acceptance of the petitioner as a teacher in the institution of the third respondent.

We cannot order the second respondent to take back the letter sent to the third respondent, since this letter was sent in reply to a question of the third respondent and merely stated that the Minister of Defence opposes the appointment of the petitioner as a teacher. This fact is correct, as appears from exhibit "E" which was filed by the petitioner. We also cannot order the second respondent to "withdraw his opposition", if by withdrawing his opposition he will be taken to have assented, and this court cannot order the second respondent to give his consent to the appointment of the petitioner as a teacher by the third respondent. As far as this letter is a consequence of the circular referred to, and constitutes an objection to the employment of the petitioner by the third respondent, I think that we should follow the view of the majority in *Sabo v. Military Governor, Jaffa,* (3), and decide that the objection of the second respondent has no legal authority, and that he must therefore refrain from interfering in this matter. In this sense we should make the order nisi absolute.

WITKON J. The petitioner is a teacher by profession and has been a teacher in Israel and elsewhere. It is alleged in the petition - and is not denied by the respondent - that the petitioner came to Israel in 1941, and engaged in teaching in Tel Aviv until he was arrested by the British police in April, 1944, on suspicion of belonging to the underground movement of the Freedom Fighters of Israel. He remained in custody in Latrun for two years until he escaped and continued to work in the underground movement.

2. The petitioner alleged further in his affidavit that after the establishment of the State he decided to return to teaching and applied to a number of institutions for a post. He was confronted with difficulties the root of which - as later because evident to him - was to be found in the fact that the Department of Education refused to confirm his employment as a teacher. The petitioner communicated with the third respondent, the principal of the Reali Montefiore School in Tel Aviv, in order to secure employment for the 1951 school year, but the principal made the employment of the petitioner as a teacher conditional upon confirmation by the Department of Education. It would appear that the petitioner started working before receipt of the confirmation, bat his work was terminated on September 17, 1950, when a letter was handed to him in which the principal of the school informed him that in accordance with a letter which the principal had received from the Inspector of the Department of Education, the petitioner was not to be accepted as a teacher in the

institution. The contents of the Inspector's letter, a copy of which was attached, were as follows : "The Director of the Department of Education has requested me to inform you that the Ministry of Defence objects to the appointment of Dr. Israel Sheib as a teacher." The petitioner approached the Ministers of Defence and Education and demanded an explanation of why they had disqualified him and opposed his appointment as a teacher. He received a reply from the Minister of Defence in the following terms :- "The Ministry of Defence objected to your. appointment as a teacher because, in your book and your newspaper, you urge the use of arms against the Defence Army of Israel and the Government of Israel in cases where this seems to you desirable." This reply was annexed to the petition in which the correctness of its contents was denied, and I should point out that no evidence as to the matters stated in this reply was placed before the court either by the petitioner or the respondents. The petitioner received no reply from the Minister of Education. That respondent states in his affidavit that no letter was sent to him by the petitioner and that there was nothing, therefore, which called for a reply on his part.

3. The petitioner applied to this court for the issue of an order against the Minister of Defence and the Director of the Department of Education to appear and show cause why they should not withdraw their opposition to the acceptance of the petitioner as a teacher in the Montefiore School; and also for an order against the principal of the school that he appear and show cause why he should not allow the petitioner to return to his teaching duties. The court issued an order nisi against the Director of the Department of Education alone, and he filed an affidavit explaining his attitude. He emphasized that the Montefiore School is a private school, that he has no authority under the law in regard to the acceptance of teachers in that school, that he has no authority in regard to the dismissal of teachers save that conferred upon him by s. 8(3) of the Education Ordinance, and that no such authority was exercised by him in this case. In addition to this, the respondent disclosed in his affidavit that he had in fact approached all secondary schools (including also private schools), and had requested them not to employ teachers save with the consent of the Inspector of Secondary Schools. The relevant paragraph is as follows :-

> "(f) In a circular which I sent to the principals of secondary schools in the country on June 13, 1950, I requested them not to employ teachers in their schools, save with the consent of the Inspector of Secondary

> Schools. My intention, as the official responsible for the organization of education in the State, was to maintain an appropriate professional standard and to ensure that secondary education is suited to the requirements of the State."

The affidavit goes on to state that the respondent "is under no legal or other duty to answer the question of the Reali Montefiore School relating to the petitioner with a reply which is dishonest; and that in view of the decision of the Minister of Defence that the petitioner is unsuitable to act as a teacher, he, the Director of the Department of Education, as the one responsible for the education organization in the State, is obliged to do all in his power to prevent the petitioner from being accepted as a teacher in the school in question, or in any other school in the State.

4. The opposition of the respondent to the order sought is in fact based, therefore, upon two submissions: first, that there is no duty upon him to give his consent or confirmation to the acceptance of the petitioner as a teacher in a private school, and that he cannot, therefore, be compelled to give such consent or confirmation or to withdraw his opposition to the employment of the petitioner as a teacher; and, secondly, that if it should be said that there is a duty upon whose fulfillment this court will insist, then the respondent has discharged his duty by relying upon the decision of the Minister of Defence disqualifying the petitioner from being a teacher. As far as the first submission is concerned, we must investigate the powers of the Director of the Department of Education in regard to schools and teachers in the State.

5. The Education Ordinance draws a fundamental distinction between public and assisted schools on the one hand and private schools on the other hand. Every school (other than a government school) whether it be a public, assisted, or private school, must be registered with the Department of Education (s. 4), and wide powers are conferred upon the Government in regard to the supervision of sanitary conditions obtaining in all schools without distinction. In this regard it is provided by the Education Rules that the registration of a school shall be valid only in respect of the premises specified in the application for registration, and that if alterations are made in the premises which adversely affect these from the point of view of health, the validity of the registration will expire. A public school,

however, which - as I have said - also requires registration, shall not be registered or continue to be registered unless the conditions laid down in rule 9 of the Education Rules are fulfilled, and these are the rules which deal with the educational aspect of the institution. It is desirable to point in particular to sub-rule (h) of rule 9, in which it is specifically laid down that no person shall be appointed as a teacher who is unacceptable to the Director of Education. s. 7(1) of the Ordinance empowers the authorities to visit any school - other than a non-assisted school established or maintained by a religious association - and to demand information from the principal, in regard to the tuition of the pupils, the management of the school, and the names and qualifications of the teachers. The same power is conferred upon the Director of Education or his deputy in respect of any non-assisted school established or maintained by a religious association, but only after giving prior notice, nor may the Director or Deputy-Director demand any change in the curriculum or the internal administration of such school (s. 7(2)) From this, perhaps, it may positively be inferred that in respect of every other school, which is not a non-assisted school established or maintained by a religious association, the Director is entitled to interfere with the curriculum and internal administration. Attention must also be drawn to the proviso to s. 7(2), which provides that nothing in that subsection shall prevent the High Commissioner from exercising such supervision over any school as may be required for the maintenance of public order and good government.

6. Greater importance in the matter before us attaches to s. 8. It is provided, in sub-section 1 of that section, that no person shall act as a teacher in any school unless be has registered with the Director of Education. Sub-section 2 provides that no person may teach in a public or assisted school who does not possess a licence to teach issued to him by the Director. Rules 10 to 31 provide the method by which a person may apply for registration and for a licence as a teacher, the classes of licence and the conditions of their issue, and it must be pointed out that registration is not a matter within the discretion of the Director, whatever may be his powers in regard to the issue of a licence. These, then, are the provisions of the law relating to the acceptance of a person as a teacher in a school and we see that there is no restriction whatsoever on a person being accepted as a teacher in a private school (save that he requires to be registered - a condition which, it appears, has been fulfilled by the petitioner). There is no need for the Director to give his consent or confirmation to the acceptance of a person as a teacher in a private school, while in regard to the dismissal of

teachers, sub-section 3 of s. 8 empowers the Director to require the dismissal "of any teacher, whether in a public or assisted school or in a non-assisted school, who has been convicted of a criminal offence involving moral turpitude or who is shown to the satisfaction of the High Commissioner, after judicial enquiry . . . to have imparted teaching of a seditious, disloyal, or immoral character." The Law here lays down that the power to require dismissal exists in respect of teachers in all schools including also private schools. Similarly the power conferred upon the High Commissioner under s. 9 of the Ordinance to order the closure of a school is general in character and applies to every kind of school.

7. The practical effect of what I have said is that the Director of the Department of Education had no legal power to consent to or to oppose the acceptance of the petitioner as a teacher in the school of the third respondent. What is more, everything that was done by the Director of the Department of Education as described in paragraph (f) of his affidavit, that is to say, his approach to the principals of secondary schools not to employ teachers save with the consent of the Inspector, has no legal basis. We have seen that the Education Ordinance confers upon the authorities the power of supervision over all types of schools, and it describes how that supervision is to be exercised : the school must be registered, it is possible to impose upon the school sanitary conditions, it is permissible to demand information and it is possible under certain conditions to require the dismissal of teachers and the closure of a school. It is not, however, provided in the Ordinance that a teacher may not be accepted in a private school save with the consent of the Director of the Department of Education. The Law has not authorised the Director, either expressly or by implication, to supervise a private school in this way.

8. I do not think that every administrative act which is not provided for by law must of necessity be fundamentally invalid. As is known, there is in our day - and not only in this country - an ever-growing body of what is sometimes called "administrative quasi-law" (see Allen in his well-known work "Law and Orders", at page 155, and an article entitled "Administrative Quasi-Legislation," by Megarry in 60 L.Q.R. p. 255, and see also p. 218 ibid.). This is a body of rules which the executive authority and not the legislature lays down for itself, and according to which it acts not only in its internal arrangements, but also in its relations with the citizens. The influence of office administration which is based not on the provisions of the law but upon rules circulated by the authorities among its officials by

means of circulars, is today considerable. This is a phenomenon in the life of a modern State which many regard with trepidation. (See, inter alia, Allen, *ibid. and* also Lord Hewart in his book. "The New Despotism"). Where the legislature has empowered the executive authority to frame subsidiary legislation within defined limits, its actions should of course not be too closely scrutinised, so long as that authority does not exceed its powers. It sometimes happens, however, that such administrative rules are framed to regulate a matter upon which the legislature has expressed no opinion, a matter within a vacuum from the legal point of view. In such a case it is appropriate to enquire as to the legal validity of such rules and provisions which do not derive from the authority of the law itself. However, this is neither the place nor the time to expatiate upon this elusive problem, since even a person who is prepared to regard this development of a body of administrative rules as a healthy and natural development, and would not hasten to invalidate it as something fundamentally bad -"administrative lawlessness", as Lord Hewart has called it - even such a person will admit that such rules have no right to exist if they exceed the limits which the legislature has conferred upon the executive authority in a particular matter. It is simply a case of an excess of authority if the authority arrogates to itself powers which are wider than those which are defined by law, and this is also true where the powers, which the authority assumes, contradict those which are conferred upon it by law. That is in fact the situation in this case. The legislature introduced a distinction, and laid down that private schools are not the same as public or assisted schools insofar as the acceptance of teachers is concerned. If this be so, the second respondent was not entitled to assume a power of which he had been deprived by law, and to lay down a rule that a teacher in a private school also may not be accepted save with the confirmation of the Inspector of the Department. It is clear that the court will not approve an administrative rule which is inconsistent with the law.

9. As I have said, the respondent admitted that his action was not based upon law, and he therefore emphasised the nature of his approach to the principals of private schools, stating that he only "requested" them not to employ teachers in their schools save with the consent of the Inspector. It is not necessary to say that a "request" such as this is tantamount to an order at least in so far as the petitioner before us is concerned, because for reasons which are self-evident schools would tend to yield to a "request" of this kind, as the present case proves. It is possible that had the respondent approached the principals of schools in a form that was less compelling, and had emphasised that his request had no binding force, it would

have been difficult to find any fault with his approach. It is clear to me, however, from the evidence of the respondent in his affidavit, that he in fact did not employ language which gave the principals any choice - that if they so wished they could follow his opinion, and if not they could disregard it and employ a teacher against his will. In this case the respondent did not set out in the circular that the principals of schools had a choice in the matter. I have no doubt, therefore, that the respondent exceeded his authority in approaching the principals of schools.

10. The question arises whether we are able to grant relief to the petitioner. To the extent that I have held in this judgment - as a result of the above reasoning - that the second respondent exceeded his authority it is possible that that itself constitutes some remedy for the petitioner. The petitioner, however, asks for an order against the respondent that he withdraw his opposition to accepting the petitioner as a teacher in the Montefiore School. In regard to this it is first necessary to examine what in fact was the respondent's unlawful act in regard to the petitioner. In this respect there is in my opinion a contradiction between the version of the petitioner and that of the respondent. We must guard against a certain ambiguity in the expression "opposition". If the intention is that the respondent is not happy about the appointment of the petitioner, there is indeed no doubt that he "opposes" the petitioner's appointment in that sense. It is clear, however, that this court has no interest in the mental reservations of the respondent but only in his acts or omissions. And if the intention is to refer to a particular act, it is my opinion that the respondent did not "oppose" the appointment of the petitioner in this sense. He did not write to the principal of the school that he, the Director of the Department of Education, opposes, but that the Ministry of Defence opposes. That means that he, the respondent, refused to give his consent upon the basis of this opposition by the Ministry of Defence. It is true that the petitioner stated in paragraph 12 of his affidavit that counsel for the second respondent gave "a verbal instruction that the employment of the petitioner should be discontinued within 24 hours", but the second respondent has denied this version. It seems to me that the letters annexed to the petitioner's affidavit - that in which the Inspector informed the principal of the school of the opposition of the Ministry of Defence, and that in which the principal of the school informed the petitioner that he could not be accepted as a teacher - supports the version of the respondent, namely, that the principals of schools acceded to his request not to employ teachers save with the Inspector's consent and that in this case no such consent was given. If

that is so, the petitioner can advance no contention against the respondent in regard to some positive act relating to himself, that is to say, opposition to his acceptance as a teacher, and for that reason he cannot seek the "withdrawal of his opposition". His complaint concerns a passive act, namely, the failure to give the consent that was required by the petitioner in order that the principal of the school would be prepared to accept him.

11. The court was not asked to compel the respondent to give the consent referred to, and even had it been asked to do so, I have no doubt that the court would have had to refuse such au application. As I have said, the second respondent exceeded his authority in requesting the principals of schools not to employ teachers save with the consent of the Inspector. If that is so, this court will not compel the respondent to do the very act which exceeds his authority, that is to say, to give his consent (or to instruct the Inspector to give his consent). The court, therefore, will also not interfere with the grounds which induced the respondent to refuse his consent in this instance. Authority for this proposition - if such be needed - way be found in *R. v. Barnstaple Justices,* (6). In that case the Justices were authorised to issue a licence for the use of buildings as cinemas- They were asked to give their decision in regard to a building which had not yet been built, and they considered the application and refused it. It was held by the court that no order of mandamus or of certiorari should be made against them since they had in any event no power to deal with an application for the issue of a licence before the building had been erected. The position in our case is similar actually to that which obtained in the case of *Matossian v. Bergman,* (4). In that case too an official exceeded his authority, but in order to remedy the situation and restore the previous position it would have been necessary for the official to perform an act which the law did not empower him to do. The unlawful act had already been done. The court considered the position after the event, and found no way to issue an order to the official in order to remedy the situation that had arisen. The unlawful act in the case before as is the approach in the circular to the principals of the schools. The court is now asked to order the respondent to withdraw its opposition to the petitioner. I have already said that the question in this case is in fact not one of opposition, but of the absence of consent. It is clear that the court cannot compel the respondent to restore the position to what it was by giving his consent, since he has no power to consent. In regard to the "withdrawal of opposition", it is no doubt correct that where an official is unable himself to set aside an unlawful act on his part, the court will be competent to set aside such act *(Bouchman and*

Shoulyan v. Bergman, (5). In the present case, however, there was no act on the part of the respondent which can be regarded as "opposition", so that even if an order setting aside such opposition were to be made, it would not operate as a consent, the giving of which is made a condition - albeit unlawfully - to the petitioner being accepted as a teacher. It seems to me that in these circumstances this court has no alternative but to discharge the order nisi.

OLSHAN J. The decision of the court is that the interference by the second respondent in the employment of the petitioner as a teacher in the institution of the third respondent was unauthorised in law, and that the second respondent must refrain from interfering in this matter. It is decided by a majority to make a final order to this effect.

Order nisi made absolute against the second respondent.
Judgment given on February 8, 1951.