AAA 5875/10

Appellants: 1. The Conservative Movement

2. Movement for Progressive Judaism in Israel

v.

Respondents: 1. Beer Sheva Religious Council

2. Ministry of Religious Services

Attorneys for the Appellants: Orly Erez-Likhovski, Adv., Einat Hurvitz, Adv.

Attorney for Respondent 1: Dr. Amram Melitz, Adv.

Attorneys for Respondent 2: Roi Shweka, Adv., Yochi Genessin, Adv.

The Supreme Court sitting as Court of Administrative Appeals

2 Adar II 5776 (Feb. 11, 2016)

Before: President M. Naor, Deputy President E. Rubinstein, Justice S. Joubran

Appeal of the judgment of the Beer Sheva District Court sitting as Court of Administrative Affairs (Deputy President B. Azoulay) in AP 237/08 of March 3, 2010.

Summary:

An appeal of an administrative judgment finding that there was no defect in the decision of the Beer Sheva Religious Council to prevent the Masorti (Conservative) Movement and the Movement for Progressive (Reform) Judaism from using the mikve [ritual bath – plural: mikvaot] in its jurisdiction for the purpose of their conversion ceremonies.

The Court (*per* Deputy President E. Rubinstein, Justice S. Joubran and President M. Naor concurring) granted the appeal, holding as follows:

Inasmuch as a number of local councils that permit the immersion of converts from the official conversion system in their mikvaot, the question of whether immersion for the purpose of conversion falls within the scope of a "religious service" is rendered superfluous, inasmuch as the service is actually provided, and it may be presumed that it is provided lawfully, as no one has argued otherwise in the matter before us. The question to be decided, therefore, is whether the state/local council can lawfully distinguish between converts in the official conversion system and converts in other frameworks – including those of the Appellants – and the same is true, of course, for the religious council.

In the opinion of the state, the distinction between official and private conversion in regard to mikvaot is justified by three reasons: (1) the supervision over the official conversion system, which is lacking in regard to private conversion; (2) the legal consequences that arise from official conversion, which are absent in private conversion; (3) official conversion has a "public dimension". The Court was of the opinion that those reasons could not justify preventing immersion for the purpose of private conversion in pubic mikvaot.

First, the existing discrimination in the general policy (in choosing who to supervise and how). Cannot justify the discrimination exercised in practice (in regard to access to the mikvaot). Such behavior is inconsistent with an administrative authority's obligation to act equally in all of its endeavors. Second – the legal significance of immersion in a mikve and the issue of unofficial conversion – which is pending before the Court – is irrelevant to the matter of placing limits upon immersion itself. From the moment that the state erected public mikvaot and made them available to the public – including for the purpose of conversion – it cannot employ a policy of different measures, large and small (Deut. 25:14), in regard to their use. In this regard, there is no importance to the legal consequences, or lack thereof, attendant to the immersion itself, nor to any worldview, legitimate as it may be, in regard to the religious significance under these circumstances. Third, as we are concerned with public mikvaot that are financed with pubic funds, it is hard to understand the state's contention that the religious council is under no obligation to serve private bodies. This is particularly so when private Orthodox organizations that conduct conversions encounter no difficulty in arranging for immersion in various mikvaot, even if it may be the case that some of them may be private.

As for the exemption included in the Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000, sec. 3(d)(1) states that "The following shall not be deemed discrimination under this section – when that is necessitated by the character or nature of the product, public service or public place." According to the Respondents, the matter before us falls within the scope of this section, inasmuch as mikvaot are, by their character and nature, intended for the immersion of Jews, whereas converts are, at present, not Jews. The Court rejected this argument. As long as the Respondents permit the immersion of converts from the official conversion system – who all agree are not yet Jews at the time of their immersion – they cannot prevent the immersion of the converts of the Appellants on a claim that the mikve is intended for Jews alone.

Section 6A of the Religious Services Law which states that "The religious council and its members will act in accordance with the rulings of the local rabbinate and the Chief Rabbinate of Israel – like any public authority in every matter in the realm of the functions and authorities of the religious council" cannot make it "kosher" to bar the Appellants' converts from public mikvaot, as the Rabbinate – like any public authority – is not empowered to establish a policy of discrimination. The above is also required by the freedom of religion and worship granted to all in the State of Israel, subject to the Validity of Laws clause in Basic Law: Human Dignity and Liberty.

The appeal was therefore granted in the sense that converts from the the Appellants' private conversion system must be permitted to immerse in a public mikve in Beer Sheva, including the presence of a rabbinic tribunal in the course of the immersion. Inasmuch as the arguments in this case were general, and inasmuch as Respondent 2 represents the state in this matter, the Court added that a similar solution must be found for the mikvaot of other councils that permit immersion for conversion.

Judgment

Deputy President E. Rubinstein:

A. This is an appeal of the judgment of the Beer Sheva District Court sitting as a Court of Administrative Affairs (Deputy President B. Azoulay) in AP 237/08 of March 15, 2010, finding that there was no defect in the decision of the Beer Sheva Religious Council to prevent the Masorti (Conservative) Movement and the Movement for Progressive (Reform) Judaism from using the mikve [ritual bath – plural: mikvaot] in its jurisdiction for the purpose of their conversion ceremonies.

Background and Prior Proceedings

B. The Appellants are associations that advance the interests of Conservative and Reform Jews in Israel. In the framework of their activities, the Appellants operate a private conversion system, the legal status of which is pending before this Court (HCJ 11013/05 *Dahan v. Minister*

of the Interior, and related cases). A decision in regard to private Orthodox conversions is also pending before this Court (HCJ 7625/06 *Ragacova v. Minister of the Interior*, and related cases). On May 7, 2006, the Appellants petitioned to permit their representatives, who accompany their converts, to enter the public mikvaot for the purpose of ritual immersion that constitutes a kind of "commencement ceremony" to the conversion process (HCJ 3775/06). We should explain here that the immersion of the convert constitutes the final stage of the conversion process, which is performed before a three-member religious tribunal. The petition was denied on Aug. 2, 2007, holding that the proper procedure in this matter was the filing of a petition in the Court of Administrative Affairs. On Feb. 19, 2008, following an initial enquiry and an exchange of correspondence with the Beer Sheva Religious Council (hereinafter: Respondent 1), the Appellants filed a petition in the Beer Sheva District Court sitting as a Court of Administrative Affairs. We should note that the Appellants claimed that they are generally denied entry to the mikvaot – with the exception of one mikve in Kibbutz Hannaton (a Conservative kibbutz) in the north of the country – and that they are forced to conduct immersions for the purpose of conversion in other places, such as the Mediterranean Sea. The Court of Administrative Affairs rejected the petition on March 15, 2010. The court held that there is a relevant distinction between the state-supported *official* conversion system – which is granted entry to the mikvaot for the purpose of conversion – and the *private* conversion system operated by the Appellants. Another distinction cited by the court was between conversion that carries legal effect (official conversion) and conversion that is not of legal effect (private conversion). It was further held that immersion for the purpose of conversion is not one of the services that the Religious Council is legally required to provide. An appeal of the District Court's judgment was filed with this Court on Aug. 5, 2010, after the Appellants request for an extension for the filing of the appeal was granted.

Arguments of the Parties

C. According to the Appellants, immersion for the purpose of conversion constitutes a "religious service" for the purpose of the Jewish Religious Services (Consolidated Version) Law, 5731-1971 (hereinafter: the Religious Services Law), and therefore Respondent 1 must provide it. Under their approach, the operation of the mikvaot is conducted by virtue of that law, and

there is no reason to distinguish between the use of a mikve for the purpose of conversion and its use for other purposes related to ritual purity. It is further argued that the Respondents are improperly discriminating in permitting converts from the official conversion system to immerse in their mikvaot while preventing such immersion for those converting by means of the Appellants. In addition to the fundamental breach of equality, the Appellants aver that this constitutes a violation of the Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000 (hereinafter: the Prohibition of Discrimination Law). According to the Appellants, the Respondents' distinction between *official* conversion and *private* conversion is not relevant under the circumstances, and is therefore improper. A similar argument was made in regard to the distinction that the Respondents make between conversion that has legal effect and conversion that lacks legal effect. According to the Appellants, the Respondents must permit converts to immerse in the mikve regardless of whether it is part of a process that will lead to a change in their legal status (e.g., in regard to the Law of Return). The Appellants further argue that insufficient weight was given to freedom of religion and the principle of pluralism, which support granting converts access to the mikve. According to the Appellants, the Respondents cannot make recourse to sec. 6A of the Religious Services Law – which provides that the Religious Council act in accordance with the rulings of the Chief Rabbinate – to justify their decision, inasmuch as, according to the Appellants, the section is relevant to the *erection* of the mikvaot, but cannot justify *discrimination*.

D. Respondent 1 stressed that it does not prevent the immersion of private individuals on the basis of their association with a particular stream of Judaism. It avers that the Appellants have not shown a single concrete case in which access to a mikve was denied. Moreover, in its view, it is not obligated to provide immersion services for the purpose of private conversion, and that such does not constitute discrimination. The Ministry of Religious Services (hereinafter: Respondent 2) also argued that conversion does not fall within the purview of a "religious service". In its view, immersion is an inherent part of conversion – which is not a "religious service" – and therefore there is no obligation to permit immersion conducted in the framework of conversion. It was further argued that there is a relevant distinction between official conversion – for which Respondent 1 may provide immersion services – and private conversion, in that official conversion, as opposed to private conversion, is supervised, has a "public dimension", and legal consequence. In the view of Respondent 2, even if the policy somewhat

infringes freedom of religion and worship, it is an infringement that does not warrant the Court's intervention, inasmuch as immersion is a single, one-time event for a convert, and therefore, the inconvenience caused by the need to travel to a distant mikve that will accommodate him – as noted, the Appellants stated that they have access to another mikve located in Kibbutz Hannaton – is not a serious infringement of his rights. As for the Prohibition of Discrimination Law, it is argued that the subject before us falls within the scope of the exception under sec. 3(d)(1), according to which: "The following shall not be deemed discrimination under this section – when that is necessitated by the character or nature of the product […]". It was further argued that Respondent 1 is required to operate the mikvaot in its jurisdiction in accordance with the directives of the Chief Rabbinate, as stated in sec. 6A of the Religious Services Law, with which the Appellants' demands are not consistent.

E. The Appellants argued in their rejoinder that just as discrimination is prohibited in regard to the providing of support for preparation for conversion (as held in HCJ 11585/05 *Movement for Progressive Judaism v. Ministry of Immigrant Absorption* (2009)), so it is prohibited in regard to the use of mikvaot for the purpose of conducting conversions. The Appellants emphasized that its prospective converts are all Israeli citizens and residents. It was further argued that the official conversion system allows only for Orthodox conversion, and that the state is not promoting any official conversion path that is not Orthodox. Moreover, the Appellants claim that their suggestion that mikvaot be erected for their use, or that existing mikvaot be designated for that purpose was rejected. The Appellants argue that it is unreasonable that a resident of southern Israel who wishes to convert under their auspices be required to travel to Kibbutz Hannaton in the north of the country for immersion, when there are 13 public mikvaot in Beer Sheva.

Discussion

F. Following requests for adjournments, the case was set for a hearing before a panel (President Grunis, then Deputy President Naor, and the author of this opinion) on Feb. 26, 2014. The Appellants stressed that the issue affects a large number of people – some 250 people a year. It was argued that the State is estopped from arguing that a proper distinction can be drawn between private and official conversion inasmuch as the state prevents the Appellants from

participating in official conversion. The attorney for Respondent 1 argued that the prevailing legal situation under sec. 6A of the Religious Services Law does not permit immersion for non-Orthodox conversion in public mikvaot. The attorney for Respondent 2 reiterated the argument that Respondent 1 is not required to provide immersion services for the purpose of conversion. In his opinion, Respondent 1 may provide such a service for the official conversion system inasmuch as that constitutes an allocation of a public resource (the mikve) to a public entity (the official conversion system). It was further argued that there is a public interest in distinguishing between official and private conversion. It was emphasized that Respondent 1 does not permit immersion for private conversion even in the case of Orthodox conversion. It was further noted that a private member's bill had been submitted [to the Knesset] with a view to regulating conversion. According to the Appellants, that proposed legislation is not relevant to non-Orthodox private conversion.

G. At the conclusion of the hearing, it was decided that updated notices be submitted within 90 days, in order to allow the parties to reach an agreement. On June 10, 2014, Respondent 2 submitted an updated notice according to which a meeting was held by the Deputy Attorney General (Civil Affairs) without the participation of the Appellants, in which it was found that there no religious council in many local councils, and the mikvaot are operated by the local councils. It was noted that the possibility of using those mikvaot for private conversions was examined. On June 11, 2014, the Appellants submitted an updated notice according to which they stated their rejection of the solution offered by Respondent 2, and demanded that they be granted access to the mikvaot in the main cities (in which there are religious councils) – Jerusalem, Tel Aviv, Haifa and Beer Sheva. After several requests for adjournments by the parties, the state submitted an updated notice on Jan. 29, 2015, stating that the attempt to locate a mikve in a local council that was not operated by a religious council had failed, and that the possibility was currently being examined for erecting a mikve for the purpose of conversion that would also serve the Appellants. It should be noted that the Appellants voiced their objection to this proposal as well, inasmuch as it concerned the erection of a single mikve which they would have to share with other bodies. We would add that due to the retirement of President Grunis, Justice Joubran was appointed to the panel.

H. On Nov. 10, 2015, following delays due to the elections for the 20th Knesset and the forming of a new government, Respondent 2 submitted an updated notice. The notice explained that – contrary to the claim of the Appellants – the immersion of converts under their auspices is permitted and actually carried out in at least two local councils, in addition to the mikve in Kibbutz Hannaton. As for the erecting of new mikvaot, we were informed that it requires that the local councils meet certain criteria. On Nov. 17, 2015, the Appellants submitted an updated notice stating that their use of the mikvaot cited by the State followed "a tortuous path" and were performed without official permission. It was further argued that even if regular immersion were permitted in those mikvaot, it would still not present a sufficient solution for the Appellants, who request that mikvaot be made accessible in the center of the country – in Jerusalem and Tel Aviv – where most of the converts reside. According to the Appellants, the fact that the erection of a mikve requires the cooperation of the local council does not prevent the erection of a mikve that would serve their needs. On Nov. 13, 2015, the Court President ordered that the Ministry of Religious Services inform the Court which local councils have mikvaot that are open to the Appellants, which of their organs expressed willingness to help, and whether there is substance to the Appellants' claim that their members are required to immerse "like thieves in the night", and how they may be permitted immersion in an orderly, proper manner. On Dec. 16, 2015, Respondent 2 submitted its response. It argued that it was not clear how the Appellants could demand to be allowed to immerse in the mikvaot in Jerusalem and Tel Aviv in the framework of an appeal in regard to immersion in Beer Sheva, and when the Appellants had previously submitted a petition in regard to immersion in Jerusalem that was subsequently withdrawn after the Jerusalem Religious Council declared that it does not permit immersion for the purpose of conversion at all, not even for the official conversion system. It was further argued that the Appellants' claim that the mikvaot are used by a "tortuous path" is unclear inasmuch as immersion for the purpose of conversion is, by its very nature, carried out in private. The Appellants submitted their response on Dec. 21, 2015, arguing that their demand for the provision of mikvaot in the center of the country was consistent with this Court's decision that asked the parties to reach an agreement in principle and not necessarily in regard to the specific matter of Beer Sheva. The Appellants noted that the solutions currently to be had in Hannaton, Modiin and Omer are insufficient, as they are temporary rather than systemic solutions. On Jan. 14, 2016, the Appellants gave notice that they do not insist upon a further hearing of oral

arguments, and request that a judgment be rendered that would permit their converts to immerse wherever converts of the official conversion system are permitted to immerse – Safed, Afula, Tel Aviv, Kiryat Gat, Beer Sheva, and Mevasseret Zion. The Respondents also submitted notice of their agreement to the rendering of a judgment on Dec. 23, 2015 and Jan. 14, 2016. On Jan. 18, 2016, this Court requested a factual clarification from the Ministry of Religious Services in regard to the possibility for the immersion of the Appellants' converts in Omer and Modiin. On Jan. 28, 2016, the Director General of Respondent 2 submitted a notice declaring that, to the best of his knowledge, the Appellants are granted access to the mikvaot in those two places, pursuant to telephone conversations with the head of a local council in the south (Omer, but the name was not mentioned), and with the director general of a municipality in the center (Modiin, but its name was also not mentioned for some reason). On Feb. 4, 2016, the Appellants submitted a notice – accompanied by the affidavit of the Secretary of the Conversion Court of the Council of Progressive Rabbis – according to which local authorities do not permit the immersion of their converts, and immersion in Omer and Modiin is conducted like "thieves in the night". The affidavit gives details of discussions with those responsible for the mikvaot in Modiin and the rabbi of Omer. The former referred them to the Director General of the Ministry of Religious Services, and the latter asked for what purpose they required immersion, and suggested they refer to others, adding that the mikve is not in use at all, and "that we ask whoever can to permit us, and why are things being thrown at him".

Decision

I. The case before us well demonstrates how principled arguments run up against reality, in all that it entails, in a manner that prevents a pragmatic solution. We will not deny that from the outset we believed that the appropriate solution for the matter before us should be found by reaching an agreement and arrangement in accordance to what appeared to be the prevailing situation. In other words, if the Appellants had been allowed regular, respectable access to the mikvaot in Omer, Modiin and Hannaton, as was purported to be the case, we would have been satisfied, inasmuch as according to the data provided by the Appellants, we are concerned with fewer than 300 people a year, and one mikve in each central area of the country would meet the need. We have no interest in addressing the ideological issues in dispute in these contexts, and

we hoped to address practical solutions. But from reading the last affidavit submitted by the Appellants – which names specific local actors in the communities cited by the State Respondents who do not appropriately permit access to the mikvaot – it would appear that the picture is not as we had hoped. We would note that this last, detailed affidavit, submitted, as aforesaid, by the Appellants stood in contrast to the ambiguity and terseness that, with all due respect, characterized the affidavit submitted by the state. These matters having come before us, we have no alternative but to decide the matter on the merits, which might have been unnecessary were it not that the history of the issue (and it is not an isolated issue) demonstrates that "more is less". We will state at the outset that we are not oblivious to the fact that the original relief sought related exclusively to immersion in the mikvaot in Beer Sheva, and upon that we will decide. But inasmuch as the arguments in this case were general, and inasmuch as Respondent 2 represents the state in this matter, it should be clear that the applicable principle will obtain in other places in which the state and other public authorities have a hand.

J. It also bears noting that the question hiding behind the scenes is, to a large extent, "who is a rabbi". In other words, it would seem that a significant part of the Respondents' positions is not founded simply upon the fear of immersion, but rather upon the fear that the Appellants' religious tribunals will come to the mikvaot, which may imply some quasi "recognition" of them. This matter is not, in and of itself, relevant to deciding the issue before us, and we will take no stand on it here. There is also something of an ironic "double reverse" in the refusal to permit immersion, inasmuch as all agree that immersion is one of the three elements required of a male convert (circumcision, immersion, and acceptance of mitzvoth), and one of the two required of a female convert (immersion and acceptance of mitzvoth). There is a raging argument – which cannot be resolved here – in regard to the nature of the acceptance of mitzvoth, as to whether it must be "total" or in the spirit of "he is informed of some of the minor and some of the major commandments" (Maimonides, Laws of Forbidden Relations 12:2), but when a person seeks to immerse for the purpose of conversion, why stop him when – unfortunately, in my opinion – there is no universally accepted, official conversion?

K. We would note that none of the parties dispute that there are a number of local councils that permit the immersion of converts from the official conversion system in their mikvaot. Those councils are: Safed, Afula, Tel Aviv, Kiryat Gat, Beer Sheva, and Mevasseret Zion

(hereinafter: the relevant councils). That renders superfluous the question of whether immersion for the purpose of conversion falls within the scope of a "religious service", inasmuch as the service is actually provided, and it may be presumed that it is provided lawfully, as no one has argued otherwise in the matter before us. The question to be decided, therefore, is whether the state can lawfully distinguish between converts in the official conversion system and converts in other frameworks – including those of the Appellants – and the same is true, of course, for the religious council.

L. Let us first recall basic principles. The principle of equality is a fundamental principle of our legal system. It is deeply rooted in our identity as a Jewish and democratic state. As Justice Turkel aptly stated some time ago (HCJ 200/83 *Wathad v. Minister of Finance* [1984] IsrSC 38 (3) 113):

> The principle of equality and prohibition of discrimination, embodied in the Biblical commandment "You shall have one law, it shall be for the stranger, as for one of your own country" (Leviticus 24:22), that has been construed by the Sages as requiring "a law that is equal for all of you" (Babylonian Talmud, Ketubot, 33a; Bava Kamma 83b) has been sanctified in the law of Israel since we became a nation. Having returned to its land and declared the independence of its State after thousands of years of exile, during which its children were the victims of discrimination among the nations, it inscribed at the beginning of its Declaration of Independence the promise of maintaining absolutely equal social and political rights for all of its citizens, without distinction of religion, race or gender. Therefore, we are required, more than any other nation, to scrupulously check that there be no open or hidden taint of discrimination, so that we not be found to suffer from what we suffered (and see HCJ 98/69 *Bergman v. Minister of Finance* IsrSC 23 (1) 693 (1969) [English translation: http://elyon1.court.gov.il/files_eng/69/980/000/Z01/69000980.z01.htm ; HCJ 7245/10 *Adalah v. Ministry of Social Welfare*, (2013), para. 48 of the opinion of Arbel, J. [English translation: http://versa.cardozo.yu.edu/opinions/adalah-%E2%80%93-legal-center-arab-minority-rights-israel-v-ministry-social-affairs].

That was written prior to the enacting of Basic Law: Human Dignity and Liberty, and although equality does not appear there as such, it has been construed as comprising it (see HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset*, IsrSC 61 (1) 619 (2006)) and it would seem to me self-evident, and see my book *Netivey Mimshal Umishpat* 280 (5763 – 2003) (Hebrew): "Grounding the principle of equality, which I see as interconnected with the two parts of the equation – Jewish and democratic – is the statement in our rabbinic sources of the great Tanna Hillel the Elder, 'what is hateful to you, do not do to your neighbor' (Babylonian Talmud, Shabbat 31a)."

M. Equality means – as demanded by common sense – equal treatment of equals (see HCJ 528/88 *Avitan v. Israel Lands Administration*, IsrSC 43 (4) 297, 300 (1989)). And note that the common characteristic of the members of the equal group is not formal but substantive. Thus we held in HCJ 1438/98 *Masorti Movement v. Minister of Religious Affairs*, IsrSC 53 (5) 337 (1999)) that the Ministry of Religion's decision to grant financial support only to religious-culture institutions over a certain size was not equal, as the size of an institution is not the only relevant characteristic of the members of the equal group in this regard. A similar message was sent by this Court's decision in HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister*, 2006 (1) IsrLR 105 [http://versa.cardozo.yu.edu/opinions/supreme-monitoring-committee-arab-affairs-israel-and-others-v-prime-minister-israel], which held that the Government's policy for granting benefits on a geographic basis yielded a discriminatory result, such that even if the criteria were formally equal, the substantive result was discriminatory. Similarly, we must now examine whether the Ministry of Religion may distinguish between "official" conversion and private conversion in regard to access to public mikvaot.

N. In the opinion of the State Respondents, the distinction between official and private conversion in regard to mikvaot is justified – as noted – by three reasons: (1) the supervision over the official conversion system, which is lacking in regard to private conversion; (2) the legal consequences that arise from official conversion, which are absent in private conversion; (3) official conversion has a "public dimension". I am afraid that these reasons, which should not be disregarded in some respects – and as stated, if there were appropriate legislation, then perhaps we might achieve conversion harmony, which is not unattainable – cannot justify preventing

immersion for the purpose of private conversion in pubic mikvaot, as we shall explain below. We would note here that we are stating this prior to the rendering of decisions in the pending conversion cases mentioned in para. B, above, and of course, our decision in this case is subject to the decisions that will be issued in those cases, and does not prejudice them.

O. First – and this is stated as self-evident – the State of Israel is, of course, at liberty to oversee the use of its mikvaot, to the extent that we are concerned with equal regulation. The State's *choice* not to oversee immersion conducted in the course of private conversion cannot justify preventing such immersion. Common sense prevents us from accepting the argument that actual discrimination (in regard to access to mikvaot) can be justified by reason of discrimination in the general policy (concerning who to supervise and how). Such behavior is inconsistent with an administrative authority's obligation to act equally in all of its endeavors (HCJ 6698/95 *Ka'adan v. Israel Lands Administration*, IsrSC 54 (1) 258 (2000) [English: http://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administration]; AAA 7335/10 *Rehabilitation Officer v. Lupo*, para. U. (2013)).

P. Second – the legal significance of immersion in a mikve and the issue of unofficial conversion – which, as noted, is pending before the Court – is irrelevant to the matter of placing limits upon immersion itself. As a rule, the religious act and its legal significance are distinct matters. Indeed, there is no denying that Israel does not maintain Church-State separation according to the American or French models, and there are instances wherein the legislature chose to set limits upon religious practices carried out by private bodies in order to prevent deception and confusion. However, the basic principle is that "every person has the right […] to worship his God in his own manner and in accordance with the dictates of his own conscience" (HCJ 563/77 *Dorflinger v. Minister of the Interior*, IsrSC 33 (2) 97, 102 (1979), *per* Shamgar J.). That is to say that from the moment that the state erected public mikvaot and made them available to the public – including for the purpose of conversion – it cannot employ a policy of different measures, large and small (Deut. 25:14), in regard to their use. In this regard, there is no importance to the legal consequences, or lack thereof, attendant to the immersion itself, nor to any worldview, legitimate as it may be, in regard to the religious significance under these circumstances.

Q. Third, it is hard to understand the state's contention that the religious council is under no obligation to serve private bodies. While there are public infrastructures (like schools) that primarily serve a public function (like public education), that is not the case in regard to mikvaot that are open to and at the disposal of the general public. While, as a rule, they are open for the purpose of post-menstrual immersion or for ritual purification, we are concerned with public structures that are open to the public, and even – in regard to conversions – to groups acting on behalf of the official conversion system, and under the circumstances, the state cannot hide behind the general claim that a public authority is not obligated to contract with private bodies, but rather must show cause why it would deny access to public mikvaot, funded with public monies, to groups associated with certain private organizations, while private Orthodox organizations that conduct conversions encounter no difficulty in arranging for immersion in various mikvaot, even if it may be the case that some of them may be private. We would further note that the fact that the official conversion system does not comprise a Conservative or Reform conversion track – and as long as there is no judicial decision in regard to conversion in Israel – has consequences for the state's ability to argue that the use of the mikvaot is reserved for converts in the official conversion system, in light of the principle of good faith and the principle of equality that must guide the actions of every public authority.

R. Now to the matter of the exemption included in the Prohibition of Discrimination in Products, Services, and Entry into Places of Entertainment and Public Places Law, 5761-2000. As noted, sec. 3(d)(1) states that "The following shall not be deemed discrimination under this section – when that is necessitated by the character or nature of the product, public service or public place." According to the Respondents, the matter before us falls within the scope of this section, inasmuch as mikvaot are, by their character and nature, intended for the immersion of Jews, whereas converts are, at present, not Jews. Such an argument is unacceptable and it were better had it not been raised. Knowledge is easy for one who understands [Proverbs 14:6] that as long as the Respondents permit the immersion of converts from the official conversion system – who all agree are not yet Jews at the time of their immersion – and as noted, it would appear that ready solutions are available to private Orthodox conversions – they cannot prevent the immersion of the converts of the Appellants on a claim that the mikve is intended for Jews alone. It requires quite a stretch to claim that preventing the entry of the Appellants' converts is

required by the nature of the mikvaot, since those who come to convert, come for that very purpose of becoming Jews.

S. The Respondents' claim that their policy is justified by sec. 6A of the Religious Services Law cannot be tolerated. That section states that "The religious council and its members will act in accordance with the rulings of the local rabbinate and the Chief Rabbinate of Israel in every matter in the realm of the functions and authorities of the religious council." As stated, this section cannot make it "kosher" to bar the Appellants' converts from public mikvaot, as the Rabbinate is not empowered to establish a policy of discrimination. This Court holds the Chief Rabbinate in high regard, but it is clear that – as any public authority – it is subject to the provisions of administrative law, which forbid discrimination (HCJ 77/02 *Osoblansky Ltd. v. Council of the Chief Rabbinate*, IsrSC 56 (6) 249, 273, *per* Cheshin J. (2002); HCJ 7120/07 *Yanuv Crops Ltd. v. Council of the Chief Rabbinate*, para. 25 (2007)). The argument that one administrative authority can order another administrative authority to adopt a discriminatory policy is inconsistent with one of the fundamental principles of public law. We should make it clear that no such instruction by the Rabbinate was presented to the Court, and we, for our part, have no interest in turning this case into a decision in regard to important questions that are not before the Court.

T. The above is also required by the freedom of religion and worship granted to all in the State of Israel, subject to the Validity of Laws clause in Basic Law: Human Dignity and Liberty (sec. 10). It has been stated in regard to freedom of religion that "This freedom includes, *inter alia*, the right to fulfill religious commandments and requirements." (HCJ 3267/97 *Rubinstein v. Minister of Defense*, IsrSC 52 (5) 481, 528, para. 36, *per* Barak P. [English: http://elyon1.court.gov.il/files_eng/97/670/032/A11/97032670.a11.htm]; and see my opinion in HCJ 6298/07 *Ressler v. Knesset*, para. 9 (2012) [English: http://versa.cardozo.yu.edu/opinions/ressler-v-knesset]). And note, the principle of equality constitutes a necessary element of freedom of religion. Thus, it was held in HCJ/650/88 *Movement for Progressive Judaism v. Minister of Religious Affairs*, IsrSC 42 (3) 377, 381 (1988), *per* Shamgar P.:

> Freedom of religion and worship is one of the fundamental freedoms recognized by our legal system, and is part of it. The said freedom is, of course, primarily

> articulated in the freedom of religious expression and action, but that does not suffice. *Inter alia*, we derive from the existence of that freedom that all believers be treated equally, and that the governmental authorities distance themselves from any act or omission toward the believers of all streams, as well as their organizations and institutions, that may be tainted by wrongful discrimination.

Freedom of religion comprises two directives for the state – one positive and one negative, much as in the sense of "Depart from evil, and do good" (Psalms 34:15): first, to refrain from intervening in a person's religious life; second, to provide appropriate infrastructure for the realization of religious life (see Daniel Statman & Gideon Sapir, "Freedom of Religion, Freedom from Religion, and the Protection of Religious Feelings," 21 *Bar-Ilan L. Stud*. 5, 21-27 (2004) (Hebrew)). The second aspect of freedom of religion is, of course, influenced by budgetary considerations. In this regard, the words of Netanyahu J. in HCJ 3742/92 *Bernard v. Minister of Communications*, IsrSC 47 (3) 143, 152, are appropriate: "No society has unlimited resources. No authority operating in society under the law may or can ignore budgetary exigencies and provide services without considerations of cost, as important and necessary those services may be" (and see Rivka Weill, "Healing the Budget`s Ills or Budgeting the Healing of the Ill - Is the Constitutional Dilemma," 6 *Law & Business* (*IDC Law Review*) 157 (2007) (Hebrew)). Such considerations are not substantive in the instant case inasmuch as the infrastructures exist in principle, and in any case, Respondent 2 raised no claim in this regard. Having briefly considered the status of freedom of religion in this context, we will again stress that the argument that there is some necessary "bond" between the religious act and its legal consequence is unacceptable. That being so, and without prejudicing the matter at this time, there is no reason in principle for preventing the Conservatives and the Reform from carrying out immersion in public mikvaot, *without deciding – here and now – the legal significance of such conversions.* As noted, the question of the legal significance of Conservative and Reform conversions is pending before this Court, and will ultimately be decided.

U. As the principle of pluralism has been mentioned in this case, it is appropriate that we note that Jewish law is not reticent in regard to multiple views and approaches. Proof of that can be found in the commentary of the Netziv of Volozhin (Rabbi Naftali Zvi Yehuda Berlin, Head of the Volozhin Yeshiva, 19th cent., Russia) in his *Ha'amek Davar* Torah commentary, in regard

to the Tower of Babel (cited in Aviad Hacohen, "One Language and the Same Words – Indeed? Multiplicity of Views and a Person's Right to Speak his Language," in *Parashat Hashavua, Bereishit* 32, 34, A. Hacohen & M. Wigoda, eds., (2012). The Bible tells us that there was linguistic unity at the time that the Tower of Babel was built – "Now the whole earth had one language and the same words" (Genesis 11:1) – and this was abhorrent in the eyes of the Creator – "So the Lord scattered them abroad from there over the face of all the earth" (*ibid.*, 11:8). The Netziv explains that the reason for punishing the builders of the Tower of Babel was that they imposed uniformity of thought: "Anyone among them who deviated from 'the same words' was sentenced to death by fire, as they did to our Patriarch Abraham. Thus 'the same words' among them was abhorrent because they executed those who did not think as they did" (*Ha'amek Davar, ibid.*). And the Tanna Rabbi Yehuda states in the Tosefta: "The opinions of the individual were only recorded among those of the majority because the time may come when they may be needed and they will be relied upon" (Tosefta Eduyot 1:4). Thus, Rabbi Yehuda preceded John Stuart Mill's "marketplace of ideas" (On Liberty (1859)) as a means for seeking the truth by nearly two-thousand years.

V. The appeal is therefore granted in the sense that Respondents 1 and 2 will permit the Appellants' converts to immerse in a public mikve in Beer Sheva, including the presence of a rabbinic tribunal in the course of the immersion. By the very nature of the decision, a similar solution must be found for the mikvaot of other councils that permit immersion for conversion. Each of the Respondents will pay the Appellants' costs and legal fees in the total amount of NIS 12,000.

Justice S. Joubran:

I concur.

President M. Naor:

I concur in the opinion of my colleague Deputy President E. Rubinstein and with his reasoning.

Indeed, at the outset of these proceedings, we were of the opinion that it would be best to find a pragmatic solution that would provide a satisfactory remedy to the problem raised by the Appellants, and that would make it unnecessary to render a judicial decision in matters that tend to divide society. Sometimes, there are many advantages to practical solutions that are not necessarily all or nothing. Immersion for the purpose of conversion is a one-time event in a person's life, and if mikvaot could be found within reasonable driving distance, that may have been sufficient. Therefore, I see no need to decide the question of whether there must be mikvaot that can be used for conversion in each and every council.

However, regrettably, and as my colleague pointed out in para. H. of his opinion, although the state, without adequately checking, informed the Court that the Appellants had access to two mikvaot in central locations, it turned out that there was no practical solution, as my colleague explained in detail.

Under the circumstances, there is no alternative but to render judgment, and as stated, I concur in the opinion of my colleague.

Decided as stated in the opinion of the Deputy President E. Rubinstein.

Given this 2nd of Adar 5776 (Feb. 11, 2016).