H.C.J 10/48

ZVI ZEEV
v.
THE ACTING DISTRICT COMMISSIONER 0F THE URBAN AREA OF TEL AVIV (YEHOSHUA GUBERNIK) AND ANOTHER

In the Supreme Court sitting as the High Court of Justice
[December 2, 1948]
Smoira P., Olshan J. and Cheshin J.

Requisition of flat by Competent Authority - Defence Regulations, 1939-Effect of s. 9 of Law and Administration Ordinance, 1948 - Appointment of Acting District Commissioner as Competent Authority not an act having legislative effect - Publication in. *Gazette not required.*

The Acting District Commissioner of Tel Aviv purporting to act as the Competent Authority under Mandatory regulations requisitioned an apartment in Tel Aviv for the use of a government official His action was challenged on the grounds, first, that the Mandatory regulations in question had been impliedly repealed by s. 9 of the Law and Administration Oridnance of 1948[1)] which empowered the Provisional Council to make regulations of the same kind, and secondly, that the appointment of the Acting District Commissioner as Competent Authority, being an act having legislative effect within the meaning of s.20 of the Interpretation Ordinance, 1945, was invalid as it had not been published in the Official Gazette as required by that Section.

Held:(1) that the regulation in question had not been repealed and remained in force;

(2) that the appointment of the Competent Authority was not an act having legislative effect and accordingly did not require publication in the Gazette.

Palestine Case referred to:

(1) *A. A.* 6/36 - *Ali Ibrahim El Nouri v. The Attorney-General C.O.J., Vol.* 7, p. 268.

Israel Case referred to:

(2) *H.C.* 5/48 - *Yuval Leon and Another v. The Acting District Commissioner of the Urban Area of Tel Aviv (Yehohoshua Gubernik) and Another* (1948) 1 P.D. 58.

1) See infra p. 70.

Nohimovsky for the Petitioner.
Sha'aiovitz, Deputy State Attorney, for the Respondent.

SMORIA P. giving the judgment of the court.

On September 7, 1948, the first respondent issued an order of requisition under regulation 48(1) of the Defence Regulations, 1939[1)], by virtue of which he took possession of a flat in a building at No. 34, Balfour Street, Tel Aviv. The purpose of the requisition was to provide a home for the second respondent, the Director of the Financial and Control Section of the Ministry of the Interior of the Government of Israel.

The flat referred to consists of three rooms, a kitchen, and conveniences. The petitioner had lived in this flat with his wife and two small daughters until about July, 1948, when he moved with his family to a flat of four rooms, kitchen and conveniences at No. 13, Bezalel Yaffe Street, Tel Aviv. In the meantime the petitioner's wife gave birth to a third child. According to the petitioner, one or one and a half rooms of the flat at No. 34, Balfour Street were used by him as the office of a Company called Zvi Zeev and Partners (Pty) Ltd., of which he is the principal director. When the petitioner moved to the flat at No. 13, Bezalel Yaffe Street the office of the Company remained in the flat at No. 34, Balfour Street, while one of the other rooms in this flat was occupied by an army officer.

It would appear from the cross-examination of the first respondent on his affidavit that he investigated the position of the flat in question before issuing the order of requisition, and found that it was unoccupied and that there was no name-plate of the Company on the door of the flat, or anywhere near it.

The petitioner made an application to the District Court of Tel Aviv - which at that time exercised the powers of the thigh Court of Justice - challenging the validity of the

1) Defence Regulations, 1939, reg. 48 (1):
48. (1) A competent authority may, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, defence or the efficient prosecution of the war, or of maintaining supplies and services essential to the life of the community or for any of the purposes specified in subsection (1) of section 1 of the Supplies and Services (Transitional Powers) Act, 1945, take possession of any land, and may at the same time, or thereafter, give such directions as appear to the competent authority to be necessary or expedient in connection with, or for the purposes of, the taking retention or recovery of possession of that land.

order of requisition and on September 12, 1948, an order nisi was issued. According to the affidavit of the second respondent, which was filed in reply to the order nisi, negotiations took place between him and a representative of the petitioner in order to procure the latter's consent to leasing the flat to the second respondent. These negotiations, however, were unsuccessful since the second respondent regarded the amount claimed by the petitioner as excessive.

Between the date of the issue of the order nisi and the hearing of this case, judgment was delivered by this court in *Yuval Leon's case* (2), in which it was decided that regulation 48 of the Defence Regulations of 1939 was still in force. In appearing before us Mr. Nohimovsky, counsel for the petitioner, admitted that in view of the legal principles laid down in that judgment many of the submissions which he had intended to make at the time of this application now fell away. He requested us, however, to hear two new submissions which had not been argued before the court in that case.

Mr. Nohimovsky's first submission is based upon section 9 of the Law and Administration Ordinance of 1948, which provides as follows: -

> "(a) If the Provisional Council of State deems it expedient so to do, it may declare that a state of emergency exists in the State, and upon such a declaration being published in the Official Gazette, the Provisional Government may authorise the Prime Minister or any other Minister to make such emergency regulations as may seems to him expedient in the interests of the defence of the State, public security and the maintenance of supplies and essential services.
>
> (b) .....
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> (c) An emergency regulation shall expire three months after it is made, unless it is extended, or revoked at an earlier date, by an Ordinance of the Provisional Council of State, or revoked by the regulation-making authority."

Counsel contends, moreover, that if the former legislative Defence Regulations of 1939 are no longer in force. Section 9, just cited, supplies a new legislative source for the making of emergency regulations. The Defence Regulations of 1939 were made by virtue of the Emergency Powers (Defence) Act, 1939, and the Emergency Powers (Colonial Defence) Order in Council, 1939. These old sources have now dried up. The Law and Administration Ordinance does nothing to perpetuate them. Therefore Defence Regulations, 1939, made under them no longer exist.

In support of this argument counsel relied upon *El Nouri's case* (1). In that case the accused was charged under regulation 8(a)(2) of the Emergency Regulations, 1936, which had been made by the High Commissioner under the powers conferred upon him by Article IV of the Order in Council (Defence), 1931. According to Article II of the Order in Council it was to remain in force until suspended by a declaration of the High Commissioner. On September 30, 1936, a new Order in Council was issued by which Article IV of the Order in Council of 1931 was expressly replaced by another Article. In these circumstances, lt was held by the court that since there was no express provision in the Order in Council of 1936 that regulations made under the article which had been replaced were to remain in force, such regulations were no longer in force. Mr. Nohimovsky pointed out that there was in fact no express provision in the Law and Administration Ordinance to the effect that it replaced the Order in Council of 1939, but he argued that his submission was in no way weakened by this fact. Counsel found support for his argument in section 2 of the Law and Administration (Further Provisions) Ordinance, 1948, which provides that where any law enacted by the Provisional Council of State is repugnant to an earlier law (of the time of the Mandate), the earlier law shall be deemed to be repealed, even if the new law coutains no express repeal of the earlier law.

In order to convince the court that no other interpretation of section 9(a) of the Law and Administration Ordinance is reasonably possible, Mr. Nohimovsky cited the Declaration of the Establishment of the State of Israel, which contains the following sentence: "The State of Israel shall be based on freedom, justice and peace as envisaged by the prophets of Israel."

The Declaration is part of the law of the land, because "law" as defined in the Interpretation Ordinance, 1945, covers a Declaration such as this. This "law" restores to the Citizens of the State all the freedoms to which a citizen is entitled. Since this is so, the Declaration repeals those regulations and the laws from which they are derived, which robbed the citizen of his freedoms. The Declaration opened a new chapter of independent legislation. Counsel admits that a state of war sometimes requires emergency regulations. In his opinion, however, it is for this reason that section 9, which creates a new instrument for the making of such regulations, was enacted. It cannot be assumed that it was intended by this section to retain the previous restrictions, imposed in the time of the Mandate which contradict the provisions of the Declaration.

Counsel contends, moreover, that if the former legislative sources have not been repealed by section 9 and by the Declaration of the Establishment of the State of Israel, then that section is completely superfluous, since it is possible to continue using the old sources for the making of emergency regulations in the future, without resorting to the new legislation.

We cannot accept the attractive argument of counsel for the petitioner. As was submitted by Mr. Sha'aiovitz, Deputy State Attorney, the only object of the Declaration was to affirm the fact of the foundation and establishment of the State for the purpose of its recognition by international law. It gives expression to the vision of the people and its faith, but it contains no element of constitutional law which determines the validity of various ordinances and laws, or their repeal. The body which was temporarily empowered to enact statutes was the Provisional Council of State which was established with the Declaration of the State. It was this legislature which enacted the Law and Administration Ordinance and declared in section 11 of that Ordinance the law to be applied in the State. Mr. Sha'aiovitz was correct in his submission that in every case in which the question arises of the validity of a particular ordinance or regulation issued during the time of Mandate, such question must be solved by the test laid down in section 11[1)]. If, on applying that test, the ordinance or regulation is seen not to be repugnant to the Law and Administration Ordinance itself or to other laws enacted by or on behalf of the Provisional Council of State, then it is valid.

1) The text of this section is quoted on p. 47 supra.

It had already been held in *Yuval Leon's case* (2) (supra) that where a later statute is similar in content to an earlier statute, which it does not expressly repeal, no implied repeal of the earlier statute may be assumed unless it is inconsistent with the later statute or unless there is no justification or reasonable ground for its continued independent existence. Section 2 of the Law and Administration (Further Provisions) Ordinance, 1948, relied upon by counsel for the Petitioner, does not contradict this opinion but actually strengthens it.

Let us now test the submissions of counsel in the light of the above principles.

It seems to us, in the first place, that the judgment in *El Nouri's case* (1) is irrelevant. In that case it was expressly provided in the Order in Council of 1936 that a new article was to be substituted for Article IV of the Order in Council of 1931, while there is no similar feature in section 9(a) of the Law and Administration Ordinance. That section contains no express repeal of any earlier legislative source.

As to the merits of the matter it is clear, as has already been held in *Leon's case* (2), that even if we disregard section 9(a) for a moment as if it did not exist, there is no inconsistency between the earlier statutes and the Defence Regulations made under them, and any section of the Law and Administration Ordinance. We must consider, therefore, whether section 9(a) has created any such inconsistency, or provides any other ground for the conclusion that the continued validity of the earlier statutes cannot be justified.

In terms of the earlier statutes, the power of making Emergency Regulations was conferred upon the High Commissioner and he was not bound to consult any higher authority. According to section 14 of the Law and Administration Ordinance the powers of the High Commissioner were transferred to the Provisional Government which, were it not for section 9, could have continued to exercise those powers, without invoking the authority of the Council of State. The effect of section 9(a) is that although it is provided in section 11 that the law which was in force in Palestine on May 14, 1948 (including the Order in Council of 1939 and similar legislation) shall remain in force in the State, nevertheless the power of making Emergency Regulations is hemmed in by certain

restrictions, one of which is that the authority of the Council of State must first be obtained. There is no hint in this section that earlier regulations, which were issued at a time when the exercise of the power in question was unconditional, shall cease to be valid. Further, there is no inconsistency between the Order in Council of 1939 and section 9 of the Law and Administration Ordinance. Section 9 put an end to the operation of the earlier statutes as a source of power to make regulations *in the future,* but that source, as part of the "law in force" in accordance with section 11, remained effective. This conclusion also follows from the arrangement of the sections in the Ordinance: section 9 is found in the third chapter of the Ordinance, which deals with methods of legislation for the future, while section 11 is found in the fourth chapter which lays down the existing law. It follows that the earlier source is not to be regarded as having become superflous and no longer valid.

The second new submission of Mr. Nohimovsky is based upon section 10 of the Law and Administration Ordinance. His contention is that the appointment of the first respondent as a Competent Authority for the purpose of regulation 48 of the Defence Regulations, 1939, is not valid so long as it has not been published in the Official Gazette.

According to the Interpretation Ordinance, 1945, counsel submits, a "letter of appointment" is included in the definition of the expression "regulation", and the provisions that apply to regulations also apply to letters of appointment. The letter of appointment of the first respondent, therefore, is a new "regulation" which has been made by the Minister of Labour and Building, and in terms of section 10(c) of the Law and Administration Ordinance it is only valid from the date of its publication in the Official Gazette. In so far as the Defence (Amendment No. 4) Regulations 1945 - which provide that section 20 of the Interpretation Ordinance, 1945, in regard to the necessity for publication shall not apply to Defence Regulations - are concerned, counsel for the petitioner again relies upon section 2 of the Law and Administration (Further Provisions) Ordinance and submits that the amendment in question has been repealed by implication since it is inconsistent with section 10(c) of the Law and Administration Ordinance. Counsel concludes, therefore, that the appointment in question requires publication and that since it has not yet been published, it is invalid.

It has already been emphasised, in *Leon's* case (2), that regulation 3 of the Defence Regulations, 1939, contains a special provision that the appointment of a Competent Authority shall be made by the High Commissioner *in writing*. There is no provision requiring publication of the appointment. Moreover, if we assume that the Defence Regulations (Amendment No. 4), 1945, do not apply to a regulation which has been amended by virtue of section 9 of the Law and Administration Ordinance and that section 10(c), which requires publication in the Official Gazette, does apply to such a regulation, then it cannot be argued that the Interpretation Ordinance, 1945, is inconsistent with section 10(c). The Interpretation Ordinance, therefore, is still in force, and new ordinances and regulations must be interpreted in accordance with its provisions. Now section 20 of the Interpretation Ordinance defines the expression "regulation" for the purpose of publication in the Official Gazette, and it would appear from this definition that it is only regulations of a legislative character which are regarded as regulations for such purpose. And if we read the "regulations" mentioned in section 10(c) of the Law and Administration Ordinance in the light of this definition, it is clear that a regulation of an administrative character does not derive its validity from publication in the Official Gazette. Note also that section 10 is included in the third chapter of the Ordinance, which bears the title "Legislation". In other words, this section only applies to ordinances and regulations which are passed or made under legislative, and not administrative powers. Were this not so there would have been no need to provide specifically in section 2(e) of the Ordinance that decisions of the government in regard to the duties of its members - which is an administrative regulation which is found in chapter I in connection with "administration" - shall all be published in the Official Gazette. Section 10(c) would have been sufficient for this purpose. It follows that there is no necessity for the publication of an administrative regulation in the Official Gazette unless the law expressly so requires. In conclusion, we must point to the inconsistency in this submission of counsel for the petitioner. In order to include a letter of appointment within the definition of "regulation", counsel relies upon section 2 of the Interpretation Ordinance but at the same time he disregards section 20 of the same Ordinance, which excludes a letter of appointment from the framework of the definition in section 2 for the purpose of publication in the Official Gazette. We have reached the conclusion therefore, that the issue of the letter of appointment of the first respondent as a Competent Authority was an administrative act and that there was no necessity, therefore, to publish such appointment in the Official Gazette.

We willingly associate ourselves with the opinion of counsel for the petitioner that it is desirable in the public interest that such appointments be published in the Official Gazette. In the light of the above analysis, however, we cannot hold that in the absence of publication the appointment is defective.

We decide, therefore, to discharge the order nisi.

Order nisi discharged.

Judgment given on December 2, 1948