HCJ 1268/09

Leah Zozal

v.

Israel Prison Service Commissioner

The Supreme Court Sitting as the High Court of Justice
[28 February 2012]

Before Vice President (Emeritus) E. Rivlin, Vice President M. Naor and Justices S. Joubran, E. Hayut, Y. Danziger, N. Hendel and U. Vogelman

Facts: The petitioner began working at the Israel Prison Service ("the IPS") in 1986. In April of 2009, two months after her fifty-seventh birthday, she was forced to retire. At this age, she was already six months past what was defined in the Civil Service Retirement Law, 5730-1970, as the "retirement age for IPS wardens." According to the IPS procedures relating to IPS employees of her age and experience, her continued employment after that age was dependent on approval by the IPS Commissioner (following a recommendation made by an internal committee). Such extensions of employment past the "retirement age for IPS wardens" could not be granted for more than one year at a time, and could not be granted for a total of more than three years or for any period past the age of 60, except in exceptional circumstances. The mandatory retirement age established by law for civil servants except IPS employees and police officers was (and is) 67, and retirement can only be forced at an earlier age if the Civil Service Commissioner is persuaded by the worker's supervisor that the worker is no longer fit to serve in his position, in a proceeding initiated by the supervisor. The petitioner argued that the internal IPS procedures pursuant to which she was ultimately forced to retire at the age of 57 were discriminatory and unlawful. She also argued that the IPS Commissioner's claim that her retirement was part of an overall agency policy eliminating her particular rank was false.

Justice Hayut, with Vice President (emeritus) Rivlin, Vice President Naor and Justices Danziger, Hendel and Fogelman concurring: The retirement arrangement established for IPS wardens, which stipulates, as its starting presumption, that wardens (with at least ten years of service) must retire at the age of 57 unless specific

extensions are granted, must be struck down. The retirement arrangement wrongfully discriminates between IPS workers (at least those who serve in professional positions), on the one hand, and all civil servants holding similar positions, on the other hand.

The respondent did not prove the necessity of this starting presumption or the difference between this arrangement and the practice followed by the civil service. The discrimination caused by the IPS procedure was particularly pronounced with respect to professional and managerial employees. Although it might have been argued that IPS workers who hold "operational" positions experience "burnout" in their jobs at an earlier age than do other civil servants, that issue could have been handled through an optional earlier retirement age. There is certainly no justification for mandatory retirement at the age of 57, for those holding professional and managerial positions.

With respect to the petitioner's particular case, the respondent argued that the main reason for his failure to extend her employment was not her age but rather an IPS policy of phasing out the rank that she held at the time. However, even if this argument is accepted as a factual matter, this consideration cannot serve as the determinative factor relied upon in the decision to force her into early retirement.

Thus, to the extent that it relates to IPS workers serving in professional and managerial positions, the internal IPS procedure must be set aside, but the IPS will be allowed a one-year period to prepare a new, non-discriminatory arrangement. The decision regarding the petitioner's own forced retirement is revoked and she is to be reinstated at the IPS under the same terms as before her retirement, in accordance with current IPS needs.

Justice Joubran, concurring in part and dissenting in part, found that the IPS retirement procedure was reasonable and should, as a whole, stand. In general, once the legislature had established that IPS and Israel Police workers could have different retirement arrangements than other civil servants, the Court cannot determine that the IPS arrangement established by the statutorily authorized IPS Commissioner is unreasonable only because it is different than the civil service procedure. Furthermore, mandatory retirement is a theoretically reasonable form of administrative discrimination, because of the public interests that it serves. However, certain aspects of the IPS procedure – specifically the granting of extensions for only one year at a time and the provision prohibiting extensions past the age of 60 except in very exceptional circumstances – had no rational basis and were therefore disproportionate. Furthermore, in the petitioner's specific case, the respondent had shown that the IPS' own internal procedure had not been followed, that the criteria for evaluating an application for extended employment had not been applied and that the petitioner's employment was terminated only because the IPS wished to phase out her rank. Since the respondent had not shown that younger workers with the same "undesirable" rank were also dismissed, it was clear that the decision to force

the petitioner's retirement was based entirely on her age; in this specific case, such age-based discrimination had no rational justification.

Petition for an order *nisi*.

For the Petitioner: M. Aviram
For the Respondent: M. Sasson

JUDGMENT

Justice E. Hayut

The petitioner, Leah Zozal (hereinafter: "Zozal") served in the Israel Prison Service (hereinafter: "the IPS") since 1986, and in April 2009 she was forced to retire. Her age at the time was 57 years and two months, six months older than the "retirement age for a prison warden" as defined in the Civil Service (Retirement) Law [Consolidated Version], 5730-1970 (hereinafter: "the Retirement Law"). In the petition before us, Zozal claimed that the procedures pursuant to which she was forced to retire are invalid, and should be abolished. She also claimed that there were defects in the manner in which the decision regarding her matter was reached.

Before we set out the facts that are relevant to Zozal's case, we will note, briefly, the normative framework relating to the petition.

The Normative Framework

1. Section 3 of the Retirement Age Law, 5764-2004 (hereinafter: "the Retirement Age Law"), applicable to all employees in the country, establishes the retirement age at which male and female workers may retire. That age is 67 for men and 62 for women (although the retirement age for women is subject to the provisions of Chapter D of the Law). Section 4 provides that an employer may compel a worker to retire at age 67 (hereinafter: "the mandatory retirement age"), and s. 5 further provides that when a worker of either gender reaches the age of 60, which is defined in the Retirement Law as the "early retirement age," they may retire due to their age and receive a pension, although the amount of the pension will be reduced, due to the early retirement. Alongside this arrangement, which, as stated, applies to all workers in the country, the Retirement Law establishes a specific arrangement concerning the retirement and pension of civil servants.

Section 18(a) of the Retirement Law provides as follows:

'If a worker has served at least ten years, the service commissioner *may* decide to retire him if the worker has reached the age of 60 and he is *required*

to do so at the end of the month in which the worker reaches the age of 65; but the service commissioner may, with the approval of the service committee and with the consent of the worker, allow the worker to continue to be employed beyond the age of 65 for a period that shall not exceed the period that he will determine, if it is proved to the satisfaction of the service committee that the worker is capable of continuing to work in his job.'

Section 73 of the Retirement Law excludes policemen from the coverage of the above-mentioned s. 18, and s. 81 of the Retirement Law applies the exclusionary provisions in s. 73 to prison wardens as well.

Section 73 provides as follows:

'Section 18 shall not apply to a policeman, but if a policeman has served at least ten years, the police commissioner may order his retirement, if the policeman has reached the age of 55.'

"The retirement age for a policeman" is defined in s. 69A of the Retirement Law as "the age established for him, in accordance with the month of his birth, in Part B of the Second Schedule." Part B of the Second Schedule of the Retirement Law provides that the retirement age for a police officer falls within a range that begins at age 55 and continues to age 57, depending on the month and year of the particular police officer's birth.

2. On the basis of these provisions, the IPS and the Israel Police have adopted internal procedures which establish a uniform retirement age – subject to certain exceptions – for police officers and wardens who have served at least ten years in their respective services. At first the uniform retirement age was set at 55, but it was gradually raised to 57 years after the Retirement Age Law was enacted. Three petitions were already pending before a full panel of this Court by the time the Retirement Age Law was enacted; these petitions challenged the arrangement that created a uniform retirement age for the IPS and the Israel Police. They were decided together, in HCJ 10076/92 *Rosenbaum v. Israel Prison Service Commissioner* [2006] IsrSC 61(3) 857. Although these petitions were decided after the uniform age established in those arrangements was changed (from 55 to 57, as stated), the Court believed that this change did not have any substantive consequences for the decision that it had reached regarding the petitions – a decision that involved an analysis of the disparity between the retirement age in the civil service, on the one hand, and the retirement age for the IPS and for the Israel Police, on the other.

Finding that the relevant peer group in this context was the group of all civil servants, the Court held, on December 12, 2006, that the respondents in *Rosenbaum*:

> 'have not succeeded in persuading us that a uniform retirement age, which is ten years lower than the retirement age in the rest of the civil service, is required by the 'nature or character' of all the jobs or positions in the prison service or the Police' (p. 874).

The Court went on to note that no relevant foundation had been presented to support the establishment of 55 or 57 as the retirement age for the IPS or the Israel Police; that the respondents had not shown that any effort had been made to create a mechanism for setting the retirement age on the basis of individual characteristics, or on the basis of the types of jobs or positions within the IPS or the Israel Police; and that the stark difference – ten years – between the age established as the uniform retirement age for the IPS and the Israel Police, on the one hand, and the retirement age for the civil service, on the other hand, could not be ignored. The Court also held that the respondents had not proven that "the distinction that the State made between its employees is required by the character or nature of the jobs or positions in the prison service or the police" and that they had adopted "an extreme, disproportionate and unreasonable approach" in determining a uniform retirement age which is ten years lower than the age of retirement in the civil service, without sufficient and convincing evidentiary basis justifying that determination. For this reason, the Court concluded that "the retirement policy practiced in the prison service and the police is unlawful" and ordered the setting aside of the internal practice according to which a uniform mandatory retirement age of 55 (or 57) was set for all police officers or prison workers who had served at least ten years. Because of the complexity of the matter, the Court also directed that declaring the arrangement void should not take effect until eighteen months after the decision was rendered, so that the respondents could work to establish new retirement procedures during the interim period.

3. Following the *Rosenbaum* decision, the IPS and Israel Police established new arrangements. We will focus on the arrangements implemented by the IPS, as those are the arrangements that are the subject of this petition. At first, during the course of 2007, the IPS established Procedure 03-5007, entitled "Consideration of the Extension of the Service of a Warden who is of Retirement Age" (hereinafter: "the Service Extension Procedure" or "the Procedure"), and on 8 March 2009 this procedure was absorbed, with certain changes, into Commissioner's Order 02.33.00 "Consideration of Extending the Service of a Warden who is of Retirement Age" (hereinafter: "the Extension of Service Order" or "the Order"). The normative status of the Commissioner's Order is the equivalent of an

administrative guideline (see LHCJA 6956/09 *Yonas v. Israel Prison Service*, (unreported) (2010) *per* Justice Y. Danziger, at para. 59, and the references cited there. See also para. 60, for thoughts regarding this classification).

As discussed below, the decisions concerning Zozal's retirement that are the subject of this petition were reached pursuant to the Service Extension Procedure before it was absorbed in the Extension of Service Order. However, given the fact that the Extension of Service Order primarily adopted the provisions of the Procedure, and because Zozal does not argue any differently, the decisions which are the subject of this petition will be examined in light of the arrangement established in the Order – the arrangement which is currently followed, and on which the respondent focused his claims. The relevant provisions in the Order will be addressed in detail below, but at this stage and in order to complete the normative picture, it will be noted in brief that according to the Order, each year all wardens who have reached the age of 57 are sent a notice informing them that they are "of retirement age." It should be emphasized here that the term "wardens" does not refer only to those who actually hold that position inside the prisons – the term covers all IPS employees, including any personnel who hold a variety of the administrative and other positions. This is due to the fact that the definition of the term "warden" in s. 1 of the Retirement Law provides that a warden is anyone who "is included within the Israel Prison Service pursuant to the Prisons Ordinance 1946, including a temporary additional warden (see the provisions of Part 6 of Chapter C of the Prisons Ordinance [New Version], 5733-1971) and excluding a new warden, as that term is defined in s. 108b."

Wardens who have received such a notice may submit an application for an extension of their employment if they meet certain criteria that are stipulated in s. 5 of the Order, and decisions concerning such applications are made by a committee led by the chair of the Human Resources Administration at the IPS (hereinafter, "the Service Extension Consideration Committee" or "the Committee"). The Committee examines the warden's application based on criteria listed in s.7 of the Order, and it may recommend an extension of the warden's employment in the current position; an extension of employment in a different position; or forced retirement. A recommendation of extended employment is given for a period of no more than one year at a time, and may not be given for a total of more than three years, or for a period extending beyond the time the warden reaches the age of 60. However, if the conditions set out in s. 8(e) of the Order are satisfied, the Committee may recommend an extension of service past the age of 60.

The Committee's recommendation regarding an application for an extension of a warden's employment is submitted to the IPS Commissioner, who is authorized to render a final decision on the matter. The warden may appeal the decision to the IPS Commissioner and the decision made on appeal is final (compare this with the procedures established by the Israel Police following this Court's decision in *Rosenbaum*. See Temporary Provision – ss. 3 and 4 of Order 07.07.02 of the National Headquarters Order "Retirement"; Order 07.07.10 of the National Headquarters Order "Retirement – Extension of Service beyond Retirement Age" (hereinafter: "National Headquarters Order – Service Extension")).

The Petition before Us

4. Zozal was born on 27 February 1952 and joined the IPS in May of 1986, where she worked as a social worker-officer at Magen and Maasiyahu prisons. In this position, she reached the rank of Superintendent, and was paid according to the "Preferred Academics" salary scale, with a special supplement for IPS employees added to her salary. On 29 December 1994, she was appointed "Chief Superintendent", pursuant to the "Flexible Chief Superintendent" arrangement that was in place at that time at the IPS. From this point onwards, in accordance with that arrangement, Zozal was paid the salary set for personnel with the rank of Chief Superintendent. Approximately a year and a half later, on 1 May 1996, she was awarded the rank of Chief Superintendent as well. It should be noted, parenthetically, that the Flexible Chief Superintendent arrangement was created within the IPS as a response to the shortage of positions for officers. The Flexible Chief Superintendent plan allowed an officer with the rank of Superintendent to be promoted to a level of Chief Superintendent even though the position that he held was officially that of only a Superintendent, provided that the officer met the criteria established for this purpose (see Human Resources Procedure 02-3018 "Personal Rankings" (hereinafter: "the Personal Rankings Procedure")).

In June of 1999, Zozal was given a job as a Registration Officer in the Prisoners Division. At the same time, she began to study law. On February 13, 2005, after she completed her legal studies, she was reassigned to the IPS Legal Department, where she served as an intern in the Torts Division. When she finished her internship, she began serving as an assistant in the Torts Division, pursuant to a letter of appointment dated March 20, 2006 (Zozal was admitted to the Israeli Bar on September 5, 2007). Zozal served in this position until she was forced to retire.

5. The "warden retirement age" which applies to Zozal, according to the table in Part B of the Second Schedule to the Retirement Law, is 56 years and eight months, and in anticipation of her reaching this age, she was sent a notice informing her that she was of retirement age. Zozal applied for an extension of her employment, and submitted a proper application which was deliberated on June 3, 2008 by the Service Extension Consideration Committee. The Legal Advisor to the IPS advised the Committee that Zozal "conducts her job diligently," but added that "due to a reorganization, a change is required and she would be suitable for a position of assistant to the officer in charge of Petitions, outside the Legal Department."

Based on this statement, the Service Extension Consideration Committee found that:

> 'In light of the Legal Advisor's opinion which, on the one hand, noted her dedication to her work but on the other hand noted that she was not suitable for continued work in the Legal Department, the Committee cannot recommend the continuation of her employment – even though the Committee understands her personal circumstances, as she presented them to some degree, and as were presented to a greater degree by the head of the Welfare Department, which indicate that she is childless and is required to financially support her ex-husband.'

In light of the changes in the deployment of personnel within the IPS Legal Department, the Legal Advisor sent a revised notice to the Service Extension Consideration Committee on June 10, 2009, following which the Committee changed its conclusion, and recommended that Zozal's employment be extended for a period of twelve months, noting that "[b]ecause the Legal Advisor's opinion was a main reason for the Committee's recommendation, the change in his position necessarily to a change in the Committee's recommendation [sic], and the Committee therefore recommends that her employment be extended in one year, provided that during that year she continues to work within the Legal Department." This recommendation was submitted to the IPS Commissioner, who decided to accept it, partially, and ordered that her employment be extended for an additional six months only, until April 30, 2009. A proper notice was sent to Zozal, in which she was also informed that she would begin a pre-retirement vacation on March 1, 2009. Zozal filed an objection to this decision on December 10, 2008, which was denied following two interviews with the Director of the Human Resources Department of the IPS (hereinafter: "the HR Director") – the first on 25 December 2008 and the

second on 31 December 2008. During the second interview, the HR Director stated that "the organization has been engaged for a number of years in an effort to deal with eliminating the Flexible CS [Chief Superintendent] position" and that her job would therefore be filled by someone else with the rank of Superintendent. The HR Director also noted that she had not been found suitable for any other legal position at the rank of Chief Superintendent.

6. Once her objection was denied, Zozal appealed on 7 January 2009 to the Equal Employment Opportunities Commissioner at the Ministry of Industry, Trade and Labor. Approximately one month later, and before the Commissioner had time to address her application, Zozal filed the petition now before us, asking that the IPS Commissioner be ordered not to terminate her employment. By doing so, Zozal waived the involvement of the Equal Employment Opportunities Commissioner (see s. 18M(a)(2) of the Equal Employment Opportunities Law, 5748-1988 (hereinafter: "the Equal Employment Opportunities Law").

In this petition, Zozal applied for an interim order that would prevent her from being ordered to begin a pre-retirement vacation, and would prohibit the termination of her employment until the petition was decided. At first, on 1 April 2009, a temporary order was issued, postponing her pre-retirement vacation and the termination of her employment until any further decision, but on 12 May 2009, after the respondent's answer was received, this Court (Justice Joubran) denied the application. On 26 July 2009, an additional application that she submitted was also denied, and Zozal was forced to retire.

7. After a hearing was held regarding the petition on 25 April 2010, this Court (Justices M. Naor, Y. Danziger and N. Hendel) recommended that the parties look into the possibility of finding a practical solution to their dispute and ordered them to update the Court on this matter. As no such solution was found, an order *nisi* was issued on 18 July 2010, directing the respondent to explain why its decision to force Zozal into early retirement should not be revoked. This Court also ordered the respondent to explain how this decision did not contravene the Court's decision in *Rosenbaum*, and ordered that the hearing of the petition after the issuance of the order *nisi* would be held before an expanded judicial panel.

To complete the picture, it should be noted that on August 1, 2010, Zozal submitted an application for an injunction ordering that she be returned to her job at the IPS, on the grounds that a position for the rank of Chief Superintendent had become available. This application was denied on

October 3, 2010 (Justice M. Naor), due to the fact that her retirement had already taken effect and because of the IPS Commissioner's statement that if her petition was ultimately granted, it would still be possible to reverse his decision, and Zozal's rights would not be affected.

The Parties' Arguments

8. Zozal argued that the Service Extension Procedure, on which the decision that she be compelled to retire was based, is an improper and discriminatory procedure. She also argued that the specific decision reached in her own case suffers from defects that justify its revoking.

Zozal argued that the starting point for the arrangement embodied in the Service Extension Procedure – that the IPS Commissioner may order any IPS employee who has reached the age of 57 to retire – is unlawful, and constitutes age-based discrimination. Zozal emphasized that in the *Rosenbaum* decision, this Court rejected the IPS and the Israel Police's retirement policy, holding that it discriminated between wardens and policemen, on the one hand, and civil servants, on the other. She also noted that in that decision, the Court found that the IPS would have been expected to change its policy at least with respect to workers holding professional, as opposed to operational, positions. However, she argued, the retirement arrangements that were established after the *Rosenbaum* decision did not change IPS policy in this regard in any substantive way, and they in fact worsened the situation for IPS wardens, by the fact that all wardens above the age of 57 are now classified as temporary workers who are "of retirement age" and must apply for yearly extensions of their employment time and again. Zozal added that no substantive reason was given within these arrangements for establishing the uniform retirement age at 57, and that in her specific case, the respondent has not given any explanation for her forced retirement ten years before the age at which an attorney working in the civil service would be forced to retire. Zozal also argued that although s. 73 of the Retirement Law does grant the IPS Commissioner discretion to terminate the employment of a worker on the basis of age, there is no justification for transforming this optional power into official IPS policy, implemented in an irrelevant, improper, and discriminatory fashion. Likewise, Zozal argued that the arrangement violates the provisions of s. 2(a) of the Equal Employment Opportunities Law and the provisions of the Equal Retirement Age for Men and Women Law, 5747-1987, and that a requirement that a person must retire at the age of 57 despite retaining all his faculties constitutes a violation of a person's dignity and freedom of occupation, because the chances that he will be able to find a new job at that age are minimal. Zozal contends that this is

an unreasonable, disproportionate, and improper violation which should not be tolerated. She added that to the extent that the respondent sought to end her employment due to the lack of a proper placement, he is bound by the provisions of regular dismissal procedures, which require a hearing and the approval of the relevant appointed Minister.

Zozal also argued that her age was the real reason that her work at the IPS was terminated, and that the version according to which her termination was the result of the IPS' move toward eliminating the "Flexible Chief Superintendent" rank was brought up for the first time only at her second interview with the HR Director, on 31 December 2008. According to Zozal this version is unreliable, and does not conform to the IPS procedures that govern the employment of IPS personnel holding that rank. In any event, Zozal contends, this explanation is irrelevant to her case – because after completing her internship, she was working in a regular Chief Superintendent position; she supports this contention by referring to her letter of appointment, dated 20 March 2006. Zozal further noted that the IPS Legal Advisor had stated, in her periodic review, that she was conducting her job diligently, to the satisfaction of her division head within the Legal Department. According to Zozal, even if it is determined that the Service Extension Procedure is lawful, the extension of her employment should be ordered pursuant to the conditions established in that Procedure. Zozal refers to the criteria listed in s. 6 of the Procedure, and emphasizes that after twenty-three years with the IPS, she would have been entitled to a pension in the amount of 59% of her determinative salary, and that the termination of her employment by the respondent prevented her from having the opportunity to be promoted to a rank at which she would receive a pension in the maximum rate, of 70%, which would ensure that she would be able to support herself with dignity in her old age. Zozal adds that the respondent did not give proper consideration, in his decision, to her financial and family situation; to the fact that she was childless and without any social benefits from any other source; and to the fact that pursuant to a Family Court decision, she is required to use part of her pension to support her ex-husband. Zozal also argues that she did not have a proper hearing and that for this reason the decision rendered in her case should be overturned.

9. In contrast, the respondent argued that the petition should be denied – that there is no defect in the Service Extension Procedure, in the Extension of Service Order, or in the arrangements established therein, and that the manner in which the Procedure and the Order have been implemented is consistent with the decision in *Rosenbaum* and reflects a proper balancing

between IPS characteristics and the rights of those who serve in the IPS. In this context, the respondent further emphasized that there is currently no uniform retirement age in the IPS; that the arrangements that were established give rise to an individualized examination process for each application; and that age is merely one of several considerations weighed in each case. The respondent added that the pressure and fatigue that IPS personnel experience is greater than that experienced by the average worker (and is even greater than what is experienced by a police officer), because of the extra number of hours (at least five hours more *per* week than any other civil servant), and because of the unusual times in which IPS personnel are required to work as well as their ongoing contact with criminals. The respondent further argued that the retirement age within the civil service differs from one sector to another and that as a practical matter, it is lower than the age established in the Law. This is especially true with respect to the security forces, where the average retirement age is between 50 and 54. The respondent also noted that the legislature itself distinguished between police officers and wardens on the one hand, and civil servants on the other, with regard to the retirement age established in s. 73 of the Retirement Law – by establishing a different retirement age for police officers and wardens. The Law even allows, in s. 100(a), for increased pensions for police officers and wardens (according to the procedures enacted pursuant to that section, the pension can be increased by a rate of up to 8%, which is equal to an additional four years of employment). The respondent also argued that the early retirement age for IPS personnel conforms to the needs and wishes of the wardens themselves. According to the respondent, in this context, the reliance interests of those serving in the IPS should be protected. The respondent also believes that the possibility of retiring at an early age significantly contributes to the high motivation of IPS personnel. The respondent further argued that it is completely acceptable that the Extension of Service Order requires a warden who has reached retirement age to provide notice that he wishes to continue his employment, since past experience teaches that most wardens do prefer the earlier retirement age. The respondent emphasized that the IPS' approach towards service is different from that embedded in the Civil Service Law (Appointments), 5719-1959 (hereinafter: "the Civil Service Law – Appointments"). This approach is embedded in ss. 82 and 85 of the Prisons Ordinance [New Version] 5732-1971 (hereinafter: "the Prisons Ordinance") and in the procedures that were established regarding this matter, according to which any person serving in the IPS must, regardless of age, apply for an extension

of employment every five years until the twentieth year of employment. The respondent also noted that in terms of the criteria and guidelines used in deciding requests for extensions, the Extension of Service Order does distinguish between a prison warden and an IPS employee in an administrative or staff position, and that the applications are considered on an individual basis by the Committee, which is chaired by the HR Director. A substantial number of these applications (approximately 82%) is approved for continued employment, even beyond the age of 60.

10. According to the respondent, there is no defect in the particular decision reached in Zozal's case, noting that Zozal's overall personal circumstances were examined by the Service Extension Committee, and the Committee recommended that her employment be extended for another year. The Committee's recommendation was presented to the respondent, who examined all the relevant data once again, and decided to accept the recommendation in part, and to extend Zozal's employment for an additional six months. The respondent noted that the "Flexible Chief Superintendent" arrangement that applied to Zozal, through which she obtained the rank of Chief Superintendent, presented significant difficulties for the IPS' salary budget, and caused organizational difficulties that necessitated its elimination. The arrangement was therefore eliminated in the year 2000, and the decision was made to end it by requiring the retirement of those wardens who reached retirement age. The target date for ending this arrangement was the end of 2008, and it is argued that this organizational goal led to Zozal being ordered to retire and her position being filled by an IPS officer with the rank of Superintendent. The respondent added that Zozal's functioning within the legal department was indeed satisfactory, yet she was not found to be suitable for a promotion to the position of "division head" (with the rank of Chief Superintendent), and no suitable alternative position could be found for her. The respondent also argued that Zozal was never actually placed in a position with the rank of Chief Superintendent, and the reference made to this rank in her letter of appointment, given to her when she completed her internship, was erroneous. According to the respondent, age considerations were not at the core of the decision made regarding her retirement – the decision was in fact based on her personal capabilities and the organizational needs of the IPS. The respondent added that the IPS is now implementing a "term of office policy," according to which the proper step would be repositioning Zozal after four years in one position, and since no other appropriate position was found for her – releasing her from the IPS.

The respondent also noted that in contrast to Zozal's claims, she was indeed given a proper hearing, in which she was given the opportunity to raise all of her arguments. The respondent also pointed out that unlike other IPS personnel who do not wish to retire at the age of 57 because they have not yet earned enough pension rights, Zozal was entitled, upon her retirement, to a pension consisting of 60% of her determinative salary. Additionally, certain sums had accrued to her credit in a provident fund and in a continuing education fund, and she was entitled to a retirement grant in an amount equivalent to 12 months of her determinative salary, and to another grant for unused sick days and vacation days. All of this added up to about half a million NIS. The respondent also noted that in light of her personal circumstances, Zozal is entitled, pursuant to s. 100 of the Retirement Law, to request for her pension to be increased. It was also noted that Zozal has formal education in two professional fields that are not unique to the IPS (social work and law) and therefore her argument that her freedom of occupation has been violated by her forced retirement should be dismissed.

11. In response to the respondent's arguments, Zozal noted that the procedures to which the respondent referred are irrelevant in this case, and that the decision to have her retire was based on her age. Zozal added that in any event, according to her letter of appointment, she was assigned to a regular position of a Chief Superintendent, and she emphasized that the respondent's claim that this was based on an error was made in bad faith. According to her, officers who were promoted to the rank of Flexible Chief Superintendent were not informed of the fact that the promotion would work against them with regard to their retirement age, and the respondent's position suggests that her promotion, which was based on her skills, turned out to be a double-edged sword that put her at a disadvantage. Zozal further argued that the claim that she could not be transferred to a different position should be dismissed, since she was never offered a suitable alternative position, despite the fact that legal positions matching her skills were available. She noted that in any event there was no proper reason to move her from the position in which she had gained success, as was indicated in the report written by her superiors. These circumstances, Zozal argued, demonstrate depravation, discrimination, and injustice caused by her forced early retirement and the respondent's trivializing of her work and the positions she held during the course of her employment shows lack of good faith.

According to Zozal, the IPS retirement policy has not changed in any substantive way since the decision in *Rosenbaum*, and the discrimination

between IPS workers holding professional positions like hers, on the one hand, and civil servants, on the other hand, remains in place. She emphasized that an IPS warden who reaches the age of 57 can, in the best case scenario, extend his employment for a limited period of time as prescribed in the Order, but from that age onwards any promotion—both in terms of jobs and in terms of ranks—would not be considered. Zozal added that no reasons were given for the respondent's decision to extend her employment by only six months, and that the Extension of Service Committee (in its deliberation on June 3, 2008) discussed her retirement only with reference to the issue of her age. She noted that the reasoning offered in the interview that took place on December 31, 2008, including the remarks relating to the Flexible Chief Superintendent position, were developed at a later stage in order to obscure the fact that her retirement was based solely on her age, and without being given a proper opportunity to prepare for these arguments or to respond to them. Zozal finally argued that because no other law establishes a mandatory retirement age for wardens, the IPS Commissioner is bound to implement the mandatory retirement age established in s. 4 of the Retirement Age Law, which is 67. According to her, that section supersedes any arrangement or administrative guideline presented by the respondent in this context. Zozal added that the respondent's policy does not reflect the needs of the wardens and is inconsistent with the large number of applications for extensions of employment that are submitted after the age of 57; she also noted that the data presented by the respondent indicate that the average retirement age for wardens has risen over the years. It may be presumed, she argued, that should this obstacle be removed, the average retirement age would continue to increase.

Discussion

12. The main issue which must be decided in this petition is whether the arrangements that the IPS has established for the retirement of IPS personnel are consistent with the State's obligation to treat all its employees equally, in accordance with the principles that were outlined in *Rosenbaum*.

Before we respond directly to this question, we will again present a brief outline of the normative framework that is relevant to the matter.

Since the early years of the State, the right to equal treatment has been recognized by our legal system as a primary and basic right (see I. Zamir and M. Sobel "Equality before the Law" 5 Mishpat u'Mimshal (5760 -2000) 165, 166-169 (hereinafter: "Zamir and Sobel"). According to the standard approach, the concept of equality means "equal treatment of all people when there is no difference between them that is relevant to the matter" (HCJ

9863/06 *Karan – League of Military Amputees v. State of Israel, Minister of Health* (2008) (unreported), at para. 9; HCJ 4293/01 *New Family v. Minister of Labour and of Welfare* (2009) (unreported), *per* Justice A. Procaccia, at para. 45). Discrimination is improper when a differentiation is made between people or situations without any substantive justification. However, there can be situations in which there are good reasons for making such a distinction. This Court has noted this possibility:

'Equality in the case before us means equal treatment for persons who are equal and different treatment for persons who are different. Discrimination means different treatment for persons who are equal and equal treatment for persons who are different… It follows that equality does not require identical treatment. Sometimes, in order to achieve equality, we need to act differently. Not every different treatment is discriminatory treatment. The principle of equality is therefore based on the approach of relevance' (HCJ 6778/97 *Association for Civil Liberties in Israel v. Minister of Internal Security* [2004] IsrSC 58(2) 358, at p. 365. See also HCJ 721/94 *El-Al Israel Airlines Ltd. v. Danielowitz* [1994] IsrSC 48(5) 749, at p. 762).

When Basic Law: Human Dignity and Liberty was enacted in 1992, the right to equal treatment was recognized as a fundamental right embodied within the human right to dignity, in accordance with an intermediate model which relates to discrimination that does not involve humiliation too, provided that such discrimination is closely and substantively related to human dignity (see HCJ 4948/03 *Alhanati v. Minister of Finance* (2008) (unreported), at para. 17, and the references cited there).

13. The duty not to discriminate – which is but a mirror image of the human right to equality – is imposed primarily on government authorities, but it can arise in personal law situations as well (see Zamir and Sobel, supra, at pp. 174-179). One of the key areas in which the principle of equality "is given a place of honor as a norm to be upheld" is labor law (*Alhanati*, at para. 18). In this field, the Knesset has enacted a series of laws which include provisions that anchor the principle of equality and which are designed to eliminate various types of discrimination (see, for example: Equal Salaries for Male and Female Employees Law, 5756-1996; Women's Work Law, 5714-1954; Equal Retirement Ages for Male and Female Employees Law, 5747-1987; Chapter D of the Equal Rights for People with Disabilities Law, 5758-1998; s. 15A of the State Civil Service Law – Appointments; s. 42 of the Employment Service Law, 5719-1959; ss. 18A-18A1 of the Government Companies Law, 5735-1975).

A key law which is intended to establish the principle of equality within the field of labor law is the Equal Employment Opportunities Law, which this Court has termed "the lynchpin of legislation concerning equality in the field of labor relations in Israel" (HCJ 6051/95 *Recanat v. National Labour Court* [1997] IsrSC 51(3) 289, at p. 306 (hereinafter: "*Recanat*"); the Equal Employment Opportunities Law applies to the State as an employer (s. 17 of the Law), and served as the normative basis for the analysis of the parties' claims in the *Rosenbaum* case.

Section 2 of the Equal Employment Opportunities Law provides as follows:

> '(a) An employer shall not discriminate between his employees, or between candidates for employment on the basis of their gender, sexual orientation, personal status, pregnancy, fertility treatment, in vitro fertility treatments, the fact that they are parents, or because of their age, race, religion, nationality, country of origin, views, party affiliation or duration of reserve service or expected reserve duty service, within the meaning thereof under the Military Service Law [Consolidated Version], 5746-1986, including due to its expected frequency or duration, in any of the following:
>
> (1) acceptance for employment;
> (2) terms of employment;
> (3) advancement in employment;
> (4) vocational training or supplementary vocational training;
> (5) dismissal or severance pay.
> (6) benefits and payments for employees in connection with their retirement from employment.
>
> (b) For the purposes of subsections (a) and (a1), the making of irrelevant conditions shall also be regarded as discrimination.
>
> (c) Differential treatment necessitated by the character or nature of the job or position shall not be regarded as discrimination under this section.'

This section prohibits discrimination by an employer among his employees, or among job applicants, and this prohibition "revolves around two key axes:" (1) The grounds on which a claim may be based – classification of people according to distinctions that are prohibited in the opening passage of s. 2(a) of the Law; (2) The subject of discrimination – the subjects listed in sub-sections (1) through (6) of s. 2(a) of the Law, regarding

which discrimination is prohibited (see the remarks of Justice M. Cheshin in *Recanat*, at p. 308; HCJFH 4191/97 *Recanat v. National Labour Court* [2000] IsrSC 54(5) 330, at p. 343 (hereinafter: "*Recanat II*"), and see also Sharon Rabin Margaliot "The Slippery Case of Discrimination in the Workplace – How can it be Proven?" 44 Hapraklit 529 (1998), at pp. 532-535 (hereinafter: "Rabin-Margaliot").

The concept of relevance, on which the principle of equality is based, is expressed in the above-mentioned provisions of s.2(c) of the Equal Employment Opportunities Law, which provides that "[d]ifferential treatment necessitated by the character or nature of the job or position shall not be regarded as discrimination under this section." This test is objective by nature, and when we implement it we must examine whether the job's requirements and nature do in fact reasonably necessitate the differentiation for which justification is being sought. It is also necessary to determine whether reasonable weight was attributed to each of the relevant details, allegedly justifying the differentiation (*Recanat II*, at pp. 348-349). It should be noted that a worker who claims that he has suffered discrimination bears the burden of proving that the employer discriminated against him compared to other employees, and once the worker has met this requirement, the burden shifts to the employer to prove that the conditions listed in s. 2(c) of the Law have been satisfied, at least at the level of proof required in civil proceedings (*ibid*., at pp. 351-352).

14. One of the forms of discrimination prohibited in the Equal Employment Opportunities Law is age-based discrimination. This prohibition was added by Amendment 3 to the Law, in 1995 – an amendment which added several new grounds for discrimination claims. Age-based discrimination is generally directed at older members of society and can create an obstacle that prevents individuals from finding employment; it can also be a factor that influences terms of employment and promotions, as well as a motivating factor in employee dismissals and in forced retirement (see Sharon Rabin-Margaliot, "Distinctions, Discrimination and Age: Power Games in the Job Market" 32 Mishpatim 131 (2001) (Hebrew), at pp. 161-165; Batya Ben-Hador, Aliza Even-Hirik, Efrat Applebaum, Hadas Dreiher, Dafna Sharon, Yanon Cohen, Guy Mundlak, "Assessing Employment Discrimination in Hiring through Correspondence Studies", 11 Work, Society and Law 381 (2005) (Hebrew), at p. 395; Ruth Ben-Israel, Equal Opportunity and the Prohibition against Employment Discrimination, at pp. 1082-1089 (Vol. 3, 5758) (hereinafter: "Ben-Israel"); Ruth Ben-Israel, Gideon Ben-Israel, Who's Afraid of Old Age (2004) (Hebrew), at pp. 56-60).

Age-based discrimination against employees or job applicants is usually a reflection of "stereotypes with regard to the limitations of the body and the mind of the older person. Usually this has no rational or objective basis. This discrimination violates the human dignity of the person who suffers the discrimination. He feels that he is being judged according to his age and not according to his talents and abilities." (*Rosenbaum*, at pp. 871-872. See also *Recanat II*, at p. 369; for a review of the development of the prohibition against age-based discrimination and the nature thereof, see: Ben-Israel, Equal Opportunity, supra, at pp. 1029-1186; Pnina Alon-Shenker "'The World Belongs to the Young': On Advanced Age-Based Discrimination in the Workplace and Forced Retirement at a Fixed Age," Dalia Dorner Volume, at p. 81 (Shulamit Almog, Dorit Beinisch, Ya'ad Rotem, eds., 2009) (hereinafter: Alon-Shenker); Yisrael Doron and Anat Klein "The Wrong Forum? Age-based Discrimination from the Perspective of the Haifa Regional Labour Court" 12 Work, Society and Law 435 (2010) (hereinafter: Doron and Klein); Rabin-Margaliot, "Distinction, Discrimination and Age"). Various scholars have also noted the fact that age-based discrimination against older workers is one of society's expressions of its perception of the old as different, weakened people that should thus be eliminated from society (a phenomenon known as ageism. See Israel (Issi) Doron "Ageism and Anti-Ageism" 25 Hamishpat (2008); "Law in the Service of the Elderly Society," The Legal Rights of Veteran and Elderly Workers in the Field of Employment (2010)).

15. Age-based discrimination in connection with the forced retirement of a worker is hurtful and cruel. An older-person's retirement is very significant, and carries weighty consequences for that person's life, in financial and social terms, and no less with respect to the person's self-image, given the insult inflicted on a person who is capable and wishes to continue working but is nevertheless denied the ability to do so. We therefore cannot exaggerate the importance of the duty not to discriminate between employees with regard to the determination of a retirement age (*Recanat*, at p. 326). Justice G. Bach noted this point in HCJ 104/87 *Dr. Naomi Nevo v. National Labour Court* [1990] IsrSC 44(4) 749, when he wrote the following:

'Retirement from work has many negative personal, mental and social consequences. Frequently, a person who retires from his employment because of his advanced age feels that he is no longer a participant in the productive sector of society. He feels that he has been deprived of the satisfaction of working and receiving compensation for his labor. This feeling is strengthened by society's attitude towards him, which in many cases treats

him as an "old man" who no longer serves any useful purpose. The situation is more acute in our day, when the average life expectancy has increased and people remain healthy even at an advanced age. Therefore, there are now more years in which an older person, of sound body and mind, is forced, despite his capabilities, to abandon his activities in the labor market and gaze, frequently in frustration, on the progression of life's activities in which he can no longer take part' (*ibid.*, at p. 755.) See also Israel Doron, "The Connection Between the Aging of Israeli Society and the Status of Economic and Social Rights in Israeli Law" in Economic, Social and Cultural Rights in Israel (Yoram Rabin and Yuval Shani, eds., 2005) 893, at p. 926 (hereinafter: Doron).

It should be noted in this context that in many cases, the interest of older employees in continuing to work is consistent with employers' interest in continuing to employ them, because these older employees have know-how and life experience (see HCJ 4487/06 *Kelner v. National Labour Court*, (2007) (unreported) *per* Justice E. Rubinstein, at para. 10; *Rosenbaum*, at p. 872; Alon-Shenker, supra, at pp. 117-118).

16. Discrimination in the form of a low retirement age is not mentioned explicitly in the Equal Employment Opportunities Law, but it has been recognized as one of those matters that fall within general age-based discrimination, which is a form of discrimination listed in that Law (see Rabin-Margaliot, "Distinction, Discrimination and Age," at p. 173). It has been held that "the establishment of a lower retirement age for an individual worker or for a particular group of workers, when the nature of their positions does not require such early retirement, constitutes age-based discrimination vis-à-vis the particular worker or group" and in general, "an employer's duty to treat all his employees equally in terms of their age, means, *inter alia*, that the same retirement age must be in place for all workers (who constitute the peer group)…" (*Recanat II*, at pp. 347, 360. See also *Recanat, per* Justice Zamir, at pp. 347-350. Regarding the application of the Equal Employment Opportunities Law to this subject, see the position of (then) Justice M. Cheshin, *ibid.*, at pp. 335-336, and of (then) Justice D. Beinisch, *ibid.*, at p. 375. See also Alon-Shenker, supra, at pp. 91-97).

There are those who believe that "the very fact that a certain age – any age – is established – at which an employee must retire from his job, discriminates between those who have reached that age and those who are younger" (*Recanat*, at p. 309). According to this approach, a different arrangement should be put in place, one that outlines an individualized model for retirement that takes into consideration the particular characteristics of

each worker (for a review of the various approaches concerning the proper model, and the constitutional questions arising in this context, see HCJ 7957/07 *Sadeh v. Minister of Internal Security* (2010) (unreported), at para. 11, and the references cited there. See also Rabin-Margaliot, "The Slippery Case of Job Discrimination," at pp. 559-561; Ruth Ben-Israel, Social Security (Vol. 3, 2006), at pp. 1030-1038, 1047-1050). The Israeli legislature, as noted, chose to adopt the model of a uniform mandatory retirement age for all workers in the economy, including civil servants, and this is the model reflected in the Retirement Age Law and the Retirement Law (a similar approach was adopted by US federal law. See Age Discrimination in Employment Act, 1967 29 U.S.C. §§ 621-634; *EEOC v. Wyoming*, 460 US 226 (1983)). This approach therefore serves as the starting point for our discussion. At the same time, it is important to remember that this model may increase the sense of discrimination and mistreatment if principles of equality are not upheld properly. Justice Zamir noted this point when he wrote:

> 'The harm generally done to a person when he is forced to retire at an age that has been fixed as the general age for mandatory retirement *is heightened when a person belongs to a group of workers who are forced to retire from their work at a younger age*' [emphasis added] (*Recanat*, at p. 342).

Indeed, Zozal focused her arguments on the fact that the arrangements established in the Extension of Service Order, on the basis of which the decision was reached to retire her at age 57 and two months, is wrongful, and that it discriminates against her as an attorney at the IPS, relative to other workers in the Civil Service who do similar work.

17. As noted above, the relevant peer group for this case includes all civil servants. It has already been held in this context that "all policemen and prison wardens are 'workers' and the State is their 'employer'" (HCJ 1214/97 *Rabbi Halamish v. National Labour Court* [1999] IsrSC 53(2) 647, at p. 653). In *Rosenbaum* the Court added that:

> 'The arrangements in the Civil Service (Retirement) Law apply to all civil servants. The employees in the various parts of the civil service have a reasonable expectation of being treated equally, as employees of the State of Israel. The State owes general duties of reasonableness, fairness, and equality to each citizen… and it certainly owes these duties to all of its employees. Indeed, for the purpose of the prohibition of discrimination before us, the State is one entity. It is the 'employer' under s. 2. [of the Equal Employment Opportunities Law]' (*ibid*., at pp. 872-873).

We have already discussed the fact that discrimination is unlawful if a distinction is made between individuals or situations, when there is no substantive justification for such a distinction. The party arguing that he has been the victim of discrimination must establish that there is a "peer group" whose members are all identical or equal to the claimant in terms of relevant characteristics and who, despite such similarity, are treated differently (see HCJ 6784/06 *Major Ronit Shlitner v. Director of Pensions* (2011) (unreported), at para. 49). Once it has been established that those serving in the IPS are treated differently than all other civil servants with regard to the age of their retirement, we must determine whether the respondent has met the burden of showing that there are substantive reasons that justify this distinction.

The respondent argued repeatedly that there is a very significant difference between the work of various categories of civil servants, on the one hand, and the work of prison wardens, on the other hand. According to the respondent, this difference justifies their different retirement arrangements, as established in the Extension of Service Order. In this context, the respondent stressed that most wardens enter the IPS at a relatively early age and serve in very demanding positions, which expose them to many difficult situations; the experience of burnout is therefore relatively high for those who serve in the IPS. According to the respondent, the fact that the wardens ask to retire earlier than other civil servants supports the distinction between IPS personnel and other civil servants. The respondent presented data showing that the average retirement age for wardens in 2009 was 50.7, and noted that apart from career soldiers in the IDF (for whom the average age is 45.6), this is the youngest average retirement age among other groups of State employees (see *Shlitner*, at para. 57). The respondent appears to have concluded, from these numbers, that a lower retirement age for IPS personnel is thus justified.

18. The various characteristics that differentiate the IPS and Israel Police employees from other civil servants have already been noted by this Court in *Rosenbaum*:

> 'Admittedly, the prison service and the police are special bodies within the civil service. Their functions are complex, and they are often exceptional in nature and in the demands that they make of those serving in their ranks. They are likely to require greater physical fitness, maximum alertness, long and irregular hours, and the ability to withstand pressure and tension. Moreover, many of those who serve in the prison service and the police — and this

> includes persons in administrative positions or jobs requiring a special professional expertise (such as doctors or engineers) — are sometimes required to exercise their enforcement powers or to act as reinforcements for operational forces' (*Rosenbaum*, at p. 873. On physical strength as a relevant criterion, see also *Recanat*, at p. 359).

However, it is still necessary to examine the reasonableness of the arrangements established by the IPS. This Court has already held, in *Rosenbaum*, that even though the characteristics of the service in the IPS and in the Israel Police reflect the uniqueness of those two entities –

> 'they do not render these bodies — which are, after all, branches of the State — immune from the duty to treat their employees in the same way as other civil servants… These special characteristics should not be allowed to serve as a way of narrowing the 'equality group,' with the result that it exempts the respondents *ab initio* from examining the basis for their policy' (*ibid.*, at p. 873).

The court further noted in the same case that while the conditions in the IPS and the Police are "unique in different ways":

> 'these are merely conditions that require the respondents to develop a complex and objective arrangement, which both takes into account the characteristics of the service, *on the one hand*, and is also sensitive to the human rights of the persons serving in it, *on the other*. As the court has already held, the test in this regard is ultimately a "test of reasonableness and proportionality"...' [Emphasis in the original] (*ibid.*, at p. 878).

Thus, the difference in the characteristics of the service in the IPS can justify retirement arrangements for its personnel, which differ from those that apply to other civil servants, but these arrangements may still be subjected to judicial review examining whether those arrangements – and in this case, the Extension of Service Order – are indeed reasonable and proportionate, and whether the principle of equality was given proper consideration within these arrangements in balancing all the relevant considerations.

The Arrangements Established in the Extension of Service Order

19. I will first note my conclusion, which is that the arrangements established in the Extension of Service Order constitute an unreasonable and disproportionate violation of the principle of equality; they conflict directly with the rule established in *Rosenbaum*, and with the outline set out in that judgment concerning the nature of appropriate retirement arrangements.

I will describe below the reasoning that has led me to this conclusion.

Section 3 of the Extension of Service Order includes a statement that the Order establishes the criteria according to which "a decision will be made regarding a warden who has reached retirement age and who wishes to defer his retirement and continue to serve after retirement age, and regarding whom the IPS Commissioner is authorized to order a forced retirement." A warden of retirement age is defined as a warden whom the IPS Commissioner is authorized to order to retire. Section 2 of the Order provides that in accordance with the Retirement Law, the IPS Commissioner may order any warden who has reached the age of 57 to retire, if the warden has served at least ten years in the IPS or in the civil service. According to the provisions of the Order, a list of wardens whose retirement the IPS Commissioner may so order is distributed each year, and those wardens who wish to extend their employment may submit an application for an extension of their employment. These applications are all reviewed by the Extension of Service Committee, provided that the "basic conditions for Committee review of a warden's case" have been met. These conditions are set out in s. 5 of the Order and they are as follows:

> 'a. Confirmation from the Head of the Medical Division, addressed to the senior staff that the warden is fully qualified, from a medical perspective, to continue his employment (with the specific competence requirements adjusted for the sector in which the warden is employed).
>
> b. In addition to the requirement in section (a) above, the warden is included within one of the following criteria:
>
> 1) Wardens of retirement age who serve in professional/administrative [staff] positions or in required staff positions;
> 2) Wardens from the operational sector who make a unique contribution to the organization, or wardens from the operational sector who are in need of an additional period of employment of not more than 12 months in order to fully exhaust their salary rights [or for whom an appropriate staff/administrative position has been found.

c. Wardens who are of retirement age, and who, as of the determinative date, have not yet earned all their pension rights.

d. Notwithstanding the provisions of section (c) above – the Committee may review applications by wardens who have exhausted all of their pension rights if the reason for the application is their unique contribution and a clear organizational need for their continued employment.'

Section 4(d) of the Order provides that when a Service Extension Committee considers an application, it must take into account all the information regarding the particular warden and "the nature and character of his service; the nature and substance of the function that he performs; his service track; the completion of a term of office; the needs of the system; and additional factors." It is further clarified in the Order that "the fact that a warden has reached the age at which the Commissioner is authorized to order his retirement will not constitute the only grounds on [sic] his retirement" (s. 4(e) of the Order). The Order also stipulates, in s. 7, the factors to be considered in assessing a warden during a Committee's deliberation, and provides as follows:

'a. The factors for assessing a warden will focus on the following areas:

1) Evaluation of job performance, and the nature and character of the job that the warden performs.
2) The warden's service history, the length of his term of office and the number of years he has spent at his current job.
3) The warden's medical condition.
4) The degree to which the warden is essential to his job, the possibility of repositioning him, the potential for other placements (including a requirement that he undergo training for another position) and the potential for his promotion.
5) The scope of the warden's entitlement to a pension.
6) The warden's financial and family situation.

> b. In addition to the factors regarding the warden's functioning, the Committee will also take into account systemic considerations and the realization of IPS objectives.'

The Order further provides that the warden whose matter is being deliberated must be invited to the Committee's deliberation and must be given the opportunity to make his case before the Committee, either verbally or in writing. The Committee, after hearing the warden's arguments and receiving an opinion from his supervisors, and after considering said criteria, may recommend to the IPS Commissioner to extend the warden's employment, and if the recommendation is to extend employment, the Committee may recommend the manner in which the employment will be extended and the position in which the warden will continue his employment. Alternatively, the Committee may recommend that the warden should be forced to retire. A recommendation to extend employment can be for a period of up to one year, and if such an extension is granted, the warden may, at the end of the extension period, submit an application for further extension. However, the "Recommendations regarding extensions of employment may only be given for a total period of up to 3 years and/or until the warden has reached the age of 60" (s. 8(d) of the Order). Section 8(e) also provides as follows:

> 'The case of a warden who wishes to extend his employment beyond the age of 60 will be presented to the Committee for deliberation, and the Committee will consider the degree to which the continuation of his employment in his current position is essential; it will also consider his expected contribution to the organization should he remain in his position. The Committee will also examine the request in accordance with the standards set out in s. 7a and 7b. The Committee may recommend the continuation of a warden's employment for periods that do not exceed one year per each request.'

To complete the picture, we note that s. 10 of the Order establishes an additional exception, for a bereaved parent or widow/er, according to the definition of that term in that section, who may serve an additional five years beyond the retirement age for wardens, provided that he is found suitable for continued employment in the IPS. Section 9 of the Order also provides that only the Commissioner is authorized to render a final decision regarding the extension of employment or a forced retirement, and that a warden has the

right to appeal a decision denying his application for employment extension to the Commissioner. The Commissioner's decision on such appeals is final.

20. These arrangements, established in the Extension of Service Order, are indeed substantially different from the arrangement that was followed in the IPS in the past, and which was struck down in *Rosenbaum*. The IPS policy expressed in that earlier arrangement was to require all wardens (with very rare exceptions) to retire at a uniform age (either 55 or 57). According to the new arrangement, any warden, upon reaching retirement age, may apply for an extension of his employment, and that application will be deliberated in an individualized manner by the Service Extension Committee, which conveys its recommendations on to the IPS Commissioner. The Order also distinguishes – with respect to their retirement – between wardens who serve in professional, administrative, or staff positions, on the one hand, and wardens who serve in the operational sector, on the other hand. This distinction conforms to this Court's holding in *Rosenbaum* regarding the relevance of the nature of a warden's position to his retirement, and concerning the possibility of "establishing a categorization of positions or jobs within the entities" (at p. 877). The Order also emphasizes that the fact that a warden has reached the age at which the Commissioner is authorized to order his forced retirement cannot serve as the "exclusive grounds" for ordering his retirement (s. 4(e) of the Order). This provision teaches us that in contrast to the previous situation at the IPS, in which age was the sole grounds (except in very rare occasions) for the forced retirement of a warden, the current system requires an individual evaluation for any warden who seeks to extend his employment past the age of 57. At the same time, upon examining the overall provisions of the Extension of Service Order, it seems there is still a substantial unjustified disparity between the arrangements for the retirement of wardens and for all other civil servants. This is because of the strong emphasis placed on age as a key factor—even if no longer a sole factor—in decisions concerning the retirement of wardens, and as a central axis around which the entire process revolves.

21. A review of the Order indicates that its starting point and basic presumption is that a warden is "of retirement age" at the age of 57. This is the default option for the retirement arrangement embedded in the Order, unless the warden has actively applied for an extension of his service. If such an application is submitted, it is brought before the Extension of Service Committee which discusses the application. After the deliberation, the Committee may recommend that the warden's employment be extended, but the recommendation may only be for a maximum period of one year each

time, and all extensions combined may be for a total period of no more than three years or until the warden reaches the age of 60. Thus, even if a warden serves in a professional, administrative, or staff position, and satisfies all the criteria outlined in the Order, his employment at the IPS may not be extended for more than a single year *per* application, nor for a total period of more than three years or past the time at which the warden reaches the age of 60 (except in very exceptional cases set out in s. 8(e) of the Order). These restrictions discriminate against IPS personnel who serve in professional, administrative, or staff positions – employees who serve as lawyers, social workers, accountants, human resources directors, organization managers, etc. – compared to civil servants who hold similar jobs. This discrimination is reflected in the fact that according to the arrangements set forth in the Extension of Service Order, age 60 is established, as a practical matter, as the mandatory retirement age for wardens. In contrast, age 67 is the mandatory retirement age for other civil servants (see and compare: provisions of the Extension of Service Order for the IPS; provisions of the Civil Service Regulations (Retirement) (Continued Employment of a Worker Beyond Age 65), 5729-1968; and s. 82.54 of the Civil Service Bylaws).

The Civil Service Commissioner's power to order the retirement of civil servants who have reached the age of 60, if they have been employed within the civil service for at least ten years (s. 18 of the Retirement Law), is parallel to the IPS Commissioner's power to order the retirement of wardens when they reach the age of 57 (ss. 73 and 81 of the Retirement Law). Civil servants also have the right to give notice that they wish to retire at the age of 60. However, the arrangement established in s. 82.52 of the Civil Service Bylaws regarding the Commissioner's exercise of his authority in this regard is completely different from the IPS arrangement described above, as set out in the Extension of Service Order. First, the minimum age (60) at which the Civil Service Commissioner can order retirement pursuant to the Retirement Law is effectively the same as the maximum age at which a warden can remain employed pursuant to the provisions of the Extension of Service Order. This fact highlights the harsh discrimination that exists in this context between IPS personnel and civil servants, particularly with respect to IPS workers that perform functions that are no different in any relevant respect from those performed by other civil servants. Second, even though the Civil Service Commissioner has the authority to order the retirement of a civil service worker who has reached the age of 60, the provisions in the Civil Service Bylaws make clear that this is not the default age for retirement, and the worker is therefore not required by those provisions to submit an

application for the extension of his employment. To the contrary, in order for the worker to retire at the age of 60, the State must initiate a process at the end of which the Civil Service Commissioner can order the worker to retire, provided that he has been persuaded that there are good reasons that justify such an order. If such a process is not initiated, the default is that the worker may continue to work within the civil service until he reaches the mandatory retirement age of 67.

22. The differences in the approaches of the two arrangements are quite stark, and they are reflected, naturally, in the substantive difference between the operative provisions included in each arrangement. According to the retirement arrangement used by the IPS, age 57 is perceived as the age at which employment will end, unless the worker has initiated a process in order to extend his employment. Even then, the possibilities for an extension are limited, such that the extension cannot last for more than a maximum period of three years, unless the IPS Commissioner is persuaded that there is justification for the extension. The very title of the IPS' administrative arrangement, the "Consideration of the Extension of the Service of a Warden of Retirement Age Order" indicates the same point. By contrast, the retirement arrangement followed by the civil service and established by the provisions of the Civil Service Bylaws, reflects the perception that civil servants will generally be able to serve until the mandatory retirement age (67), unless the Civil Service Commissioner is persuaded that there are good reasons which justify an order requiring the worker to retire early (but not before reaching the age of 60, and only if the worker has served for at least ten years). For this purpose, the State must initiate a process, based on a reasoned request made to the Civil Service Commissioner by the responsible party at the relevant Ministry, asking for permission to order the worker's early retirement. This request is examined by the Civil Service Commissioner, and the Commissioner decides whether or not to grant it.

A comparison between the factors and criteria mentioned in the Civil Service Bylaws for the purpose of exercising the Civil Service Commissioner's discretion in this context, on the one hand, and the criteria and factors specified in the IPS' Extension of Service Order, on the other, also reflects the differences in perception discussed above. For instance, the Civil Service Bylaws emphasize the reasons that could justify forced retirement prior to the mandatory retirement age, including reducing the Ministry's work responsibilities or a reorganization, and the responsible party in the relevant Ministry must specify "why this employee specifically should be forced to retire." If the reason is inefficiency, the responsible party must

specify details that will prove that claim (s. 85.251 of the Civil Service Bylaws). The same Bylaws also provide that if the Civil Service Commissioner finds that the forced retirement of a worker is justified, he must send an appropriate notice, ninety days prior to the date set for the retirement, and the notice must specify the worker's right to appeal to the Civil Service Committee – a committee appointed pursuant to the Civil Service Law – Appointments (see the Civil Service Regulations (Retirement) (Appeal of Forced Retirement), 5728-1968). This is an additional significant difference between the two arrangements. For instance, according to the arrangement used by the civil service, a separate and independent authority – the Civil Service Committee – reviews any decision made by the Civil Service Commissioner to force an employee to retire before he reaches the mandatory retirement age. In contrast, at the IPS, the IPS Commissioner himself adjudicates the warden's appeal against the Commissioner's own decision not to grant the warden's request for an extension of his employment, and the Commissioner's decision is final.

23. The respondent emphasized that after the Extension of Service Order's arrangements were implemented, the average age for wardens' retirement – those retiring only due to their age – began to rise. The respondent noted that the IPS Commissioner grants 82% of the applications submitted for extensions of employment, and added that "the employment of an IPS employee has, on more than one occasion, been extended beyond the age of 60." Yet, the respondent did not specify the average length of employment extension for extensions applicants; the average age of retirement for IPS personnel in professional positions, compared to the average retirement age of all civil servants, at least compared to the average retirement age of civil servants holding equivalent positions; the number of cases in which the employment of wardens had been repeatedly extended; the percentage of wardens whose employment was extended beyond the age of 60; until what age employment was extended in those cases; or whether the employment of a significant number of wardens has been extended until or close to the age of 67. In the absence of these substantial data (it would appear that Zozal herself is included in the category of those whose employment was extended, according to a figure presented by the respondent, since her employment was extended for a period of six months), and in light of the restrictive provisions in the Extension of Service Order mentioned above, the respondent's argument concerning this matter is insufficient to rebut the argument raised in the petition concerning discrimination.

I will further note that the respondent mentioned the reliance interest of the wardens as one of the justifications for the arrangements included in the Extension of Service Order. The claim made by the respondent is that when an individual decides to join the IPS, one of the considerations that he or she weighs is the fact that due to the high level of burnout involved in an IPS career, the retirement age is relatively young; this early retirement enables IPS workers to begin a second career after they leave the IPS. However, this consideration cannot serve as a justification for the retirement arrangement which is the subject of this petition. First, a reliance interest does not justify an arrangement that *requires* wardens to retire at the age of 57 based on a decision by the IPS Commissioner, and a solution can be found with respect to that interest, to the extent that it exists, by allowing wardens the opportunity to retire at that age, if they choose to do so (compare *Nevo*, at p. 756). Second, the wardens' reliance interest, insofar as it exists, cannot by itself justify discriminatory arrangements. The alleged reliance interest argument (i.e., the argument that IPS workers have relied on the possibility of retiring at the age of 57) can be addressed by providing that the said early retirement age will apply only to those wardens who argue that they relied on the possibility of retiring at the age of 57, and who wish to do so. At the same time, for other wardens, who are not interested in the early retirement, *the age of 57 will serve as a juncture at which the IPS Commissioner will examine the possibility of retirement, but this examination will be in a format similar to the above-described process used by the civil service and embedded in s. 85.52 of the Civil Service Bylaws, rather than conforming to the retirement arrangement set out in the Extension of Service Order*.

24. As a parenthetical note, and without deciding on the matter, I would add that the provisions in the Order relating to wardens from the operational sector (as opposed to IPS workers in professional, administrative, or staff positions, including Zozal), are also problematic. This is because the opportunity given to wardens from that sector to extend their employment pursuant to the Order's provisions, is restricted and strictly limited to wardens "who make a unique contribution to the organization" or who "need an additional period of employment of no more than 12 months in order to fully exhaust their salary rights, or for whom an appropriate staff/administrative position has been found" (s. 5(b)(2) of the Order). It may be presumed that to the extent that the positions discussed herein are operational, the operational competence and physical fitness required for the job are a substantive consideration, which could justify the forced retirement of a significant portion of the wardens in this sector when they reach the age

of 57. However, in a different context, it has already been held that "the need for proportionality requires us to investigate whether it is possible, as a practical matter, to ensure this requirement of physical fitness… on the basis of an individual review" (*Recanat II*, at p. 355). This is because there may be workers whose physical fitness at an older age is better than that of younger wardens (see: *Association for Civil Liberties*, at pp. 367-369; LabA (NLC) 1414/01 *Dead Sea Works Ltd. v. Nissim*, (2004) (unreported), *per* Justice S. Tsur at para. 2 and *per* President Adler, at para. 2. See also Ben-Israel, supra, at pp. 1045-1050. With respect to the implementation of the principle of proportionality in the field of labor law in general and equal opportunity in employment in particular, see also Guy Davidov, "Proportionality in Labor Law," 31 Iyunei Mishpat 5 (2008)). In our case, the IPS has not presented a proper foundation for the presumption on which the provisions of the Extension of Service Order is based – that a warden who serves in an operational position is no longer fit to carry out the requirements of his job once he has reached the age of 57, except in extremely unusual circumstances (compare *Association for Civil Liberties*, at p. 367, and see also the approach taken by the relevant American federal regulations, which require that there be a "bona fide occupational qualification" that justifies the establishment of a retirement age below the age of seventy in operational positions – 29 C.F.R. §1625.6; *Western Airlines, Inc. v. Criswell*, 472 US 400 (1985); *Meacham v. Knolls Atomic Power Lab.* 554 U.S. 84 (2008)). Nevertheless, there is no need, in the context of the case before us, to establish hard and fast rules regarding the provisions of the Order to the extent that they relate to the operational sector – these provisions raise an issue which, by its nature, is even more complex.

25. The conclusion to be reached from the above discussion is that the premise that age 57 should be the retirement age for all wardens, holding a wide variety of positions, unless the IPS Commissioner is persuaded that an extension for a limited time is justified – is improper. This conclusion is consistent with the trends that are developing in Israel and throughout the world regarding retirement arrangements. These trends have been expressed in recent Israeli legislation, including in the Retirement Age Law that was enacted in 2004, and which was preceded by the recommendations of the Public Committee for the Examination of Retirement Age, headed by Justice (emeritus) Shoshana Netanyahu. This Committee was instructed to examine the degree to which the structure of the labor market was prepared for the increase in life expectancy and for the expected proportionate increase of the elderly sector within the general population (see the Draft Retirement Age

Law, 5764-2003, Government Draft Laws 64, 201. See also, Doron, supra, at pp. 894-895; Alon-Shenker, supra, at pp. 82-87). The majority opinion in the Committee's report, submitted in July of 2000, recommended that the age for entitlement to a pension should be raised to 67 for both men and women, but the Committee also recommended that the change should be implemented gradually, by adding an additional year of work once every three years. The Retirement Age Law that was enacted following this report adopted part of the Committee's recommendations; it raised the mandatory retirement age for men from 65 to 67, through a gradual process that concluded in 2009. The Law also established a mandatory retirement age of 67 for women, although a woman may still retire and receive a pension as early as the age of 62. The Law further provided that this retirement age may be raised to 64, if a public committee—to be established by the Minister of Finance—so recommends and the Knesset's Finance Committee approves it (on 29 December 2011, an amendment to the Law provided that the public committee would submit its recommendations regarding this matter by 30 June 2016 – see Amendment 3 to the Retirement Age Law, SH 5772, 2328, at p. 92).

Thus, the developing trend in Israeli law clearly points toward an older retirement age for both male and female workers (and see, regarding this matter, the Law's objective as defined in s. 1 of the Retirement Age Law). The Retirement Law was also amended on 18 January 2004 (Amendment 44), as part of the Economic Policy for Fiscal Year 2004 Law (Legislative Amendments) 5764-2004. This amendment added a new Part B to Chapter 9 of the Retirement Law, entitled "Non-Application." It provided that the provisions of the Retirement Law, except for the exclusions set out in s. 108c of the Law, would not apply to a "new warden" who had joined the IPS after 31 December 2003; these IPS workers would be subject to the provisions of the new Part B (similar provisions were enacted concerning police officers and security forces employees). The purpose of the enactment of the above-mentioned Part B was to apply the cumulative pension method to security services workers, instead of the budgetary pension method that had been used until that time (see Government Draft Laws 64, 108 (5764)). Nevertheless, according to the language of the amendment, it also revokes the IPS Commissioner's authority to order the retirement of a warden who has reached the "retirement age for a warden." The respondent himself noted, in his response dated 4 February 2010, that "an officer who joins the IPS at the current time will be subject to s. 108 of the Retirement Law, and will thus be defined as a 'new security force employee' to whom the Retirement Law, including s. 73 which deals with the retirement ages for wardens and police

officers, shall not apply" (s. 26 of the Response). Consequently, the Extension of Service Order – which essentially implements the authority given to the IPS Commissioner pursuant to ss. 73 and 81 of the Law – will not apply to "new wardens" as defined in Part B.

26. Zozal joined the IPS in 1986. The provisions of the above-mentioned Part B of Chapter 9 therefore do not apply to her. However, it appears that when we examine the reasonableness and the proportionality of the provisions of the Extension of Service Order, we cannot ignore Amendment 44 of the Retirement Law which was enacted in 2004 – some five years before the enactment of the Extension of Service Order – and which added the above-mentioned Part B. The amendment indicates that the legislature sought to align the retirement age of a new warden with the retirement age set forth in the Retirement Age Law for all workers in the country. This fact greatly weakens – if not completely undermines – the respondent's argument that the gap between the retirement age of all civil servants and that of a warden pursuant to the Retirement Law in its previous format (and the Extension of Service Order which was enacted to implement it) is necessary because of the nature of IPS service. And note: Part B does not distinguish in this context between wardens who serve in operational positions and IPS personnel who hold professional, administrative, or staff positions.

The Leiba Decision

27. In his arguments, the respondent refers to this Court's decision in HCJ 10022/08 *Chief Superintendent Monal Leiba v. Israel Police Commissioner* (2009) (unreported) (hereinafter: "*Leiba*"), where we examined the retirement arrangement established by the Israel Police after *Rosenbaum* (National Headquarters Order – Extension of Service). The respondent believes that these arrangements are similar to those of the IPS, and asks that we adopt the Court's conclusions in the *Leiba* case with respect to the retirement arrangement established by the IPS in the Extension of Service Order. In the *Leiba* decision, this Court found that the Israel Police arrangement was reasonable, and that it reflected a proper consideration of the outline set out in *Rosenbaum*.

With respect to the National Headquarters Order – Extension of Service, this Court held as follows in *Leiba*:

'A review of the procedures formulated by the Israel Police shows that they respond sufficiently to the defects which had led to the invalidation of the procedures in *Rosenbaum*. Indeed, even within these new procedures, age 57 remains, more or less, the default retirement age for members of the police force. However, while this is a uniform retirement threshold, it does not end

the discussion and to the extent that any particular police officer wishes to postpone his retirement to a later age, he may apply to the relevant authority to have his employment extended. This examination is of course done on an individual basis, taking into consideration, first and foremost, the nature of the police officer's job, which is understood to reflect the degree of burnout and pressure that accompany that job. Beyond this issue, the review takes into consideration the circumstances of the particular case as a whole, including the interests and characteristics of the police officer, on the one hand, and the needs of the system, on the other. It should be recalled that it is not in vain that the legislature distinguished between police officers and other civil servants with regard to retirement age. A distinction of this kind is not improper in and of itself, even if it means determining, in principle, a lower uniform threshold retirement age for the police force (and see *Rosenbaum*, at para. 15). While in the past, police procedures emphasized the age at which police officers could be ordered to retire as the determinative factor in deciding that they should in fact be ordered to retire, that age now serves merely as a starting point for a process, the main part of which now relates to a detailed examination of the issue, involving the exercise of discretion in a particularized manner and the consideration of all relevant factors' (*ibid.*, at para. 8. See also HCJ 515/08 *Superintendent Aryeh Weintraub v. Police Commissioner Dudi Cohen* (2008) (unreported); HCJ 7362/07 *Chief Superinterndent Ran Katzir v. Police Commissioner* (2008) (unreported); in both cases, this Court examined the interim arrangements established by the Israel Police).

As noted above, the petition before us was originally heard by a three-judge panel (the honorable Justices (then) M. Naor, Y. Danziger and N. Hendel), and on 18 July 2010, the panel issued an order *nisi* ordering the respondent to explain why his decision to order Zozal's retirement should not be overturned. The order also required that the respondent explain how his decision, which relied on the new retirement arrangements concerning the retirement of wardens, did not conflict with the holding in the *Rosenbaum* decision. In its decision, the Court noted that:

'The continuation of the deliberation of this petition will be held before an expanded panel of five or more justices, taking into consideration, *inter alia*, the State's reliance on this Court's decision in *Leiba*, dated 25 June 2009…'

Thus, the three-judge panel directed that the retirement arrangement established by the IPS should be examined by an expanded panel, which would determine whether or not reliance on the *Leiba* decision in this context was appropriate.

Based on the reasoning set out above, I have concluded that the retirement arrangement established for wardens in the Extension of Service Order is discriminatory and should be struck down – at least to the extent that it relates to wardens such as Zozal who serve in professional, administrative, or staff positions. The retirement arrangement created by the Israel Police in the National Headquarters Order – Extension of Service was not presented to us, and therefore we have not carried out an exact comparison between that arrangement and the one used by the IPS. Nevertheless, and to the extent that this Court's opinion in *Leiba* indicates a similarity between the two arrangements, it is inevitable for me to state that I disagree with the conclusion reached by this Court in *Leiba*. The *Leiba* decision dealt with a police officer who held the rank of Chief Superintendent, an engineer by training, who had served as the head of the projects department within the Construction Division of the Israel Police. This Court found that there was no justification for interfering with the process through which *Leiba* was compelled to retire, noting that – as quoted above – the retirement arrangement for police officers which established the age of 57 as a default retirement age conformed to the decision issued by an extended panel in *Rosenbaum*. For the purpose of establishing such conformity, this Court held, it was sufficient that the application for an extension of employment resulted in an individualized examination of the police officer in question. For the reasons specified above, I take a different view, and I believe that the retirement arrangement in the Extension of Service Order for wardens (at least as it pertains to those serving in professional, administrative, and staff positions, such as Zozal) is an arrangement that discriminates against those workers, as compared to other civil servants who hold the same type of positions, in the absence of any relevant justification for such differentiation. It is important to recall in this context that the presence or non-presence of discrimination is determined on the basis of actual outcome (the impact), and the lack of any intention on the part of the respondent to discriminate has no effect on the final determination that there has been discrimination (see *Alhanati*, at para. 27).

The Defects Concerning the Specific Decision in Zozal's Case

28. Despite the sufficiency of my conclusion that the IPS retirement arrangement with respect to wardens whose positions are included within the same category of positions as Zozal's is improper, we will further examine the arguments that Zozal raised against the specific decision reached in her case.

The criteria outlined in the Extension of Service Order and which the Service Extension Committee is required to consider include the following: (a) considerations relating to the warden's personal situation – the scope of the warden's entitlement to a pension and his financial and family situation; (b) considerations relating to the warden's potential contribution to the IPS – an assessment of his job performance, and of the nature and character of his job; his service history, the length of his term of office and the number of years at his current job; his medical condition; the degree to which he is essential to his job, the possibility of repositioning him, and the potential for finding a placement for him within the IPS and for promoting him; and (c) systemic considerations of the IPS, and considerations relating to the realization of the organization's objectives.

Assuming that all these considerations are relevant, and assuming further (which we do not accept) that the mechanism established in the arrangement involving the review of a possible limited extension of employment beyond the age of 57 is appropriate, a question remains as to the weight that the Committee should attribute to each of the listed considerations when it makes its recommendation regarding the requested extension. When Zozal's request was deliberated by the Service Extension Committee, it noted her personal circumstances and her financial situation, which indicated that she needed to be able to stay at her job at the IPS. It also noted her positive performance at the Legal Department, on the one hand, and the fact that she was not suitable for other positions in that Department, on the other. Given all these considerations, the Committee at first decided not to recommend that her employment be extended. However, when it became clear that there was an organizational need for Zozal to continue to hold her job at the Legal Department, the Committee changed its recommendation and decided to recommend that her employment be extended for a single year. The respondent adopted this recommendation, partially, as noted, and ordered an extension for only six months. And behold - at her interview with the HR Director following the appeal that she submitted against the respondent's decision, she learned that the main reason for the decision not to extend her employment for a longer period was the fact that she served in a position intended to be held by someone with the rank of Superintendent, even though Zozal was earning the salary of a Chief Superintendent, because of the "Flexible Chief Superintendent" arrangement that was in place at the time. The respondent emphasized and expounded upon this aspect in his response to the petition, arguing that the IPS had been working toward terminating this arrangement since the year 2000. He had even announced, on 13 December

2007, that arrangements were being made to end the arrangement completely during the course of the 2008 work year. As part of this development, the respondent added, he had ordered the retirement of all wardens to whom the "Flexible Chief Superintendent" arrangement was applied, and Zozal's retirement was part of the implementation of that order. The respondent also noted that this was the main reason not to extend Zozal's employment, and her forced retirement should therefore not be viewed as age-based discrimination, because the decision to order her retirement was not based on her age, and was instead a result of the nature of the position that she held.

29. It is undisputed that the respondent has the prerogative and the authority to terminate arrangements such as the "Flexible Chief Superintendent" arrangement (regarding the reasonableness of terminating a parallel arrangement followed in the Israel Police, see and compare LabC (TA) 2414/04 *Ashed v. Israel Police* (2007)). Nevertheless, the question remains as to how this factor should be weighed, if at all, in reaching a decision regarding the time at which a warden seeking to extend his employment should be made to retire – and this is not a simple question. On the one hand, the IPS is a multi-dimensional organization with a hierarchical structure, and any decision regarding the acceptance of a worker into the organization, or the dismissal of a worker from the organization, should take into consideration systemic factors and the organization's overall objectives (see *Leiba, per* Justice Joubran, at paras. 9-10). On the other hand, and the case under discussion here is an example, making this consideration a main factor upon deciding a warden's request for an extension of his employment may lead to the "elimination" of all other considerations, including a warden's personal circumstances, thus making it all too simple to remove from the service wardens who have reached the "retirement age for a warden," in accordance with the outline established in the Order, which requires such wardens, as stated, to submit requests for extension of service.

30. In this case, we learn from the remarks of the HR Director, made at Zozal's interview with him on 31 December 2009, and from the respondent's affidavit and the documents attached thereto, that the IPS' organizational objective of terminating the "Flexible Chief Superintendent" arrangement became a determinative factor in Zozal's case. It also appears that the other relevant factors that should have been considered were not given their proper weight. Zozal doubts that this was the actual main consideration and argues that it served to conceal the fact that the real reason for her being forced to retire was her age. However, even if, for this purpose, we shall accept the respondent's explanations, a difficulty arises with regard to the process

through which the decision was reached. This is because the rejection of Zozal's request for an employment extension could not have been based solely on the IPS policy to terminate the "Flexible Chief Superintendent" arrangement, important as it may be. The manner in which the respondent presented this issue indicates that a decision was made to terminate the "Flexible Chief Superintendent" position, and because no suitable legal position for a worker with a Flexible Chief Superintendent rank could be found for Zozal, the die was cast and no other factor was examined when considering the extension of her employment. This was the case, even though there were other factors that should have been considered.

Conclusion

31. For the reasons discussed above, I believe that the retirement arrangement set out in the Extension of Service Order, which applies to all IPS wardens (except new wardens, to whom Part B of Chapter 9 of the Retirement Law applies) conflicts with the principles established in *Rosenbaum*. It discriminates, unjustifiably, between IPS wardens – at least between wardens who serve in professional, administrative, or staff positions – and all other civil servants in comparable positions. The respondent has not shown any relevant facts justifying the assumption on which the Extension of Service Order is based. According to this assumption, age 57 is the retirement age that should be imposed on all wardens, whatever positions they hold, unless an application for an extension of employment is submitted and granted by the IPS Commissioner – and no such extension, even if it is approved, may exceed three years cumulatively, or extend beyond the time the warden reaches the age of 60. I did not find any satisfactory explanation in the respondent's arguments for the substantial disparity between this arrangement and the retirement arrangement that applies to all civil servants pursuant to s. 82.52 of the Civil Service Bylaws. I also did not find, in those arguments, any satisfactory answer to the question of why wardens – at least those who serve in professional, administrative, or staff positions – should not be subject, like other civil servants, to an arrangement that allows them to continue to serve until the mandatory retirement age (67), unless the IPS Commissioner is persuaded – after deliberating on a reasoned application submitted to him by the party responsible for the warden whose dismissal is sought – that there are reasons justifying the warden's retirement prior to that age.

I would therefore suggest to my colleagues that we make the order *nisi* an order absolute, and that we direct that the Extension of Service Order be struck down, to the extent that it relates to wardens serving in professional,

administrative, or staff positions. I would also suggest that this invalidation be delayed for a period of 12 months in order to allow the IPS to prepare; and that during this time, the IPS should prepare new arrangements that are consistent with the principle of equality. I would also suggest to my colleagues that they order the revocation of the decision regarding Zozal's forced early retirement, a decision which was reached pursuant to that arrangement. As may be recalled, Zozal's requests for an interim order as part of this petition were denied in light of, *inter alia*, the respondent's position that "the continuation of [Zozal's] absence from the Service, as a retiree, is reversible, and it will not be a problem for her to be paid her full benefits if such payment is ordered at the end of the main proceeding, in accordance with the outcome of that proceeding" (see para. 35 of the respondent's Answer dated 24 August 2012. See also the decision issued by Justice M. Naor on 3 October 2010). Under these circumstances, and given the conclusion that we have reached, I believe that Zozal should be allowed to return to the ranks of the IPS at the salary and rank that she held before her retirement. At the same time, we must clarify that Zozal has no vested right to return to the position that she held before her forced retirement, and that she will be given a position in accordance with the needs of the IPS.

Finally, I would suggest that the respondent be ordered to pay Zozal her trial costs and attorney's fees – in the amount of NIS 30,000.

Vice President M. Naor

I agree with the comprehensive opinion of my colleague, Justice E. Hayut, and with her operative conclusions. The Extension of Service Order is deficient in that its default option is retirement at the age of 57, which is ten years earlier than the retirement age for the civil service. The Order is also deficient in that the burden of proof is placed on the worker to prove that there is good cause for his employment to be extended, and not the reverse, as is the practice in the civil service. This does not mean that there can be no arrangement which will allow retirement at an earlier age for those who seek it, and there are apparently many who do seek such early retirement. However, mandatory retirement at an early age, against the worker's wishes, cannot be the default option (see and compare HCJ 10076/02 *Rosenbaum* v. *IPS Commissioner*, at pp. 877-878.)

Justice U. Vogelman

I agree with the comprehensive opinion of my colleague, Justice E. Hayut.

Justice S. Joubran

1. The proceeding before us raises a painful issue, yet to be sufficiently discussed in Israeli society – age-based discrimination in the job market. Life experience has taught us that despite the competence of older employees, the perception persists within the job market that a young worker should be preferred over an older one. The concrete question arising in the proceeding before us relates to the arrangement established in Commission Order 02.33.00 – Consideration of the Extension of Service for a Warden of Retirement Age (hereinafter: "the Order" or the "Extension of Service Order") which regulates the forced retirement of workers, beginning at age 57. This question must be examined in light of the general context of the laws that apply to older workers in the labor force, including the laws that apply to all civil servants. I have read the opinion written by my colleague, Justice E. Hayut, who believes that the arrangement created for IPS workers does not comply with the requirements of reasonableness and proportionality, and that it should be struck down – because it discriminates between civil servants and IPS workers. I note that the decision in this proceeding will have direct consequences for the arrangements that apply to employees of the Israel Police, which were discussed in HCJ 10022/08 *Leiba v. Israel Police Commissioner* (2009) (unreported). It is also possible that our decision here will have an impact on the arrangement for those serving as career soldiers in the IDF and in the other intelligence and security forces. (As these arrangements are not before us in this case, we need not examine the substance of those arrangements in the context of this proceeding.) After reviewing the opinion written by my learned colleague Justice E. Hayut, I found that I agreed with her with respect to the outcome of the decision in this specific case - that the petitioner should be returned to her place of employment. However, I found that I could not agree with Justice Hayut's conclusion that the arrangement established for IPS workers should be invalidated in its entirety. I will explain my reasoning below.

Previous Proceedings

2. The retirement arrangement for police officers and wardens has been examined by this Court in various iterations. In *Rosenbaum*, the Court examined the arrangement that was in place before the current one; pursuant to that arrangement, all Israel Police and IPS workers were required to retire when they reached the age at which forced retirement was permitted (initially 55, and later on 57). In the *Rosenbaum* decision, President A. Barak held that the relevant peer group consisted of all civil servants, and that the policies of the Israel Police and the IPS discriminated on the basis of age in a

disproportionate manner. He found that this was the case for three reasons. First, he held that there was no substantive reasoning given for the determination that the retirement age would be 55 (and later, 57). Second, he held that the disparity between the retirement age for civil servants and that established for police officers and wardens was substantial and that it indicated a level of inequality. Third, he found that a collective arrangement that did not take into account the individual characteristics of the various workers was disproportionate in its impact. Based on these findings, this Court ordered that the arrangement should be invalidated.

3. After the *Rosenbaum* judgment, the Israel Police and the IPS changed their policies and established new retirement arrangements. The interim arrangement established by the IPS, which was in place until the permanent procedure was adopted, provided that an IPS worker who had reached retirement age would be subject to a suitability review with respect to his continued employment, which would be based on his individual circumstances (as explained below, this procedure is similar to the procedure discussed in the case before us). The IPS examined the continued employment of the petitioners in *Rosenbaum* based on that procedure, and found that there was no need to re-employ Junior Commissioner Lazrian. Lazrian challenged the decision of the IPS Commissioner in another petition to this Court (HCJ 4545/07 *Lazrian v. IPS* (2008) (unreported)). This Court (Justice U. Vogelman, with concurrences by (then) Vice President E. Rivlin and Justice E. Rubinstein) denied the petition. The Court held as follows:

'There is also no justification for a claim that the dismissal constitutes age-based discrimination, since – as noted further in the decision regarding the petitions – the dismissal of the petitioner was based on his concrete individual circumstances, rather than solely on the fact that he had reached 55 years of age. It cannot be denied that at the time it was decided to dismiss him, the reality was that workers were generally released from service at age 55. Nevertheless – and this was made clear in the letter from the Administration Director, dated 10 August 2003 and in the Court's judgment regarding the petitions, the petitioner's dismissal was based on other factors, in addition to his age (*ibid., per* Justice U. Vogelman, at para. 8).

4. The Court thus held that despite the fact that the petitioner's age was at the background of his dismissal, the fact that the dismissal itself was also based on factors other than his age was sufficient to reject the claim that age-based discrimination had been involved in the dismissal process. The interim arrangement established by the Israel Police has also been subjected to judicial review. In HCJ 7362/07 *Katzir v. Israel Police Commissioner* (2008)

(unreported), (then) Justice E. Grunis, writing for this Court, held that the Police Commissioner's decision pursuant to the interim arrangement did not justify judicial intervention – because the arrangement was temporary, and was only meant to be in force during the period in which the permanent arrangement called for in *Rosenbaum* was being formulated. A review of the judgment indicates that the procedure described therein is not substantively different from the permanent procedure established by the Israel Police. For the same reason, the petition in HCJ 515/08 *Weintraub v. Israel Police Commissioner* (2008) (unreported) was also denied.

5. Later on, in *Leiba*, this Court dealt with the arrangement established by the Israel Police, while in the case before us we are faced with the arrangement established by the IPS. Both arrangements have similar characteristics. Because the Israel Police arrangement was described in my opinion in the *Leiba* decision (see paras. 6-7), and the IPS arrangement has been described at length in the opinion written by my colleague Justice E. Hayut (see paras. 3 and 19-21), I will only discuss their main aspects. In brief, the starting point for both arrangements is a retirement age of 57. Nevertheless, the arrangements stipulate that either a police officer or a warden wishing to defer their retirement may apply to the relevant authorities within the Israel Police or the IPS for continuation of their employment. That request is decided on an individual basis, taking into account the system's needs, the applicant's functioning, his financial situation and the personal significance that the retirement will have for him.

6. Based on this set of facts, the Court held in *Leiba* that the arrangement established by the Israel Police was reasonable and proportionate, and did not conflict with the principles set out in *Rosenbaum* – because even though the age factor is the starting point in deciding whether the worker is suited for the position, it is not the end point. When a worker objects to early retirement, the actual retirement decision is based on the worker's individual skills and suitability for the position, and not on his age.

7. As stated, the arrangement established by the IPS is similar in its nature, and it is this arrangement that we must review in the case before us. My colleague, Justice Hayut, found that the arrangement does not satisfy the reasonableness and proportionality requirements. Therefore, according to her, this type of retirement arrangement must be invalidated. Because this issue is now a matter of dispute – this time before an expanded panel – I have decided to discuss in depth the considerations that have led me to the conclusion that the arrangements need not be invalidated in their entirety, and

I shall note the principles that the government authority should follow in implementing the arrangement with regard to specific workers.

Age-based Discrimination and Administrative Discrimination

8. It is beyond dispute that age-based discrimination is prohibited. This prohibition is derived from the principle of general equality, which applies to all areas of law. In labor law, this prohibition is expressed specifically in the Equal Employment Opportunities Law. Through this concrete piece of legislation, the legislature created an efficient and effective mechanism for exercising the rights of workers who have suffered from discrimination, which includes the establishment of burdens of proof, special litigation procedures, remedies for claimants, and criminal offenses based on acts of discrimination. In this context, I noted the following in a previous case, concerning the relationship between the Prohibition of Discrimination Concerning Goods, Services and Entry into Public Areas and Entertainment Sites, 5761-2000 and the Basic Law: Human Dignity and Liberty:

> 'It is proper to interpret a specific statute, particularly when the statute contains constitutional language as it does in this case, in a manner that is consistent with the general constitutional framework of Israeli law […]. It is clear that this does not mean that the particular statute is rendered irrelevant. *The particular statute creates a legal framework that reflects the manner which the legislature decided is proper for dealing with the constitutional violation in the given context.* Thus the statute prohibiting discrimination shapes the exercise of the right to equality in the civil sphere on two planes – the scope of the application of the right, and the nature of the remedy for a violation of the right' (LCA 8821/09 *Projinsky v. Good Night Productions Ltd.* (2011) (unreported) (emphasis added – S. J.); regarding the interpretation of specific pieces of legislation as specific arrangements that are meant to protect the constitutional right in equality contexts, see also HCJ 10662/04 *Salah v. National Insurance Institute*, *per* Justice Joubran, at paras. 3-4 (hereinafter: "*Salah*")).

9. Although the Equal Employment Opportunities Law does not directly list retirement-related discrimination as one of the areas to which it will apply, I agree with my colleague Justice E. Hayut that this issue is covered by that law. This is because of the principle that a law that protects a constitutional right should be construed broadly. The conclusion that the law applies to age-based discrimination is also supported by the fact that the list

in s. 2 (both the list of types of discrimination, and that of types of issues covered by the Law) is an open list; and by the fact that the harm caused by forced retirement (such as the reduction of the pension rate to be paid) may constitute a reduction of "benefits and payments given to a worker in connection with retirement from employment" (s. 2(6) of the Equal Employment Opportunities Law).

10. Against this background, we must examine the question of whether the IPS' permanent arrangement violates the principle of age-based equality. For this purpose, we must first identify the peer group that is relevant to an age-based distinction. The approach of my colleague Justice E. Hayut concerning this issue, which is based on the decision in *Rosenbaum*, is that the relevant peer group for determining whether discrimination is being practiced on the basis of age is the group consisting of all civil servants. As I shall explain, my view is that the correct classification for differential treatment on the basis of job or place of work is the category of administrative discrimination, which is not related to the constitutional right to equality. The question of what law applies in a situation where an employer treats workers differently, but not on the basis of an unlawful classification such as gender, sexual orientation, age, etc. – is not a matter of violation of a constitutional right and is instead, as stated, a matter of administrative inequality. Thus, if the employer is a private party who determines that workers in various departments are to receive different salaries, it is doubtful that the Court would intervene in that employer's implementation of that determination. (However, if a correlation between the groups of workers receiving different salaries and the suspect classifications could be proven, there would be a basis for claiming that there was unconstitutional discrimination). This does not mean that weight should not be given to the distinction between civil servants, on the one hand, and police officers and IPS personnel, on the other, which, as I explain below, gives rise to difficulties in and of itself, regardless of whether or not it constitutes age-based discrimination. It should be noted, even at this early stage, that the fact that other civil servants are not the relevant peer group for examining the issue of age-based discrimination does not mean that this comparison carries no importance in the constitutional analysis. A determination of whether there are alternative arrangements that exist within the national labor force in general and within the civil service in particular, allows us to examine whether the constitutional violation – if such in fact exists – is proportionate, or whether there are other measures available that cause a lesser violation.

11. At this stage, I note that from a theoretical standpoint, a violation of equality can be reviewed on two tracks. Such violation can be reviewed on a single-stage track, according to which when a relevant difference between the groups exists, there has been no violation of the principle of equal treatment. This is the case even if the relevant difference does not relate directly to the feature on the basis of which the distinction is made, but rather to its indirect characteristics (for example, a statistical correlation between age and physical fitness can constitute a relevant difference when physical fitness is necessary for job performance, and there is therefore no violation of the principle of equality), or to external considerations (such as a social policy, security needs or possible additional costs). Alternatively, a violation can be reviewed on a two-stage track. In this framework, the first stage involves only an analysis of the question of whether there is a relevant difference between two individuals, who differ only with regard to the distinguishing characteristic itself. At the second stage, the question examined is whether – assuming that the distinguishing characteristic is itself not a relevant difference – it is nevertheless proper to allow the distinction because of considerations that are external to the distinction (further to the example given above – even if it is found that the use of age as an indication of physical fitness is indeed discriminatory, it may be that such discrimination will nevertheless satisfy the conditions of the limiting paragraph in the Basic Law: Human Dignity and Liberty, given the costs savings derived from reliance on age as a basis for differential treatment, in the particular context). In my view, the structure of Israel's Basic Laws indicates that the legislature preferred the latter model, according to which the violation of the right is examined first, and if such a violation is found to exist, the next matter to be determined is the issue of compliance with the limiting paragraph. This is the procedure that is often adopted in case law dealing with violations of the principle of equality (and see a similar treatment of this issue in paras. 24-25 of President D. Beinisch's decision in *Salah*; HCJ 1213/10 *Nir v. Knesset Chairman* (2012) (unreported), *per* President D. Beinisch, at para. 17 (hereinafter: "*Nir*"); for a different approach, see, for example, *Nir*, per (then) Justice Naor, at para. 2). This is also the outline for analysis that I myself used in earlier cases, and I follow it in this case too (see *Nir*, *per* Justice Joubran; HCJ 466/07 *MK Galon v. Attorney General* (2012) (unreported), *per* Justice Joubran).

Discrimination among Different Groups of Civil Servants

12. As noted above, the first issue arising in this case is the question of whether the fact that a distinction is made between all civil servants, on the one hand, and police officers and IPS workers (who are also State

employees), on the other hand, is a distinction that rises to the level of discrimination. If it does rise to that level, it is also necessary to determine whether the discrimination is prohibited, or whether there are good reasons for such discrimination to be practiced.

13. It is clear that the answer to this question does not depend only on whether or not age-based discrimination has been practiced, and many examples of different benefits given to workers in different sectors of the State can be found in many other contexts – benefits that do not depend on the worker's age (for example, risk premium paid to those holding certain jobs; different restrictions on the scope of overtime hours available to workers in similar positions, etc.).

14. Before discussing the case itself, I will refer briefly to the normative framework governing this matter. The starting point is that the State must treat all parties equally – both as a sovereign state, when coming into contact with its citizens – and as a private entity, as an employer. It is undisputed that when the nature of the work is different, the employment conditions for civil servants may be different, and this does not constitute discrimination. This is the case as long as there is a connection between the difference in the nature of the work and the different employment conditions. In this context, the legislature established different employment arrangements even among civil servants who are similarly subject to the Civil Service Commissioner – arrangements that differ because of the nature of the position. For example, it was determined that the retirement age for kindergarten teachers is different than the general retirement age for civil servants – the retirement age for most kindergarten teachers being 59 (s. 64 of the Civil Service Law (Retirement) [Integrated Version] 5730 – 1970).

15. Consequently, there are situations in which, because of the differences in the employment framework, the legislature has conferred parallel authorities to various agencies with respect to the determination of terms of employment in their particular areas. This is the situation in our case, in which the legislature expressly provided that the IPS Commissioner and the Police Commissioner will have powers parallel to those of the Civil Service Commissioner (parallel authority was also given to the Chief of Staff of the IDF, see s. 13 of the Career IDF Service Law (Retirement) [Integrated Version] 5745-1985; similarly, an alternative arrangement was also established for judges, which sets their retirement age at 70 and enables early retirement under certain circumstances (s. 13 of the Courts Law [Integrated Version] 5744-1984). It should be noted that the statutory provision does more than establish the identity of the party who is authorized to force an

early retirement – it also includes a full, detailed arrangement regulating all issues relating to the worker's retirement, such as the calculation of the rate of the pension, and the scope of the relevant party's authority to intervene with respect to that rate, under various circumstances.

16. It is clear that since the relevant statute expressly establishes different and separate arrangements concerning retirement in different sectors of the civil service, the discretion exercised by one authorized party cannot be made subject to the discretion of another authorized party (however, it should be noted that in the current proceeding, neither party is challenging the constitutionality of the law by arguing that the exclusion of IPS, Israel Police and IDF workers from the authority of the Civil Service Commissioner is unlawful). This is particularly relevant when the retirement arrangement for all civil servants is different from that established for those working for the IPS or the Israel Police. In this context, it may be that different authorized parties will choose to act differently, but both courses of action will nevertheless be deemed reasonable, such that this Court's intervention would not be justified. The Court only examines whether the action falls within the realm of what is reasonable, and it need not substitute its own judgment for that of the government authority regarding the optimal manner for handling the issue. This is true, too, when a parallel authority is given to two different entities that have similar features. *A fortiori*, a comparison of the manner in which the parties holding parallel authority exercise that authority does not lead to the conclusion that the policy followed by one of the parties is unreasonable, if the entities involved are different in nature (such that even if they were both subject to a single authorized party, the determination of a different set of rules for each entity would be appropriate).

17. In the current case, the arrangements established by the IPS and the Israel Police are fundamentally different from the arrangement established by the civil service. In this context, I agree with the respondent's argument that the arrangement was formulated on the basis of comprehensive administrative work – which included consulting external experts – taking into consideration the unique nature of the work of IPS wardens and police officers. For example, these workers are not subject to the Work and Rest Hours Law, 5711-1951 – unlike other civil servants. Additionally, research carried out for the purpose of formulating the procedure – the quality of which has not been challenged by the petitioner – shows the different level of burnout that police officers and IPS workers, including administrative workers, experience. Similarly, the pension arrangements that apply to police officers and to IPS workers are themselves different from the pension

arrangements that apply to civil servants. These reasons – to which we must add the difference in organizational structure – explain the differences between procedures for mandatory early retirement in the civil service as opposed to such procedures in the Israel Police and in the IPS. It is clear that there are many more civil servants than there are police officers and IPS workers. Thus, if the civil service adopted an arrangement similar to that used in the IPS, the Civil Service Commissioner and the Committee would be significantly more burdened; this is an additional justification for the difference between the two arrangements.

18. In light of all of the above, I believe that if the issue at stake here was the distinction made between civil servants, on the one hand, and police officers and IPS workers, on the other hand, it would be proper to deny the petition because of the significant difference between all of the members of the first group and all those of the second. I do not find that the petitioner proved, satisfactorily, that the different manner in which the Civil Service Commissioner and the IPS Commissioner exercised the discretion given to each of them, respectively, shows that there has been any administrative discrimination. This is the case due to a relevant difference which exists between the nature of the work done by IPS workers and the work done by other civil servants. I believe that in a situation in which the legislature expressly provided that two administrators would carry parallel authorities, it is not proper for us to determine that a decision reached by one of them should bind the second, and we should examine the reasonableness of each administrator's decision on its own.

19. To sum up the points discussed above – I believe that it would not be proper to invalidate the Order on an *administrative discrimination* ground, for two reasons. First, it is not discrimination, given that the legislature expressly provided that the IPS Commissioner would have parallel authority with respect to the early retirement of IPS workers, and did not subject IPS wardens to the same arrangement that applies to other civil servants. There is therefore no justification for this Court to deviate from the arrangement established in the Law and to make the discretion of the IPS Commissioner subject to that of the Civil Service Commissioner. Second, I find that there is a relevant difference between the nature of the positions filled by all civil servants, on the one hand, and the nature of the positions filled by IPS wardens, which itself justifies the difference between the two arrangements.

20. Before I move on to an examination of the Order itself, I wish to note at this stage that my holding here should not be understood to mean that I am satisfied with the fact that there are two separate retirement arrangements for

civil servants, in two different frameworks. It may very well be that the government should dictate a uniform policy with regard to the retirement age for all civil servants, and that it should take action to amend the Law, to the extent necessary.

Constitutionality of the Commissioner's Order

21. Since I have found that the Order should not be invalidated on the basis of the difference between the arrangement it establishes and the arrangement in place for all civil servants, I now turn to examining the Order itself. My colleague Justice E. Hayut wrote in her opinion that "the arrangements established in the Extension of Service Order constitute an unreasonable and disproportionate violation of the principle of equality" (para. 19 of Justice Hayut's opinion). She therefore did not discuss the issue of the distinction to be made between examining the Order's proportionality and examining its reasonableness. A review of this Court's case law shows that as a rule, when a claim is made that an administrative decision violates a constitutional right, the claim must be examined in accordance with the various proportionality tests (see HCJ 11437/05 *Kav La'Oved v. Minister of the Interior* (2011) (not yet reported). I noted, in this context, that:

> 'The proportionality requirement is the proper legal construct for examining a restriction on the realization of a constitutional right, by a legal norm whose legal status is less than constitutional […] I believe that the proportionality standard stands together with the reasonableness claim in this case, which, as is known, is the main standard used for assessing the exercise of administrative discretion. In this case, as stated, there is a clash between human rights and the general public interest. This leads to the fact that the limiting paragraph, which requires that a measure must have a proper objective and be proportionate, can serve as the proper mechanism for achieving a balance between the objective and the harmful measure being examined. In actuality, the reasonableness of the measure will also be examined this way, in light of the substantial similarity between reasonableness and proportionality in cases such as these' (*ibid., per* Justice Joubran, at paras. 6-7, and the references cited there).

22. These remarks are pertinent in this case too. As described below, the issue under discussion here is the constitutional issue of age-based discrimination. The administrative norm, to the extent that it violates a constitutional right, must therefore comply with the requirements of the limiting paragraph, which in any case "absorbs" the reasonableness

requirement as part of the third proportionality test. I will therefore turn to examining the Order's proportionality. Based on my conclusion, explained below, that the Order is for the most part proportional, I will then move on to examine the manner in which the arrangement has been implemented.

Age-based Discrimination

23. A practice is discriminatory if two individuals who have the same characteristics are treated differently because of an irrelevant distinction that is made between them. It should be recalled that as part of our examination of the relevant distinction, we also need to determine whether the discrimination is an indirect outcome of a discriminatory reality. For instance, the test for determining whether a salary structure discriminates against women involves examining whether a man holding the same position receives a higher salary (see HCJ 1758/11 *Goren v. Home Center (Do it Yourself) Ltd.* (2012) (unreported)). The question of whether other women in different departments receive a salary that is similar to that of a man is irrelevant. Similarly, the test for determining whether or not there is age-based discrimination is the question of *whether a worker with the same skills required for doing the work is treated differently only because he is younger*. In this context, it is important that the skills required for the job are truly relevant to the work, and are not used as a pretext for enabling discrimination.

24. In this context, it is clear that any arrangement that mandates retirement may potentially fall within the definition of age-based discrimination, since by its very nature, it distinguishes between younger and older workers regardless of their skills or work abilities. Nevertheless, a uniform retirement age is generally viewed as a measure based on good reasons, since the objective of retirement is an important social objective. The Retirement Age Law, 5764-2004, by establishing a national retirement age, prevents employers from directly or indirectly pressuring their workers not to retire (an example of such pressure would be reducing workers' salaries over the years, so that they would not be entitled to a dignified pension when they do retire). In other words, the Law should be seen as part of a set of protective laws, which seek to create a humane and non-exploitative job market. It should also be noted in this context that the age at which a worker must retire reflects a balance between the need to allow for a sufficiently lengthy period of employment, such that the worker can accumulate a substantial pension that would support him with dignity; the public's need to have broad segments of the population participate in the work force; and the need to protect the right of workers to retire as a *de facto* right and not only a *de jure* right. In any event, the constitutionality of s. 4 of

the Retirement Age Law has not yet been discussed by this Court, and the parties have made no claims regarding that issue in the current proceeding. Consequently, and at least for the purpose of the current discussion, I will presume that there is no violation involved in the establishment of a uniform retirement age, given that the violation of the right to age-based equality, provided by that uniform retirement age, is proportionate (for a discussion of this matter, see HCJ 4487/06 *Kelner v. National Labor Court* (2007) (unreported); LabA (NLC) 14705-09-10 *Mutzafi v. Bank Leumi Le-Israel Ltd.* (2012) (unreported)).

25. The issue is different when it comes to an arrangement that enables a worker to retire earlier than a mandatory retirement age. Such an arrangement, so long as it truly reflects the worker's free will, is a privilege granted to that worker. It is clear that in this case, the privilege is given to the older workers, based only on their age. It could be that under certain circumstances, that advantage could generate its own difficulties. Because this issue has not arisen in this case, I see no need to discuss it, and the difficulties that it may generate will be discussed when they do arise.

26. The proceeding before us deals with the group of workers who are entitled to early retirement but who wish to continue to work. For these workers, their forced retirement is a difficult blow, on two levels. First, on a symbolic level, as their forced retirement, based on nothing except their age, sends the message that older workers are not qualified. This message hurts the core of a person's dignity – a person who, only because of his age, is identified as being of little worth. Second, forced retirement often involves a considerable degree of financial harm. A worker who has not yet worked long enough to be entitled to a maximum pension will be left with only a partial pension during his final days, and it is unlikely that he will find new employment that will increase his financial security. Even for a worker who is entitled to a maximum pension, the meaning of retirement is a significant reduction of approximately 30% of his monthly salary.

27. In light of the above, the IPS arrangement – like any other mandatory retirement regime – does in fact violate the constitutional right to equal treatment, in that it discriminates on the basis of the worker's age. The constitutional question that arises in the case before us is whether or not the *additional violation* generated as part of the arrangement is nevertheless permissible because it satisfies the requirements of the limiting paragraph. But before we can discuss the proportionality of the arrangement, we note that it is undisputed that the authority given to the IPS Commissioner is expressly granted in the statute. Additionally, the arrangement conforms to

the values of the State of Israel, and in particular the values that form the foundation of Israel's labor laws.

28. Consequently, under the presumption that the law itself does not disproportionately violate the wardens' rights, it seems that the very existence of an early retirement arrangement is for a worthy purpose. Its objective is to establish a balance between the protection of the individual's rights, and the public need to have those IPS workers aged 57-67 who are no longer fit to continue in public service removed from their jobs. In this context, the Order's own objective is to allow the Commissioner to force certain workers to retire even though they do not wish to retire, when the worker is no longer qualified to perform his work. (As noted above, the parties do not claim in this proceeding that the use of age as a statistical indicator of fitness for work or of the deterioration thereof is itself a violation, nor has any challenge been made regarding the range of ages in which the Commissioner can order early retirement). For this reason, the core of the deliberation is the question of the arrangement's proportionality. In this context, we note that there are different components to the IPS arrangement, and the degree of violation of the equality principle caused by each component is also different. In my view, there is no justification for examining all of these components together (since separate parts of the arrangement may be invalidated, instead of a sweeping invalidation of the entire arrangement). In this vein, I will now examine the proportionality of the various components of the arrangement.

The Starting Assumption of the Arrangement

29. As explained above, the arrangement's basic assumption is that once an IPS worker reaches the age of 57, he must apply for the right not to retire. In my view, this assumption is a proportionate measure. As I noted in *Leiba*, this starting assumption is only the first stage of the process, followed by examining the suitability of the individual worker. As stated, the Law's starting assumption is that there is a rational connection between a worker's age and the degree to which his fitness has deteriorated. On the basis of this, there is – in the context of the Order – a reasonable connection between the degree to which the worker's fitness has deteriorated (and, consequently, between his age) and the purpose of examining his forced retirement. Thus, this component of the arrangement satisfies the first test for proportionality. I therefore did not find that this assumption does more harm to the worker than the reverse – in which the employer is the one to initiate the dismissal process. In both cases, the harm done to the worker's dignity is similar, and in both he is aware that as of age 57, the employer can force him to retire.

Even if, symbolically speaking, there may be a difference between the two alternatives, I believe that it is negligible, and there is no indication that there exists a less restrictive way to achieve the interest at hand. Consequently, the basis of the IPS arrangement also satisfies the third test for proportionality. A presumption that assumes that a worker will want to retire early has real advantages, as it does not require the workers who do wish to retire early to take any action in order to retire when they wish to do so. As stated, the marginal excess violation inherent in this presumption is of lesser magnitude. In my opinion, it does not justify a determination that there is a disproportionate violation of the right to equality inherent in the mere assumption that the continued employment of a worker will be examined only if he is interested in remaining in his position.

Standards for Evaluating an IPS Worker

30. According to s. 7 of the IPS Order, an IPS worker's application for continued employment is evaluated on the basis of six criteria: an assessment of his job performance, the nature and character of his job; his service history, the length of the term in his current job, and the length of time during which he has been at his current position; his medical condition; the degree to which the continued employment of the particular individual, in his particular job, is essential; the possibility of transferring him to a different position and the potential for reassigning him (including the requirement that he undergo training for the purpose of performing a different job); the scope of the worker's entitlement to pension; and the worker's own financial and family situation. Alongside these, the Order also allows for the consideration of "additional general IPS considerations and the realization of IPS objectives."

31. I start by noting that at any stage during an IPS worker's employment, the IPS Commissioner may order his dismissal, if it has been shown that the worker is in some way not qualified for his job. Section 80(c)(2) of the Prisons Ordinance [New Version] 5732-1971 (hereinafter: "the Prisons Ordinance") provides that the Commissioner may: "suspend, discharge or dismiss a warden, if it has been proven to the Commissioner's satisfaction that the warden is negligent or *ineffective in the performance of his job, or is, for some other reason, not suitable for his job*, and he may suspend a warden who has been indicted of improper behavior or who is being investigated for committing a crime or a disciplinary infraction…" (emphasis added – S.J.). This means that the violation of a warden's rights caused by his discrimination on the basis of his age, to the extent that the violation relates to the standards applied for determining whether he should be forced to retire, only arises from the gap between the standards applied for

justifying the dismissal of a warden at any age, and the standards applied for forcing the retirement of a warden who has reached retirement age (if there is such a gap). (For examples of the exercise of the IPS Commissioner's authority with respect to workers below retirement age, see HCJ 668/81 *Ma'adi v. Minister of the Interior* [1983] IsrSC 37(1) 744; HCJ 6208/84 *Amara v. IPS Commissioner* (2004) (unreported); HCJ 7931/05 *Biton v. IPS Commissioner* (2005) (unreported)).

32. I find that all of the first six criteria for determining the propriety of extending an IPS worker's employment are proportionate. In terms of the *rational connection test*, only the first criterion (an assessment of the warden's job performance) and the third criterion (medical condition) relate directly to the worker's fitness, as a matter that is related to his age. In other words, these criteria are used to determine whether the statistical correlation between a worker's age and the degree to which he has experienced work-related burnout, or the degree to which his physical fitness for the work has declined (to the extent that physical fitness is relevant to the specific job), exists in each case. Moreover, pursuant to s. 82(c)(2) of the Prisons Ordinance cited above, these criteria apply to all IPS workers. The violation that is therefore caused is due only to the fact that the fitness of any worker who has reached retirement age and who wishes to continue working will be examined, but before that age is reached, the worker's fitness will only be examined if the IPS has initiated a process to dismiss him.

33. The fourth criterion (the need for the particular worker at his particular job, and the possibility of repositioning him) involves a more indirect connection to the worker's age. At the same time, this criterion reflects the relatively high cost involved in training a worker for a new position, when his work prospects become more limited. For this reason, this criterion also satisfies the rational connection test. Regarding the second criterion (the service history), the fifth criterion (the scope of entitlement to a pension) and the sixth criterion (financial and family situation) – none of these are at all dependent on the worker's age. Nevertheless, the Procedure indicates that these three criteria are considered specifically for the benefit of the worker. Even a worker who has been exhausted by his work and whose fitness has declined can, under certain circumstances, be allowed to continue to work. In other words, these criteria cushion the harm done to the workers, even when their dismissal is justified given the decline in the quality of their work – if the harm caused as a result of such dismissal will be disproportionately severe.

34. Consequently, with respect to an assessment of a worker in accordance with the first, third, and fourth criteria that are listed in the Procedure, I do not see that there is a less restrictive alternative. These criteria are directly related to the worker's fitness for the job, and they effectively sever the connection between the worker's continued employment and his age. Additionally, if we apply the narrow test for proportionality, we see that the harm resulting from the fact that the worker's age is used as a starting point in determining his fitness for continued work, combined with the harm caused by the assumption that there is a statistical correlation between age and a decline in fitness for work – is still less than the benefit obtained from forcing the retirement of workers who are no longer able to work. As noted above, this approach is strengthened by the existence of mechanisms such as the second, fifth and sixth criteria, which serve to limit the damage and ensure the protection of the worker's interests, even when he is less fit for the job (regarding the importance of an individualized evaluation, see HCJ 7052/03 *Adalah – Legal Center for Rights of the Arab Minority in Israel v. Minister of the Interior* [2006] IsrSC 61(2) 202, at pp. 316-318).

35. Regarding the possibility of taking into account general, systemic considerations as well as IPS objectives, I acknowledge that I have doubts as to whether this criterion could be considered proportionate. This criterion does not relate at all to a worker's age, but rather only to his job. Clearly, there could be a situation in which the IPS might want, because of organizational considerations, to eliminate a position held by a younger worker. If the IPS was obligated to continue to employ younger workers, even if it wished to eliminate their positions because of general, systemic considerations, I would say that this criterion is disproportionate, as there would be no rational connection between it and the harm caused to the warden. Nevertheless, a review of the legislation relating to the service of prison wardens shows that these considerations may be weighed when making a decision regarding the dismissal of a warden, as part of the broad discretion given to the IPS Commissioner to dismiss a worker because he is "for some other reason, not suited to his job." It is true that this Court has not yet deliberated any cases in which a warden was dismissed only because of IPS general systemic considerations, and it has therefore not established any binding interpretation of the concept of "non-suitability for some other reason." Nevertheless, I believe that so long as the criterion relating to systemic considerations and IPS objectives is interpreted in accordance with the dismissal criterion relating to efficiency considerations, the use of this

criterion cannot in itself be deemed to be age-based discrimination. Moreover, even if more importance is attributed to systemic considerations in the specific context of a forced retirement, it is not disproportionate if the level of importance attributed to these considerations can be considered reasonable. This is because although a person who has been forced to retire is in an unfortunate position, that position is incomparably better than that of a person who has been dismissed. It is therefore appropriate that when the needs of a worker are balanced against the needs of the system, slightly more weight is given to the system's needs in the context of a forced early retirement. (Later on, in the context of my discussion of the form in which the Procedure was carried out, I will discuss the manner in which this criterion was implemented in the current proceeding.) It should be noted that a review of parallel legislative material shows that a clear procedure was established for other civil servants, relating to dismissals occurring in light of organizational changes (see s. 82.27 of the Civil Service Bylaws). *The IPS should establish a clear procedure that will apply to all its workers, with regard to the termination of their employment because of systemic considerations*. Clearly, the arrangement must be consistent with the rules that apply to this issue (see, regarding this matter, LabA (NLC)) 133/09 *Milcham v. Jedida Machar Local Council* (2012) (unreported), in which the court refined the rule so that even in the context of downsizing, dismissals should be carried out while protecting workers' rights and avoiding discrimination; and see also, regarding age-based discrimination in the context of downsizing dismissals, UC (TA) 3270/07 *Cohen v. City of Bat-Yam* (2012) (unreported)). In any event, I did not find that, according to the rules that apply to this matter, that taking into account systemic considerations when making a decision to forcibly retire a worker constitutes age-based discrimination, so long as such considerations are weighed in the same manner in which the IPS would weigh them when deciding to dismiss a worker in a non-retirement context (and it still will not constitute such discrimination, even if the system's needs are given somewhat more consideration in a retirement context than they are given in an ordinary dismissal context). At the very least, such a practice would not fall within the definition of a disproportionate level of harm.

Sections 8(d) and 8(e) of the Order

36. For the sake of convenience, I will quote here ss. 8(d) and 8(e) of the Order, *verbatim*:

> '8 (d) If the Committee recommends to extend employment, it will recommend that the warden's

> employment be extended for a period of not more than one year. Towards the end of the period, if the warden wishes an additional extension period, the Committee will consider his matter again and will make its recommendation regarding the further continuation of his employment. Recommendations regarding extensions of employment may only be given for a total period of up to 3 years and/or until the warden has reached the age of 60.
>
> 8 (e) The case of a warden who wishes to extend his employment beyond age 60 will be presented to the Committee for deliberation, and the Committee will consider the degree to which the continuation of his employment in his current position is essential; it will also consider the amount of his expected contribution to the organization should he remain in his position. The Committee will also examine the request in accordance with the standards set out in s. 7a and 7b. The Committee may recommend the continuation of a warden's employment for periods that do not exceed one year *per* each request.'

As I explain below, I found that these two sections are not proportionate and that they must be invalidated.

37. The policy of extending the employment for only one year at a time does not satisfy any of the tests for proportionality. First, there is no rational connection between this policy and the arrangement's objective. That objective, as stated above, is to determine whether the worker's fitness for his work has declined as a result of the worker's burnout and whether there is a need to require his early retirement. The respondent has not claimed, and in any event has not proven, that the burnout rate increases once a worker reaches the age of 57. This means that even if the starting assumption is that there is a statistical correlation between the worker's age and the quality of his work, from the moment that it has been determined that he is fit to continue at his work, there is no reason to assume that this fitness will significantly decline over a one-year period. Consequently, even if it had been proven that a worker's burnout begins to accelerate at the age of 57, it would be possible to adopt a less restrictive means, such as allowing the Committee to determine that a particular worker would be re-assessed after a period of time determined by the Committee. For example, if the worker has

one more year left to complete the term of his office at his current position, the Committee could determine that his matter would be re-examined after a year. However, if the worker has just begun working at his current position, in which he could potentially serve for a number of years, it would not be reasonable for the Committee to re-examine his fitness for that position once a year. Subsequently, this policy also fails the third test for proportionality. This policy seriously infringes on the right not to be discriminated against on the basis of age. The actual significance is that a worker will, from the time he reaches retirement age, suffer from a permanent state of uncertainty. Such a worker will be unable to make any plans based on an expected income. Even if the respondent had proven that there is some connection between the burnout rate after age 57 and the need to re-examine the continuation of a worker's employment every year, it is doubtful that this would justify the infliction of this kind of harm on the worker. I therefore believe that this policy of examining a worker's fitness every year should be rejected, on the grounds that it causes disproportionate harm to the worker's right to equality.

It should be noted in this context that the fact that the said policy only takes the form of a recommendation, and that the Commissioner can theoretically extend the worker's employment for longer periods, in contrast with what has been recommended, does not minimize the violation. This is because we can reasonably presume that once only data relating to the coming work year is shown to the Commissioner, it will be difficult for him to reach a decision to extend the employment for a period of more than one year, in the absence of a Committee recommendation to do so.

38. Regarding the establishment of a high threshold for allowing the continued employment of wardens past the age of sixty, I have reviewed the respondent's position and have not found that it provides even the slightest explanation for a distinction between workers of the ages 57 to 60, on the one hand, and workers who are older than 60, on the other. Moreover, the two additional criteria that apply to workers above the age of 60 are not proportionate, as they are of no relevance to the worker's capacity for work. In actuality, a review of the section points to a disturbing picture, in which the presumption is that the worker should be forced to retire unless, because of systemic considerations, there is a need for him to continue working. Since this component of the Order does not satisfy neither the rational connection test, the least restrictive means test, nor the proportionality test in its narrow sense – this component is, in my opinion, invalid.

39. That being the case, I believe that all of the above indicates that there is no need for a sweeping invalidation of the entire Order. Nevertheless, ss.

8(d) and 8(e) of the Order, which are disproportionate, and which constitute an excessive violation of the workers' rights to equal treatment with respect to their ages, should be struck down.

Implementation of the Arrangement Established in the Order

40. I do not conclude – from my finding that the Order itself constitutes a proportionate violation of the right to equal treatment and that it need not be invalidated in its entirety – that its implementation is proper. As is known, if it is proven that a suspect classification, such as a distinction based on age, is being used, the burden of proof then shifts to the party that has made the classification, to prove that it is not a wrongful distinction (see HCJ 6778/97 *Association for Civil Liberties in Israel v. Minister of the Interior* [2004] IsrSC 58(2) 358). In the area of labor law, this procedure regarding the burden of proof is expressly established in s. 9 of the Equal Employment Opportunities Law. Here, we see that suspect classifications can be identified in two ways. The first is by examining the case of a particular worker at hand, asking whether prohibited considerations were weighed in that case. It will often be difficult to make such a determination, since discrimination rarely leaves clear footsteps. The second involves proving a suspect classification through an examination of an entire group of workers. Once a worker has proven that in either of these respects, the employer has made a suspect classification, the burden to prove that it is not discriminatory is imposed on the employer. It is still necessary to balance between the two methods of identifying wrongful discrimination. That is, the clearer the individual worker's circumstances are, and the more it is demonstrated that there has not been any discrimination in his case, the harder it will be for a worker to ask for a remedy based on a generally discriminatory policy. Consequently, the more that an employer's general behavior indicates a broader discriminatory policy, the greater the burden will be on that employer to prove that there is no discrimination in the case of a particular worker.

41. In the case before us, the petitioner has, I believe, succeeded in showing that a suspect classification has been made, based on the two levels of proof. The burden of proof has therefore shifted to the respondent – it is he who must prove that there has been no prohibited discrimination. The respondent has not met this burden.

42. On the collective level, the petitioner argued that the rules established in the Order, and the manner in which the Order is implemented, indicate that a suspect classification has been made on the basis of age. I agree with this contention. First, as explained above, at least some of the rules reflect

unlawful discrimination on the basis of age, and it is enough that some part of the normative system that regulates the petitioner's case is discriminatory for the burden of proof to shift to the respondent. This is especially so in light of the substantial difference between the retirement arrangement established in the Order and the retirement age established in the Retirement Age Law. (The two frameworks establish retirement ages that are ten years apart). As I have noted, the starting point for the discussion was that mandatory retirement at the age of 67 reflects a proportionate violation of the right to equality; therefore, the party wishing to deviate from this arrangement should bear the burden of proving that the proposed deviation is proportionate.

43. Moreover, as my colleague Justice E. Hayut wrote, outcome-based discrimination can be inferred here, even from the data presented by the respondent. For example, according to the data that he presented, the average retirement age for wardens in 2008 was 57.64, compared to 56.16 in 2004 (before the decision in *Rosenbaum* was issued). The respondent did not break down the data between workers who retired voluntarily on the basis of age, and those who were forced to retire against their wishes. Nevertheless, on the assumption that this breakdown of the two groups had not changed, it is clear that the impact of the *Rosenbaum* decision on the average retirement age of these workers was insignificant. This can only be explained by the fact that the manner in which the Order is implemented reflects *de facto* age-based discrimination. Thus, at least on a collective level, the respondent has not proven satisfactorily that the distinction he made does not constitute wrongful age-based discrimination (and in effect, the data that he provided to the Court actually supports the claim that there has been discrimination). It should be noted in this context that the fact that the respondent can point to only two workers above the age of 60 who are employed by the IPS merely reinforces the suspicion that the policy is tainted by discrimination. It should also be noted that the respondent did not meet the burden of proof on this issue when he stated that 33 out of 55 requests for extended employment were approved in 2008, 12 out of 17 were approved in 2009 and 18 out of 22 were approved in 2010. First, as my colleague Justice Hayut noted, the respondent has not provided any information regarding the breakdown of these requests, and it could be that most of them involved approvals for only short periods past the age of 57. Second, it remains unknown how many requests for extended employment were simply not submitted, due to an open or concealed policy that makes clear to workers that their chances for having their applications approved are low (and it appears that the sharp drop in the number of requests submitted would support the presumption that workers

who wanted to stay in their jobs refrained from asking for such extensions, because they had little confidence that their requests would be granted). In other words, it is not sufficient to prove that there was no discrimination in the implementation of the Order with respect to requests that were submitted. Discrimination can also be reflected in the fact that there may have been workers who would have wanted to continue working, but because of various institutional reasons (primarily because of the tone set by the establishment), they did not submit any requests to be allowed to stay.

44. On an individual level, a review of the petitioner's case shows that her forced retirement was not based on the criteria set out in the Order. There is no dispute that the petitioner did her job well, and there was therefore no reason to dismiss her on the basis of the first criterion. Accordingly, it was not argued that the quality of her work had declined or that she was physically unfit to do her job. In effect, the main argument made was that her forced retirement was necessary because she held a rank that the respondent sought to phase out. The respondent did not prove that he was also applying a similar policy with respect to other workers whose ranks he also wanted to phase out and who were not yet of retirement age. The significance is that a worker in the same situation as the petitioner, who held a rank that the IPS wished to phase out but who was not of retirement age, would continue to serve in his position. Consequently, we cannot help but conclude that the process of forcing the petitioner to retire was itself tainted by age-based discrimination. It should be noted in this context that even if there was some difficulty in finding an appropriate alternative position for the petitioner, as the respondent noted, this would not have been enough to justify her forced early retirement. As is known, once discriminatory and legitimate considerations are mixed together in the decision-making process, the decision as a whole is tainted by discrimination, and it must be revoked. Moreover, in the current case, the respondent himself notes – time after time – that the difficulty in finding an alternative position for the petitioner was caused by the fact that she held the rank of Flexible Chief Superintendent (see, for example, paras. 148 and 158 of the respondent's answer). As stated above, the discrimination suffered by the petitioner is connected to that very fact, and the respondent cannot buttress his position by making this argument.

45. Since the petitioner has proven, as stated, that the IPS was following a general policy that discriminated against older workers, and even more importantly, because she has proven that in her own specific case, she was discriminated against on the basis of her age, her petition should be granted.

An order should be given, that she be reinstated in her job or placed in a different position found for her in the IPS.

Conclusion

46. The phenomenon of age-based discrimination is a very serious one. It humiliates the victim and denies his human dignity. This phenomenon also does serious harm to the economy, which loses good, skilled workers on the basis of nothing more than unfounded stereotypes. Moreover, the harm it does is usually especially severe, because it affects a group of workers who are already in an inferior position and whose members have difficulty defending their rights. While in the forefront of the economy, public institutions and government authorities there are many employees who are older than sixty, there are nevertheless many older workers who find themselves outside of the labor force at their peak – only because of their age. This policy is often practiced openly, in which case it is easy for a court to identify it and to strike it down. However, it is an open secret that in many institutions that have no openly discriminatory directives regarding this matter, discrimination of this type is nevertheless practiced, without leaving obvious traces. When these proceedings come before this Court, we do our best to eliminate the discrimination and to defend the dignity of those whose only crime is that they have reached a certain age. At the same time, this phenomenon must be eliminated by all public and private parties, who must all stop engaging in this practice. *A fortiori*, the various government authorities must do all they can to root out the phenomenon from within their own sectors.

47. On the basis of all that has been stated above, I choose to concur in the result reached by my colleague Justice E. Hayut with respect to the petitioner's particular case, and to have her reinstated within the ranks of the Israel Prison Service. Regarding the Order itself, my opinion is that we should only strike down ss. 8(d) and 8(e). Clearly, the other sections of the Order will be interpreted on the basis of the rule established by this Court and by the Labor Courts, and which was described to some extent in my judgment here.

Vice President (emeritus) E. Rivlin

I concur in the judgment of my colleague Justice E. Hayut, as I also believe that the order *nisi* should be made absolute, and that the respondent should be ordered to revoke his decision to order the petitioner to retire. I believe that the respondent's decision to order the petitioner's retirement at the age of 57 and a half, only half a year after she reached the minimum

retirement age, does not comply with the rules of administrative law and must be struck down. Therefore, and because I am not certain that the Order which is the subject of this petition – the Extension of Service Order – is invalid, I do not wish to discuss the issue of that Order's invalidity as part of this petition. I nevertheless wish to describe my position, in principle, regarding the issue of age-based discrimination.

The Respondent's Exercise of Discretion in the Petitioner's Case – the Concrete Aspect

1. The respondent's legal authority to order workers to retire relates to the period between the time they reach age 57 (s. 81 of the Retirement Law) and the time they reach the mandatory retirement age – 67. The respondent decided to allow the petitioner to work for only one twentieth (six months) of this long period in which the petitioner could have legally continued to work in the IPS, and to order her to retire at age 57 and a half. I believe that in reaching this decision, the respondent exercised his discretion in an improper manner.

As the decisions rendered by this Court in *Recanat* and *Rosenbaum* indicate, it is undisputed that the fact that the petitioner reached the age at which the respondent was permitted to force her to retire cannot be the sole reason that the respondent had for actually forcing her retirement. If the petitioner's age was the reason for her being forced to retire, and in the absence of any indication that she was having difficulty doing her work as an attorney – then this was age-based discrimination. Age-based discrimination, meaning a preference for the employment of a younger worker over the employment of an older worker, is *absolutely unacceptable* and must be uprooted and removed from the labor market. However, the reason that the respondent gave for having compelled the petitioner to retire was that it was the result of budgetary considerations. The budgetary issue arose because for 15 years, the petitioner had been entitled to the salary of a Chief Superintendent, even though she was employed in a position intended for a person holding only the rank of Superintendent. Thus, this was not a matter of preferring younger workers over older ones. It was instead a matter of preferring a worker whose salary was consistent with his job description over one who – for historical reasons – was entitled to a excessive salary for a long time. The petitioner, on her part, argued that this factor was not the true reason for her retirement and that it was being used to conceal the respondent's wish not to employ an older worker and to prefer younger workers to her. The difficulty is that the petitioner's argument is completely unsupported, while the respondent's argument is supported by documents

that attest to his consist efforts to terminate the employment of all workers whose ranks were inconsistent with the nature of their work. Under such circumstances, we cannot presume that the respondent is simply presenting an excuse for discriminating against the petitioner; it would be more appropriate to presume that the respondent was seeking to allocate public funds more efficiently, in conformity with his position and his authority. Regarding the petitioner's specific situation, the disparity between her position and her salary was particularly sharp, as she had received a special approval for earning a Chief Superintendent's salary during the period she was an articling law clerk, instead of a typical clerk's salary. She also had special approval for earning a Chief Superintendent's salary between the time when she completed her clerkship until she was admitted to the bar. We must therefore presume that the budgetary issue was the respondent's primary concern, and examine the manner in which he weighed this factor against the other factors that needed to be considered in this matter.

2. There were other significant factors that needed to be considered in this case, factors which justified the petitioner's continued employment: the relatively low level of pension benefits that she had accumulated, her family and financial situation, and the satisfaction that her superiors had expressed regarding her work. The respondent should also have taken into account the fact that in recent years the petitioner had been employed in an administrative position, for which the typical level of burnout is relatively low, compared to that of a warden who comes into daily contact with prisoners. Indeed, these considerations led the internal committee of the Israel Prison Service to recommend that the petitioner's employment be extended for an additional year. As may be recalled, in accordance with the Extension of Service Order (s. 8.d), this is the maximum extension that the committee may recommend each time it receives an application, and it was certainly possible that the committee would have continued to recommend extensions in future years.

In light of all this, and without taking lightly the budgetary reasons that the respondent did consider – reasons that it was his job and his obligation to consider – I believe that under the circumstances of the case, the decision to extend the petitioner's employment for such a short period of time was not proportionate. The respondent's exclusive authority to determine the date at which a worker will retire imposes on the respondent a duty to balance the system's needs against the individual worker's needs. In this case, the proper balance was not reached. The petitioner's personal and financial circumstances, as expressed in the recommendations of the IPS welfare department, and of which the respondent was made aware, were exceptional

circumstances. The fact that the petitioner had earned very little pension benefits and the fact that her superiors were satisfied with her work performance should have tipped the scale in her favor. Even though, as stated, the legislature had authorized the respondent to order workers to retire from the time they had reached age 57, it is clear that the balancing carried out by the respondent here was skewed, and his decision is therefore invalid.

The Extension of Service Order and Age-based Discrimination – the Matter of Principle

3. As I have concluded that the respondent's decision concerning the petitioner's case is invalid, and that she should be granted the relief requested in the petition – i.e., overturning the respondent's decision in the petitioner's case – there is no need for me to examine the validity of the Extension of Service Order; nevertheless, because this matter was discussed in my colleagues' opinions, I will discuss it briefly below.

The petitioner's main argument against the Extension of Service Order is that it leads to the practice of age-based discrimination. The main support given for this argument is that the default option established by the respondent is that a worker must periodically ask to have his or her employment extended, from the time he reaches the minimal age for mandatory retirement. This contrasts with the procedure established in the Civil Service Bylaws, the starting point of which is that a worker will continue to work until age 67, unless the worker's employer asks the Civil Service Commissioner to order the worker's retirement. But if this is the case, then the argument being made is not of age-based discrimination. An age-based discrimination claim weighs the treatment of a young worker, on the one hand, against the treatment of an older worker, on the other hand, whereas a claim of discrimination in terms of the treatment of IPS workers as compared to other civil servants is, at most, a claim of discrimination based on association with the IPS. Regarding this last matter, it is doubtful that it can be argued that IPS workers are discriminated against, as a group, compared to other civil servants. Even if we isolate the retirement arrangements, and make no comparison between the overall terms employment for IPS workers and those of civil servants – we would still see that the *voluntary* retirement age for police officers and wardens is five years younger than the voluntary retirement age for civil servants (compare: ss. 17 and 72A of the Retirement Law and Part B and Part C of the Second Schedule to that Law). Furthermore, those who retire from the IPS and from the Israel Police enjoy a special arrangement that increases the size of their pensions by up to 8% by virtue of a government resolution (Notice of

Government Resolution Regarding Retirement Policy for the Israel Police and the IPS, Official Gazette 4936, at pp. 465-466 (2000); Israel Prison Commissioner Order 02.26.00, "Extended Period of Service for the Purpose of Calculating a Pension"). It should be noted that these arrangements also apply to administrative workers within the IPS and the Israel Police.

4. It is therefore difficult to view the group of IPS workers or even just the group of administrative workers within the IPS, as a group that is being discriminated against because of its belonging to that organization. It would be just as reasonable to believe that civil servants actually face discrimination compared to IPS personnel, in that their voluntary retirement age and the size of their pensions are lower. A review of the Retirement Law indicates that the legislature, whose exercise of judgment in this matter is not challenged in this petition, chose to create *different* arrangements for different groups of civil servants. The first three chapters of the Retirement Law deal with all civil servants; the statute later moves on to special provisions covering General Security Service workers (Chapter C-1), Israel Lands Authority workers, (Chapter C-2), kindergarten teachers and teachers (Chapter D) and police officers and IPS workers (Chapter E). The statute establishes different retirement arrangements for each of these groups of workers, and naturally, some of these give extra benefits to the relevant group and some provide lesser benefits. The purpose of the special arrangements for the Israel Police and the IPS is to conform the retirement arrangements to the special nature of the work performed by the IPS and by the Israel Police:

> 'Their functions are complex, and they are often exceptional in nature and in the demands that they make of those serving in their ranks. They are likely to require greater physical fitness, maximum alertness, long and irregular work hours, and the ability to withstand pressure and tension. Moreover, many of those who serve in the *Israel Prison Service* and the *Police* — and this includes persons in administrative positions or jobs requiring a special professional expertise (such as doctors or engineers) — are sometimes required to exercise their enforcement powers or to provide reinforcement for operational forces' (*Rosenbaum*, *per* President Barak, at para. 13).

5. In other words, given the fact that any group arrangement can reflect only a weighting of the abilities of all of the organization's workers, the legislature reasoned that the *average* set of demands that are placed on all the *different types* of IPS workers are greater than those placed on civil servants. Indeed, a group arrangement that takes into consideration the average worker

will necessarily present advantages and disadvantages for the individual worker. Sometimes the "non-average" worker will benefit from advantages that were designed for the average worker and to which the particular non-average worker would not naturally be entitled, and that same worker will sometimes suffer from being denied a particular benefit to which he should have been entitled. This anomaly is a consequence of the legislature's decision to establish rules that serve to encompass all IPS and Israel Police workers, without making any sub-distinctions among these workers. However, as it is the respondent's judgment that is being examined here and not the Retirement Law, we must refer to the distinction between all IPS workers and all civil servants as a given.

6. Moreover, not only is it inappropriate to compare IPS workers as a group with all civil servants as a group, it is also not essential that there be any overlap between the manner in which their superiors – the IPS Commissioner and the Civil Service Commissioner – exercise their judgment. The legislature granted the Civil Service Commissioner, the Police Commissioner and the IPS Commissioner the authority to render decisions about the forced retirement of those under their supervision. These three officials established internal guidelines that define the manner in which they intend to exercise their judgment, and there are differences between these sets of guidelines. The petitioner asks us to consider the rules established by the respondent as discriminatory in that the internal rules that he established create a disadvantage for those who do not wish to be forced to retire, as compared to the guidelines established by the Civil Service Commissioner. But the legislature did not determine any normative hierarchy between the Civil Service Commissioner's guidelines and those relating to the respondent. Once the legislature granted the respondent the power to determine the retirement age for wardens, the respondent's duty was to exercise his own independent judgment. There is no reason to assume that he should be obligated to establish arrangements that are similar in nature to those established by the Civil Service Commissioner in the Civil Service by-laws.

7. I would note parenthetically that in the leading case on this issue – *Rosenbaum* – the respondent's decisions were also invalidated on the ground that they did not comply with the reasonableness and proportionality rules. As may be recalled, in *Rosenbaum*, the Court discussed the decisions made by the respondent and the Police Commissioner to use their authority to force retirement at the earliest possible age, without exercising any judgment in specific cases. This arrangement, it was held in that case, was

disproportionate and unreasonable since "[s]ufficient and convincing evidence was not presented to show why the Procrustean measure of a uniform retirement age, which is ten years lower than the customary age in the rest of the civil service, constitutes the least harmful measure to human rights when realizing the goals of the prison service and the police." (*Rosenbaum*, at para. 19). The key flaw in the respondents' policy in that case was the arbitrariness and the failure to exercise judgment inherent in the establishment of a uniform and sweeping rule. The rules established by the IPS and the Israel Police prior to the *Rosenbaum* decision deviated not only from the way in which the parallel administrative authority – the Civil Service Commission – had exercised its judgment, but also from the statutory determination regarding the maximum retirement age. In effect, these rules created an alternative maximum retirement age and presumed that any worker older than such age was not suitable for continued employment in the IPS or in the Israel Police. This was age-based discrimination – it was discrimination against older workers who were forced to retire, without any investigation of their fitness for the work, while younger workers were able to continue their work. *Such discrimination is prohibited and it is improper*. It is unnecessary, in order to reach this conclusion, to examine the parallel arrangements used in the civil service – the conclusion can be reached by viewing the differential treatment of younger and older workers *within the IPS itself*.

In this context, we need to look at the comparison the Court made in *Rosenbaum* – between police officers and IPS workers on the one hand and all civil servants on the other – with regard to the maximum retirement age, an age which is established in s. 4 of the Retirement Age Law, 5764-2004. I do not believe that we need to infer, from this comparison, that the different treatment of workers in *different* organizations, with respect to age, is an example of age-based discrimination. As stated, differential treatment to workers that are distinguished only by their belonging to different organizations, may give rise only to discrimination based on the identity of their employer organization– and not to any other type of discrimination.

Furthermore, I do not believe that the Extension of Service Order should be interpreted as imposing on the worker the *burden* to prove that there is *good reason* to extend his employment. The Order only imposes on the worker the obligation to *ask* for the extension of his employment, but does not impose any burden of proof whatsoever. The procedural directive, which requires that the worker must ask for an extension of his employment, should be distinguished from the considerations to be weighed in reaching the

decision to extend that employment – considerations that are specified in s. 7 of that Order, and which are ostensibly examined without any bias in either direction.

8. As stated, the subject of our examination here is the manner in which the respondent has exercised his judgment. This exercise of judgment is required to be reasonable, proportionate and non-discriminatory – in accordance with the rules of administrative law. As I noted at the beginning of my opinion, in this case, such an examination must lead to revoking the respondent's decision. It may be that because of the petitioner's specific circumstances we can infer that the procedure established by the respondent for examining the continuation of employment is often an obstacle. The need for a renewed examination of the extension each year can create the impression that an extension for only half a year strikes an appropriate balance between the conflicting considerations. However, as noted above, the balancing carried out in the case of the petitioner's application was in any event far from proportionate. I stress that this is the case with respect to the petitioner's exceptional case, in which there was a substantial budgetary reason for requiring her early retirement. In the absence of an exceptionally strong reason like this, this kind of balancing is even more obviously improper. I believe that there is no need for this Court to intervene in the respondent's authority to establish internal procedures, and it is sufficient for the Court to make certain that the respondent's decisions comply with the rules of administrative law. Examining the Extension of Service Order from the perspective of the treatment of younger IPS workers versus older IPS workers (without making any reference to irrelevant comparisons to other civil servants) demonstrates that the policy is not discriminatory; in fact, the Order itself does not establish any substantive policy whatsoever. All that it determines is the procedural mechanism that assists the respondent in deciding when to exercise the power given to him in s. 81 of the Retirement Law. It is presumed that the respondent will internalize the provisions of this judgment and will determine – based on his experience and judgment – the best way to implement its conclusions, with regard to the future conduct of the Israel Prison Service.

I therefore join in the ultimate outcome of my colleagues' decision – that the petition should be granted, that the order *nisi* that we have issued should be made absolute, and that the respondent's decision to order the petitioner's retirement should be reversed. In my view, there is no need for further relief in the context of this petition.

Justice N. Hendel

1. I concur with the comprehensive and well-presented opinion of my colleague E. Hayut. I believe this case may be significant for future cases and I have therefore decided to emphasize certain aspects of it.

Leah Zozal was forced to retire at 57 years and two months, without any substantive justification considering the nature of her job. My colleague held that the retirement arrangement discriminated against Zozal on the basis of her age. Among the grounds for a discrimination claim that are listed in s. 2(a) of the Equal Employment Opportunities Law, 5748-1988 (see *Recanat, per* Justice Cheshin, at p. 308), age discrimination is apparently something of a step-child, in two respects. First, even though it is the "oldest" of the grounds – since in actuality the cases deal with discrimination against an older worker and not the other way around – the issue of age is also among the youngest, in the sense that as an issue it does not have much seniority within Israeli Law. (See s. 2(a) of the Equal Employment Opportunities Law (Amendment 3) 5755-1995). Second, the junction between the prohibition of discrimination on the basis of age on the spectrum of causes for discrimination, and the phenomenon of workplace layoffs on the spectrum of those subject to discrimination, reveals an inherent irony in Israeli Law. On the one hand, age-based discrimination with respect to dismissals is prohibited. At the same time, the law imposes mandatory retirement at a particular age.

2. Other legal systems have dealt with this ironic conflict in various ways. In the United States, for example, the law has come to eliminate mandatory retirement ages. (Congress has banished age-based mandatory retirement in 1986 through an amendment of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634, except in unusual cases that are defined in the statute, such as the retirement of airline pilots. See also: Kenneth R. Davis, Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem, 70 BROOK. L. REV. 361 (2004-2005).

In England, the Employment Equality (Age) Regulations (2I 2006/1031) (2006) were enacted in 2006. According to Regulation 30, an employer had the freedom to establish a mandatory retirement age of 65. This provision was repealed in 2011 with the enactment of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011/1069). In a judgment handed down in 2012, the Supreme Court held that an employer could create a mandatory retirement age but would have to prove that it had used "proportionate means to achieve a legitimate aim" (*Seldon v. Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16). The Supreme Court

clarified that the aim of any differential treatment based on age must be to promote a social policy in which there is a public interest, and that in determining whether or not a public interest was involved, the Court should take note of the following considerations: promoting the access of young people to employment; efficient planning of the recruitment of workers which will insure the integration of various generations within the workforce, in order to encourage the transmission of experience and the exchange of new ideas; the softening of the blow to older workers when it is hard for them to find a new job if they are dismissed; compensation for experience; and helping older workers take part in the labor force. It should be noted that two of the key purposes are inter-generational justice and dignity.

Twenty years ago, a Canadian court examined the constitutionality of provincial laws that established a mandatory retirement age, in view of the Canadian limitations clause in s. 1 of the Canadian Bill of Rights and Liberties, and s. 15(1) of the Bill, which deals with age-based discrimination. However, in recent years, the trend in Canadian law – both provincial and federal – has been to eliminate the concept of mandatory retirement at a particular age, except in cases that are enshrined in specific pension agreements or in which retirement is necessary because of job requirements (see, Professor Ruth Ben-Israel, "Retirement Age and Equality: Biological or Functional Retirement?", 43(3) Hapraklit 251 (5755-1995), at p. 285; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.* [2008] 2 S.C.R. 604). In contrast, in France and in Japan, there is a mandatory retirement age; ten years ago, that age was 60, but it has been rising since then (Andrew Wood, Marisa Robertson & Dominika Wintersgill, "A Comparative Review of international Approaches to Mandatory Retirement", 674 DEPARTMENT FOR WORK AND PENSIONS RESEARCH REPORT (2010)). We thus have several different legal systems with uneven regimes and developments.

It is interesting to look at an illuminating example from Jewish law, which is relevant to our case. The Torah states the following: "[b]ut at the age of fifty they shall retire from the work force and shall serve no more. They may assist their brother Levites at the Tent of Meeting" (Numbers, Chapter 8, 25-26). Is this an example of a mandatory retirement age? Does a Levite who has reached the age of 50 stop working, or does he continue to work with his fellow Levites in the Tabernacle? The Sifrei commentary takes careful note of the text and writes as follows: "'But at the age of fifty they shall retire from the work force'; does this mean that he does not work at all? The explanation is: 'and [they] shall serve no more. They may assist their brother

Levites at the Tent of Meeting.' This shows that he returns to the task of locking the doors and to the work performed by the sons of Gershom" (one of Levi's sons). According to this approach, the Levite stops doing one particular kind of work at age 50, but is given another job which is also part of the work of the Levite tribes – for example, locking the doors. The Zohar explains that the job of the Levites is to sing, but at age fifty, a man's voice "has weakened and is not as pleasant to hear as his friends' voices are" (free translation [from the Aramaic]; Zohar Vol. 1 (Genesis, Parshat Vayechi). According to another Midrashic commentary, Sifrei Zuta (Chapter 8), the Levite's work also included heavy lifting – which is inappropriate for a Levite over fifty, because of his age. We see that the approach here is that there is room to dismiss a worker due to his age because of a relevant change that relates to the nature of the job – voice or heavy lifting. In contrast, there is no justification for an age-based dismissal if the worker (the Levite) can continue his work, based on his skills and abilities – in the Tabernacle. As explained below, given the nature of the petitioner's job – an attorney's position – there is no justification for an age-based dismissal.

On a general level, it may be recalled that a finding of age-based discrimination, like any discrimination, rests on its own unique characteristics. For example, the issue of age, as opposed to other issues of discrimination, is a developmental matter, which may be relevant to each of us when the time comes, hopefully if not in practice. However, the establishment of an age at which a worker retires, after many years of investment in his labor, is designated to benefit the worker and give him social security, so that he is not forced to work for his entire life (see: Todd D. Nelson, *Ageism: Stereotyping and Prejudice Against Older Persons*, x, 174 (2004)).

3. As to our approach here in Israel, the law recognizes the establishment of a mandatory retirement age for workers (Retirement Age Law, 5764-2004). The relevance of the characteristics of age as cause for discrimination noted above is expressed in the sensitivity required for examining an age-based discrimination claim. The statutes and the case law have referred to this issue in four ways, all of which become more significant in this case in light of the opinion of my colleague, Vice President (emeritus) E. Rivlin. *First*, even when a mandatory retirement age has been established, it must be ascertained that the determination does not discriminate against a particular worker compared to others, based on his age. The prohibition against age-based discrimination, in s. 2(a) of the Equal Employment Opportunities Law, is a normative provision which is aimed at directing

behavior. The law does not prohibit any kind of differential treatment. Rather, it only prohibits differential treatment that is based on an identifying characteristic which the employer is barred from considering. The meaning of the concept of discrimination that is "based on" a particular issue was discussed in a recent decision by President (emeritus) D. Beinisch (HCJ 1758/11 *Orit Green v. Home Center* (2012) (unreported)). In that decision, President Beinisch held that even in the absence of an intention to discriminate against the worker, the employer will have engaged in age-based discrimination if one of the factors that the employer considered when making a decision is one of the prohibited factors listed in s. 2(a) (*ibid.*, at para. 16). In this case, it is clear that the workers' age was considered by the IPS Commissioner in establishing his mandatory retirement procedures. When it comes to age-based discrimination, we cannot include a condition that the discrimination must be in favor of a younger worker and against an older worker; it is sufficient that a worker, of any age, is discriminated against in relation to identical employees, because of his age (see also *Recanat*, *per* Justice Zamir, at p. 346).

Second, the presence or absence of discrimination, in the sense that it means different treatment for parties who are equals, requires an answer to the question: "different from whom?" The definition of the peer group – which is the basis for the comparison made by the worker who claims he has been the subject of a discriminatory measure – is an important stage in the analysis of whether or not discrimination has been practiced. According to my colleague Justice E. Rivlin, the relevant peer group consists of all IPS workers, and the different treatment given to older IPS workers as compared to younger IPS workers constitutes unlawful discrimination. This dispute already arose in *Rosenbaum*, and this Court decided there that the "the relevant equality group in our case is civil servants as a whole" (*Rosenbaum*, at p. 872). In this sense, that holding is correct with regard to the instant case as well. In establishing the prohibition against age-based discrimination, the legislature directed the employer and the courts – with respect to their exercise of judicial review –to examine the workers' conditions based on the various causes for discrimination, such as age and gender. In other words, the employer does not satisfy its legal obligation merely by distinguishing between different groups of workers. In examining the peer group, the prohibition against discrimination established in the statute forces us to look beyond the prohibited types of discrimination. The examination is a legal-normative one, not just organizational. The relevant "groups" for comparison are defined according to the types of discrimination claims listed in the

statute. This point is demonstrated in particular when the employer of the two employee groups discussed by my colleague – IPS workers and the civil servants – is, in fact, a single employer: the State of Israel. The relevant peer group is determined based on the nature of the work and not necessarily based on the workers' institutional affiliation. My approach, as has already been well stated in the opinion of my colleague Justice E. Hayut, is that the petitioner in this case should be compared to other workers holding professional, administrative and staff positions in the civil service, rather than to the IPS wardens.

Third, we need to look at whether the differential treatment is indeed discriminatory or whether there is in fact a relevant and justified difference between the groups, as indicated in s. 2(c) of the Equal Employment Opportunities Law: "Differential treatment necessitated by the character or nature of the job or position shall not be regarded as discrimination." At this stage, what is examined is the differences between the nature of the work of administrative employees in the IPS, on the one hand, and the nature of the work done by the same type of employee in the civil service, on the other. The question to be answered is whether those differences justify differential treatment with regard to the matter of forced retirement (and see the implementation of the section regarding the requirement made of El Al flight attendants for proper appearance in HCJFH 4191/97 *Recanat II*, at p. 354). Here, I did not find any relevant difference derived from the nature of the petitioner's job which can remove the stain of discrimination.

Fourth, the standard for determining whether there has been discrimination is not just the age of retirement but also the "procedures" established for retirement. The mechanism used for reaching retirement decisions is material to the issue of discrimination. I therefore agree with the holding in the opinion of my colleague Justice E. Hayut – that there is an independent defect in the arrangement which is the subject of this deliberation. This defect is that the starting assumption for an IPS worker is mandatory retirement at the age of 57, regardless of the type of job held by the worker, *unless* he applies for an extension of his employment, which must be granted by the IPS Commissioner. Such an extension is also limited to a maximum period of three years. This is in contrast to the retirement arrangement for civil servants, for whom the starting assumption is that they will be employed until the general retirement age of 67, *unless* the Civil Service Commissioner orders that the worker retires upon reaching the age of 60 (s. 18 of the Retirement Law [Integrated Version] 5730-1970). That is, even in comparison to the group of IPS workers only – according to my

colleague – I do not understand why workers who have reached the age of 57, specifically, must ask for an extension of their employment, when this arrangement is not necessitated by the nature of the job or position. The statute grants discretion for the IPS Commissioner to exercise, including by deciding not to extend an IPS worker's employment. An additional distinction that has been noted is that an IPS worker's employment can be extended only until he turns 60. This makes the petitioner's situation different from that of a civil servant of the same age, who also holds an administrative position.

The different retirement arrangements reflect the difference between the opt-in approach and the opt-out approach, which are used in – *inter alia* – marketing, privacy matters, and class action lawsuits. The difference between the two methods centers on the question of whether an individual needs to act passively or actively in order to establish his belonging to the group or to preserve his rights. The IPS retirement arrangement places an unjustified burden on the worker, requiring him to proactively apply for employment extension each year from the time he turns 57, as opposed to civil servants whose employment is extended without any need for action on their part, unless it is the Civil Service Commissioner who takes action to initiate retirement proceedings. The arrangement tips the scales – excessively – against IPS workers as opposed to civil servants holding equivalent positions, even though the employer retains the right to decide to extend the worker's employment for a limited period (compare *Leiba v. Police Commissioner*, at para. 8). The IPS retirement arrangement delivers a particular message and embodies a particular tone and significance. These point to its discriminatory nature – i.e., to the fact that it treats workers differently, without justification, on the basis of their age.

In this case, a comparison between the retirement arrangement in place for the petitioner and for other workers in the IPS, on the one hand, and the retirement arrangement for the relevant peer group among other civil servants, on the other, is sufficient to show that there has been discrimination against the petitioner. To this, we must add the retirement age established for the petitioner – 57 – as compared to the standard retirement age in the economy. The said age, given the nature of the petitioner's job, appears to be arbitrary, or to have been chosen – together with the mechanism used for extending workers' employment – only to satisfy the legal requirements outlined in *Rosenbaum*. This is not to presume that the IPS acted in bad faith in establishing its retirement arrangement. The presence or absence of discrimination is not measured by the subjective intention of the employer,

but rather by the objective outcome for the worker (compare the Canadian court's decision in *New Brunswick*, *supra*). A worker should not have to feel that he is being granted a favor, where the law is actually on his side.

Justice Y. Danziger

I agree with the judgment of my colleague Justice E. Hayut.

As my colleague noted in para. 20 of her opinion, the retirement arrangement under discussion here is substantially different from the arrangement that was struck down in *Rosenbaum*. Unlike the arrangement at issue in *Rosenbaum*, the arrangement invalidated in the present case includes practical standards and tests for an individual examination to be performed with respect to each warden when he or she reaches age 57. This is a significant step in the right direction. At the same time, I accept in full my colleague's position that this is not enough, and that there is still a substantial and unreasonable disparity between the retirement arrangement for IPS personnel and the arrangement for all civil servants. There are three factors that have led me to this conclusion. First, I have considerable difficulty with the arrangement's starting assumption – i.e., that a worker automatically falls within the "worker of a retirement age" category when he turns 57 (ten years earlier than the retirement age for the civil service), and that from that time onward the worker bears the burden of proving that he is qualified to continue working. This is in contrast to the arrangement that applies to other civil servants, where the starting assumption is the reverse. I do not believe that this is a symbolic or minimal difference. Second, the mechanism through which the employment is extended, as set out in the arrangement (and which allows for a limited extension for a period of only one year at a time, for a maximum period of three years, or until the worker reaches the age of 60) is unreasonable (see para. 21 of my colleague's opinion, and paras. 37-38 of my colleague Justice S. Joubran's opinion). Third, the arrangement does not distinguish between IPS workers who hold operational positions and those who hold professional-administrative positions. The strength of the respondent's arguments – that IPS workers generally experience work-related burnout more quickly – is thus greatly weakened.

Consequently, I believe that the arrangement as a whole cannot remain in place and that it must be invalidated in its entirety.

My colleague Justice S. Joubran provided an in-depth analysis of the various mechanisms and tests included in the arrangement, and concluded that it should not be completely invalidated; that instead, only a few provisions need to be struck down – provisions which he believes are

insufficiently proportionate (see paras. 29-39 of his opinion). My colleague also believes that the arrangement's starting assumption (that the worker automatically becomes "a worker of retirement age" at the age of 57) is symbolic and of minimal importance.

I reviewed my colleague's opinion carefully, but at the end of the day, I remain of the opinion that it would not be right to merely "correct" the arrangement, and that it is impossible to distinguish between its provisions so as to invalidate only some of them.

As stated, I believe that an examination of the arrangement in its entirety leads to the conclusion that it is unreasonable and cannot be divided into its various parts, as my colleague Justice E. Hayut has shown.

Decided as *per* the opinion of Justice E. Hayut.

Given this day, 9 Elul 5772 (27 August, 2012).