

## LILACH LURIE

PHD, TEL-AVIV UNIVERSITY, DEPARTMENT OF LABOR STUDIES

## ISRAEL'S SUPREME COURT INVALIDATED A LAW REGARDING PENSION OF MIGRANT WORKERS: THE CHABANO CASE

In July 2023, Israel's Supreme Court ruled that a statute-based mechanism for deducting pension contributions deposited for foreign workers significantly infringes the constitutional right to property (the *Chabano* case). The Supreme Court invalidated the mechanism in a majority decision. This article briefly examines the legal background to the Chabano decision (I) and then provides a summary of the case (II).

### I - BRIEF LEGAL BACKGROUND

#### A - MIGRANT WORKERS AND OCCUPATIONAL PENSION IN ISRAEL

As a global phenomenon, democracies' policies toward migrant workers are generally complex, and democracies' policies regarding pension arrangements for migrant workers are particularly complex. Traditionally, governments and employers designed pension arrangements for employees who worked all their lives in the same workplace and country. Pension arrangements are, in many cases, not accommodated well for migrant workers. Even where international conventions are in place, they usually address the first pillar of pension systems, namely of state-provided basic income, rather than the second one of occupational pension<sup>1</sup>.

In Israel, migrant workers, unlike Israeli residents, are not entitled to be insured by the National Insurance Institute's old-age insurance (the first pillar of Israel's pension system). Israel's National Insurance Institute insures migrant workers only in the following insurances: pregnancy and birth, bankruptcy and corporate liquidation, and work injury<sup>2</sup>. In contrast to the first pillar of Israel's pension system, migrant workers are not excluded from the second pillar of occupational pension. The second pillar in Israel is mandatory. Employers and employees must contribute 18.5 % of the employee's salary to an occupational pension (6.5 % employer's contribution, 6 % employee's contribution, and 6 % employer's contribution for severance pay). The arrangement does not exclude migrant workers. Nonetheless, occupational pension funds, which provide annuities upon retirement, are in practice unaccommodated

1 R. Blanpain (ed.) *Social Security and Migrant Workers*. Pays-Bas, Wolters Kluwer, 2014.

2 The National Insurance Law [consolidated Version] 1995.

for migrant workers (who are supposed to leave the country before retirement), and, in some cases, the funds refuse to insure migrant workers.

In 2016, the government established a special fund for employers of migrant workers in several sectors. These employers must contribute pension contributions to this special fund (only the employers' part of the contributions). According to the law and regulations (Sections 11(d) and 11(g) of the Law on Foreign Workers and the Regulations on Foreign Workers (Deposit for Foreign Workers))<sup>3</sup>, migrant workers will be entitled to their pension savings only when they leave Israel, and only if they leave the state at the end of their legal stay in Israel. If they do not leave the state by the end of their legal stay, the state will deduct from their savings an amount ranging from 15 % to 100 %. In the Chabano case - described below - Israel's Supreme Court declared that this arrangement infringes on the constitutional right to property and is therefore void.

## **B - ISRAEL'S JUDICIAL REFORM**

In contrast to many democracies, Israel does not have a full written entrenched constitution. During the 1990s, the Knesset (Israel's parliament) enacted two basic laws that would be chapters in Israel's future constitution: the Basic Law: Human Dignity and Liberty; and the Basic Law: Freedom of Occupation. Since then, in several cases, the Supreme Court ruled that legislation disproportionately infringes rights enshrined in these fundamental laws and is therefore unconstitutional.

In January 2023, Israel's Minister of Justice declared a judicial overhaul, including a series of changes to the judicial system in Israel. The judicial overhaul aims - among other things - to limit the Supreme Court's ability to invalidate laws and to declare that a specific law is unconstitutional. The proposed overhaul is highly controversial in Israel. Since the introduction of the proposal to the public, Israel faced significant protests. The Michael Chabano case - described below - is the 23rd ruling in which the Supreme Court of Israel invalidated a specific piece of legislation since the 1990s.

## **II - MICHAEL CHABANO CASE**

### **A - FACTS**

According to sections 11(d) and 11(g) of the Law on Foreign Workers and the Regulations on Foreign Workers (Deposit for Foreign Workers) 2016, Israel's Government established a special fund for employers of migrant workers in several sectors (including the construction and nursing sectors). These employers must contribute pension contributions - which they are obligated to pay based on collective agreements - to this special fund (only the employers' part of the contributions). According to the law and regulations, the migrant workers will be entitled to their savings only when they leave Israel and only if they leave the state by the end of their legal stay in Israel. If they leave the state after the end of their

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<sup>3</sup> The Law on Foreign Workers 1991, Sections 11(d) & 11(g); The Regulations on Foreign Workers (Deposit for Foreign Workers) 2016.

legal stay, the state will deduct from their savings an amount ranging from 15 % (in case of an illegal stay of up to two months) to 100 % (in case of an unlawful stay of more than six months).

Michael Chabano, a citizen of Moldova, worked in Israel - under a work permit - in the construction sector for five years (between the years 2013-2017). At the end of 2017, Chabano was injured in a work accident. Israel's National Insurance Institute (NII) accepted his temporary work injury allowance claim. The NII invited him to return to another medical committee hearing in August 2019. In September 2018, Chabano resigned from his job due to his medical situation. In March 2019, Chabano applied to the population authority to enable him to leave Israel, receive his savings, and attend Israel again in August 2019 for the NII medical committee hearing. The population authority answered Chabano that it would deduct 25 % of his savings since he did not settle his status after he resigned from his job. Chabano left the country in March 2019, and the state deducted 25 % of his savings.

Zo Longzon, a Chinese citizen, worked in Israel - under a work permit - in the construction sector for twelve years (between the years 2006-2018). He worked for several months after his work permit expired. In February 2019, he left Israel after the Israeli police arrested him for working without a work permit. The population authority rejected Zo Longzon's application to receive his pension savings because more than six months had passed since his work permit expired. Zo Longzon was not entitled to any part of his savings (the state deducted 100 %).

The petitioners - Michael Chabano, Zo Longzon, an organization called the Worker's Hotline, and the Association for Civil Rights in Israel - claimed that sections 11(d) and 11(g) of the Law on Foreign Workers and the Regulations on Foreign Workers (Deposit for Foreign Workers) 2016 - which enables the state to deduct up to 100 % of migrants' savings - infringe their constitutional right to human dignity, equality, and property.

The legal question in the Chabano case was as follows: Do sections 11(d) and 11(g) of the Law on Foreign Workers and the Regulations on Foreign Workers (Deposit for Foreign Workers) 2016 - which enables the state to deduct up to 100 % of migrants' savings - infringe on the constitutional right to human dignity, equality, and property?

## B - THE DECISION - MAJORITY OPINION

Justice Esther Hayut, the President of the Supreme Court of Israel, wrote the majority opinion. President Hayut wrote that while the arrangement does not infringe on the rights to human dignity and equality, it does infringe on the right to property. President Hayut emphasized that migrant workers in the construction and nursing sectors in Israel are among the most vulnerable groups in the Israeli labor market<sup>4</sup>. The arrangement, therefore, infringes on the right to property of one of the most vulnerable groups<sup>5</sup>.

4 HCJ 6942/19 *Michael Chabano - the Minister of Interior* (2023), Esther Hayut, sec. 47.

5 *Ibid.*

In her judgment, President Hayut analyzed the infringement of the right to property. Israel - in contrast to many democratic states - does not have a written constitution. The Basic Law: Human Dignity and Liberty enshrines the right to property in Israel. According to Article 3 of that Basic Law: « the property of a human being shall not be violated ». The Basic Law includes a limitation clause, which specifies the conditions for a possible allowed violation of the rights enshrined in it, including the right to property<sup>6</sup>. According to the limitation clause: « One is not to violate the rights accorded by this basic law save by means of a law that corresponds to [1] the values of the state of Israel, [2] which serves an appropriate purpose, and [3] to the extent that does not exceed what is required (...)»<sup>7</sup>.

The court analyzed in its ruling whether the infringement of the right to property caused by the arrangement falls within the limitation clause's three above conditions. First, the court asked if the arrangement corresponds to the value of the state of Israel. The court determined that the purpose of the arrangement is to increase migrant workers' incentive to leave the state of Israel by the end of their legal stay and that this purpose corresponds to the value of the state of Israel<sup>8</sup>. Second, the Court decided that the purpose of the arrangement to increase migrant workers' incentive to leave the state of Israel at the end of their legal stay is an appropriate purpose. Third, the court then turned to the proportionality test, which, according to previous rulings of the Supreme Court - consists of three sub-tests: (1) the test of rational connection, (2) the test of the least harmful means, and (3) the test of proportionality in the narrow sense<sup>9</sup>.

Regarding the first sub-test - the test of rational connection - the Court ruled that the first sub-test is held and that there is a rational connection between the arrangement of deducting up to 100 % of migrants' savings and its purpose of incentivizing them to leave the state of Israel at the end of their legal stay. Regarding the second sub-test - the test of the least harmful means - the court ruled that the second test is maintained, because although there are alternative means that can fulfill the arrangement's purpose, without the deduction arrangement this purpose of incentivizing migrant workers to leave Israel by the end of their stay would not be achieved with the same efficacy<sup>10</sup>. Regarding the third sub-test - the test of proportionality in the narrow sense - the court ruled that the third test is not held and that there is no proper relationship between the benefits arising from the arrangement and its violation of constitutional rights<sup>11</sup>. The court determined that the arrangement infringes on the right to property and that the terms of the limitation clause are not maintained.

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6 The Basic Law: Human Dignity and Liberty, art. 8.

7 The Court has consistently interpreted this limitation clause as mandating proportionality analysis of the infringement of rights. See, e.g., A. Barak, *Proportionality: Constitutional Rights and their Limitations*, 2012, p. 208.

8 HCJ 6942/19 *Michael Chabano - the Minister of Interior* (2023), Esther Hayut, sec. 53.

9 *Ibid.*, President Esther Hayut, sec. 54.

10 *Ibid.*, sec. 66-68.

11 *Ibid.*, sec. 69-85.

In its judgment, the Court wrote that an arrangement threatening to deny social rights under Israeli law constitutes an exceptional arrangement<sup>12</sup>. The Court noted that the measure is unprecedented not only from an Israeli perspective but also from a comparative perspective. The Court noted that no other legal system was found to deduct migrant workers' pensions to incentivize them to leave the country<sup>13</sup>. The Court also noted that the state's data did not clearly show that the arrangement actually fulfilled its purpose and that it increased in practice the number of migrants who left the country by the end of their legal stay<sup>14</sup>.

The Court wrote that the severity of the infringement of property rights due to the arrangement is significant<sup>15</sup>. The Court stressed the particular characteristics and specific vulnerability of migrant workers in Israel and the considerable power differences between the migrant workers and the state. The Court also noted the importance of pension savings - a part of the social safety net - for all workers, specifically the most vulnerable ones<sup>16</sup>. Regarding the infringement of the right of property, the Court also mentioned that after six months of overstaying in Israel, migrant workers might automatically lose all of their savings (even if they worked in Israel for many years). The Court (in its majority opinion) ruled that the arrangement would become void within six months and that until then, the Knesset has time to legislate an alternative arrangement.

### C - MINORITY OPINION

Justice Noam Sohlberg wrote the minority opinion. According to Justice Sohlberg, the arrangement did not infringe on the right to property, and even if it did, it passed all the tests of the limitation clause<sup>17</sup>. Justice Sohlberg emphasized that the Supreme Court should exercise judicial restraint regarding intervention in legislation and that the Court should decide that specific legislation is unconstitutional only as a last resort<sup>18</sup>. Justice Sohlberg wrote that one must consider that migrant workers who came to Israel knew the legal situation in Israel before their arrival and still chose to arrive. According to Justice Sohlberg, Israel, like every other sovereign state, is entitled to determine its migration policy and to try to eliminate the illegal stay of migrants. Justice Sohlberg also wrote that the arrangement includes a discretionary power to reduce the amount of the deduction (in exceptional cases). The arrangement, therefore, does not infringe on the right to property, and even if it did, it passes all the tests of the limitation clause.

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12 *Ibid.*, sec. 71.

13 *Ibid.*

14 *Ibid.*, sec. 74.

15 *Ibid.*, sec. 75.

16 *Ibid.*, sec. 76.

17 *Ibid.*, Justice Sohlberg's opinion.

18 *Ibid.*, sec. 4.

## Conclusion

In a time when workers move from one country to another without a proper global arrangement securing their pension rights, the Israeli *Michael Chabano* case stands as an essential case necessary to protect migrants' rights and particularly to protect their rights to occupational pension benefits. Nonetheless, the status of the Supreme Court of Israel is under attack, and it is unclear whether the Court's power to invalidate unconstitutional legislation and its ability to effectively protect human rights will remain in the future.