The Supreme Court sitting as the High Court of Justice

HCJ 8242/19

Before:	His Honour Judge M. Mazur Her Honour Judge A. Baron Her Honour Judge Y. Willner
The Petitioners:	1. The Israel Physical Therapy Society 2. The Union of Physiotherapists – The New Histadrut
	Against
The Respondents:	1. The Council for Higher Education 2. The Minister of Education 3. The Minister of Health 4. The Director general of the Ministry of health 5. The Registration of Medical Professionals Branch – Ministry of Health 6. Prof. Chaim (Haggai) Pick 7. Ono Academic College 8. Sheba Medical Centre – the Orthopaedic Unit 9. Loewenstein Hospital
	Petition for an order nisi
Date of the session	2 Nissan 5780 (25th May 2020)
On behalf of the petitioners:	Adv. Eliad Shraga, Adv. Adva Ben Yosef, Adv. Uri Resnick
On behalf of respondents 1 – 6:	Adv. Daniel Marx
On behalf of Respondent 7:	Adv. Yaniv Dekel, Adv. Keren Iscovitch
On behalf of Respondent 9:	Adv. Ophir Shlittner – Hai

Verdict

Judge M. Mazuz

1. This petition is aimed at cancelling the decision of the Council for Higher Education (henceforth: "CHE"), dated 29th May 2018, which approved the opening of a study programme for a first degree (B.Sc.) in Sports Therapy (henceforth: "the Programme"), at respondent 7, Ono Academic College (henceforth: "the College").
2. In June 2017 the College submitted a request to the Council for Higher Education (CHE) to open a study programme in Sports Therapy. Two reviewers, Prof. Chaim Pick (henceforth: "Prof. Pick") and Prof. Gideon Mann (henceforth, together: "the Reviewers") were given the task of checking the request. On 3rd January 2018, Prof. Pick's preliminary opinion was received, which reviewed all the academic and administrative aspects of the programme, raised various comments and questions, and asked the College to relate to a number of topics, including to the differences between Sports Therapy and Physiotherapy. The end of his opinion, Prof. Pick states that he views the opening of the programme positively. On 8th February 2018, the CHE received the College's reply regarding Prof. Pick's comments and questions. Regarding the nature of the difference between Sports Therapy and Physiotherapy, the College made it clear that while physiotherapy concentrates on treatment in the stages after an injury, for example diagnosis, treatment and rehabilitation, sports therapy concentrates on working on the sports field – building a programme to prevent injuries, giving initial treatment to the sportsman on the pitch, and also completing the final sections of the Sportsman's rehabilitation after the medical treatment and the physiotherapy, by helping him on the pitch.
3. On 12th February 2018, Prof. Pick and Prof. Mann visited the College, met with its senior figures and examined the existing infrastructure. Further thereto, on 1st March 2018, Prof. Mann gave his opinion; he covered all the material relating to the programme, examined the study programmes in foreign countries, and formed an impression of his visit to the College. Prof. Mann also recommended that the study programme be opened, paying attention to the fact that the programme and the College's physical infrastructure will meet the requirements. In the opinion, it was brought to the attention of the College that the subject of practical work was not sufficiently emphasised in the programme; the question was also raised of the difference between physiotherapy and sports therapy, stating that there is a built-in overlap between the two fields.

   On 22nd March 2018, the College sent further answers to the reviewers' proposals and questions and announced that it would adopt their recommendations. In response to Prof. Mann's comment regarding the matter of the practical work, the College made it clear that students in the programme would be exposed to practical work as part of the practical studies in the classroom, simulations and active observation, and announced that it would increase the practical work in the degree by 25% to 300 hours. Regarding Prof. Mann's comment regarding the overlap between sports therapy and physical therapy, it was made clear, that, although there is a certain overlap, this is to be found only on the edges of the profession, while the differences between the two professions were clarified once again.

4. On 28th March 2018, the reviewers announced, further to the opinions that they had given, that they had examined the College's response to their comments, and that they recommend opening the course.
5. On 29th May 2019, the CHE's sub-committee for paramedical sciences held a discussion on the College's request, and recommended that it be approved. Later the CHE's plenum discussed the request and decided to approve the opening of the study programme.
6. On 15th January 2019, Petitioner 1 (henceforth: "the Society") together with others, wrote to the CHE and claimed that the appointment of reviewers to examine the College's request deviated from the CHE's usual procedure, which obligates the establishment of an examination committee to examine the request. It was also claimed that Prof. Pick does not have the appropriate expertise to serve as a reviewer of a sports therapy programme, and that he also has a conflict of interests. In response, it was said that the matter would be brought to a discussion with the sub-committee, and, consequently, CHE checked the matter once again, including, inter alia, receiving the College's comments on the Society's letter, clarification with the Ministry of Health and an examination of sports therapy programmes abroad.
7. On 13th August 2019, the sub-committee discussed the Society's claim, and decided not to cancel its recommendation to approve the programme. On 24th September 2019, the plenum of the CHE discussed the Society's request, together with the sub-committee's recommendation, and after all the material was brought before the plenum, it also decided that there was no reason to cancel the decision to approve.
   Regarding the claim of the programme's similarity to the study of physiotherapy, it was stated that, according to the reviewers, it was made clear that these were substantially different programmes in two different fields, as graduates of the sports therapy programme do not require, according to the law, to be licenced by the Ministry of Heath, therefore the programme does not contain any practical, clinical training, as is the case with other health professions. It was further made clear that the reviewers were appointed in accordance with the CHE's standard procedure, that was accepted in a decision, made in August 2017, that determined when it is necessary to appoint reviewers, and when a committee should be appointed, and that there is no fault in Prof, Pick's competence for the position.
8. The Petitioners' principal claim is that, despite what has been clarified by the CHE, in its various discussions and in its reply to the Petitioners' letters, the sports therapy programme does not contain a treatment component, and so, does not require practical work or clinical training, yet in the College's official publications a completely different picture can be seen. Furthermore, it was claimed that the very name sports therapy creates a built-in deception, as this is a degree in treatment. Therefore, it was claimed, that in its publications the College causes the public to be misled, by offering a degree in treatment which does not meet the requirements of the Formalisation of Occupation in Medical Professions Law, 5768 – 2008 (henceforth: "the Formalisation of Occupation Law").
   It was further claimed, that according to the CHE's procedures there was room for examining the College's request by means of an examination committee, and not by appointing two reviewers. In this regard it was claimed that Prof. Pick was not professionally competent to serve as a reviewer, and that he had a conflict of interests in his activity as a reviewer, as Dr. Ella Been, the head of the College's Sports Therapy Department, is employed as an external teacher in the Tel Aviv University Anatomy

Department, which is headed by Prof. Pick. Finally, it was claimed that the physiotherapists' occupational freedom, and their right to equality, have been harmed, for sports therapists can now give treatment that is given by physiotherapists, without being obliged to undergo practical training to which physiotherapists are obliged.

9. In the response from the State respondents – CHE, and the Ministries of Health and Education (henceforth: "the Respondents") - it was claimed that there is no factual foundation to the claim regarding a significant overlap between the two fields, and that the sports therapy profession supposedly constitutes an attempt to circumvent the study and the training requirements of the physiotherapy professiin. This claim was investigated exhaustively by the CHE and its reviewers, and it was found that sports therapy is a different and separate profession that concentrates on sport, movement and the theory of training, and it does not deal with the fields of neurology and rehabilitation that characterise physiotherapy. It was also pointed out that the main part of a sport therapist's work is in community centres, sport teams, gyms, etc., as opposed to physiotherapists whose work is performed in hospitals, rehabilitation centres and community clinics. Even if there is a certain overlap, it was claimed that it was only to be found at the very edges of the profession. It was also made clear that a sports therapy study programme is not something new, and that such programmes have existed in Israel (for example at the Wingate Institute), and abroad, for a number of years, and their graduates hold diplomas in sports therapy and work in the field.
   On the legal level, the Respondents claimed that even if the opening of the sports therapy programme will impact the physiotherapists' profession, they have not been awarded a given right to prevent competition, where the decided ruling is that it is not in the interest of a person working in a professional field to justify a restriction on others who wish to act in the same field; similarly, in our case, in light of the differences between the two fields. It was further made clear that the provisions of the Formalisation of Occupation Law do not formalise the profession of sports therapy, and do not prohibit the use of a sports therapy degree, a use that has been practiced in Israel for quite a few years. It was also stated that the examination conducted by the CHE of the College's publications does not establish the Petitioners' claim of misleading publication.
   With regard to the claim of Prof. Pick's conflict of interests and his competence to serve as a reviewer, it was claimed that he is a world renowned expert, who serves as the head of the Anatomy Department of Tel Aviv University, and there is nothing in the claimed academic acquaintance to establish prevention of the position. Finally, regarding the appointment of reviewers, it was made clear that the petitioners' claim was based on a procedure from 2015,which is not up to date, and which was replaced by a procedure dated 2017, which does not obligate the examination of a study programme, in a new field, by a committee.
10. The College, in its response, also gave a detailed answer to the claims in the Petition, in a similar manner to what was claimed by the Respondents. The College went into great detail, in its response, about sports therapy studies in Israel and abroad, making clear why the two fields are not identical, as can be seen from the difference in the content of the studies and from the different professional diplomas that are given to the degree graduates. In doing so, it was made clear that a sports therapist attends to a sportsman before and after physiotherapy treatment, but he does not give him physiotherapy treatment. The College also states that there is no fear of deceiving the

public in approving the programme, paying attention to the fact that the field of sport therapy is not included in the Formalisation of Occupation Law; that it is a field that has existed in Israel for many years, and has not been "invented" by the College; and that the names of the diplomas that the graduates receive correspond to those awarded throughout the world.

11. Respondent no. 9, Loewenstein Hospital, complained about being attached as a respondent to the petition, although it has no connection to the matter, and asked to be deleted as a respondent.
12. In the hearing before us, the Parties' representatives repeated their main written claims, as specified above. The Petitioners' representative once again stressed the fear that the physiotherapy profession would be harmed as a result of the Programme being approved. It was claimed that, in this regard, CHE and the Ministry of Health failed in their duty by approving the Programme.

    The Respondents' representative emphasised that it was a decision taken after a comprehensive, professional examination, and that the starting point was freedom of occupation, and that the task of pointing out the legal cause thereof lies with the party wishing to restrict it. The College's representative repeated the difference between the two professions, and made it clear that even though there is a certain overlap in the subjects studied, there is no overlap in the work. It was stated that the Wingate Institute has been holding diploma studies for sports therapy for more than ten years, and that, at the College, the Programme has already started after the approval was given in May 2018, and so far, two classes had already started their studies, in the previous academic year, and in the current academic year, and at the start of the coming academic year (2020 – 2021) the third class is expected to begin its studies.

The representative of Respondent no. 9 once again complained about its attachment as a Respondent to the Petition.

<u>Discussion and decision</u>

13. After studying all the claim statements from all the Parties, together with the large amount of material attached by them, and after hearing, at length, before us, the oral claims of the Parties' representatives, I have not found that the Petitioners have established any cause for our intervention in the CHE's decision to approve the Programme. Herewith follows a summary of my reasons for this conclusion to reject the Petition.
14. The decision of the CHE, on 29th May 2018, in which approval was given to the College for a study programme for a first degree in sports therapy, which is the subject of this petition, was given by the CHE, by virtue of its authority under Article 23 of the Council for Higher Education Law, 5718 – 1958 (henceforth: "the Law"). The Council for Higher Education (CHE) constitutes, as per the law, "the national institution for matters of higher education in the country" (Article 3 of the Law), and the legislature granted it the authority and the discretion "to authorise a recognised institution to award a recognised degree", (Article 23 of the Law). The CHE is composed, according to the Law, of senior members of the profession, the vast majority of whom can be counted among "those of good standing in the field of higher education, who have

been recommended by the Minister of Education and Culture, after consultation with the recognised institutions of higher education" (Article 4a of the Law).

15. The CHE's decision in the matter before us was made, as specified above, after an organised process of checking, and after the matter had been examined professionally and in depth by two professional reviewers on behalf of the CHE, with a senior professional status, who examined the matter, visited the College, requested and received clarifications for various topics that they raised, and submitted their opinion to the CHE, namely that the Programme should be approved. Furthermore, the matter was examined by the CHE sub-committee, and also by the CHE plenum, which decided to approve the Programme. What is more, when the claims were raised by the Petitioners, the CHE conducted another check of the matter, which included, inter alia, the College's reference to the claims, clarification with the Ministry of Health, and a check of sports therapy programmes abroad, after which the sub-committee and the plenum of the CHE discussed the matter once again, and it was decided to insist on the decision to approve.
16. Under these circumstances, and in light of the fact that this is a professional matter, on which the ruling was given, by the legislature, to the authority and the professional discretion of the CHE, the Court will not lightly lean towards intervening in a decision like this. This Court has repeatedly stated that:

> "The Court for Administrative Affairs will examine, in a proceeding taking place before it, the Authority's decision according to reasons for judicial review, but it is not a legal body that will decide instead of the administrative authority; it will not weigh up the authority's considerations, and will not replace the authority's reasoning with its own…….. that is how it is generally, and that is how it is especially when the administrative authority bases its decisions on the professional opinion of professional bodies……. In a place where the authority has used experts on its behalf, the Court will not place itself in the position of an expert…… so, there will always be a number of solvers and solutions for every problem. It is possible that the Court will even tend towards a decision that gives preference to one solution over another. But there is nothing in that to bring the Court to replace the reasoning of the authority with its own reasoning". *(Administrative Application for Right to Appeal 3186/03 State of Israel v. Shulamit Ein Dor, verdict, 58(4) 754, 766 (2004)*)
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> And in the same spirit:
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> "There is an established ruling that this Court will not intervene in a decision of the qualified authority, in the field of the authority's professional expertise unless on the grounds that there are contradictory professional opinions……. This ruling emanates from the fundamental concepts of judicial criticism by which this Court does not take the place of the authority, especially in the case of a ruling on clear professional issues, in

> which the authority benefits from the relevant professional knowledge, the expertise and the expertise to make the decision". *(High Court of Justice 6269/12 The National Parents' Leadership v. the Minister of Education, paragraph 16 (29th April 2015)*).

See also, in this matter, among many examples: High Court of Justice (HCJ) 5263/16 Nesher – Israeli Cement Works Ltd. v. the Ministry of the Environment, paragraph 11 (23rd July 2018); HCJ 6271/11 Delek, Israel Fuel Company Ltd. v. Minister of Finance, paragraph 11 (26th November 2012); HCJ 8487/03 IDF Disabled Veterans Organisation v. the Minister of Defence, paragraph 10 (2006); HCJ 1554/95; Shoharei Gilat v. the Minister of Education, verdict 50(3)2, 20 (1996); HCJ Menahem v. the Minister of Transport, verdict 57(1) 235, 270 – 271 (2002); HCJ 726/94 Clal Insurance Company v. the Minister of Finance, verdict 45(5) 441, 486 (1994); HCJ 13/80 Nun Canned Goods Industries Ltd. v, the Ministry of health, verdict 34(2) 693, 695 – 696 (1980); HCJ 492/79 Anon v. the Ministry of Defence, verdict 34(3) 706, 713 (1980).

17. A study of the Petitioners' arguments, as opposed to the Respondents' explanations, does not raise any fault in the decision, nor in the process by which it was taken, that might justify our intervention. The Respondents, as also the College, insisted on the differences between physiotherapy and sports therapy, and, even if there are areas where the two occupations meet, as was claimed, there is nothing therein to spoil the decision that was made. Areas where professions overlap and points where they meet, especially when those professions are, grosso modo, in the same field (such as the field of medical and health professions), are not an exceptional phenomenon, and as there is no ruling, under Article 5 of the Formalisation of Occupation Law, on actions singled out, in the law, exclusively for certified physiotherapists, there is no overlap which is, as claimed, contrary to the law.
18. Nor is there any foundation to the Petitioners' claim of damage to freedom of occupation. It was justifiably claimed by the Respondents that, in practice, it is the petitioners that are asking to prevent, or to restrict, the other Party's freedom of occupation. As stated, even if there is a certain overlap, the Petitioners have no right to prevent competition, especially as it has been made clear that these are fields of activity that are basically different.
19. Finally, I have not found any foundation to the claim of Prof. Pick's conflict of interests, for the reasons stated by the Respondents, as specified above.
20. To all this must be added the fact that, from a review of the above processes, it appears that the Petition was submitted late. The CHE decision to approve the study programme in sports therapy at the College, was taken on 29th May 2018. It was only after approximately seven and a half months that the Petitioners wrote to CHE on this matter, and even after the further decision was taken the petitioners delayed approximately two and a half months before submitting the Petition. Under these circumstances, we are, in practice, faced with a "fait accompli", for, as has been pointed out by the College's representative, the Programme started about two years ago; two classes are already studying, and the third class is due to start in the coming academic year.

21. For these reasons, I propose to my colleagues that we reject the Petition.

The petitioners will bear the costs of Respondents 1 – 6, for a total of NIS 15,000, and the same sum for the costs of Respondent 7. The Petitioners will also bear the costs of Respondent 9, who was attached unnecessarily, at a sum of NIS 7,500.

Judge

Judge A. Baron:

I agree.

Judge

Judge Y. Willner

I agree

Judge

Decided, as stated above, by the verdict of Judge M. Mazor.

Given today, 4th Sivan 5780 (27th May 2020)

Judge Judge Judge