At the Supreme Court Sitting as the High Court of Justice

HCJ 6845/05

Before:	**Honorable Justice D. Beinisch** **Honorable Justice M. Naor** **Honorable Justice E. Rubinstein**
The Petitioner:	**1. Commander of the Military Forces in the West Bank**
	v.
The Respondent:	**1. President of the Military Court of Appeals for Judea and Samaria and the Gaza Strip** **2. Walid Muhammad Hamdan Hanatsheh**

Petition for *Order Nisi*

Session date:	24 Tamuz 5765 (July 31, 2005)
Representing the Petitioners:	Att. Haran Reichman
Representing the Respondent:	Att. Francis Sahar**,** Attorney Hassnan Mahmoud

Judgment

Justice E. Rubinstein:

a. This is a petition by the Commander of IDF forces in Judea and Samaria against the Military Court of Appeals in the Area and respondent **2,** an administrative detainee since June 31, 2002 currently present at the "Ketziot" facility, and its subject is the decision by the military court of appeals not to accept the petitioner's appeal against the decision of the military court, in which it was decided to release respondent **2** from his administrative detention. According to the petitioner, the decision of the Military Court of Appeals was unreasonable to an extreme degree. It was further argued there was a need for an interpretation of the scope of the al-Amla rule (HCJ 2320/98 al-Amla v. Commander of IDF Forces, *Piskey Din* 53(3) 346, which dealt with the extension of a detention period by an army commander after a military judge had decided to shorten it.

b. As stated, respondent 2 has been administratively detained pursuant to the order of a military commander, since 13 June 2002, in the context of activity in the Popular Front for the Liberation of Palestine (PFLP), a terror organization. The first detention was for six months, and there were subsequent extensions, each of three months.

c. The last-but one extension, which is essentially the foundation of the procedures which are the subject matter of this petition, followed an order of the military commander dated May 24, 2005, in the matter of the detention of respondent **2** for three months, from that day, pursuant to Section 1 of the Order of Administrative Detention (Temporary Provision) (Judea and Samaria) 5748 -1988**,** on the grounds of the danger posed by respondent **2** to the security of the Area.

d. On May 25, 2005, after examining classified information, the military judge, Major Michael Ben-David determined that "the information on which the administrative detention of the detainee rested was serious and based on reliable sources. From the totality of information that was presented to me it emerged that at the time of his detention the respondent constituted a danger to the security of the Area. However, there has been nothing new in the material against him for a long period of time, and I am of the opinion that in light of this, and in light of the long period in which the detainee has been held in administrative detention, it will not be possible to continue extending the administrative detention of the respondent beyond a short period of one month, which I hereby confirm. In order to avoid any doubt, this is a substantive shortening of the said administrative detention order during which period the military commander shall examine whether he has additional information in his possession, or if new circumstances exist that justify the continued administrative detention of the respondent, or whether alternatives to detention may suffice". The words "substantive shortening" have a legal meaning within the scope of the al-Amla rule, as shall be detailed below.

e. (1) The military prosecution did not appeal this decision, but on June 15, 2005, prior to the end of the month confirmed by Judge Ben-David, a decision was taken regarding the extension of the administrative detention for five months, from June 23, 2005 to November 22, 2005, i.e. this time the military commander was of the opinion that there was a need for a longer detention period. The file was reviewed again before a military judge, Major Ronen Atzmon, who also read the classified information. The judge instructed himself, based on the al-Amla rule, that it was possible to extend the detention "only if new information shall be received containing something that significantly alters the evaluation of the danger posed by the detainee." Based on this, he determined that "the new information received does indeed reveal hitherto unknown details of activity, but that they contained nothing to essentially change the intelligence picture given previously… Although the new information includes details that demonstrate the *modus operandi* of the detainee during the period of his imprisonment, yet, a reading of the information that already existed beforehand illustrates that part of this activity was already known, and that the other part is a logical deduction from the detainee's status as a senior PFLP operative".

(2) When reviewing the military prosecution's appeal, a Military Court of Appeals' judge, Lieutenant Colonel Shlomi Kochav, expressed the view, after he, too, had read the classified information, that the court of first instance had not erred, - and he rejected the appeal.

f. (1) The petition before us – which alleges that the judicial decision was extremely unreasonable – is justified by the fact that the material received after the decision of

Judge Ben-David on May 25, 2005 substantially broadens the information pertaining to the status of the respondent as one of the PFLP's leaders at the detention facility and also indicates a fear that upon his release he will integrate into the PFLP's military activities. "From the new information received it emerges, in the view of defense sources, that respondent's rank in the hierarchy and the danger that he would become integrated in a senior position in PFLP military activity is far more significant than their earlier assessment…it appears that one can compare the distinction in the hierarchy to the distinction between a minister without portfolio and the Minister of Defense."

(2) The respondent argues that the overturning of decisions of military courts by this court "will determine who has the last word in matters pertaining to administrative detention. Whether it is the military commander or the court who is authorized by the legislator to examine and review the discretion of the military commander, precisely in the assessment of the intelligence material and the determination of the level of risk". The respondent also refers to the fact that in the decision of October 11, 2004 a judge of the Military Court of Appeals, when upholding a detention extension, noted that in view of the time that the respondent had been held in detention, and bearing in mind the medical condition of his wife, the parties must, in his opinion, examine, possible alternatives to administrative detention if the intention is to continue. It was also noted that in the decision of December 12 , 2004 Major Atzmon upheld the extension of the detention, but stated that if no extraordinary events occurred, it would be it difficult to continue to justify it. It was also noted that in the decision of March 2, 2005, at the commencement of the extension which ended on May 24, 2005, the judge, Major Carmel Wahabi stated that -notwithstanding the severity of the information against respondent 2 - it was not current, and a balancing led to the conclusion "that there is room for seriously considering the release of the detainee from military detention. Nevertheless, and only because of the sensitivity of the period, I am of the opinion that there is cause to keep the detainee in administrative detention for a short additional period… In the absence of extraordinary developments, it will be very difficult to justify continued detention."

g. (1) In the hearing before us, counsels for the petitioner again alleged that the new information significantly altered the situation of the risk posed by the respondent. By contrast, his counsel argued that two judge-jurists believed there had essentially been no change of circumstances, and that the petition should thus be rejected.

(2) With the consent of respondent's counsel, we viewed the classified information, and an order nisi was subsequently issued.

(3) In the respondent's reply to the order nisi it was stressed, inter alia, and in addition to the aforementioned, that there was no room for intervention by this court, which does not sit as an appeals instance for military courts, which weighed matters befittingly.

(4) During a further hearing, respondent's counsel reiterated that a common thread in military court judgments from as far back as October 2004 was that there was cause to release the respondent, and that consequently there was no need for intervention in the decisions.

(5) Petitioner's counsel argued that the military courts had clearly erred in not examining the level of danger posed by the respondent against the backdrop of the updated information. In the absence of a determination that the individual in question was not dangerous - and the level of danger posed is the real question – there was

scope for arguing that the updated information showed an increased danger level and justified extending the detention.

h. (1)(a) The normative framework concerns the Order regarding Administrative Detention (Temporary Order) Judea and Samaria (No. 1226) 5748-1988, as interpreted in HCJ 2320/98, al-Amla v. Commander of IDF Forces in the Judea and Samaria Area (quoted from Justice Zamir). This judgment seeks to outline the balance related to the complex issue of administrative detention. However, it is superfluous to repeat that administrative detention itself is a severe and complex measure, in the operation of which the legal instances have a special obligation to examine; see HCJ 5555/05: Federman v. GOC Central Command (not published yet). Indeed, in the criminal case the investigation material was passed on to the respondent; material that had been withheld from him for legal reasons could not serve against him. During administrative detention, the detainee does not receive the material against him and which serves as the basis for his detention so that he is unable defend himself directly against it; he is also not criminally indicted so that he is unable to investigate evidence as much as required. However, administrative detention is a necessity, imposed in conditions of a tough struggle against terrorism, and acts of sabotage, and it is even understandable that it is impossible to disclose sources (who are sometimes liable to pay with their lives if they are exposed) or methods and measures to obtain intelligence information. In light of this, a court which deals with reviewing administrative detention is under a special obligation to demand and to investigate the material presented to it, since in a certain sense it serves as the detainee's mouthpiece and "extension" in the sense of the trust given it by the detainee, and it must remember that "there is no justification for such a severe violation of the freedom of the individual, unless this is to prevent a real danger to the public" (Justice Zamir, the al-Amla case, p. 349) and due to "imperative security reasons " (Order regarding Administrative Detention (Temporary Order) Judea and Samaria (1226) cited in Section 1).

(b) In the el-Amla judgment it was determined - as self-evident in the complex reality - that: "The goal in administrative detention is primarily protection of the security of the Area and of the public. However, this goal integrates with another aim - protection of the freedom of the individual. The order regarding detention determines that every detention order may be appealed before a judge, and that the judge is empowered to revoke or shorten the order. From this it is clear that the order regarding detention entrusts the judge with the authority to strike a balance between security needs and the freedom of the individual. (Page 356). That court sought to ensure in the judgment in question that if the judge-jurist decided not to extend or shorten an administrative detention for a substantive reason, there would be no "bypassing" of the decision by means of issuing a new administrative order, unless a substantive change occurred regarding the danger posed by the detainee (see *ibid.* pp. 357-358). The rule is summarized as follows: "A military commander may not extend the period of administrative detention following a judge's decision to shorten the period, unless one of the following situations exist: (1) the judge decided to shorten the detention order in order that the military commander shall reconsider whether – at the end of a shortened period, there is justification for continuing the detention, or (2) following the judge's decision to shorten the detention period, new information emerged or a change in the circumstances occurred, which might significantly alter the level of danger posed by the detainee" (Page 364).

(c) This precedent still stands and is valid. The question is its application to every case – and in this case to the case at hand. We have also expressed our opinions on the fact that intervention in the considerations of military courts which carry out their work while living the day to day activity in the field, is an extraordinary matter; but

following deliberation, we opined that there is room, in this case for partial intervention on our part.

(2) What the petitioner should have presented before the military courts in order to persuade them to continue the detention under the circumstances was current material that added significant information about the danger posed by the respondent. At the time when the material was scrutinized, we paid attention to the question of how new material appeared at a late stage of the detention procedures, we were in the midst of a one month detention under an extension granted by the military court on May 25 2005; it should be noted that this was information received after a long period during which there had been no new information. After studying and reviewing the material, we believe that the classified material serves to significantly intensify the information regarding the respondent, and to indicate a higher level of danger from that which was previously known to the petitioner. Indeed, a danger level is not weighed with an exact balance that can be quantified in a computer program; its assessment is a cumulative result of an impression drawn from different materials. Among other things we examined the weight of the new material against the background of security related tension and sensitivity which are characteristic of this period and of the approaching one, and we have come to the conclusion that in the present case the information tips the scale toward a certain extension of the detention; One should remember that thy type of activity in which the PFLP engages, namely terror, is at the basis of "imperative security reasons", and we believe that in the material before us there is a basis for the respondent constituting a danger at present. Nevertheless, even within these bounds, one may not ignore the long period during which the respondent has been detained, and we have taken this into account as well, The respondent was detained in the past for periods of three months; we believe that the danger which emerges from the material justifies the present extension for this period, i.e. for three months from June 23, 2005 to September 22, 2005. During this period the petitioner shall give consideration to the totality of circumstances, including comments by the court that were heard during the discussion with regard to the possibility of an alternative.

i. The order nisi shall therefore be rendered absolute in the sense that the order issued by the petitioner shall be partly restored, and shall remain effective in a manner that the detention of the respondent shall end on September 22, 2005

Justice: The Hon. Justice D. Beinicsh
I concur

The Hon. Justice M. Naor

I concur

Justice

Decided as aforesaid in the judgment by the Hon. Justice E. Rubinstein

Issued today, 28 Tamuz 5765 (August 4, 2005)