

In the Supreme Court sitting as the High Court of Justice

HCJ 11026/05

Before: The Honorable President A. Barak
The Honorable Justice A. Procaccia
The Honorable Justice M. Naor

The Petitioners: A.

v e r s u s

The Respondents: 1. Commander of IDF Forces in Judea and Samaria
2. Judge of the Military Court of Appeals, Lt. Col. Shlomi Kochav

Petition for Order Nisi

Date of the session: 4 Kislev 5766 (5 December 2005)

On behalf of the Petitioner: Attorney Tamar Peleg-Sryck

On behalf of the Respondents: Attorney Netta Oren

J U D G M E N T

President A. Barak

In 2001, the petitioner was on his way to execute a suicide attack. The petitioner's intention was not carried out. Based on confidential material indicating his intention, an administrative detention order was issued against the petitioner. Since then (8 January 2002), and for four years, the petitioner has been held in administrative detention, which is periodically extended. It is against the most recent extension that the appeal before us is directed.

Background and the proceedings

1. The petitioner, who was born in 1981, is a resident of 'Aqabeh, in Jenin District. In October 2001, the petitioner was arrested by security forces. In January 2002, an administrative detention order was issued against him "for being a Hamas activist, who endangers the security of the region," this under the Order Regarding Administrative Detentions (Temporary Provision) (Judea and Samaria) (No. 1226), 5748 – 1988 (hereafter – Administrative Detentions Order). Since that time, the petitioner

has been held in administrative detention, the validity of the orders being renewed from time to time, while emphasizing that his detention is “for being active in hostile terrorist activity with intentions to carry out serious terrorist attacks.” The last administrative detention order (of 19 September 2005) – which Respondent 1 issued – extended the petitioner’s detention from 26 September 2005 to 25 December 2005.

2. The administrative detention order was brought before a jurist judge, in accordance with the provisions of the Administrative Detentions Order, in the military court in Ketziot (Military Judge Captain Menachem Lieberman). The military judge considered at length the petitioner’s contention that there had been a defect in the process of judicial review of his detention, in that his case did not commence being investigated before a judge within eight days, as the order directs. He also studied privileged material, which raised substantial suspicion that the petitioner intended to carry out a suicide attack. The judge decided to shorten the detention order, to two months. He did so taking account of the updated privileged material, taking account of the petitioner’s detention, and taking account of the procedural flaw that took place in his case. The judge added that extension of the detention for another period would not be allowed unless new and meaningful material is presented.

3. The military prosecutor appealed this decision before the Military Court of Appeals in Judea and Samaria (Respondent 2). The Military Court of Appeals accepted the appeal, and reinstated the administrative detention in its entirety. The court held that, even if there was a certain deviation from the required procedure, “this is only one consideration among various considerations.” The petitioner was not caused any meaningful injustice, inasmuch as grounds for administrative detention existed. The Military Court of Appeals described the picture received from the privileged material, as follows:

Indeed, the most severe information was received in 2001 and it testifies to the decision of [the petitioner] to carry out a suicide attack, to the seriousness of his intentions (that did not remain solely in the realm of desire), and to his ties with the military-activity infrastructure of Hamas. In addition, there is information relating to 2002. . . that also supports the evidence of [the petitioner’s] murderous intentions, and his connection to the military infrastructure. Also, later, information was added, but it is not very significant.

The court related, then, to the quality and updated nature of the intelligence material in the petitioner’s case. The court held – based on this material – that even after four years, the petitioner was very dangerous. It was found that there was reasonable basis to assume that the petitioner did not change his demeanor. For these reasons, and in light of the security situation presently prevailing in the Territories, the appeal of Respondent 1 was accepted and the administrative detention order was approved in its entirety.

4. In the petition before us, the petitioner complains that he has been held in administrative detention, for four years, based on intelligence material that was submitted four years ago. The new material in his case- the petitioner believes – does not present anything new but reinforces the earlier material. According to his way of thinking, even if the earlier material in his case is credible, and the suspicions against him are correct, it is improper to hold him in administrative detention for such a long period of time. Administrative detention is intended to prevent a future danger. The test for future dangerousness of an administrative detainee must be a stringent test, a test of actual, almost certain danger. This is especially so when the petitioner has been held in administrative detention for so long. The respondents object to the petitioner's release or shortening of the period of administrative detention. They are of the opinion that the petitioner – and this also appears from the privileged material in his case – is "active in hostile terrorist activity with intentions to carry out serious terrorist attacks." The detention order was lawfully issued, it having been found that the petitioner poses actual danger to the security of the region and the public. At the present time, in which the security situation is not calm, extension of his detention is necessary despite the long period of time that he has been held in administrative detention.

The normative outline

5. The power to order administrative detention is granted, in the Administrative Detentions Order, to Respondent 1. The Administrative Detentions Order states the conditions in which Respondent 1 may order administrative detention. These reasons are security reasons (see HCJ 5784/03, *Salameh v. Commander of IDF Forces in Judea and Samaria*, P. D. 57 (6) 721, 725 (hereafter – *Salameh*)). Respondent 1 may only exercise his power if there is a "reasonable basis to assume that reasons of security of the region or public security require that a particular person be held in detention" and there are "imperative security reasons" for this (sections 1(a), 3 of the Administrative Detentions Order (see, also, *Salameh*, supra). Indeed, imprisonment of a person in administrative detention severely impedes a person's liberty. "Liberty is denied, not by a court, but by an administrative authority; not in a judicial proceeding, but by administrative decision; generally, not on the basis of disclosed facts, which one can cope with, but on the basis of privileged material (comments of Justice Zamir in HCJ 2320/98, *Al-'Amleh v. Commander of IDF Forces in Judea and Samaria*, P. D. 52 (3) 346, 349). In considering issuance of an administrative detention order, the military commander must balance the right of the administrative detainee to personal liberty against the security considerations. The work of balancing the severe harm to freedoms of the individual and public security is not simple. This task is imposed on the military commander. He has discretion in the matter.

6. The military commander must exercise his discretion proportionately. In this context, the length of time a person has been in administrative detention is important. I noted this in the past, in the context of the Emergency Powers (Detentions) Law, 5739 – 1979:

Administrative detention cannot continue indefinitely. The longer the period that the detention lasts, the greater the need for reasons of considerable weight to justify further extension of the detention. With the passage of time, the means of administrative detention become so burdensome as to cease to be proportionate. Indeed, even when the power to impair liberty by means of a detention order is given, use of this power must be proportionate. It is forbidden to cross the “breaking point” beyond which the administrative detention is no longer proportionate (Crim. Reh. 7048/97, *A. and other Anonymous Persons v. Minister of Defense*, P. D. 54 (1) 721, 744).

These comments are appropriate also for administrative detention under the Administrative Detentions Order (compare *Salameh*, supra, 726). “The longer the administrative detention lasts, the greater the weight of the detainee’s right to personal liberty grows in balancing it against considerations of the public interest, and with it increases the burden on the competent authority to provide a basis for the necessity of continuing to hold the person in detention” (HCJ 11006/04, *Qadri v. Commander of IDF Forces in Judea and Samaria* (not reported), paragraph 6; see, also, HCJ 4960/05, *G’afreh v. Commander of IDF Forces in the West Bank* (not reported)).

7. The question of proportionality of the use of the means of administrative detention will be examined according to the objective underlying the Administrative Detentions Order. The order empowers the military commander to order administrative detention when reasons of public security dictate. The administrative detention anticipates a future danger. It is, at its basis, not a punitive means, but a preventive means (compare Adm. App. 8607/04, *Fahima v. State of Israel* (not reported), paragraph 8). Taking into account this objective of administrative detention, it is understood that extension of the period of administrative detention must be examined in accordance with the period of detention and the degree of dangerousness posed by the detainee. Continuation of the detention is a function of the danger. This danger is examined according to the circumstances. It depends on the level of danger the evidence attributes to the administrative detainee. It depends on the credibility of the evidence itself and the degree to which it is up to date. The longer that the administrative detention lasts, the greater the burden imposed on the military commander to show the dangerousness of the administrative detainee.

8. The discretion given to the military commander is subject to judicial review. Because administrative detention infringes human rights, judicial review of this proceeding, both by the military courts and by this court, is very important. "The judicial review is substantive. . . The Military Court and the Military Court of Appeals may consider the question of the credibility of the evidentiary material, and not only examine if a reasonable authority would have made its decision on the basis of the aforesaid material. . . This judicial review is an internal part of consolidating the legality of the administrative detention order or of consolidating the legality of the extension of the order" (*Salameh*, supra, 726-727; see, also, HCJ 4400/98, *Barham v. Jurist Judge Lt. Col. Shefi*, P. D. 52 (5) 337). The military courts must examine the material relating to holding a person in administrative detention. The judicial review must be done as soon as possible following the administrative detention (compare HCJ 3239/02, *Mar'ab v. Commander of IDF Forces in Judea and Samaria*, P. D. 57 (2) 349. 368-372); compare recently also HCJ 7607/05, *'Abdullah v. Commander of IDF Forces in the West Bank* (not reported), paragraph 9). Thus, where the detention orders specify a certain time in which the administrative detainee must be brought before a judge for the purpose of commencing the hearing in his matter (section 4(a) of the [Administrative Detentions Order; see, also, *Mar'ab*, 382-384). In addition to the military courts, the respondents' discretion is subject to the review of the High Court of Justice (compare HCJ 1052/05, *Federman v. OC Central Command Moshe Kaplinsky* (not reported), paragraph 6). "Although this court does not sit as an appellate court of the Military Court and of the Military Court of Appeals, in carrying out its judicial review, this court takes into account the severe harm to human rights of administrative detainees, and gives this factor substantial weight when examining the foundation that led the security authorities to impose administrative detention, and the discretion of the military courts" (*Salameh*, 726).

From the general to the specific

9. The question placed before us is whether holding the petitioner in administrative detention for four years is lawful. In our opinion, the answer is yes. The intelligence material in the petitioner's case – which with the petitioner's consent we studied and which is extremely credible – reveals that the petitioner intended to carry out a suicide attack before he was arrested. More up-to-date intelligence material that dates from various times during the course of his detention indicates that these intentions of the petitioner have not changed. This credible material also reinforces previous material

regarding the petitioner's past intentions. These intentions, and those that were formed in the past, are prospective. So, too, the administrative detention and the danger that it seeks to prevent. In the situation of things before us, the privileged material in its entirety, both that which was received prior to his detention and that which was received during the period of his detention, indicate the petitioner's extreme dangerousness. The danger he poses is clear. His release from administrative detention at the present time, in which a bloody struggle between the terrorist organizations and the State of Israel is being waged, is comparable to releasing a "ticking bomb" waiting to be exploded. In this situation, when the dangerousness is so high, the decision of the respondents is reasonable even though the petitioner has been held in administrative detention for four years. Based on the information before us, we cannot assume that the prolonged stay in administrative detention reduced the petitioner's dangerousness. The material before us raises a sufficient evidentiary foundation, at the present time, to continue the petitioner's administrative detention. Indeed, the situation in the matter before us, in which the dangerousness of the petitioner is so high, might change in the future. The danger posed by the petitioner is liable to diminish if his intentions and plans change, or if there is a change in the present security situation in which terrorist organizations make frequent use of suicide terrorists to harm citizens of the state. But at the present time, and in the framework of the petition before us, we found that the military commander met the burden imposed on him to show that his decision is reasonable, and there are no grounds for our interference in the conclusions of the military courts.

The petition is denied.

The President

Justice A. Procaccia:

I concur.

Justice

Justice M. Naor:

I concur.

Justice

It is decided as stated in the judgment of President A. Barak.

Given today, 21 Kislev 5766 (22 December 2005).

The President

Justice

Justice