At the Supreme Court Sitting as the High Court of Justice

HCJ 8091/14

Before:	**Honorable Justice E. Rubinstein** **Honorable Justice E. Hayut** **Honorable Justice N. Sohlberg**
The Petitioners:	**1. HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger** **2. Bimkom – Planners for Planning Rights** **3. B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories** **4. The Public Committee against Tortures in Israel** **5. Yesh Din – Volunteers for Human Rights** **6. Adalah – The Legal Center for Arab Minority Rights in Israel** **7. Physicians for Human Rights** **8. Rabbis for Human Rights**
	v.
The Respondent:	**1. Minister of Defence** **2. IDF Commander in the West Bank**
Petition for *Order Nisi*	
Session date:	11 Kislev 5775 (December 3, 2014)
Panel secretary:	Matan Barzilai
Typist:	Sigalit Doster
Representing the Petitioners:	Adv. Michael Sfard, Adv. Noa Amrami; Adv. Roni Peli
Representing the Respondent:	Aner Helman

Protocol

For the petitioners Adv. Sfard: …This may be one of the most difficult cases which were brought before this honorable court. Since my colleagues responded, and I will say without pettiness, with a collection of threshold arguments, and I am not complaining, it was expected of them to respond in this manner, I need to respond to these arguments and explain why our petition was required, a public and general petition is not filed by someone specific but rather [to protect] rights in Israel… We are concerned with a regulation, with an authority, and even if I accept for discussion purposes that the motivation to use it is deterrence, the measure which was chosen for this purpose was the infliction of injury on innocent people… when this is the measure we are faced with some difficult problems which are both moral and legal which were raised before this court not dozens but hundreds of times, as specified in our petition and in a legal research which was conducted by a group of experts and which is attached as Exhibit 7 to the petition. The research shows that this issue was treated in an incomparable manner by this honorable court… the main argument I have against the use of regulation 119… is that we are concerned with an absolute prohibition, that when collective punishment is concerned there are no exceptions and this prohibition was violated by the use of regulation 119.

In addition, another argument which pertains to the West Bank is that… property may not be injured other than for necessary and exigent military purposes… My colleagues will be able to argue that the exception to the rule applies and I argue that it does not apply…

These arguments were never really discussed by the honorable court. In two judgments from 1979 and 1969 it was held that these arguments should not be discussed and that the domestic law [applied]… also in East Jerusalem and Article 23 of the Hague regulations applied in times of belligerent occupation… Since then an incomparable process commences in which the court repeatedly states that this issue has already been decided and refers to said judgments but when we look for a legal [discussion] regarding the lawfulness of regulation 119 we find nothing other than statements which are almost incidental statements… in hundreds of judgments we find statements to the effect that the purpose is not to punish but rather to deter, but no judgment quotes Article 50 of the Hague Convention and Article 53 of the Geneva Convention which prohibits and there is no judgment which quotes Article 23G of the Hague regulations which also prohibits – there is no discussion and the reason is that in the petitions which are brought, the court is requested to give judgments here and now… to "strike while the iron is hot."… This was the case, for instance, with respect to the special investigation measures used by the Israel Security Agency (ISA) which were challenged in 91 in the Salaha case and were denied… In specific petitions… when the issue is complex and exhaustive deliberation is not possible…. Therefore a year later, after the Salaha petition was denied, a second petition was filed… public, general petitions are the ones which enabled the court to conduct an in-depth review of the issue without pressure and request the parties to bring their best arguments to enable the court to make a decision and it is not the only case. In fact the honorable court has a glorious history of deciding in hard cases, hard petitions the remedy of which pertains to a large number of cases… This was the case for instance in the petition that challenged the policy of targeted killings, this was also the case in the well known … case which concerned the duration of the detention where the court stated that it could not conduct an in-depth legal review when a decision should be made… within a few days… Recently in HCJ 11437-05 Kav La'Oved v. Ministry of the Interior where the issue of pregnant foreign worker procedure was discussed … Justice Procaccia said that the petition was not specific but rather a public one. Reads paragraph 15 of her judgment. This is one of the clear cases in which the court not only enables but prefers general petitions… which enable the court to deliberate without being under the pressure of a tight schedule…

Honorable Justice E. Rubinstein: They always say that there are 24 hours …

Adv. Sfard: … We think that 36 or 29 years after Ja'ber this issue should be revisited especially in view of the fact that so many things have changed in criminal and international law… and I can read two short judgments... in which there is no thorough deliberation of the question whether regulation 119 which is a mandatory regulation… grants authority… the argument is that ostensibly, as the occupying power we must respect the domestic law… but it does not obligate us to exercise the power without discretion.

… The judgments make references backwards and backwards but eventually you are left with nothing… we attached an opinion of Prof. Yuval Shani, Prof. Harpaz… they all determined that the regulation was unlawful and worse than that, in view of the fact that a broad policy is concerned it may constitute a crime.

There is a big difference between a case in which we know that there is a terrorist or where we know that an action is about to be carried out from a certain house, in which case we will demolish because we have information, this is the exception to the rule… but with respect to regulation 119… there is no evidence of deterrence. The infliction of intentional injury on innocent people cannot be done based on the hope that it would help, and I am not even talking about the fact that an absolute prohibition applies to the punishment of innocent people…. The terrorists who committed the monstrous action in the Har Nof synagogue are not with us and they will not suffer from the demolition of the house, and directly only their family will suffer… We cherish human values and this court which deals with issues involving human rights emphasized individualism. In all judgments of this court it is emphasized that sanction is imposed on the people who committed the crime. Only in these files which involve regulation 119 there is a deviation from this principle. This justifies a review of the issue and even by an expanded panel because this measure has been used for years and has never been properly examined by this court in an orderly manner… It is not without reason that have dedicated in this case a chapter for Jewish law… and here in Jewish law the prohibition on collective punishment is so fresh and clear, that sons should not be punished for the sins of their fathers is a basic principle in Jewish law and we cited several sources and Torah sections from the story of Sodom and onwards. Our state should assimilate the Jewish humanistic values of Jewish law. There is no case which contradicts more sharply these Jewish values…

When we filed this petition we did not ask for an interim order or for an urgent hearing. We thought that the matter should be properly reviewed. My colleagues received a short time to respond… in their response my colleagues request the court not to go into these issues which have already been discussed, but let them show me where they have been discussed? In view of the above… the arguments of my colleagues should be denied and they should be obligated to respond to our clear and comprehensive arguments on their merits, and it should be reviewed by an expanded panel so that this matter which preoccupies us for 47 years would be properly resolved once and for all.

Adv. Genesin:…our first argument is that the petition is theoretical and that there is no room to discuss regulation 119 in this manner…

My colleague requests a sweeping order and disregards the fact that this regulation applies within the territory of the State of Israel and by virtue of domestic law in the Area… In a situation in which as my colleagues argue, international law prohibits, but Israel has an opposing primary legislation, it is common knowledge that where there is contradiction between Israeli law and international law the Israeli law prevails. Here it is primary legislation. International law will apply only if it is incorporated into and made part of Israeli law…

… my colleagues filed a theoretical petition… and it should be denied for this reason alone…

… they submitted a general petition… I think that there is nothing more appropriate than the words of the Honorable Justice Barak who spoke about the legal and [factual] aspects of the harm caused by the security fence… - again the simple truth proves that the facts underlie the law and the law stems from the

facts. … In the Eid judgment which I quoted … it was determined that the family knew… therefore our main argument is that the court cannot generalize … when they have something relevant they can file [a petition]. They cannot just generally claim collective punishment…

My colleague referred to the Bar Ilan judgment [which was given] three years ago where one of the exceptions applied… It was held by the court that the legal question itself was not theoretical…

This concerns the argument that a general petition should not be heard. Our main argument is that there is no exception which justifies it.

Again, I am not saying. The regulation was exercised twice in Judea and Samaria and six times in Jerusalem. Five cases are pending before you. We all hope that there will be no need to use the regulation. Nobody wishes to exercise this regulation, but this is the situation these days... As to the second argument of my colleague… my colleague raises again and again the Geneva regulations… the court is exposed to these arguments not from today, to say the least.

I would like to make a comment about a war crime. A decision was made in 2005… that [the regulation shall be used] only in exceptional and unique cases… the policy is clear and did not change since then. The fact is that 5 years elapsed after two demolitions. The 2005 policy did not change. This summer we presented the honorable court with data which indeed constitutes a change of circumstances and we act according to policy which was established ten years ago, and I was not here in 91 and I don't know what was argued.

There is no justification to revisit this [issue] again… and according to us the files should not be joined because these are files within the territory of the State of Israel.

In conclusion, my colleague filed a long theoretical petition with no facts which really looks like an academic dissertation, this is how it looks like, and the court is requested to give a declaratory judgment. We are of the opinion that it should not be done in a petition of this kind in view of the arguments specified by us. I don't give my colleagues any advice on how to raise their arguments but this is not a customary manner, it is an exception and the court does not merely grant orders.

Adv, Sfard: … My colleague raises various arguments, that this petition is theoretical and general and he suggests that we raise our arguments elsewhere… but what my colleague says, that specific petitions were filed, shows that it was not us who were looking to do it in this manner, but it seems that within the framework of a specific petition it is too complicated, when the security establishment requests an immediate decision… In the torture cases clearly there were specific cases… in 1994-1995 individuals filed petitions and requested that violence would not be used against them.

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Adv. Sfard: A distinction should be drawn between two kinds of 'theoretical'… there is theoretical in the sense that an issue is not expected to actually materialize… and there is another theoretical in the sense that the issue actually materializes and the court rules on it, but the petition does not refer to a specific set of circumstances… it is not an academic institution… but in the second kind of theoretical where the issue comes up again and again, the general issues may be reviewed within the framework of a general petition. If the family is involved… my colleague can say we limit the use of regulation 119 to cases in which the family is involved… but this is not the argument… My argument is that this regulation injures innocent people and violates the prohibition against such injury… a person who lives alone who do we deter… there is a difference between East Jerusalem and the West Bank. Some of the arguments in this petition are also relevant to East Jerusalem. There is a part which deals with discriminatory implementation of the policy… I have the feeling that had regulation 119… been enacted today I believe that such a regulation would have been disqualified by the court… my colleague may be correct [in

saying] that the use is not broad in scope. Is it a reason not to discuss the issue? The [regulation] is used. There are six pending petitions. There are two additional petitions. What should we wait for? A huge wave, Tsunami, in which case the hearings would have to be held expeditiously under the pressure of terror attacks.

Honorable Justice E. Rubinstein: It went beyond the core issues that the committee outlined …

Adv. Sfard: … The court stated a few times that the hearing of general petitions had an advantage in the sense that they presented the issues before the court in a more comprehensive manner. My colleague submitted within the framework of his exhibits copies of the previous petitions. I am looking at Exhibit RS/1C , pages 6-7. Quotes. The argument was made and did not get any response as things happen in these files. This leads the petitioners who tried to raise the issue within the framework of a specific petition and did not succeed. I think that the court, as its judgments show, is not comfortable with… it's not easy for the court… I think that this issue should at least be discussed on its merits and my colleagues should respond to the material arguments which were raised against regulation119.

Adv. Helman: The State requests the court to make an effort and give a judgment as soon as possible. In Mugrabi it took three years to get a judgment. The court has all the time it may need to make decisions. Nobody terrorizes the court. If the court thinks that there is an issue that should be decided. There were issues that required time. The fact that deterrence should take place immediately is nice by it [the court] sees the material. After it hears the arguments it [can take] as much time as it needs. The State does not hold a gun to the court's head. My colleague tries to make a connection; we have a general argument of discrimination. The petition was heard four months ago. My colleagues explained it in length last week in petitions which were heard by two of you. It is a shocking case. If this regulation was punitive it was the case to use it. The purpose of the regulation is to deter, therefore if there is no phenomenon which requires deterrence in the Jewish sector… there is no phenomenon of ramming in the Jewish sector etc.,… There is none. There is nothing to deter from. Therefore we think that the terror attack was horrendous. If there is no deterring reason it should not be used. There is no justification for it to be revisited by the court. This argument was decided four months ago by the honorable court. … there are only a few cases and it is not a war crime, it takes time until it amounts to a war crime. My colleague came with the argument that a decision should be made, and I referred to this argument so that they would not come and say that a decision should be made now. We hope that peace or at least tranquility will erupt soon. We reiterate our arguments and request to deny the petition.

Honorable Justice E. Rubinstein: A decision shall be given.

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