At the Supreme Court Sitting as the High Court of Justice

HCJ 2690/09

Before:	**Honorable President D. Beinisch** **Honorable Vice President A. Rivlin** **Honorable Justice A. Procaccia**
The Petitioners:	**1. Yesh Din – Volunteers for Human Rights** **2. The Association for Civil Rights in Israel** **3. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger**
	v.
The Respondents:	**1. IDF Commander in the West Bank – Major General Gad Shamni** **2. Defense Minister – M.K. Ehud Barak** **3. Public Safety Minister– M.K. Avi Dichter** **4. Israel Prison Service**
Petition for *Order Nisi*	
Session date:	2 Nisan 5770 (17 March 2010)
Representing the Petitioners:	Att. Michael Sfard
Representing the Respondents:	Att. Aner Helman; Att. Gilad Shirman

Judgment

1. The petitioners, human rights organizations, petitioned this court to instruct the respondents to refrain from holding Palestinian administrative detainees, detainees and prisoners (hereinafter: detainees) who are residents of the Judea and Samaria Area (hereinafter: the Area) in incarceration and detention facilities located inside the territory of the State of Israel. The petitioners further request that we instruct the respondents to refrain from holding detention proceedings for residents of the Area in military courts located inside the State of Israel. The petitioners argue that holding residents of the

Area in incarceration facilities located inside the territory of the State of Israel and holding proceedings in their matters inside Israel are unlawful as they contravene the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: the Geneva Convention or the Convention).

2. Before we address the petitioners` main argument, we shall briefly review the facts that form the background for the petition. Palestinian residents of the Area who are imprisoned or under arrest (criminal and administrative) have been held in incarceration facilities located inside the territory of the State of Israel for many years. This practice began when the military administration was instated in the Area. Two facilities where detainees from the Area were held operated inside Israel for many years – the Qetziot camp and the Megido incarceration facility. After the withdrawal of IDF forces from the areas now held by the Palestinian Authority and the evacuation of the incarceration facilities located in those areas, the number of detainees held in facilities inside Israel grew significantly. There is currently one incarceration facility located in the Area – the Ofer camp, which houses 691 detainees, according to figures examined on the day of the hearing. The remaining Palestinian detainees, 6,594 in total, are held in various facilities in Israel, of these 1,326 are detainees, 1,104 are criminal prisoners and 4,168 are security prisoners. It shall also be noted that currently all incarceration facilities where Palestinian detainees are being held – i.e. Ofer, Qetziot, Shikma, Jerusalem, Petah Tiqva, Megido and Kishon are under the responsibility and management of the Israel Prison Service (IPS).

3. The legal framework which established that possibility of holding detainees from the Area in Israel is anchored in the Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offences and Legal Aid) 5727-1967 (hereinafter: the Regulations or the Emergency Regulations) enacted as early as 1967, after the seizure of the Area by IDF forces. Since then, the validity of the Regulations has been periodically extended by Knesset primary legislation. The normative framework at the present time is valid under Section 1 of the Law Extending the Validity of the Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offences and Legal Aid), 5767-2007, which stipulates that the Regulations shall remain in effect until June 30, 2012. Section 6 of the Regulations stipulates as follows:

6. Implementation of penalties and arrests	(a) The penalty imposed on a person convicted and sentenced by a military court may be served in Israel in the manner in which a penalty imposed by the court is served in Israel, provided the penalty was not served in the Area.
	(b) The arrest and detention of a person against whom an order for arrest or warrant for arrest was issued in the Area under authority granted pursuant to a commander's proclamation or order, may be carried out in Israel in a manner in which an order for arrest or warrant for arrest is carried out in Israel and such person may be transferred for detention in the area in which the offence was committed.

Simultaneously, as a mirror image, the security legislation of the Area established that the basis for holding residents of the Area under arrest or criminal imprisonment in Israel is found in Sections 5(a)(1) and 5(b)(1) of the Order regarding Punitive Methods (Judea and Samaria) (No. 322), 5729-1969:

5. Implementation of arrest, incarceration and	(a)(1) The arrest and detention of a person against whom an order for arrest or warrant for arrest was issued in the Area under authority granted pursuant to a commander's proclamation or order, may be carried out in Israel in a manner in which an order for arrest or warrant for arrest is

orders on minors carried out in Israel

…

(b)(1) The penalty imposed on a person convicted and sentenced by a military court may be served in Israel in the manner in which a penalty imposed by a court in Israel is served in Israel, provided the penalty was not served in the Area and subject to any security legislation.

In response to the petition before us, the state notified that this legislation has been rephrased in the Order regarding Security Provisions [incorporated version] (Judea and Samaria) (No. 1651), 5770-2009 which shall come into effect on May 1, 2010 and replace the provisions stipulated in Sections 265(a) and 266(a) of the Order respectively.

It shall further be noted that the basis for holding residents of the Area in administrative detention in incarceration facilities inside Israel is found in Section 2(b) of the Order regarding Administrative Detentions (temporary order) [incorporated version] (Judea and Samaria Area) (No. 1591) 5767-2007, which stipulates that a detainee may be held in custody in a prison as it is defined in the Prison Ordinance [new version] 5732-1971.

4. The question of the legality of holding [detainees] in Israel as stated, is not new for us and it has been reviewed by this court in HCJ 253/88 **Sajdyia v. Minister of Defense** IsrSc 52(3) 301 (1988) (hereinafter: the Sajdyia case). That petition challenged the legality of holding residents of the Area in incarceration facilities inside Israel. It also addressed detainees' holding conditions in those facilities. It shall be noted that that petition specifically addressed the matter of detainees who were being held at the Qetziot prison facility at the time. In the judgment rendered in the Sajdiya case, the issue of the legality of holding was reviewed vis-à-vis Article 49 of the Geneva Convention which prohibits the deportation and forcible transfer of population from the occupied territory into the territory of the occupying country. The justices in said case were divided in their opinions regarding the interpretation of Article 49 of the Geneva Convention, but the decisive reasoning for ruling on the legality of the custody relied on the provision of Regulation 6 of the Emergency Regulations, which, of their status as Israeli primary legislation, supersede the provisions of international law.

   The petitioners are in effect asking to depart from that rule. In their view, the change of times and primarily the change in the legal approach to the status of the Geneva Convention justify a reevaluation of the rule set forth in the Sajdiya case. First, the petitioners argue that holding Palestinian detainees in the territory of the "occupying" country does not conform to the provisions of Articles 76 and 49 of the Geneva Convention. The petitioners also argue that holding [Palestinian detainees in Israel] also impinges upon the rights of the Palestinian detainees due to their disconnection from their families, particularly in view of the travel restrictions imposed on residents of the Area in recent years. The petitioners attempt to distinguish the judgment in the Sajdiya case, *inter alia*, in view of the fact that it addressed the issue of holding administrative detainees whereas the question of criminal detainees and the provisions of Article 76 of the Convention which focuses on where convicted defendants are held, were not under review before the court. On this issue, we shall preface and state that there is no substantive difference whether the issue is administrative detainees or criminal prisoners, as the court noted in the Sajdiya case, the aforesaid Regulations 6(a) and 6(b) apply to both detainees and prisoners (*ibid.* pp. 816-817).

5. The respondents, on their part, claim that the passage of time since the judgment in the Sajdiya case was handed down has not detracted from the validity of the rule and that the petitioners did not meet the heavy burden borne by parties requesting to revisit well rooted case law such as that of the Sajdiya case. They further argued that it is undesirable to depart from this case law for practical

reasons, as this may lead to an infringement on the rights of the Palestinian detainees, due, *inter alia*, to the need that would arise to seize lands for building new incarceration facilities in the Area as the facilities which operated there in the past are no longer under Israel's control. Finally, it was argued that inasmuch as the petitioners have individual claims regarding the violation of the rights of a detainee who is a resident of the Area, they could have filed an appropriate petition regarding the individual issue and it would have been handled in a concrete manner.

6. It shall be noted at the outset that we have not found that there is indeed sufficient cause to amend the rule set out in the Sajdiya case regarding the status of Regulation 6 of the Regulations, which trumps the provisions of the Convention. With regards to the application of the provisions of the Geneva Convention, indeed, ever since the application of the laws of occupation to the Area in 1967, the state has argued before the court that it is a treaty convention and that the state considers judicial review over the implementation of its provisions to be carried out as part of a commitment the state took upon itself, as a matter of policy, to respect the humanitarian provisions of the Convention. In accordance thereto, the court has examined the implementation of those provisions over the years through extensive case law. Now the petitioners claim that there has been a change of approach and that the provisions of the Convention have come to be accepted as part of customary law, and as such, have binding status. Whatever the status of the Geneva Convention, we are willing to accept the argument that the actions of the military commander in the Area are to be examined in accordance with the provisions of the Convention and that its customary provisions should be accepted as part of the applicable law (see for example HCJ 3278/02 **HaMoked: Center for the Defence of the Individual v. Commander of the Israel Defense Force in the West Bank**, IsrSC 57(1) 385, 396-397 (2002), hereinafter: the HaMoked case; HCJ 5591/02 **Yassin v. Commander of the Ketziot Military Commander**, IsrSC 57(1) 403, 413 (2002), hereinafter: the Yassin case). However, there is no dispute that when an express legal provision in Israeli domestic law conflicts with the principles of international law, even when it is customary law, Israeli law supersedes (see the Sajdiya case, p. 815; CrimA 336/61 **Eichman v. Attorney General**, IsrSC 16 2033, 2040-2041 (1962); and, for example: HCJ 256/01**Rabakh v. Municipal Court in Jerusalem**, IsrSC 56(2) 930, 934 (2002)0; HCJ 591/88 **Taha v. Minister of Defense** IsrSC 45(2) 45, 52-53 (1991)). As such, and in view of the fact that, as stated, this reasoning is the main reasoning which underlay the ruling in the Sajdiya case, we have not seen cause to address the petitioners' arguments regarding the interpretation of the provisions of Articles 49 and 76 of the Convention.

7. It should be noted, briefly, that the case law of this court and the overall facts indicate that the interpretation of the provisions of the Geneva Convention for the purpose of applying them to the Area must be carried out in a manner corresponding to the special circumstances and characteristics dictated by the need to apply the laws of occupation in conditions that match the way the Area is held. This, considering the protracted period of the holding, the geographic conditions and the possibility of maintaining contact between Israel and the Area. Purposeful interpretation which conforms the provisions of the Convention to Israeli reality and the conditions of the Area must, primarily, give substantial weight to the rights of the protected population, and, in so doing, the rights of detainees. This court has often addressed the question of securing appropriate conditions for Palestinian detainees, whether they are detained in Israel or at the Ofer camp, according to the substantive criteria set in international conventions. Thus, the court has insisted on the duty to uphold international standards for detainees according to the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988), which were passed by the UN General Assembly in 1988, and of course, under the Geneva Convention, and has also applied the principles established in the provisions of Article 10(1) of the International Convention on Civil and Political Rights, 1966 (the Yassin case, p. 412-413; the HaMoked case, p. 397-399). In its judgments, the court has also recommended the establishment of a committee to monitor prisoners' conditions (see the Sajdiya

case, pp. 825-826; the Yassin case, pp. 417-418); and reviewed issues related to overcrowding, hygienic conditions, supplies etc. The following was ruled in the HaMoked case:

> "Indeed, the nature of detention necessitates the denial of liberty. Even so, this does not justify the violation of human dignity. It is possible to detain persons in a manner which preserves their human dignity, even as national security and public safety are protected". (*ibid.* p. 397. See further on this issue: the Yassin case, p. 411; HCJ 221/80 **Darwish v. Israel Prison Service**, IsrSC 35(1) 536, 538 (1980)).

Judicial review in judgments regarding detainee rights and holding conditions has thus focused on upholding the substantive provisions set in international law.

8. Due to the constraints which emanate from the decreased deployment of IDF forces in the Area and the military's evacuation of the city centers where the incarceration facilities of the Area had operated, a system of incarceration facilities was built inside Israel. As mentioned above, all the facilities where Palestinian detainees are held in Israel are no longer in the hands of the IDF, but are rather managed by the IPS, with all that necessarily follows with respect to bringing the detention and imprisonment conditions of residents of the Area up to par with those of Israeli residents. There is no dispute before us that there has been a marked improvement in the holding conditions of detainees in the IPS facilities inside Israel as well as the incarceration facility at Ofer, which is in the seam zone, and that, compared to the incarceration facilities which were under military control and those which were in the Area, there are better prospects with regards to the ability to conduct inspections of the holding conditions, file complaints about them and continue improving them. The move to transfer the facilities from IDF control to the responsibility of the IPS was influenced by the statements of this court in the Yassin case:

> "… it should be reconsidered whether it is appropriate that the army be responsible for the detention conditions of administrative detainees from the Area. It is our opinion that the government should consider placing this responsibility in the hands of the Prison Service. Such a resolution would allow a number of advantages. **First**, the responsibility of tending to detainees and detention conditions will be placed in the hands of a body whose expertise is in this field. **Second**, the Prison Service operates in accordance with an intricate system of law. These laws guarantee that an appropriate balance is struck between security needs and the rights of the detainees. For example, under these laws, the detainees will have the opportunity to submit "prisoner petitions" which will ensure judicial review over their detention conditions" (*Ibid.* p. 418, emphases in the original, D.B.).

As stated, in all the above, prison authorities are now obliged to respect the provisions of international law and the standards these establish regarding detention and imprisonment conditions in general and the conditions of detainees who are protected residents under international law in particular.

9. In his arguments before us, counsel for the petitioners did not ignore the fact that there was a reason not to build incarceration facilities in the Area when the IDF was leaving the major cities in the Area where facilities had been in place until that time. The petitioners also agreed, in their arguments, that the issue of holding conditions, including the issue of family visits, inasmuch as it requires judicial review, is a matter for a separate petition. The petitioners' argument, inasmuch as it relies on concrete conditions, to distinguish from the provisions of the Convention, focuses on the fact that more than anything else, the detainees need contact with their families. The petitioners argue that the closures and travel restrictions from the Area to Israel, which, due to security demands, have recently been many, prevent the existence of this vital contact, seeing as the incarceration facilities are located inside Israel. Counsel for the state responded to the specific arguments that detainee visits are

routinely carried out, subject to the necessary restrictions, as per arrangements which have been put in place and have withstood the scrutiny of this court. These are arrangements which are similar to those provided to Israeli prisoners in terms of the frequency of visits. Counsel for the state also noted that there are travel restrictions inside the Area and access is not simple there either, though, he did claim the policy regarding Palestinian movement in the Area, and even into Israel, has recently improved compared to previous years during the intifada. Therefore, the sate argues that a petition for relocating incarceration facilities to the Area should not be based on an argument that relates to the prevention of family visits. Passage arrangements for visits inside Israel necessitate, as a matter of course, coordination and transportation methods and this issue has been brought for review before us more than once, out of a recognition of the importance of family visits as part of the right to actualize family ties (see, for example, on this issue: HCJ 7615/07, **Barghouti v. Commander of Army Forces in the West Bank** (unpublished, May 25, 2009)). It may be that the issue of relatives' access to visit their incarcerated family members requires improvement and coordination of appropriate arrangements. However, as stated, this is not the issue of the remedy sought in the petition at bar.

10. Another argument presented by the petitioners related to the fact that detention and detention extension hearings are held by military courts inside the territory of Israel, which, according to them, contravenes the provisions of Article 66 of the Geneva Convention. This issue has arisen in this court's case law in HCJ 6504/95 **Wajia v. State of Israel** (unpublished, November 1, 1995) (hereinafter: the Wajia case), where it was found that the basis for the possibility of military courts' holding hearings on the detention of residents of the Area lies in Regulation 6(b) of the Emergency Regulations. This regulation indeed does not make reference to the location of the court ordering the detention, yet allows its operation on the substantive level. We have not seen cause to change the rule set forth in the Wajia case and repeated by this court in other instances (see for example: HCJ 1622/96 **Ahmad v. Israel Security Agency**, IsrSC 50(2) 749, 751 (1996)) either. This, for the above detailed reasons regarding the relationship between internal legal provisions and international law.

11. On the factual aspect, the state's notice relayed that military court hearings on detention extensions as well as periodic reviews of administrative detention have been held in special halls located close to the detention facilities inside Israel for over twenty years - ever since the first intifada. The court of first instance as well as the appellate instance are located in military courts in the Area. Of course, with most of the detainees being held in Israel, detention hearings in the country have also multiplied. This decision was made considering the logistical difficulties involved in transporting the thousands of detainees to the military courts in the Area for detention hearings. This state of affairs is indeed not optimal for holding the aforesaid hearings. However, in the framework of the balance between the security interest of holding in detention, the need for which is also acknowledged in the provisions of the Convention, and the need to transport to the Area which would burden not only the officials in charge of transporting the detainees, but also the detainees themselves, it seems that the solution that was found, which conforms to the arrangement established in the Emergency Regulations and with the substantive conditions required for protecting the rights of the detainees, is the necessary solution, so long as the detainees are indeed held in Israel.

12. The petitioners further argue that in the current arrangement, of detention extensions in military courts operating within the territory of Israel, the Palestinian detainees' right to due process is impaired, due to the inability of attorneys from the Area to appear and represent them in the proceedings. This argument is based on a report published by petitioner 1 regarding the conduct of military courts in the Area. In their response to the petition, counsels for the state argued that this general claim is not anchored in a factual infrastructure. They also disagreed with the conclusions of the aforesaid report and their validity. This matter is not up for review before us and cannot be examined in the current proceeding in the absence of individual arguments. We shall only comment that with regards to an appropriate and fair opportunity for representation by counsel during detention

proceeding, the state is obligated to maintain appropriate arrangements guaranteeing proper counsel for the detainees, and we presume that this allegation will be individually examined by the respondents inasmuch as applications on this issue are submitted to them.

Conclusion

13. For the reasons detailed above, we have not seen cause to revisit the Sajdiya and Wajia rules. We stress again that in all matters relating to detention conditions and the substantive provisions of the Geneva Convention and other international conventions relating to holding detainees, this court has clearly and unequivocally ruled that Israel must respect the provisions of international law and that every detainee is entitled to detention conditions in line with his human dignity. This court has not held back criticism when it comes to the physical conditions and personal welfare conditions required for detainees. On this issue, as stated, there has been a significant improvement particularly because the detainees are held in Israel. As we have noted, the provisions of the Convention must be interpreted and applied in accordance to the special conditions of the Area's holding by Israel, and considering its general premise established in Article 27 of the Convention which stipulates:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity…
>
> However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

In so doing, the respondents uphold the substantive provisions of the Geneva Convention regarding detainees' holding conditions. Justice Bach's dictum in the Sajdiya case is correspondingly relevant to the issue at hand. The justice maintained that the Convention must be implemented according to its appropriate interpretation, and stated as follows:

> "One must not deduce from the aforesaid that all the provisions included in the Convention and relating to the detention conditions of administrative detainees must be blindly followed: each provision must be examined according to its importance, essentiality and its correspondence to the special circumstances of the detainee camp which is the subject matter of our deliberation." (*ibid.* p. 832).

14. In the circumstances that have come to pass, one must consider the practical significance of building new incarceration facilities in the Area in the scope required following the withdrawal of IDF forces from the cities where facilities once existed. During such building, the detainees may be harmed with respect to their detention conditions. Local residents in whose territories these facilities will be built will also be harmed. The application of the provisions of the Geneva Convention must correspond to a reality unforeseen by its authors. One must also consider the Area's geographic proximity to Israel and the fact that holding detainees in Israel does not necessarily result in denying them family visits or legal assistance. One must therefore separate between the obligation to uphold the humanitarian provisions of the Convention regarding the detainees' holding conditions and the argument regarding the location of detention. Considering that the question of the location of detention was regulated years ago in Knesset legislation and sanctioned in the case law of this court, and considering the conditions under which Israel holds the Area and the reality which exists between Israel and the Area, the mere fact of holding detainees in incarceration facilities inside Israel does not infringe upon the substantive provisions of international law.

Under these circumstances, we have not found cause to alter the rules set forth in the Sajdiya and Wajia cases. As such, the petition at bar is dismissed without a writ for expenses.

President

Vice President A. Rivlin

I concur.

Vice President

Justice A. Procaccia

I concur.

Justice

Ordered as stated in the judgment of President D. Beinisch

Given today, 13 Nisan 5770 (28 March 2010).

President Vice President Justice