**In the Supreme Court**

**Crim. App. 1221/06**

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| Before: | The Honorable Justice E. Rubinstein |
| The Appellants: | 1. Riad S'adi 'Abd al Hamid 'Iyad<br>2. Hassan Mas'ud Hassin 'Iyad |
| | v e r s u s |
| The Respondent: | The State of Israel |
| | Appeal of the decision of the District Court in Tel-Aviv of 25 January 2006 (Misc. Appl. 93226/05 and Misc. Appl. 93227/05) given by the Honorable Judge Caspi |
| Date of the hearing: | 7 Adar 5766 (7 March 2006) |
| On behalf of the Appellants: | Attorney Heysham Abu-Shahadeh; Attorney Tamar Peleg-Sryck |
| On behalf of the Respondent: | Attorney Zmira Goldner; Attorney Oded Keller; Attorney Yuval Roitman |

**JUDGMENT**

A. Appeal under section 5(d) of the Internment of Illegal Combatants Law, 5762 – 2002 (hereafter the Law), of the decision of the District Court in Tel-Aviv (Judge Caspi) of 25 January 2006 (Misc. Appl. 93226/05 and Misc. Appl. 93227/05). The District Court, sitting in judicial review under the Law, held that the internment orders that the Chief of General Staff issued on 12 September 2005 against the defendants were legally issued.

B. This appeal is apparently the first under the aforesaid Law in this court to reach a decision; previous appeals (Crim. App. 3660/03, 3675/03, *Óbeid, Dirani and Ayub v. State of Israel* (not reported, President Barak)) were dismissed when they became academic, the appellants in that case having been released. Therefore, before formulating the manner of hearing this proceeding, which is judicial review that includes, inter alia, the District Court and this court, it is permissible to deviate from the laws of evidence and to study material *ex parte* (section 5 of the Law). It

stands to reason that the manner of hearing the proceeding will take shape as time passes, as necessary. As appears from the material, the District Court, too, pondered and ranked its methods of handling the procedure in the way it determined, and some of the claims on the appeal herein are related to that matter itself.

C. Obviously, the material in this case is not simple. The security situation of the country leads to situations and needs that are not within the "normal" legal frameworks, and we are involved with a kind of detention having an administrative character, which the legislator wanted to formulate to cope with persons who belong to a force that executes hostile acts against Israel, to whom the prisoner-of-war principle does not apply.

D. The appellants, residents of Gaza, were previously held in administrative detention under detention orders issued against them by the commander of IDF forces in the Gaza strip. Appellant 1 was held in administrative detention from 1 January 2002 to 12 September 2005, and Appellant 2 was held from 24 January 2003 to 12 September 2005. On 12 September 2005, after the IDF withdrew from the Gaza Strip, the chief of staff, Lt. Gen. Dan Halutz, signed, pursuant to his authority under section 3 of the Law, internment orders against the two appellants, thus changing the appellants' status from administrative detainees to internees who are illegal combatants. The appellants are said to be members of Hezbollah, and are also alleged to be personally dangerous, in light of their involvement in terrorist attacks against Israeli civilian targets.

E. (1) Under section 5(c) of the Law, the District Court is required to conduct judicial review of the internment orders, and, indeed, since the appellants were detained, they were brought before the District Court in Tel-Aviv – Yafo a few times, on 22 September 2005 (when judicial review in the appellants' matter began) and then – in continuation of the hearing – on 16 November 2005, 6 December 2005, and 20 December 2005. Appellants' counsel raised several arguments before the court: they question the very legality of the Law, and assuming that the Law comports with constitutional criteria, they object to the proportionality – in their language – in use of this means in the present case, when, they contend, there are means that are less harmful, that being the Emergency Powers (Detentions) Law, 5739 – 1979 (hereafter the Administrative Detention Law), and they object to the evidentiary foundation relating to the appellants.

(2) On 25 January 2006, the District Court gave its decision. We see from the decision that the District Court split the proceeding, whereby it made a decision regarding the substantive reasons underlying issuance of the internment orders relating to the evidentiary foundation, and also expressed a principled framework opinion, but did not complete its handling with respect to the question of the preference for administrative detention (the "proportionality"), while it waited for additional material. The court has not yet adjudicated the question of constitutionality. The court held that the decision regarding the fundamental arguments raised by counsel for the sides (constitutionality of the law, and all that entails, and "proportionality") will be given in the course of the next periodic judicial review, which is set, apparently, to take place in the coming days.

(3) With respect to the evidentiary foundation, the District Court held that, based on the material before it, the chief of staff had proper, supported intelligence material that gave him a reasonable basis for the assumption required under section 3(a) of the Law, and, as a result, to issue internment orders against the appellants. This decision of the District Court was based primarily on the testimony of the two expert witnesses that appeared on behalf of the state ("Floyd," of the IDF's intelligence division, who testified as to the characteristics of Hezbollah, and "Amitai," of the Israel Security Agency, who testified about the appellants themselves), and on intelligence material laid before it. The District Court held that, based on the material, the appellants are members of the Hezbollah organization, which is a force carrying out hostilities against the State of Israel – section 2 of the Law – and therefore it can be said that the appellants are illegal combatants, as defined in section 2. The court held further that, in addition to belonging to the organization, the individual actions of each of the internees were proven before the court.

(4) In its decision, the District Court related, on the fundamental level, also to the question of the relationship between an internment order under the Law and an administrative detention order under the Emergency Powers (Detentions) Law, 5739 -1979, mentioning that in Misc. Appl. (T-A District) 92690/03, *State of Israel v. 'Obeid et al.*, it was noted that the Administrative Detention Law, according to its purpose, is not useful with respect to illegal combatants, but the court found that the time had not yet come to decide the question, given the various factual and legal changes that have taken place since that decision, and that the question would be considered in the framework of the next periodic judicial review, as stated. This would take place

after the sides complete their briefs on questions such as whether it is possible, or proper, at this time to make use of the Administrative Detention Law against the appellants under the statue with which we are dealing.

(5) It was against this decision that the present appeal was filed.

F. (1) The first argument raised by appellants' counsel is that the conclusion of the lower court with respect to the existence of a factual foundation for issuing the internment orders is mistaken. They contend that the evidentiary material does not connect the appellants to the Hezbollah organization, and no such contention was raised against the appellants, neither during their interrogation nor in hearings that took place in the past for the purpose of issuing the administrative detention orders. It was also argued that the delay in raising the contention relating to the appellants' membership in the Hezbollah organization indicates that it was raised for the purpose of transferring the appellants to the status of illegal combatants in accordance with that term in the Law. The appellants also object to the conclusion of the lower court that release of the appellants from detention will potentially lead to the establishment of bands of the Hezbollah organization in Gaza or to strengthening of the organization.

(2) The second argument raised by appellants' counsel is directed against the proportionality of the internment orders, in their words, this in light of the existence of the possibility of detention, which harms the appellants' rights to a lesser extent, that is, by means of the Administrative Detention Law, as stated. To their way of thinking, study of the lower court's decision indicates that, although it refrained from expressly deciding their claim regarding the lack of proportionality in the internment orders, the decision hints – so appellants' counsel state – that their argument on the question of proportionality was rejected. However, the Administrative Detention Law provides the state – it is alleged – an efficient and practical tool to continue to detain the appellants, if detention is necessary, and this tool harms the rights of the respondents [Should be appellants] to a lesser extent than continuing their internment under the Law.

(3) It should be noted that this appeal does not consider the question of the constitutionality that the lower court has not yet discussed at all.

(4) In light of all the above, the appellants plead that this court nullify the decision of the District Court, nullify the internment orders, and order the release of the appellants because of the lack of the evidence necessary to detain them. In the alternative, they request that the

internment orders be nullified for the reason that they are disproportionate, in light of the existence of a less harmful means.

G. (1) This was the procedure on the appeal in this court: after hearing the principal arguments of the sides, I studied the privileged material that was before the lower court, and the sides assembled again, and following exchange of words, Appellant 2 also made his comments.

(2) Appellants' counsel further made a special argument, contending it was proper to reach decision at this point in time on the question of proportionality, that is, whether the use of the means taken, under the Law, was lawful, and the internment proper. They believe that the District Court has basically decided this question, and its decision is that it is; therefore, because of the subject for decision, and also the need to decide, inasmuch as this argument was raised in the framework of the judicial review in the first period of internment, and there are arguments related to this period and they must be decided in the context of this judicial review. They reason that, whatever the case, if the court reached a decision, that is, that the means selected were proper, it erred and the decision may be appealed, and if it did not decide, it erred in the very fact that it did not decide. They are of the opinion that every person, in the proportionality context, is entitled to a sanction that harms him to a lesser extent so long as the same purpose is achieved. In this context, the severity of the behavior of the person is irrelevant. Semi-decisions are not, it is argued, proper, and, they argue, such was the case with respect to the decision of the lower court in this context.

(3) Counsel for the state stressed that, according to the state's reasoning, the requirements of the Law have been met, which creates (in section 7) a presumption that a person who is a member of a force that carries out hostilities against Israel or took part in such hostilities, whether directly or indirectly, is regarded as "someone whose release will harm state security as long as the hostilities of that force against the State of Israel have not ended, as long as the contrary has not been proved." It was proved before the lower court, it is argued, with respect to the appellants' organizational membership and their personal danger, and the reasonable likelihood that they will return to the terrorist activity in which they engaged prior to their detention. With respect to the matter of proportionality, the subject – according to counsel – remains pending before the lower court, and is combined with arguments against the constitutionality of the Law. These matters were not decided inadvertently. Also, counsel added, if the matter is not heard at this time, the State Attorney's Office will not argue estoppel when the time comes to hear it. It is

elementary that the District Court's discretion will not be restricted with respect to the arguments in their entirety, and, for this reason – given that a complete decision has not been made – there is no reason to hear it on appeal.

(4) I asked the appellants if they wanted to say something. Appellant 2 chose to speak. He said that Israeli forces killed his father in 2001, and arrested him, the appellant, while demolishing his house, without his being exposed to the material against him. His nuclear and extended family was greatly affected by demolition of the house and from its wandering about. He was detained for no reason and for no blame on his part. If he were to see the material against him, he could respond, which would enable justice to be done.

(5) *Ex parte*, with consent, I heard the comments of representatives of the Israel Security Agency regarding the appellants. I shall point out here, and return to this below, that the material I studied clearly indicates the appellants' ties to Hezbollah and their participation in hostilities against citizens of Israel prior to their detention, and the attempts of Hezbollah to exploit the situation in the Gaza Strip since the disengagement and withdrawal of Israel's forces.

H. (1) The Internment of Illegal Combatants Law, 5762 – 2002, was enacted following the decision (by majority opinion) of this court in Crim. Reh. 7048/97, *A. v. Minister of Defense*, P. D. 54 (1) 721, that a person may not be kept in detention under the Administrative Detention Law where the reasons for the detention is release of prisoners and missing persons (the said anonymous persons were Lebanese nationals connected to Hezbollah who were held for the purpose of obtaining the release of IDF soldiers who were held prisoner or were missing-in-action). In HCJ 2967/00, *Batya Arad v. The State of Israel*, P. D. 54 (2) 188, 192, the court stated, President Barak writing for the court, that, "We do not view legislation of this kind (which was, when the judgment was given, at the beginning of the legislative process – E. R.) a circumvention of our judgment in Crim. Reh. 7048/97. The court made its comments with regard to the existing law. That is its power and its function. The Knesset may change the existing situation. That is its power and its function. This is the proper separation of powers." Indeed, the comments deal with the legislative power in this context and not with its particular contents. The explanatory notes to the proposed law (P. L. 5760 – 2000, 416), which was submitted about two months after these judgments, state that, "The proposed law comes to enshrine the power, which is consistent with international humanitarian law, to intern a member of an enemy force who is not a prisoner of war, until the end of the hostilities between the State of Israel and that force," but under

judicial review, periodic study, and proper conditions of internment. The proposed provision that allows the chief of staff to issue an internment order until the end of hostilities between Israel and the enemy force was explained as an expression of "the notion, enshrined in humanitarian law, pursuant to which members of the enemy's force may be held so long as the hostilities continue, so that they will not return to the cycle of hostilities" (p. 417). As stated *the constitutionality* of the Law is not presently under discussion (I also think it improper that I deal with the constitutionality of the Law below as well, in that I took part at the time in some of the hearings in advance of the Law). It should be mentioned that, at the start, the Law was not aimed at applying to a resident of Israel, the region, or territory of the Palestinian Council, unless the person took part in hostilities from outside these areas, but this proposal was not incorporated in the Law itself.

(2) The purpose of this law, as it states (section 1), is "to intern illegal combatants, who are not entitled to prisoner of war status, in a manner that is consistent with the commitments of the State of Israel under the provisions of international humanitarian law." In section 2, an illegal combatant is defined as a person "who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war stats under international humanitarian law." The authority to intern such a combatant (in an internment order) is given to the chief of staff.

(3) I shall point out here that the internment orders issued by the chief of staff on 12 September 2005 state (with respect to the two appellants separately), in section 2, that "this order is issued in that I have a reasonable basis to believe, founded on intelligence information presented before me, that the internee is an illegal combatant within its meaning in the law and that his release will harm the security of the state." I shall observe here that, in my opinion, even if substantively, the right of the appellants to know for what and why they were interned was not harmed , if only because of the judicial review, it is proper – looking to the future – for the authorities to interpret broadly, when drafting the order, the legislator's provision, specified in section 3(a), that "an internment order will include the reasons for internment without harming the security needs of the state" and provide as much detail as possible, beyond the general statement that the person is an illegal combatant. This is necessary to enable the internee to know from the governmental authority what is confronting him, especially given that the order does

not specify a time schedule for it to end, but remains valid until the hostilities against Israel carried out by the force to which the internee belongs has ended (see, inter alia, sections 7 and 8 of the Law), unless the chief of staff cancels the order prior thereto (section 4) because the conditions are not met or for special reasons. In this matter, the orders that are the subject of the appeal might have expressly stated that the appellants were interned because of their involvement in Hezbollah. Under the Law, the internee is given the opportunity to state his case regarding the order before an officer holding the rank of at least lieutenant-colonel, who shall bring it before the chief of staff (section 3(c)), as was done in this case, and then comes the judicial review, which begins 14 days after internment (section 5(a)).

(4) The proposed law called for an obligation to review the order periodically once every six months, including an advisory committee for this purpose headed by a retired judge, but this provision was not included in the Law, rather it was specified that the internee shall be brought for judicial review once every six months from the time the order is issued. The courts' decision under this section may be appealed to this court.

(5) As stated above, a number of persons were previously (2002) detained under this law, and judicial review took place then (Misc. Appl. 93066/02, Judge Caspi) approving the orders. Appeal to this court was dismissed as mentioned.

(6) Indeed, this law is not simple. Other states cope with these issues, especially the United States in cases regarding al-Qaeda and the detainees being held at Guantanamo Base, outside the borders of the United States, and also other detainees located in the United States. See, for example, *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004) and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). The hearing in the United States generally revolves around the right of judicial review like this.

(7) In Israel, in which it was understood from the start, based on a tradition spanning many years of a battle with terrorism in the legal sphere, that periodic judicial review is needed, the Law was not enacted easily, but following many hearings in the Foreign Affairs and Defense Committee of the Knesset, with persons challenging, then and later, its constitutionality (see , recently, H. Mudrik. under the tutelage of M. Kremnitzer, *Illegal Combatants or Illegal Legislation?*, Position Paper, Israel Democracy Institute, 2005). As stated, this argument is not included in the present proceeding.

(8) I should consider the argument regarding the factual and legal foundation at this time under the Law, under which the orders were issued and the judicial review is carried out, and to determine if it is now necessary to decide the question of "proportionality," that is, whether there was a need to take less harmful means, that being the Administrative Detention Law.

(9) Learned counsel for the appellants do not conceal that their principle objective is nullification of the Law, or at least to minimize as much as possible its use, for reasons they enumerated, and this argument overlaps their arguments in the hearing. This is legitimate. However, at the end of the day, a decision must first be made in the framework formulated by the respondent in issuing the orders under this law, whether these orders are legal or not.

(10) I should mention here that the sides were faithful in their work, in the lower court and in this court, and properly presented – with all due respect – the various relevant aspects.

(11) With respect to the evidentiary foundation, I was faced with our obligation, due to the limitation inherent in privileged material that is not presented to the appellants, to serve as a kind of voice for them in this context (see HCJ 5555/05, *Federman v. Central Command*, P. D. 59 (2) 868, 869). Having studied both the disclosed and the privileged material, it appears to me that there is no reason to interfere in the decision of the lower court. First, the foundation is strengthened substantially and convincingly with respect to the detention at the time, as regards the appellants' ties with Hezbollah, Israel's enemy, and to activity in the framework of Hezbollah's hostilities against citizens in Israel. This is also true as regards Hezbollah presently and its actions against Israel. Indeed, from the perspective of the Law as presented, in the legal sense, the presumption in section 7 is sufficient to justify not interfering in the decision of the lower court, inasmuch as the material clearly indicates that we are involved with persons who were members of Hezbollah or took part in its hostile activity, and therefore are viewed as persons whose release will harm state security as long as the hostilities of Hezbollah against Israel have not ended. But added to this, in this case, and this of course provides significant and substantive strength with respect to individual justice, the personal danger. From this perspective, I can adopt the holding of the lower-court judge.

(12) Furthermore, it appears to me that, also with respect to the risk that the appellants will return to their acts if they are released, the foundation for probability is proper, also if this, of course, cannot be assumed with certainty. Indeed, the situation herein is not complicated. The Law was enacted – as presented above – in an attempt to cope with a situation that is not unique

to our region, certainly after the events of 9 September 2001 in the United States, when an "armed conflict short of war" is involved, but it is especially prominent in this region. The "classic" war between states has been joined – and possibly even occupied a central part – by hostilities of terrorist organizations, whose members do not come within the provisions of the Third Geneva Convention of 1949. Israel is not party to the Protocols of 1977 Additional to the Geneva Conventions but has constantly been required to treat persons who carry out hostilities under civilian cover of one kind or another against it, not as part of a state's armed forces and without imposing on themselves the laws of war whatsoever. There arises, naturally, as in many subjects that came and come before this court, a question of the relationship between security and the rights of the detainees. The Law assumed – as stated in the explanatory notes to the proposed law – a certain parallel to the situation of prisoners of war, in cases in which this status is not to be given them under the Third Geneva Convention of 1949. Prisoners of war are held until the end of the hostilities, and this, too, is the aim of the Law, to prevent the return of the internees to hostilities. The term "internee," it seems to me, is used in the spirit of the term in the Military Justice Law, 5716 – 1955. See section 248A(A)(1) and section 1 of the Military Justice Regulations (Military Prisons), 5747 – 1987, which defines a "person in confinement" as "a prisoner, person in incarceration, or detainee. As stated, I am satisfied, with respect to the evidentiary foundation, that there is no reason to interfere in the decision of the lower court. I cannot accept as simple the argument that the ties to Hezbollah were not at the time relevant at all, in the interrogation of the appellants and in the judicial review in the military courts in their matter. I did not have the privileged material that was presented to the military courts in the various hearings, but it is clear – and even the appellants were aware of this – that they were also suspected of ties to the organization and to known activists in Hezbollah (with regard to appellant 1, see the memoranda from his interrogation of 5 January 2002, 15 January 2002, 16 January 2002, 17 January 2002, and 22 January 2002, which were also provided to his counsel. As for Appellant 2, see the protocol of the hearing in the judicial review of 8 January 2004). Furthermore, it is not uncommon for administrative detainees to have a more thorough knowledge of the circumstances than their counsel. Taking into account the quantity and substance of the material, I have difficulty accepting the argument that the appellants' membership in Hezbollah was done for the purpose of changing their status to illegal combatants, though it might be that, retrospectively, more might have been said at the time of the judicial review on the administrative detention orders. I said this in addition to the comments of the lower court in this context.

(13) On the question that arose in the discussions with appellants' counsel, that is, if, in light of the decision of the lower court, it is proper to decide in the matter of the use of this law already at this time, it seems to me, having studied the matter, that it is proper to wait in making this decision until exhaustion of the hearing in the District Court. It may be, looking to the future, that such an argument must be decided in the framework of the particular judicial review, but in shaping the process with respect to the Law, there is no reason to attack the judge below, cheek by jowl, on his behavior.

(14) According to the appellants' reasoning, there are significant differences between the use of the Administrative Detention Law and the use of the law under discussion, one of the principal differences being that the Administrative Detention Law requires personal dangerousness. On this point, I observe only that the Law was enacted first and foremost for cases in which there is no evidence of personal dangerousness. Cases that are not like they once were, when combatants identified themselves with uniforms and emblems. Similarly, as a rule, there is no proof of future personal dangerousness with respect to prisoners of war. It is not superfluous to note that, according to the appellants' reasoning, whereby the defenses in the Administrative Detention Law are better than those in the Law, the result is that persons who constitute a personal danger, against whom the Administrative Detention Law is sought to be applied, will be – subject to the constitutionality of the Law – a better protection than for those who do not constitute a personal danger.

(15) I shall further note that, from the broad conception of procedural rights, which are granted also to persons who engaged in serious acts (see, also, HCJ 1546/06, *Gazani v. Commander of IDF Forces in the West Bank* (not yet reported)). I recalled the comments of my colleague, Justice Grunis, with respect to a person in administrative detention defending himself when blindfolded and his hands tied (Adm. Det. App *Federman v. Minister of Defense*, P. D. 58 (1) 176), although the state also acts with one of its hands tied (see HCJ 510/94, *The Public Committee Against Torture in Israel v. The Government of Israel,* P. D. 53 (4) 817, 895, President Barak). I asked myself therefore, without deciding the claim of proportionality on the merits, whether *actual* injustice was caused to the appellant at this time, in that means of this law are used under the Administrative Detention Law, which the appellants propose if their constitutional argument is not accepted. In my opinion, the answer is that no such injustice would be caused. In practice, application of judicial review began, as required by the Law, shortly after the appellants were detained under

the Law, and as was described, they appeared before the court several times (though they chose not to testify). Their matter did not, therefore, cease to be on the judicial agenda of the lower court for months, and the same is true now. This is, therefore, a kind of "ongoing judicial review."

(16) However, in waiting, as stated, for the decision of the District Court, I assume, it being obvious to me, that the court, although it sketched the fundamental framework with respect to application of the Law, is open to arguments with respect to the subject as a whole, and it is given broad discretion. It will be recalled that the court itself noted that changing times occasionally justify that the sides be heard in detail in this context. Counsel for the state declared, as mentioned above, that it will not claim estoppel on the grounds that this argument was not decided in the current judicial review. The court will decide after it views the entire picture.

(17) In conclusion, I cannot accept the appeal. I add, with an eye to the future: although the Law was intended for situations that are continuing and did not specify a time limit for internment prior to termination of the hostilities, there is – due to human nature, the dynamic circumstances, and the obligations of democracy – increasing importance in the passage of time when internment of an administrative nature is involved, in the sense of the obligation and responsibility of the judicial review. From this is derived the special importance, which cannot be exaggerated, of this review. Naturally, and based on common sense, the judicial review will have to, separate from the question of dangerousness, act precisely at all times and investigate and consider the changing times. Sometimes, in Israel's situation, there will be things of the type "darned if I do, darned if I don't," between a rock and a hard place, inasmuch as the probability that the appellants will return to harm Israel if released is, as stated, high – and on the other hand, prolonged internment in proceedings in which all the material is not presented to them and they are not tried on criminal charges based on the evidence is not among the subjects thought kindly of by the law, and much study is required the longer it continues. At the present time, it is not proper, as stated, to interfere in the decision of the lower court. Looking to the future, the authorities and the judicial review must examine – such as under the provisions of section 4 of the Law – if there has been a change in circumstances, and also, for example, whether it is possible to distinguish between the appellants themselves with respect to internment, and I make no conclusions in these contexts.

(11) As stated, I do not accept the appeal.

Given today, 14 Adar 5766 (14 March 2006).

Justice