

HCJ 5841/06

1. The Association for Civil Rights in Israel
2. Physicians for Human Rights
3. HaMoked: Center for the Defence of the Individual
4. B'tselem – The Israeli Information Center for Human Rights in the Occupied Territories
5. The Public Committee against Torture in Israel
6. Gisha – Legal Center for Freedom of Movement

v.

1. The Minister of Defense
2. The Coordinator of IDF Activities in the Territories

The Supreme Court
[February 25 2007]
Before Beinisch, P., Rivlin, V.P. & Procaccia, J.

For Petitioners no. 1-5: Azzam B'shara

For Petitioner no. 6: Sari Bashi & Noam Peleg

For Respondents: Michal Zuk

Petition for an *order nisi*

JUDGMENT

President D. Beinisch:

1. The petition before us was filed on July 11 2006, a short time after the murderous attack committed at the Kerem Shalom crossing, in which two IDF soldiers were killed, and Private First Class Gilad Shalit was abducted. As a result of the terrorist attack, the State of Israel began to carry out intensive combat activity against the terrorist organizations in the Gaza Strip, and also intermittently closed the border crossings between the State of Israel and the Gaza Strip. Thus, at the time the petition was filed, the situation in the *area* was tense, and as a result of the temporary closing of the border crossings, difficulty arose in inserting humanitarian aid into the Gaza Strip. Against the background of that state of affairs, the petition before us was filed, in the framework of which petitioners asked that we order the immediate resumption of regular and sufficient supply of fuel, food, medicines, spare parts, and other humanitarian supplies to the Gaza Strip.

2. In light of petitioners' arguments regarding the severe distress in the Gaza Strip, we held an urgent hearing of the petition, a mere two days after it had been filed. In the hearing, petitioners' arguments were heard regarding the severe implications of closing the border crossings upon the humanitarian situation in the

Gaza Strip. Respondents presented before us, in great detail, the efforts they are making in order to open the border crossings for exchange of products, and for provision of a reasonable supply of electricity, fuel, food, and medicines to the Gaza Strip. After some time, and after the changes which took place in the security situation in the area, we requested updates from the parties on both sides regarding the humanitarian situation in the Gaza Strip, and also held a second hearing in the petition. It appears, from the written and oral updates presented before us, that along with the changes in the security situation, changes also took place in the rate of provision of products and supplies to the Gaza Strip, as detailed below. These changes led to the practical solution of the issue which petitioners presented before us.

Factual Background

3. On September 12 2005, after the implementation of the disengagement plan, the Commander of IDF Forces in the Gaza Strip announced the termination of military rule there. Approximately a week later, on September 20 2005, the Minister of Interior Affairs declared the five land crossings and terminals between Israel and the Gaza Strip to be "border stations", according to the authority granted him pursuant to section 7 of the Entry into Israel Law, 5712-1952 (*see*: The Entry into Israel Order (Border Stations) (Amendment), 5765-2005). These "border stations" are not identical in purpose or functioning, and each station functions in a different fashion. "Karni Crossing" is the main crossing for exchange of products between Israel and the Gaza Strip, and the petition was directed mainly against the intermittent closing of that crossing; "Erez Crossing" is used mainly for passage of people between Israel and the Gaza Strip; "Sufa Crossing" is a crossing intended for passage of aggregates for construction; "Kerem Shalom Crossing" is used for passage of people and products between Egypt and the Gaza Strip, via Israel; and the Nachal Oz terminal is mainly used for inserting fuel from Israel into the Gaza Strip.

Some time later, in December 2005, the Ministerial Committee on National Security authorized the Minister of Defense to determine the opening or closing of the border crossings. Later, on April 11 2006, the Government determined a general policy on the issue, according to which "**subject to security considerations, the crossings from Israel to the Gaza Strip will remain open in order to allow entrance of humanitarian aid into the Gaza Strip**" (in section 6 of the Government Decision of April 11 2006). On June 28 2006, as a result of said terrorist attack, which was committed at the "Kerem Shalom" crossing, the State of Israel began to undertake intensive combat activity against the terrorist organizations in the Gaza Strip. In the framework of that activity, and as a result of an Israeli Air Force attack, the electricity production capability in the Gaza Strip was damaged, and the border crossings and terminals between Israel and the Gaza Strip were closed for certain periods. Against that background, as mentioned, the petition before us was filed on July 11 2006. On July 13 2006 we held the first hearing in the petition, and as a result of changes in the security and factual situation, we held an additional hearing on February 25 2007.

The Arguments of the Parties

4. Petitioners argued in the petition that as a result of the closing of the border crossings, the supply of food to the Gaza Strip had been compromised, and that there

was a shortage of necessary basic products, such that a humanitarian crisis had been created in the area. In their updated arguments for the additional hearing we held, petitioners detailed before us the various restrictions which exist today, according to their arguments, upon the crossing of products and supplies into the Gaza Strip, and they noted that there indeed had been an improvement in the recent period regarding passage of necessary products such as foodstuffs, fuel, and medicine. Petitioners emphasized, however, that this is not sufficient, and that the existing restrictions harm the functioning of the basic systems needed for the civilian population in the Gaza Strip. Petitioners further noted that these restrictions harm commerce and industry in the Gaza Strip, causing unemployment and poverty. In this context, petitioners also claimed that respondents have a duty to make possible the passage of the supplies needed in order to provide for all of the humanitarian needs of the residents of the Gaza Strip, and to allow them to lead regular lives, including access to education and health services, participation in commerce and industry, and other activities that depend upon the ability to insert various supplies and products into the Gaza Strip.

Regarding the normative framework that obliges respondents and applies to this case, petitioners argued that said framework includes the rules of international law, including the law of belligerent occupation which still applies to the Gaza Strip, as well as the rules of internal Israeli law. According to their arguments, due to the fact that the State of Israel has effective control over the Gaza Strip, it remains bound, even today, by the duties that apply pursuant to the laws of belligerent occupation, entrenched mainly in the annex to Convention (IV) respecting the Laws and Customs of War on Land (Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 ("The Hague Regulations")), and in the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War ("The Fourth Geneva Convention"). Petitioners claim that this law obligates respondents with a duty to refrain from harming the civilian population in the Gaza Strip, alongside a positive duty to ensure its humanitarian needs and its needs for maintaining public order and regular civilian life within it. In light of the developments which took place on the ground since the filing of the petition, the emphasis in petitioners' arguments was shifted to the duties that are beyond basic humanitarian needs, and the oral hearing ultimately focused upon the extension of the hours of operation of the border crossings. Thus, petitioners argued that we should order respondents to change their policy regarding the opening and closing of the land crossings between Israel and the Gaza Strip.

5. The respondents, for their part, requested that we reject the petition as showing no cause of action, since, according to their argument, the State of Israel makes possible reasonable supply of all the needs of the residents of the Gaza Strip. In their response, as well as in the hearings held before us, respondents detailed the steps being taken to supply the necessary products, alongside the limitations and constraints which apply on the subject. In both hearings, the head of the Gaza Coordination and Liaison Administration Colonel Nir Peres appeared before us, and relayed to us, in a detailed fashion, a description of the efforts to open the border crossings and allow movement of products to the Gaza Strip. Respondents emphasized that the State of Israel has no interest in creating a humanitarian crisis in the Gaza Strip, and that it is doing all that it can in order to allow the passage of the supplies needed for the residents of the Gaza Strip, in coordination with the international community.

Respondents further argued that the policy outlined on the issue under discussion in the petition is worthy, reasonable and proportional, and emphasized that the limitations upon passage of supplies and upon opening the crossings derive from security considerations. On this last subject, respondents argued that the existence of the combat activities taking place in the Gaza Strip, as well as the concrete information that is received from time to time regarding intentions to commit terrorist attacks at the crossings, are not to be ignored. Respondents pointed out the fact that the crossings long ago became a central target for terrorist attacks, and noted that since the outbreak of the armed conflict in September 2000, tens of shooting attacks, settings of explosive charges, diggings of tunnels and smugglings of terrorists and weapons have taken place at the area of the Karni Crossing alone. Even now, noted respondents in their response to the petition, their intelligence points to very specific alerts regarding the intentions of the terrorist organizations to commit terrorist attacks at the Karni Crossing, alongside additional alerts regarding intent to commit a terrorist attack in the areas of the border crossings. Finally, respondents emphasized that even when a decision is made to close a border crossing for a defined period, they make efforts to find alternatives for passage of supplies through other crossings. In those circumstances, respondents argued that irregular opening of the crossings is unavoidable, and that they are doing everything possible, in the existing circumstances, in order to make possible the opening of the crossings and the passage of goods to the Gaza Strip in a regular fashion.

Regarding the duties obligating the State of Israel pursuant to the laws of belligerent occupation in general, and the Fourth Geneva Convention in particular, respondents argued that, in general, after the implementation of the disengagement plan, there is no situation of belligerent occupation in the Gaza Strip, and that the relevant laws on the issue are, therefore, the Laws of War only. According to their argument, these laws require the State of Israel to make possible the regular passage of necessary humanitarian supplies only. Nonetheless, respondents emphasized that the general policy of the State of Israel is that the crossings should be left open, and to allow the passage of all kinds of products, to the extent that the security circumstances allow it.

Discussion

6. After hearing the arguments of the parties and reading the material before us, we have reached the conclusion that the petition should be rejected. We note first that we saw no need to decide the normative dispute between the parties regarding the application of the law of belligerent occupation in the Gaza Strip after the implementation of the disengagement plan, as it became clear during the hearing of the petition that said dispute is merely theoretical, having no practical implications upon the petition before us. In fact, respondents emphasized before us that the State of Israel does not restrict the passage of goods through the border crossings merely to necessary supply, and does all it can in order to prevent the development of a humanitarian crisis in the Gaza Strip. Furthermore, as clarified to us, the general policy of the State of Israel is to allow the passage of goods and supplies of various kinds to the Gaza Strip, to the extent needed, subject to security needs. Thus, it was detailed extensively before us that the State also allows passage of supplies needed in order to advance various projects in the Gaza Strip. Nor do respondents deny that in the framework of the considerations that the Israeli authorities must consider, great

weight is to be assigned to the humanitarian consideration, and the consideration of preventing suffering on the part of the civilian population.

7. The real dispute between the parties is, therefore, a factual dispute. As mentioned, the head of the Gaza Coordination and Liaison Administration, Colonel Nir Peres, appeared before us twice, and, after detailed and thorough preparation, twice presented before us, extensively, the entirety of the data relevant to the opening and closing of the border crossings, and the rate of passage of various goods to and from the Gaza Strip. It became clear, from his statements, that in January 2007 there was a rise of 72% in imports to the Gaza Strip, compared to the extent of imports from February last year, and that there was a rise of 24% in exports from the Gaza Strip, compared to the extent of exports from February last year. In his statements before us, Colonel Peres also clarified the constraints, and the circumstances under which the possibility of passage of goods through the crossings is restricted. The central reason, he explained, is the security reason, which is manifest in various aspects. First, the area of the border crossings is a sensitive one, which constitutes a target for terrorist attacks. To date, in the perimeters of the border crossings, many terrorist attacks have been committed, and from time to time intelligence and alerts reach the security agencies regarding the terrorist organizations' intentions to commit terrorist attacks in the areas of the border crossings. In these circumstances, the existence of pinpoint alerts regarding a terrorist attack might prevent the opening of the relevant crossings on a continual basis, and compromise the rate of passage of goods, due to the security need to frustrate the planned terrorist attack and to locate the terrorists and the explosives. Second, there is a need to confront the continual attempts to smuggle explosives through the border crossings, which are intended to be used in terrorist attacks inside Israeli territory or at the border crossings themselves. These smuggling attempts require complex and most strict inspection of the goods passing through the border crossings, thus slowing the rate of the passage of goods to and from the Gaza Strip. Third, there is an additional threat: the digging of tunnels in the area of the border crossings. That threat at times requires the closing of the crossings for a specific period of time, in order to locate the tunnels and frustrate the terrorist attacks planned to be carried out by using them. Finally, there are additional security threats: launching of Kassam rockets into Israeli territory and laying explosive charges. The military activity needed in order to confront those threats also requires, at times, the closing of the border crossings for defined periods of time. In those circumstances, it is clear that there indeed exists a military-security justification for putting certain limitations upon the movement of people, vehicles and goods through the border crossings, in accordance with the existing concrete dangers and threats, and in light of the relevant and updated intelligence information in the hands of the security agencies.

8. The security challenges with which the security services are confronted in the areas of the border crossings to the Gaza Strip are not easy ones, and they must be confronted in a complex and dynamic way. However, and despite the variety of security threats directed toward the areas of the border crossings, and through them into all of the State of Israel, we have been persuaded that respondents are making all efforts in order to open the border crossings regularly, to the extent possible, and that they see themselves as obligated to provide the humanitarian needs of the residents of the Gaza Strip. It appears, from the data presented before us regarding this aspect, that in recent months there has been a significant rise in the supply of goods to the

Gaza Strip, as well as in the number of trucks which pass through the Karni Crossing, and it appears that even petitioners themselves do not dispute that. *Inter alia*, it was noted in the hearing before us that at the time that the Karni Crossing was closed for security reasons, Israel allowed passage of beef through the Sufa Crossing, in coordination with the Ministry of Agriculture. It was also noted that during the months of August-September 2006, 12 tons of construction aggregates were supplied to the Gaza Strip, and that before Ramadan the Karni Crossing operated beyond the regular operating hours, in order to supply the demand for various products for the holiday. It was further emphasized that the State of Israel makes possible not only the passage of necessary basic goods, but also raw materials for industry and construction, and is even assisting in the implementation of long term infrastructure improvement projects in the Gaza Strip being carried out by the European Union, and so it is also regarding water and sewer, electricity, and communications projects. Regarding electricity, respondents noted their assistance in implementing a project for laying an electric wire between the electric company in the Gaza Strip and Israel, the purpose of which is increasing the production of electricity in the Gaza Strip. Respondents also noted that Israel allows passage of equipment necessary for additional electricity projects, the purpose of which is to reconstruct the electric infrastructure in the city of Gaza. In the area of water, respondents detailed a number of projects in which Israel is participating, and assisting in passage of the equipment needed for their implementation. *Inter alia*, respondents noted the existence of a project for sewer water purification, funded by the German government, for implementation of which 3,100 meters of pipes, as well as other equipment needed to advance the project, have passed and are today being passed though the border crossings. However, inspection is performed regarding certain types of pipes passing into the Gaza Strip, due to the real concern that pipes of certain sizes will be used to make Kassam rockets.

9. In conclusion, it should be emphasized that respondents clarified that the policy of the government is to leave the border crossings open, and to allow the passage of goods through the border crossings between Israel and the Gaza Strip, to the extent possible in the existing circumstances, subject to closure of the crossings when there is serious and immediate concern regarding the threat of a terrorist attack, and whilst giving preference, in such circumstances, to inserting goods into the Gaza Strip, particularly basic goods, over export from the Gaza Strip. This policy is balanced and reasonable, and is in line with both Israeli and international law. In light of all that, we found no fault in respondents' decision to close the crossings from time to time, subject to the security situation report, and while considering various alternatives for providing necessary goods.

After this judgment was written, we received a request from the petitioners that we order respondents to provide them a copy of the presentation presented before us at the hearing by Colonel Peres. Petitioners asked that we not rely on that presentation in our judgment, because they were not given an opportunity to examine its content and reliability, and because anonymous Palestinian sources were quoted in it. Regarding that argument we emphasize that Colonel Peres is the official authorized by the State regarding the operation of the border crossings, and that we relied upon his statements to the extent that they relate to action taken by the State or on its behalf for which he is responsible and about which he knows. In addition we reiterate that, as it appears above, the situation on the ground is a dynamic one, and

that it changes from day to day. We hope that such changes will be changes for the better. In any case to the extent that the factual circumstances change in a way that establishes legal cause showing compromise of humanitarian needs, the doors of this Court are open.

Therefore, the petition is rejected.

Vice President E. Rivlin:

I concur.

Justice A. Procaccia:

I concur.

Decided, per the judgment of *Beinisch, P.*

Given today, 23 Adar 5767 (March 13 2007).