CrimFH 7048/97

John Does
v.
Ministry of Defence

The Supreme Court Sitting as the Court of Criminal Appeal
[April 12th, 2000]
Before President A. Barak, Vice-President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, Y. Kedmi, I. Zamir, D. Dorner, J. Türkel

A further hearing on the judgment of the Supreme Court (President A. Barak, Justices Y. Kedmi and D. Dorner) in ADA 10/94, November 13, 1997.

Facts: The petitioners were citizens of Lebanon, who were brought to Israel between the years 1986-1987 by the security forces, and put on trial for their membership in hostile organizations and for their involvement in attacks against IDF and LDF. The petitioners had been convicted and sentenced to various sentences of imprisonment, which they served. Subsequently, the petitioners were held in administrative detention under section 2 of the Emergency Powers (Detentions) Law 5739-1979. This administrative detention was extended from time to time, for additional six month periods, in accordance with the same section. The question before the court was whether a person can be held in administrative detention – when that person himself does not pose a danger to national security –for that person to serve as a "bargaining chip" in the negotiation to release prisoners or missing persons from among the Israeli security forces?

Held: As per the judgment of President Barak, whose view was shared by Vice-President Levin, and Justices Or, Mazza, Zamir and Dorner, and against the opposing opinions of Justices M. Cheshin, Y. Kedmi, and J. Türkel, the Court held that according to the Emergency Powers (Detentions) Law 5739-1979 there is no authority to detain a person from whom no danger is posed to national security, and therefore it concluded that the respondent does not have the authority to detain the petitioners by authority of the Emergency Powers (Detentions) Law 5739-1979. Therefore, the court ordered the release of the prisoners.

Basic law cited:

Basic Law: Human Dignity and Liberty, ss. 2, 4, 8, 10.

Legislation cited:

Emergency Powers (Detentions) Law 5739-1979, ss. 1, 2, 2(A), 2(B), 4, 5.

Penal Law-5737-1977, s. 43U.

Regulations cited:

Defence (Emergency) Regulations, 1945, r. 119.

International treaties and conventions:

Fourth Geneva Convention (Relative to the Protection of Civilians during Times of War) 1949, articles 34, 147

Third Geneva Convention article 118.

International Convention against the Taking of Hostages, 1979.

Israeli Supreme Court cases cited:

[1] ADA 10/94 [1] *John Does v. State of Israel* IsrSC 53(1)97.
[2] HCJ 4400/98 *Ismail Braham v. Legal-Expert-Judge Colonel Moshe Shefi* (not yet reported).
[3] ADA 2/86 *John Doe v. Minister of Defence* IsrSC 41(2) 508.
[4] HCJ 869/92 *Zwilli v. Chairman of the Central Elections Committee for the 13th Knesset* IsrSC 46(2) 692.
[5] HCJ 693/91 *Efrat v. Director of Population Ministry, Ministry of Interior* [1993] IsrSC 47(1) 749 at 763.
[6] CA 105/92 *Re'em Mehandesim Kablanim Ltd v. the City of Nazareth Elite*, IsrSC 47 (5) 189.
[7] HCJ 58/68 *Shalit v. Minister of the Interior* (1969) IsrSC 23(2) 477.
[8] CA 165/82 *Kibbutz Hazor v. Rehovot* IsrSC 39(2) 70.
[9] ADA 2/82 *Lerner v. Minister of Defence* IsrSC 42(3) 529, at 532
[10] EA 1/65 *Yardor* v. *Chairman of Knesset Elections Committee* (1965), IsrSC 19(3) 365 at p. 390).
[11] MApp 15/86 *State of Israel v. Avi Tzur* IsrSC 40(1) 706 at 713.
[12] CrimMApp 335/89 *State of Israel v. Lavan* IsrSC 43(2) 410.
[13] HCJ 2320/98 *Elmamala v. IDF Commander* IsrSC 52(3) 346.
[14] ADA 7/94 *Ben Yosef v. State of Israel* (not reported).
[15] ADA 2/96 *State of Israel v. Freedman* (not reported).
[16] EA 2/84 *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [1985] IsrSC 39(2) 225; IsrSJ 8 83.
[17] HCJ 2006/97 *Mison Mahmet Avu Fara Ganimat v. Central Command General Uzi Dayan* IsrSC 51(2) 651.
[18] ADA 4/94 *Ben Horin v. State of Israel* IsrSC 58(5) 329 at 333-335).
[19] CrimA 6182/98 *Sheinbein v. Attorney General* (not yet reported).
[20] HCJ 279/51 *Amsterdam v. Minister of the Treasury* IsrSC 6 945 at 966.
[21] CrimA 336/61 *Eichmann v. Attorney General* IsrSC 17 2033, at 2041.
[22] CA 522/70 *Alkotov v. Shahin* IsrSC 25 (2) 77.
[23] HCJ 4562/92 *Zandberg v. Broadcasting Authority* IsrSC 50(2) 793.
[24] CA 243/83 *Jerusalem Municipality v. Gordon*, IsrSC 39(1)113.
[25] CA 376/46 *Rosenbaum v. Rosenbaum*, IsrSC 2 235.
[26] HCJ 5100/94 *The Public Committee against Torture v. Government of Israel* (not yet reported).
[27] HCJ 3267/97 *Rubinstein v. Minister of Defence* IsrSC 52(5) 481.
[28] ADA 1/91 *Plonim v. Minister of Defence* (unreported).
[29] ADA 1/94 *Plonim v. Minister of Defence* (unreported).
[30] ADA 1/93 *Plonim v. Minister of Defence* (unreported).
[31] CrimA 6696/96 *Kahane Binyamin v. State of Israel* (not yet reported).
[32] CFH 2401/95 *Ruth Nahmani v. Daniel Nahmani* IsrSC 50(4) 661.
[33] HCJ 606/78 *Eyov and others v. Minister of Defence* IsrSC 33(2) 113.
[34] CrimA 437/74 *Kwan v. State of Israel* IsrSC 29(1) 589.
[35] HCJ 320/80 *Kawasame v. Minister of Defence* IsrSC 35(3) 113.

Israeli books cited:

[36] A. Barak**,** *Interpretation in Law*, Vol. 2 (1994).
[37] S.Z. Feller *Foundations in Criminal Law*, Vol. A, 1984.
[38] A. Barak, *Interpretation in Law*, Vol. 1, *Rules of General Interpretation* (1994).
[39] I. Englard, *Introduction to Jurisprudence* (1991).
[40] A. Barak, *Interpretation in Law*, Vol. 3, *Constitutional Construction* (1984).

Israeli articles cited:

[41] L. Klinghofer 'Preventive Detention for Security Reasons' *Mishpatim 11* (1981).

[42] Y. Sussman, 'Some of the Rationales of Construction' the *Jubilee Book for Pinhas Rosen*, 147 (1962).

[43] S. Shetreet 'A Contemporary Model of Emergency Detention Law: An Assessment of the Israeli Law' 14 *Israel Yearbook on Human Rights* (1984) 182.

[44] I. Zamir 'The Rule of Law and the Control of Terrorism' 8 *Tel Aviv University Studies in Law* (1988) 81.

[45] M. Gur Aryeh, 'Proposed Penal Law (Introductory Part and General Part) 5752-1992', *Mishpatim* 24 (1994-2995) 9.

Foreign books cited:

[46] G. Robertson *Freedom, the Individual and the Law* (London, 6th ed., 1989).

[47] A.F. Bayefsky *International Human Rights Law* (Toronto and Vancouver, 1992).

Foreign articles cited:

[48] M.P. O'Boyle "Emergency Situations and the Protection of Human Rights; A Model Derogation Provision for a Northern Ireland Bill of Rights" 28 Northern Ireland L.Q. (1977) 160.

[49] O. Ben-Naftali, S. Gleichgevitch "Missing in Legal Action: Lebanese Hostages in Israel" 41 *Harv. Int'l. L. J.* (2000) 185.

[50] Y. Dinstein "The Application of Customary International Law Concerning Armed Conflicts in the National Legal Order – Introductory Reports" *National Implementation of Humanitarian Law – Proceedings of an International Colloquium held at Bad Homburg, June 17-19, 1988* (Dordrecht, M. Bothe and others – eds., 1990) 29.

Jewish law sources cited:

[51] *Ecclesiastes* 1, 6.

[52] *Yoma* 21 p. A.

Other:

[53] International Convention against the Taking of Hostages, 1979.

For the petitioner—Tzvi Risch.

For the respondents —Shai Nitzan.

JUDGMENT

President A. Barak

May a person be held in administrative detention – when that person himself does not pose a danger to national security – when the purpose of the detention is for that person to serve as a "bargaining chip" in the negotiation to release prisoners or missing persons from among the security forces? – This is the question before us in this further hearing.

The Facts

1. The petitioners are citizens of Lebanon. They were brought to Israel between the years 1986-1987 by the security forces. They were put on trial for their membership in hostile organizations and for their involvement in attacks against IDF and LDF forces. They were convicted and sentenced to various sentences of imprisonment. All the petitioners completed their prison terms. Despite this, they were not released from prison. At first they were held in detention by authority of the deportation orders that were issued against them. Later – beginning May 16, 1991 – as to petitioners 8-10, and beginning September 1, 1992 as to petitioners 1-7 – they were held in administrative detention by authority of the orders of the Minister of Defence that were issued in accordance with section 2 of the Emergency Powers (Detentions) Law 5739-1979 (hereinafter: "the Detentions Law"). This administrative detention was extended from time to time, in accordance with the same section, by an additional six months. On August 22, 1994 an additional extension was requested. The extension was authorized by the Vice-President of the District Court in Tel-Aviv Jaffa. An appeal was filed on this decision to this court (ADA 10/94 [1]). The judgment in the appeal serves as the subject of this further hearing. It is to be noted that in the interim the Minister of Defence decided to release two of the petitioners (petitioners 1 and 8).

2. There is no debate among the parties that the petitioners themselves do not pose a threat to national security. They served their sentence and under normal circumstances they would be deported from Israel. There is also no debate that the reason for the detention of the petitioners is the hastening of the release of prisoners and missing persons from among the security forces, and in particular the release of the navigator Ron Arad, who has been missing since his airplane was downed (on October 16, 1986) in the skies of Lebanon. Indeed, the petitioners are held in administrative detention as "bargaining chips" in a difficult negotiation that Israel is undertaking for the release of Ron Arad and other prisoners and missing persons from among the security forces. The debate between the parties – which is at the center of the judgment the subject of this further hearing was twofold: first, is the Minister of Defence authorized to issue an administrative detention order when the only reason for issuing it is the release of prisoners and missing persons from among the security forces, without there being a specific risk from the detainees themselves? Second, was the discretion of the Minister of Defence properly exercised?

3. In the Supreme Court, the views were split. The majority justices (President Barak and Justice Kedmi) answered both questions in the affirmative. It was determined that return of prisoners and missing persons from among the security forces, is, on its own, a purpose and interest that is included within the framework of national security, and the authority of the Minister of Defence also encompasses the case in which there is no danger to national security from the detainees themselves, and the whole purpose of their detention is to hold them as "bargaining chips". So too it was determined that under the circumstances, exercising the discretion of the Minister of Defence was lawful. The majority justices were convinced that there exists a concern, at the level of near certainty that the release of the petitioners will bring about a real harm to national security and that the continued detention of the petitioners was essential for continuation of the negotiation for the release of the prisoners and missing persons. It is to be noted that under the circumstances there is no alternative to detention that can be utilized; whose infringement on the basic rights of the petitioners would be less.

4. The minority opinion (Justice Dorner) determined that the Minister of Defence does not have the authority to order the detention of a person who does not pose a danger to national security. The purpose of the detention is the prevention of danger to national security or public safety from the detainee himself, as long as this goal cannot be achieved by a criminal proceeding. Justice Dorner also determined that as for exercising the discretion of the Minister of Defence, the Minister of Defence was not able to show that there exists a near certainty, and not even a reasonable possibility, that the release of the petitioners would

undermine the possibility of releasing prisoners and missing persons from among the security forces.

5. The petitioners applied for a further hearing to be held in the judgment of the Supreme Court. Vice-President S. Levin granted the application (on January 25, 1998), and determined:

> "It has been decided to hold a further hearing on the question of the validity of an administrative detention by authority of the Emergency Powers (Detentions) Law 5739-1979, where this detention takes place for the reason that it may advance the release of prisoners and missing persons from among the security forces."

The further hearing took place in the form of written summations and oral arguments. The respondent directed our attention to the fact that a number of the petitioners in the further hearing were not parties to ADA 10/94[1]. The application of the counsel for the petitioners to join them to the further hearing proceedings was denied (on August 11, 1998) by me. So too the panel decided (on January 1, 1999), with the consent of the parties, to consider the two appeals that were filed in the Supreme Court (ADA 5700/98 and ADA 5702/98) – which deal with Lebanese detainees who are not among the petitioners – separately.

6. The opening of the arguments before us concentrated – as said in the decision of my colleague, Vice-President, Justice S. Levin – with the question of the authority of the Minister of Defence. During the course of the arguments we decided (on February 1, 1999) to examine "in the special circumstances of the case, and with the consent of the parties" ex parte the confidential information in the hands of the respondent, and this "without taking a stand at this stage as to the relevance of the material to determination of the petition." We heard, behind closed doors, the head of the research unit in the intelligence section in the army general command (on May 26, 1999). Pursuant to this we received a supplementary notice (on August 26, 1999) and an application on behalf of the State Attorney General. This is the language of the supplementary notice:

> "(1) The various aspects that arose in the course of the hearings in this hon. court were brought to the attention of the entities at the head of the IDF and the political ranks, and at their head the Prime Minister and the Minister of Defence.
>
> (2)In a hearing that was held on this matter in the office of the Minister of Defence, attended by the Attorney General, senior officials from the State Attorney's Office who are dealing with this case, and the entities from the Ministry of Defence dealing with this, headed by the Chief of Staff, the various issues that arise in this case were discussed, including the moral and security issues it entailed.
>
> (3) At the conclusion of the discussion after the majority of those present made their opinion heard, the Prime Minister and Minister of Defence decided as follows:
>
> A. In all that relates to issues which deal with the matter of prisoners and missing persons, including Ron Arad, the following primary considerations exist:
>
> 1) An effort to clarify what has come of their fate in order to be able to bring them back to Israel.
>
> 2) The State of Israel is obligated to make every effort in this area, since the State is the one that sent them to battle.
>
> B. The State of Israel is before negotiations that have been bounded to a defined time frame of 15 months, in which it will be clarified whether there is a possibility of reaching a political solution in the area in which we live. **The issue of the prisoners and the missing persons is an inseparable part of this negotiation and only now is the framework for negotiation in the hands of each party, being held up to the ultimate test.**

C. Return of the prisoners now, before the beginning of the negotiation, will leave the State of Israel without a means of bargaining in this issue in the framework of negotiation.

D. During the course of the negotiation and along with its advancement we can assess the chances of reaching a solution in the time allotted for this, and so too, it will be assessed whether it is possible to release some of the detainees in this timeframe.

In any event at the conclusion of the 15 months that were allotted or a shorter time frame, in the course of which the negotiation will be concluded and if it turns out, we hope not, that these detainees do not fill any role in the release of the prisoners or missing persons, it would be proper, in the view of the Minister of Defence as well, to reconsider the approach as it was formulated in the Defence Authority, in the spirit of the comments of the court.

E. The Minister of Defence is of the view therefore that the continued detention of the petitioners during said time period is vital to the continuation of the negotiation and the advancement of the release of prisoners and missing persons.

(4) In conclusion, the Attorney General wishes to add:

A. With all due respect it appears that the conclusion of the President in ADA 10/94 [1] that 'it is possible in principle and in exceptional circumstances to detain a person for acts and danger which are rooted in another' indeed emphasizes the exceptional nature of the circumstances, meaning the enormous effort to free the prisoners and missing persons.

This exceptional nature must by nature be examined thoroughly and at all times, as one who is detained in administrative detention in these circumstances is an exception even to the administrative detention which itself is an exception in the realm of human dignity and basic rights.

B. Therefore, the proportionality of the act must be examined at all times and the date that the judgment was handed down, November 13, 1997, is not like the date after almost two years have passed (and over a year after the filing of the appeal by the State on the decision of Justice Ilan) in which no progress has been made in the matter of the release of the prisoners and missing persons.

Under these circumstances it is the opinion of the attorney general that the scales tip slightly in favor of gradual release of the prisoners in a manner that will signal consideration, such as beginning with the mentally ill, or the younger ones, or those who have not started a family, as part of a legal-humane-moral approach.

The attorney general is aware that for now the opinion of the holder of authority, the Minister of Defence is different; but it is possible that starting the release will also have a positive impact on the negotiation, thereby enabling integration of the two approaches.

(5) In addition to what has been said above we wish to update:

A. The Arad family has met recently with the Attorney General. At the meeting the State Prosecutor, the Head Military Prosecutor and additional entities from the IDF and the Justice Ministry were present.

In the meeting it was clarified that the Arad family asks in every way possible to be heard before this hon. court.

(6) In light of the sensitivity of the topic and its history and its human and public interest, the Attorney General is of the view that this is appropriate and that it is proper to hear the family's viewpoint.

This hon. court is therefore requested to decide on the matter of the petition of the Arad family.

(7) In light of all that was said above, we request that in accordance with the decision of the Court in the matters mentioned above, an additional date be set for a hearing, in which the Arad family will have the opportunity to be heard before this hon. court, and to the extent necessary an authorized entity from the military-security ranks, will appear and clarify before the court additional clarifications in all that relates to the matters raised above."

Counsel for the petitioners responded to the supplementary notice (on September 9, 1999). He expressed his objection to delaying determination of the appeal for an additional fifteen months. In his opinion, foreign considerations are at the root of the application. Counsel for the petitioners also objected to the application to hear the Arad family. Despite this we decided (on November 8, 1999) to hear (in writing) the Arad family. In its letter the Arad family notes that Ron Arad was taken prisoner approximately 13 years ago. His daughter, who was a year and three months when he was taken prisoner, is fourteen today. Ron Arad fell in the hands of individuals lacking any moral or other restraint. He was "sold" from place to place. His captors dragged him from place to place, held him in conditions, which are not even conditions, and refused to let the Red Cross visit him. His captors treated him according to the "the laws of the jungle". It is not appropriate that the State of Israel deny itself any means when trying to bring him back. The Lebanese detainees willingly took part in the battle against Israel. Just as Ron Arad was aware of the dangers entailed in flying in the skies of an enemy country, so too were the Lebanese detainees aware of the dangers entailed in their activity against Israel, including their involvement in the imprisonment of Ron Arad. In this sense the war in Lebanon is not over and as long as Ron Arad has not been brought back to Israel it is not appropriate to return the detainees to Lebanon. According to the assessment of security entities it is possible that Ron Arad is still alive. This working premise is not to be dismissed or ignored. Release of the Lebanese detainees will send a message to Israeli society and persons in the security forces that the court will tie the hands of the State of Israel when it comes to take steps to protect their liberty, life, and security.

7. Consequently, three applications have been brought before us: an application by the Arad family (that was included in the position paper submitted on their behalf, in accordance with our decision of November 8, 1999) to bring their words before us orally; the application of the petitioners to bring their words before us in the framework of a letter (as to this both an application by their counsel and the letter written by the petitioners were submitted); and the application of the State Attorney General to set another date for consideration of the petition. After considering these applications we decided (on December 12, 1999) to make do with the written position paper submitted by the Arad family. We also decided to accept the letter of the petitioners themselves. In this letter the petitioners note that the human rights of the detainees were denied – in contradiction of international treaties and basic tenets. They have been in Israeli prison for 13 or 14 years. Some of them that were put on trial served their sentence some time ago. Most were under the age of 20 when they were detained. The goal of detaining them is not clear: at times it is claimed, that it is intended to advance the return of those missing in action from the Sultan Ya'akub battle, and at times it has been tied to the subject of Ron Arad and at times it appears that they are held as a general bargaining chip for the negotiations with Syria and Lebanon. They have no connection to the Sultan Ya'akub battle as most of them were still children in 1982. Some of them have been in Israeli imprisonment since before Ron Arad was captured. The time that passed in prison proves that there is no use in keeping them in prison, as the matter of Ron Arad has not advanced at all. The detainees are simple people, lacking any status or influence in Lebanon. They have no information about Ron Arad or connection to his being held in prison. The *Hezbollah* organization has repeatedly declared that it has no information or connection to Ron Arad, and the Israeli working premise is that Ron Arad is not in Lebanon at all. The head of Internal Security Service himself declares (based on newspaper reports) that there is no point in the continued detention of the detainees.

8. As we have seen, counsel for the respondent requested that we set another date for the hearing. We requested to hear (within seven days) the position of the counsel for the petitioners. In his response (of December 27, 1999) counsel for the petitioners objected to the setting of another date for the hearing. Despite this, we decided to hold a hearing (on July 1, 2000). In this hearing we heard the arguments of the counsel for the parties. We also received information (behind closed doors) as to the efforts being made lately to obtain details as to the fate of Ron Arad. Now the time has come hand down our judgment.

The Petitioners' Arguments

9. According to the petitioner's claim, the Detentions Law is not to be interpreted as including authority for the administrative detention of a person solely as a "bargaining chip". According to their claim, the basic principles of the liberty of the individual and their dignity, as they have been expressed in the framework of the Basic Law: Human Dignity and Liberty, unravels the basis for the detention of the petitioners in administrative detention. Detaining them as such stands not only in contrast to the purpose of the law and the intention of the legislator, but also in contradiction of international law. Returning prisoners and missing persons is in fact an important interest, but it is not part of "national security" in its meaning in the Detentions Law. According to the petitioners, the Detentions Law surrounds and relates only to a situation in which a personal risk is posed by the detainee. The administrative detention is an individual act based on a person's personal responsibility for his actions. Alternatively, the petitioners argued that there is no factual and evidentiary basis for holding them in administrative detention, and that there exist less damaging alternatives for achieving the goal for which they are detained. For these reasons, the petitioners are of the view, that the opinion of Justice Dorner in ADA 10/94 [1] is to be adopted, and it is to be determined that the Minister of Defence deviated from his authority when he ordered their detention in administrative detention.

The Respondent's Arguments

10. According to the respondent's claims, the Minister of Defence is indeed authorized to detain a person in administrative detention even where the reason for his detention is just to serve as a "bargaining chip". Protecting the safety of IDF soldiers and their return from imprisonment is included within the term "national security" in the Detentions Law, meaning, in the language of the law. The purpose of the law also includes the authority for administrative detention in the circumstances of the case before us. The law is intended to address serious dangers and unexpected events, in order to protect national security. Such is the situation before us. For this reason the law was not worded narrowly but broadly, in order to address those extreme and exceptional situations in which a person's detention is necessary in order to protect national security and public order. According to the respondent's approach, the legislator's (subjective) intent does not include a clear indication that the authority in the law does not include administrative detention as a "bargaining chip". So too, it is argued, the principle of personal responsibility is an important principle, however, the very authority in the law is an exception to this principle and from here stems the authority to deviate from it. According to the respondent's claim, examining the case before us in the perspective of the Basic Law: Human Dignity and Liberty, also supports the position of the majority in ADA 10/94 [1]. This is so, as the administrative detention under the circumstances is "for an appropriate purpose and to a degree that does not surpass that which is necessary." Therefore, the basic law does not change the construction of the Detentions Law in the context before us, and does not justify deviation from previous judgments of this court, which recognized the authority of the Minister of Defence to detain a person, just as a "bargaining chip". As to international law, the respondent claims that there is not a customary law prohibition on the taking of "hostages" and the prohibition in conventional law in this matter, does not apply in this case. Whether for its non-application to the petitioners – who are "terrorists" according to its claim; whether due to the lack of applicability of conventional law to the State of Israel or whether due to the existence of a contradictory statutory provision in the domestic law,

such as the Detentions Law. For these reasons, the respondent argued, the judgment in ADA 10/94 [1] is to be left as is, and the application in the further hearing is to be dismissed

The Normative Framework

11. The detention of the petitioners in administrative detention is done by authority of the Emergency Powers (Detentions) Law 5739-1979. This law applies only when there is a valid declaration of a state of emergency (section 1 of the law). The detention authority is granted to the Minister of Defence (section 2 of the law). An important and necessary element for granting validity to a person's administrative detention is the judicial review (section 4 of the law). A person against whom an administrative detention order has been issued must be brought before the President of the District Court within 48 hours. The court is obligated to review the considerations of the Minister of Defence and will at times re-examine the evidentiary foundation on the basis of which the administrative detention order was issued (see HCJ 4400/98 *Ismail Braham v. Jurist-Judge Colonel Moshe Shefi* [2]; ADA 2/86 *John Doe v. Minister of Defence* [3]; L. Klinghofer 'Preventive Detention for Security Reasons' [41] 286). Even if the order is authorized, there is a duty to bring the matter and the validity of the detention order for re-examination before the court, at least once every three months (section 5 of the law). The further hearing before us revolves around the scope of the authority of the Minister of Defence to detain a person under administrative detention, meaning, it revolves around the interpretation of section 2 of the Detentions Law, of which this is the language:

> "2 (a) Where the Minister of Defence has a reasonable basis to assume that reasons of national security or public safety necessitate that a certain person be held in detention, he may, with an order bearing his signature, order the detention of a person for a period that will be noted in the order and which shall not exceed six months.
>
> (b) Where the Minister of Defence has a reasonable basis to assume, on the eve of the expiration of an order based on subsection (a) (hereinafter – the original detention order), that reasons of national security or public safety continue to necessitate holding the detainee in detention, he may, with an order bearing his signature, order, from time to time, the extension of the validity of the original detention order for a period which shall not exceed six months, and the law as to the extension order is as the law of the original detention order in all aspects."

In the judgment the subject of this further hearing this provision was reviewed in both the realm of authority and the realm of discretion. Logically, the question of authority is to be considered first.

12. The authority of the Minister of Defence to order administrative detention is conditioned on the fact that the Minister has reasonable grounds to assume that reasons of national security or public safety necessitate that a certain person be held in detention (section 2(a) of the Detentions Law). I am now of the view – as I was in the judgment the subject of this further hearing – that in the textual realm, the statement "national security" is sufficiently broad to also encompass within it situations in which the danger to national security does not stem from the detainee himself but from the actions of others, which may be impacted by the detention of that person. There is nothing in the statement "national security" in and of itself that can point in the textual realm to the detainee himself posing a danger to national security. But as is known, the textual realm is not the only realm to be taken into consideration. The interpreter is none other than a linguist. As interpreters, we need to give the statement in the law the same meaning – among the totality of textual meanings (over which the judge is in charge as linguist/philologist) – which realizes the purpose of the law. What is the purpose of the Detentions Law?

13. As is known, the purpose of the law is a normative concept. It includes its subjective purpose and its objective purpose. (See HCJ 869/92 *Zwilli v. Chairman of the Central Elections Committee for the 13th Knesset* [4] at p. 706). We will open with the subjective

purposes. These are the purposes which were examined by the legislators, and in fact, left by it at the foundation of the law. That is the "legislator's intent". We can learn about these purposes from the language of the statute and the legislative history. This examination in the case before us does not reveal a clear-cut picture. It is true, one can find expressions in the Knesset which relate to the danger posed by the detainee himself to national security (see, for example, the words of the Minister of Justice brought by my colleague, Justice Dorner, in paragraph 2 of her opinion which is the subject of this further hearing). Certainly that would be the natural and simple case. But, no basis is to be found in the Knesset minutes for the approach that the Knesset sought, in fact (as a historical fact), to limit the application of the law only to the detention of people who themselves posed a threat to national security. It appears that the problem before us – applying the law to one from whom no danger is posed – did not come up for discussion, and was not, in fact, examined, by those dealing with the tasks of legislation. There is therefore no escape but to turn to the objective purpose at the foundation of the Detentions Law.

14. The objective purpose of the law (in Sussman's words "the legislative objective" 'Some of the Rationales of Construction' the *Jubilee Book for Pinhas Rosen*, 147 (1962) [42] at 160.) is the purpose that the statute was intended to fulfill in our society. It is derived from the type of law and its character. It is meant to realize the foundational values of the system. It expresses the values of the State of Israel as Jewish and democratic state (see HCJ 869/92 [4] supra; HCJ 693/91 *Efrat v. Director of Population Ministry, Ministry of Interior* [5] at 763; CA 105/92 *Re'em Mehandesim Kablanim Ltd v. the City of Nazareth Elite* [6] at 198), Indeed the law is a "creature living within its environment" (Justice Sussman in HCJ 58/68 *Shalit v. Minister of the Interior* (1969) [7] at 513). This environment includes the proximate legislative context; this environment also sprawls out onto "broader circles of accepted principles, foundational goals and basic criteria" (CA 165/82 *Kibbutz Hazor v. Rehovot* [8] at 74).

15. What is the objective purpose of the Detentions Law as far as it relates to the problem before us? The answer is that this purpose is twofold: On the one hand, safeguarding national security; on the other hand, safeguarding the dignity and liberty of every person. These purposes are apparent from different circles which surround the law. The closer circle, which focuses on the statute itself and its types of arrangements, contains within it an integrated purpose that deals with protection of national security while taking care with human liberty and dignity. For this reason the law limited (in section 1) the administrative detention authority for a period in which the State is in a state of emergency, and for the same reasoning a process of periodic judicial review was established (in section 4) over exercise of authority. A similar amalgamation also arises from the more distant circle, which gives expression to the foundational values of the system. These values also include the Jewish and democratic values of the State of Israel as a liberty and dignity seeking state alongside the social interest in safeguarding national security. We will briefly discuss each of these (objective) purposes and the balance between them.

16. Safeguarding national security is the societal interest that each state wishes to realize. In this framework, democratic freedom seeking states recognize the "institution" of administrative detention (see O'Boyle, 'Emergency Situation and the Protection of Human Rights: A Model Derogations Provisions for Northern Ireland Bill of Rights' [48] at 160; Shetreet, 'A Contemporary Model of Emergency (Detention) Law: An Assessment of the Israeli Law'[43] at 203). The need for this means stems, *inter alia*, from the difficulty in finding a response within criminal law to certain threats to national security (see ADA 2/82 *Lerner v. Minister of Defence* [9] at 532). Indeed we are a "defensive democracy" (see EA 1/65 *Yardor v. Chairman of Knesset Elections Committee* [10] at p. 390). The daily struggle against terrorism requires more often than once the use of unconventional means (see Zamir, 'The Rule of Law and the Control of Terrorism'[44]). One of those means is administrative detention.

17. Safeguarding the liberty and dignity of every person and protecting this liberty and dignity are basic constitutional rights in Israel (see section 2 and 4 of the Basic Law: Human Dignity and Liberty). The liberty and the dignity are at the base of our social order. They are the foundation for all the other basic rights (see MApp 15/86 *State of Israel v. Avi Tzur* [11] at 713; CrimMApp 335/89 *State of Israel v. Lavan* [12] at 419-420). Therefore, the protection and safeguard of the liberty and dignity of the individual is a basic value which stretched out over all statutes (see HCJ 2320/98 *Elmamala v. IDF Commander* [13]). Such safeguarding and protection of liberty and dignity are also stretched out over the liberty and dignity of one who the state seeks to detain in an administrative detention.

18. There is a sharp clash between the two (objective) purposes which are at the foundation of the Detentions Law – national security and individual liberty and dignity. Detention – every detention – harms liberty. The liberty ends where the detention begins (see R. Robertson, *Freedom, the Individual and the Law* 26 (1989)). The harm of administrative detention to the liberty of the individual and their dignity is particularly harsh. The individual is detained without a trial, by authority of the order issued by the executive branch (Minister of Defence). The detention may go on – as the case before us shows – for a long period that is not limited in advance. Not once, the detainee does not know – for reasons of national security – what the factual basis is for the decision as to his detention. His ability to defend himself against the administrative detention is limited (see ADA 7/94 *Ben Yosef v. State of Israel* [14]; ADA 2/96 *State of Israel v. Freedman* [15]). With that, there is no escape – in a freedom and security seeking democratic society – from the balancing of liberty and dignity and security. Human rights must not be turned into an axe for denying public and national security. A balance is required – a delicate and difficult balance – between the liberty and the dignity of the individual and national security and public safety (see EA 2/84 *Neiman v. Chairman of Elections Committee for Eleventh Knesset* [16]).

19. This balancing presumes – and in the petition before us the matter has not come up at all – that it is possible to enable – in a democratic freedom and security seeking state -- the administrative detention of a person from whom a danger to national security is posed, but this possibility is not to be extended to the detention of a person from whom no danger is posed to national security and who merely constitutes a "bargaining chip". The reasoning for this position is twofold: first, the damage of administrative detention to the liberty and dignity of a person who poses a threat to national security is severe. The damage is severe as it harms the liberty of a person – liberty which is protected in Israel at a constitutional-supra-statutory level – without a trial and without a judgment (see HCJ 2320/98 *El-Amla v. IDF Commander in Judea and Samaria Region* [13]. However, it is tolerated. It is a matter of the lesser of two evils. On the other hand, the damage to liberty and dignity, in the administrative detention of a person who himself does not pose a threat to national security, is extremely severe, to the point where the interpreter is not entitled to presume that the statute intended to achieve such severe harm. I discussed the severe harm of such administrative detention in the judgment the subject of this petition when noting:

> "Administrative detention harms the liberty of the individual. When the detention is done under circumstances in which the detainee is a 'bargaining chip', there is in this a severe harm to human dignity, as the detainee is perceived as a means to achieving a goal and not as a goal in and of itself. Under such circumstances the detention harms the autonomy of will, and a person as a master of his actions and responsible for the consequences of his actions. The detention of the appellants is none other than a situation where the key to the imprisonment of persons is found in the hands of others and not in their own hands. This is a difficult situation" (para. 12 of my judgment).

Indeed, the transition from the administrative detention of a person from whom a danger is posed to national security to the administrative detention of a person from whom no danger is posed to national security is not a "quantitative" transition but a "qualitative" transition. The state detains, via the executive branch, a person who committed no crime, and from whom no

danger is posed, and whose entire "wrongdoing" is in being a "bargaining chip". The harm to liberty and dignity is so substantive and deep, that it is not to be tolerated in a liberty and dignity seeking state, even if the rationales of national security lead to undertaking such a step. My colleague, Justice Cheshin, has already discussed that as to regulation 19, of the Defence (Emergency) Regulations, 1945 the basic concept is that "every person bears the weight of his own offense and each person shall only be put to death for his own crime . . . there is no punishment without warning and no one but the offender is reprimanded" (HCJ 2006/97 *Ganimat v. Central Command General Uzi Dayan* [17] at 654). A similar approach is to be taken as to administrative detention. Each person will be detained based on their wrongdoing and each will be held in administrative detention based on their offense. One is not to detain in administrative detention any other than one that himself poses a risk, with his own actions, to national security. This was the situation prior to the legislation of the Basic Law: Human Dignity and Liberty. This is certainly the case after this basic law was passed, and raised human dignity and liberty to a constitutional-supra-statutory level. It is true, the Detentions Law is not being subjected to constitutional examination relative to the basic law (due to the preservation of laws provision: section 10 of the Basic Law), but the provisions of the Detentions Law must be interpreted against the background of the Basic Law (see ADA 4/94 *Ben Horin v. State of Israel* [18] at 333-335). This interpretation leads to the conclusion that it is not to be determined that the (objective) purpose of the Detentions Law is to enable administrative detention of a person who himself does not pose a risk. Indeed, the harm to basic human rights from administrative detention in which a detainee – who himself poses no risk – serves as a bargaining chip is so severe, that only a provision in the Detentions Law which would explicitly establish the statute's applicability to one from whom no danger is posed to national security – a provision whose constitutionality would need to be examined of course against the criteria of the Basic Law – could lead the interpreter to the conclusion that the law was intended to enable administrative detention of this type. Indeed, in a comparative perspective, it appears that there is no state in the Western world, which makes use of administrative detention of one who does not himself pose a risk to national security.

20. Second, holding people as "hostages" – and this term also includes holding people as "bargaining chips" – is prohibited by international law (see article 1 of the International Treaty against the Taking of Hostages (1979); article 34 of the Fourth Geneva Convention, 1949). Indeed, I am willing to presume – without ruling on the matter – that there is no such prohibition in customary international law. I am also willing to presume – without ruling on the matter – that the conventional prohibition on taking hostages does not bind the State of Israel in the domestic law of the State absent its application in state law. One way or the other, it is presumed that the purpose of the law is, *inter alia*, to fulfill the provisions of international law and not to contradict it (see CrimA 6182/98 *Sheinbein v. Attorney General* [19]). There is a "presumption of accord" between public international law and local law (see HCJ 279/51 *Amsterdam v. Minister of the Treasury* [20] at 966; CrimA 336/61 *Eichmann v. Attorney General* [21] at 2041; CA 522/70 *Alkotov v. Shahin* [22] as well as A. Barak, *Interpretation in Law*, Vol. 2 (1994) [36] at 576). Application of this presumption under the circumstances in this case strengthens the trend which arises from turning to the objective purpose of the law.

21. We have reached the end of our road: "the legislator's intent" (the subjective purpose) does not take a stand on the question that is bothering us. Not so the "statutory purpose" (objective purpose). This leads to the conclusion that the purpose of the law is to apply to situations in which the administrative detention is required due to danger posed by the detainee himself. In this situation, in which we must search for the overall purpose of the Detentions Law on the basis of both purposes – while giving preference to the subjective purpose if it clashes frontally with the objective purpose – we must reach the conclusion, that the purpose of the Detentions Law was to apply to the detention of a person from whom himself a danger is posed to security, and not beyond this. This purpose establishes the (legal) meaning that will be given to the Detentions Law. This (legal) meaning does not extend over

the entire (textual) meaning of the statute (see HCJ 4562/92 *Zandberg v. Broadcasting Authority* [22] at p. 811). A person from whom himself no danger is posed and who is only a "bargaining chip" is not to be detained. Having reached this conclusion, I would like to make three comments.

22. First this conclusion contradicts the conclusion I reached in the judgment the subject of this petition. Meaning – I changed my mind. Indeed, since the handing down of the judgment -- and against the background of the further hearing itself – I have not stopped questioning myself as to whether my approach was properly based in the law. I am not of those who hold that the finality of a decision attests to its correctness. Any one of us may err. Our professional integrity requires that we admit our errors if we are convinced that we in fact erred. (See CA 243/83 *Jerusalem Municipality v. Gordon* [24] at 136). "True and stable – True is preferable" (President Smoira in CA 376/46 *Rosenbaum v. Rosenbaum* [25] at 253). These words were said as to the power of the Supreme Court to deviate from its precedents. This question does not arise before us as we find ourselves in the process of the further hearing which establishes a formal framework for revocation of a decision that was decided and is not in accordance with the law. However, these words are relevant to each and every judge, who struggles with himself and examines his decisions. In our difficult moments when we question ourselves the North Star which should guide us is the uncovering of the truth which leads to the realization of justice in the framework of the law. We must not entrench ourselves in our previous views. We must be prepared to admit our error. Self-reflection in the case before us is not easy. Balancing is not a mechanical act. I understand the hearts of my colleagues who continue to hold that the Detentions Law also applies to a detainee who serves as a "bargaining chip" without any danger being posed by him to national security. This time I shall not be able to share their view.

23. Second, I am aware that this decision does not make it easier for the State in its struggles against those that rise up against it. Detaining a detainee – from whom himself no danger is posed to national security – in administrative detention as a "bargaining chip" may on occasion be an efficient means of advancing the State's security. But not every efficient means is lawful. I can only repeat what I have said in another context:

> "We are aware of the fact that this judgment of ours does not make coping with this reality easier. That is the fate of democracy that not all means are legitimate in its eyes and not all methods which its enemies undertake are open before it. More than once democracy fights with one hand tied behind its back. Despite this, democracy has the upper hand, as protection of the rule of law and recognition of individual liberties, constitute an important component in its conception of security. At the end of the day, they strengthen its spirit and its power and enable it to overcome its difficulties." (HCJ 5100/94 *the Public Committee against Torture v. Government of Israel* [26]).

These words are relevant to our matter as well.

24. Third, I am aware of the suffering of the families of prisoners and missing persons from the IDF. It is heavy as a stone. The passage of years and the uncertainty wound the human spirit. Even more painful than this is the situation of the prisoner who is held in secret and in hiding, ripped from his home and homeland. Indeed, I am not oblivious to this pain, together with the prime interest of the State of Israel in returning its sons to its borders. It did not lift from my heart when I handed down my decision in ADA 10/94 [1]. It has not lessened from then to today. The human and societal tragedy of prisoners and missing persons is carried daily on our shoulders. However, as important as the purpose is of the release of prisoners and missing persons, it is not sufficient – in the framework of the petition before us – to legitimize all means. It is not possible – in the legal situation before us – to right a wrong with a wrong. I am confident and certain that the State of Israel will not be still and will not rest until it finds a way to solve this painful problem. As a state and a society, our comfort is in the fact that the way to the solution will suit our foundational values.

25. Before concluding, I would like to comment that were I of the opinion that the Minister of Defence had the authority to issue a detention order against a detainee from whom no danger is posed to national security, I would rule in the case before us, that the use of the discretion of the Minister of Defence in this case, was not lawful. Administrative Detention cannot go on endlessly. The more the period of detention that has passed lengthens, so too are weightier considerations needed to justify an additional extension of the detention. With the passage of time the means of administrative detention is no longer proportional. The placement of the "breaking point" changes with the circumstances. It is all dependent on the importance of the purpose that the administrative detention seeks to achieve; it is all conditioned on the degree of probability of achieving the purpose by the use of detention and the degree of suitability of the administrative detention to achieving the purpose; it is all tied to the existence of alternative means to achieving the purpose whose harm to individual liberty is lesser; it is all derived from the severity of the harm to individual liberty against the background of the appropriate purpose which is sought to be achieved. Indeed, it is a matter of a totality of considerations which change from matter to matter and time to time.

26. The totality of factors points to the fact that the continued detention of the petitioners is not proportional. Today there is not a near certainty or even a reasonable possibility that the continued detention of the petitioners will bring about the release of the prisoners or missing persons. Due to the long time that has passed since the detention and the absence of any real data in this matter, the probability that the continued detention will indeed bring about the release of prisoners and missing persons is very low. A possible opening in the negotiation which the respondents described in the supplementary notice – does not change this assessment. In my view, there has not been presented before us – not even in the discussions behind closed doors – a factual foundation according to which it could be said today that there is a near certainty (or reasonable possibility) that the continuation of the administrative detention will bring about advancement of the release of the Prisoners or missing persons. All that has been brought before us is theories and wishes, whose degree of probability is increasingly diminishing with the years and today hangs on by a thread.

In conclusion, since the respondent does not claim that there is a lawful means of detaining the petitioners except by way of administrative detention according to the Detentions Law, and since we reached the conclusion that according to the Detentions Law there is no authority to detain a person from whom no danger is posed to national security, it is concluded that the respondent does not have the authority to hold the petitioners in detention.

The result is that we grant the petition, and declare that the respondent is not entitled to detain the petitioners by authority of the Detentions Law. Absent any other grounds for their detention, the petitioners will be released from detention and arrangements will be made immediately for their release from detention and return to Lebanon.

Justice T. Or

I agree.

Justice E. Mazza

I agree.

Justice I. Zamir

I agree.

Justice M. Cheshin

In the north of Israel battles are taking place – land battles and battles from the air. These are not couch-battles. These are not battles of words. These are real battles, battles in which fighters are killed and wounded, young men-fighters and adult-fighters. One who is killed in these battles is as one who was killed in war; in a war in its simple meaning and in a war as defined by international law. One who dies - dies, whether fighting in a war as defined by international law and whether fighting in these battles that are not a war as defined by international law. This is so for one who is killed and this is so for one who is wounded. In war – or in battles that are not war – it also happens that members of one camp fall in the hands of the other camp. And when the war or the battles are over (without a definitive victory) – or possibly by agreement in the course of the war or the battles – the battling sides exchange those that fell in their hands from the other camp. And sons return to their homeland.

The fighter Ron Arad fell in enemy territory, was caught by the enemy and was held – is held? –by our enemies as of today, the *Hezbollah*. The petitioners, member-fighters of the *Hezbollah*, are held in our hands. Against this background the State tells us: when Ron Arad is returned to us -- or when the *Hezbollah* informs us of his fate, if he is not in their hands – the petitioners will be returned to their homes, to the hands of the *Hezbollah*.

In principle, I share this position. This is the beginning - This is also the end. And if I must discuss that which is between the beginning and the end – and explain and explicate that which is obvious to me, meaning: from where have we acquired the right to hold on to enemy fighters until the redemption of our fighters – I will do my best to explain and explicate.

2. We are dealing with the provision of article 2 of the Emergency Powers (Detentions) Law 5739-1979 (hereinafter we shall refer to this law as – "the statute"), which establishes and instructs us as follows:

> Detention Order
>
> 2 (a) Where the Minister of Defence has a reasonable basis to assume that reasons of national security or public safety require that a certain person be held in detention, he may, with an order bearing his signature, order the detention of such a person for a period that will be specified in the order and which shall not exceed six months.
>
> (b) Where the Minister of Defence has a reasonable basis to assume, on the eve of the expiration of an order based on subsection (a) (hereinafter – the original detention order), that reasons of national security or public safety continue to necessitate holding the detainee in detention, he may, with an order bearing his signature, order, from time to time, the extension of the validity of the original detention order for a period which shall not exceed six months, and the law as to the extension order is as the law of the original detention order in all aspects.

The main points are found in the opening of article 2(a) [like in the opening of article 2(b)], according to which the Minister of Defence is authorized to order the detention of a person when he has a reasonable basis to assume that reasons of national security or public safety necessitate detaining that person. The authority of the Minister of Defence will arise, therefore, when the following two conditions are cumulatively met: the one is that there is a situation which falls within the scope of the concept "national security or public safety" and the second is that the Minister of Defence has a reasonable basis to presume that detaining that person is necessitated by that situation. Let us review these conditions, in order, and one at a time.

3. As to the subject of "national security or public safety": there is not the slightest doubt in my mind – not even a doubt as slight as the shadow of a bee in flight – that the purpose of the return home of prisoners and missing persons from among our fighters is at the deepest core of the concept of "national security". It is for good reason that the imperative of redemption of prisoners was established – and it is a command of the highest degree –for indeed all of Israel (and in our matter: not only Israel) are responsible for one another. The strength of an army is in the comradery of fighters, and the comradery of fighters is made up of a single unit, in times of battle and when a fighter falls in enemy captivity. And in the words of the three musketeers, as Alexandre Dumas wrote: "Tous pour un, un pour tous". The fighter will fight knowing that he is not alone, and that in times of need his friends will go to his rescue. We are commanded and insistent not to leave the wounded in the field, and just as with the wounded we will not settle down until our prisoners have been released from their imprisonment. Fighters are like rock-climbers tied one-to-the-other by ropes and by fate and a climber who lost his grip and his body is thrown into the abyss, will be saved by his friends. Such is the climber, such is the fighter. And this is national security.

4. And as for the second condition for detention: does the Minister of Defence – in principle -- have a reasonable basis to assume that the holding of the petitioners in detention is necessitated by the need to release Ron Arad from his imprisonment? As for myself there is not a slight doubt in my mind that indeed it is so. This conclusion is, in my opinion, self-evident, when we know that the petitioners have fallen in our hands and they are member-fighters of the *Hezbollah*, meaning, ones who counted themselves in fact with the enemy army. Knowing this, we say thus: Ron Arad was held – is held? – in the hands of the *Hezbollah*; the petitioners are held in our hands; if the enemy will release Ron Arad – or at the minimum, inform us of his fate –those held in our hands will go free. Any other conclusion is simply not acceptable to me. Shall we accept that the enemy will hold our fighters but we shall not be permitted to hold their people until they release our fighters? Shall we agree to this interpretation of the law? For myself I say: I have difficulty with this, great difficulty; I do not agree and will not agree. Indeed, my view is that where the enemy holds our fighter in their hands, reasons of national security require us to hold the enemy fighter in our hands until the exchange. Ron Arad fell in enemy hands in an act of war, and the petitioners – member fighters of the enemy – also fell in our hands in an act of war. An act of war will be held up against an act of war. I do not know otherwise. Even if we said that the law is open to two interpretations – and what law is not open to two interpretations? – our interpretation, in my opinion, is a just, correct and proper interpretation.

5. There is no substance to the claim that the petitioners do not pose a danger if they are released. The petitioners as fighters of the *Hezbollah* tied their fate with Israel's war with the *Hezbollah*. In this way, the matter of the petitioners differs from the subject of the demolition of the homes of terrorists, a subject that in its time came up frequently on the agenda of this court. Indeed, it is a supreme value for us that every person bears the weight of his own offense and each person shall only be put to death for his own crime. For this reason I have also held – in a minority-minority opinion – that a military commander does not have the authority to demolish a house in which the family members of a terrorist-murderer live, even if said terrorist lives in the same house. (See HCJ 2006/97 *Mison Mahmet Avu Fara Ganimat v. Central Command General Uzi Dayan* [17] at 654 and the references there). But

specifically for this reason of "each person bears the weight of his own offense" the matter of the petitioners differs from the matter of the families of the terrorists; the petitioners as fighters for the enemy, and not as families of the terrorists – knowingly and intentionally tied their destiny to the destiny of the fighting.

6. The state does not claim that there is another legal source – beyond the statute – for holding the petitioners in detention, neither in domestic law nor in international law (as for the view that holds that the statute does not give power nor grant authority to detain the petitioners, but that there is authority – albeit qualified authority – to detain them in international law, see: Orna Ben-Naftali and Sean S. Gleichgevitch, 'Missing in Legal Action: Lebanese Hostages in Israel' [49] esp. 244-248, 250-251 (2000)).

The question before us, which will be before us and will not let up: If the State is obligated to release the petitioners from detention how shall we fight our enemies? They will hold our people and we shall not be permitted to hold their people? Where the statute, according to its language – and in my view: also its spirit –also applies to people like the petitioners? The (historical) determination that the statute was not intended at its core to catch in its net scenarios such as the one in front of us, does not add or detract. Indeed, a law – any law – is a living creature within its environment; and just as a living creature adapts itself to its environment – otherwise it will not live – so too the law will do its best – and we will help it – to be integrated and interlaced in its environment and to be interpreted against the background of the living. Therefore, the question that is asked is three-fold: one, whether the language of the statute relates to our matter? Second, whether the purpose of the statute is our purpose? Third, whether the interpretation of the statute as permitting the holding of the petitioners – as a matter of principle -- does not cause deep wounds to human rights, does not undermine the most basic of the principles on which the social and legal community is based in our community? My answer to the first two questions is an adamant yes: the language of the statute relates to our matter and the purpose of the statute is our purpose. My answer to third question is an adamant no: our detention of prisoners, as a matter of principle, does not wound human rights.

7. The petitioners joined the ranks of the enemy in actuality, and describing them – during the time in which we are detaining them – as "hostages" or "bargaining chips" – terms which reek of a foul smell –can corrupt the language and the truth. I resist this description with all my strength. First of all, what a "bargaining chip" is I do not know, nor have I heard of a game of "bargaining chips". A person is a person; a chip is a chip; and a person is not a chip. Never, ever will a person be as a chip. The petitioners too are persons and not chips. And I have had difficulty understanding how the petitioners are chips. As for "bargaining", I also have difficulty with this term, as, we are not dealing with bargaining. If only Ron Arad will be returned to his home – or we will be informed of his fate –the petitioners will be returned to their homes. The petitioners are also not "hostages", not by the definitions accepted in international law, or by any other definition. We all know what "hostages" are. "Hostages" taken by Germans in the Second World War, and "hostages" in bank robberies. We have never heard that those who number among warring parties and fall in the hands of the enemy are "hostages", even if they are held until the conclusion of the hostilities or until a release agreement. Indeed, just as the holding of prisoners of war is regarded as holding for a legitimate and proper purpose – and thus prisoners of war are not described as "hostages" or "bargaining chips"—so too by way of parallel are the fighters of the *Hezbollah*, whom we hold for the legitimate and proper purpose of national security. The petitioners have none of the indicators of a "hostage" or a "bargaining chip" and thus we know that they are neither a "hostage" nor a "bargaining chip".

We should remember and remind that the petitioners are not innocent villagers forcibly taken to a land not theirs. Indeed, the petitioners were none other than simple fighters in the ranks of the *Hezbollah*. However, they counted themselves with the enemy fighters and therefore they are neither "hostages" nor "bargaining chips".

8. Even if the Minister of Defence has the authority to detain the petitioners – and that is my view – this authority must meet the requirement of proportionality. Does the detention of the petitioners meet the requirement of proportionality? Since the petitioners were detained – years ago – no contact has been made with the *Hezbollah* in the matter of Ron Arad. For this reason, I was of the opinion – when the sessions before us began in the further hearing – that the time frame of the detention of the petitioners, under the circumstances, exceeded the limit of proportionality, and thus passed the limits of permitted according to the law. If we had determined the matter at that time, then at that time I would have voted for the release of the petitioners from detention, if only due to the deviation of the detention from the proper proportionality.

However, in the last two sessions held, it turns out that lately – after all those years, and after the decision before us in the further hearing – there is a shift in the position of the *Hezbollah*. Contact has been made – albeit indirect contact – between Israel and the *Hezbollah* and in this matter the leader of the *Hezbollah* even said things in public. Following that contact, the head of the Mossad for Intelligence and Special Tasks declared before us – in answer to a question and after describing certain developments that occurred -- that in his opinion and in the opinion of his counterpart in a friendly country that is helping Israel as a mediator, the solution to the release of Ron Arad is found in the hands of the *Hezbollah*. Indeed, it is a matter of an assessment, an assessment and not knowledge, but as an assessment by a senior professional dealing with the matter, it is proper that we accept it if only for a brief period of months. Indeed, my opinion is that the State is entitled that we grant its request; and that we enable the continued detention of the petitioners for now, if not for an extended period.

Having said what I have said, it is clear that I am disagreeing with the words of President Barak in paragraph 26 of his opinion, as to the conclusion necessitated by the quality of the likelihood that the continued detention of the petitioners will bring about a change in the stance of the *Hezbollah*. Indeed, such is the case: there is no proximity to certainty that there will be progress with our contacts with the *Hezbollah*; however the assessment of the head of the Mossad -- if only an assessment – appears to me to be worthy of proper consideration on our part.

9. Until today we have held, over and over, consistently and without reservations, that the petitioners, them and those like them, are held in administrative detention lawfully. See paragraph 9 of the opinion of President Barak in the decision that is before us for review, and the references there. So too it has been held in several decisions by President Shamgar and Justices G. Bach and Z. Tal. Joining those three – in the judgment under review – were President A. Barak and Justice Y. Kedmi. We have had, then, at least five of our colleagues that have – explicitly -- been of the opinion to date that the law holds the power to authorize the Minister of Defence to hold the petitioners in administrative detention. And here now, come the nine of us, and by a majority of 6 to 3 we decide as we have decided. Will this be our way, that when we wish to we broaden and when we wish to we abbreviate, and all within a short period of years? We would have agreed to the statement "Truth and stable – Truth is preferable" if we only knew what the truth was. And as we know that none of us has the stone of wisdom that will show him the truth – the one and only truth – we will further know that each and every one of us will live with their own truth. I have spoken my truth and have not heard an answer to my words, not from my colleagues and not from those writing the articles that criticized the original decision of my colleague the President. And let us know: the meaning of this judgment of my colleagues is that the State will no longer be able to lay its hands on fighters of the *Hezbollah* as it did in the matter of the petitioners. I do not accept this conclusion at all.

10. Last word: the differences of opinion that have emerged between us are not differences of opinion between those who have taken upon themselves the task to protect human rights and the dignity of the individual and those who surrender the right of man and the dignity of the individual for the good of the public, seemingly. We have seen the petitioners and we have gone beyond this and read words that they have written to us by their own hand. Anyone who

read those words, something would move in their hearts. We have seen the petitioners – Ron Arad we have not seen. We have not read words he has written us, as he has not written to us. But this we knew and know: Human rights and individual dignity Ron Arad has also earned. Not just the petitioners. And we owe a heavy debt – all of us – to Ron Arad. A very heavy debt.

11. My view is, therefore, that it is proper for us to enable the detention of the petitioners, while not for a long period. If my view were heard we would reassemble in approximately two months to hear from the State whether there is anything new.

And so it was after this.

12. I read the opinions of my colleagues, Vice-President S. Levin and Justice Dorner, and I was sorry. I was sorry not because they disagree with my view – or that I disagree with their view – as I knew this before I wrote what I wrote. I was sorry because I have not succeeded, it appears, in explaining those things I wished to explain. I will repeat those things I said and add to them.

13. My colleague the Vice-President establishes that the respondent does not hold the authority by law to detain the petitioners and the reason is:

> "A different answer would authorize the respondent to detain the family members, relatives and friends of a person, where there is a reasonable basis to assume that he may endanger national security, only in order to pressure him to talk or to give himself or others in, even if there is no fault that can be attributed to his family, his relatives, or his friends... Indeed, the simple construction of the expression "national security" or "public safety" is that it does not refer other than to the detention of one from whom the danger to national security or public safety stems ."

In these words the Vice-President repeats words that Justice Dorner stated in her opinion in the judgment under consideration, while disagreeing with the original position of President Barak. And these were her words (para. 2 of her judgment):

> "The position of my colleague President Barak leads to interpreting the law as enabling detention, for an unlimited time period, of any person, as long as the detention has a benefit, if only indirectly, for national security. Such sweeping and unlimited authority is not even recognized by the laws of war in the realm of international law. I cannot recognize it in the realm of Israeli law."

These words are true in and of themselves; it is true that the Minister of Defence does not have authority according to the law to detain "the family members, relatives and friends of John Doe" (as in the words of the Vice-President) or to detain "any person" (in the words of Justice Dorner). But the petitioners are neither these nor those, as I have tried to explain in my opinion. Their status is the status of quasi-prisoners, and to this I have not heard a response from my colleagues.

14. In her opinion my colleague describes the petitioners – again and again, more and more – as bargaining chips and hostages; she does not even put these terms in quotation marks. I deny these things with all my might. I have discussed this in my opinion, and cannot say more than I already have. I have read the words of my colleague; and I have not heard an answer to my words.

15. My colleague goes on about international conventions which prohibit holding hostages. I agree to all of her words, but the petitioners are not hostages and thus those conventions have nothing to do with our matter.

16. Last words: in her judgment the subject of the further hearing my colleague closes the pathway for detaining the petitioners by authority of the statute. In her present opinion my colleague also closes the pathways of international law as a source of authority for detention. Meaning: they will hold our people and we will not be allowed to hold their people, if only to exchange people for people. I am sorry that my opinion is a minority opinion.

Vice President S. Levin

1. The only question to be decided before us is, whether the Minister of Defence is authorized by power of section 2 of the Emergency Powers (Detentions) Law 5739-1979 (hereinafter: "the statute"), to order the administrative detention of a person for the single reason that the detention has the potential to advance the release of prisoners or missing persons from among the security forces.

I agree with the President, that the authority is not granted to the respondent. A different answer would authorize the respondent to detain the family members, relatives and friends of a person, where there is a reasonable basis to assume that he may endanger national security, only in order to pressure him to talk or to give himself or others in, even if there is nothing that can be attributed to his family, his relatives, or his friends. Moreover, section 2(a) of the statute also covers a situation which relates to "public safety". Is it possible to interpret the statute, such that it affords the authority the power to detain the family members of a criminal offender, who endangers "public safety" without attributing anything to them? Indeed, the simple construction of the expression "national security" or "public safety" is that it does not refer other than to the detention of one from whom the danger to national security or public safety stems himself.

2. Mr. Nitzan, on behalf of the State, has not brought before us any other legal source in domestic or international law which justifies the continued holding of the appellants in detention, apart from the statute, and we are not permitted to search for such a source on our own initiative. I am aware of the reality pointed to by my hon. colleague justice Cheshin, that we are all, of course, aware of, according to which the fighter Ron Arad has fallen in the hands of an enemy, who is of the view that the laws of war do not apply to him and who does not see himself as subject to the rules of international law. It would be naïve and even dangerous to keep from the State an appropriate means of freeing its fighters. However: the statute has not placed such a tool at its disposal; in order to place it as its disposal, it requires, in my view, a different source or grounds for its authority in primary legislation on a matter that prima facie has significance of a primary nature. Compare HCJ 3267/97 [27] and HCJ 5400/94 [26]. The State has not legislated a suitable statute, and as said has not pointed us to another source on which the power to detain the appellants is based.

For this reason alone, I have agreed to the grant of the appeal.

Justice Y. Kedmi

Introduction

1. I have gone back and examined my position and have not seen fit to change my approach according to which the holding of the petitioners in detention is within the authority established in section 2 of the Emergency Powers (Detentions) Law 5739-1979 (hereinafter: "the statute"). On this matter, I am going along the path that was forged in its day by President Shamgar in ADA 1/91 *Plonim v. Minister of Defence* [28] according to which the redemption of captives and return of missing persons are reasons of national security as per their meaning in section 2 of the said law; and I adopt the words that were said in this context later by Justice Tal in ADA 1/94 *Plonim v. Minister of Defence* [29], as detailed in the judgment of President Barak in ADA 10/94[1]. President Shamgar and Justice Tal were joined by the Justices who sat with them on those cases; and Justice Bach decided in the same vein – in ADA 1/93 *Plonim v. Minister of Defence* [30].

And this is how this was expressed in the judgments of President Shamgar and Justice Tal:

President Shamgar:

> "the routine grounds for detention by authority of said law is indeed a matter of the security risk that arises from the future anticipated activity of a person whose detention is being weighed at that time. However, reasons of national security do not embrace only the prevention of hostile intelligence or terrorist activities."

And later on:

". . . and taking effective steps to release hostages, who fell in enemy hands, are, in my view, reasons of national security."

While as per Justice Tal:

"I am also of the view that the rationale for release of our captives is a quintessential rationale of national security. It is well known that army morale is of utmost importance for its effectiveness. The confidence of a soldier that the State will not spare any effort to free him if he falls captive, is an important component of his morale, his dedication and his willingness to take risks"

And later on:

"Therefore, I have no doubt that considerations of redemption of prisoners are considerations of national security."

National Security and the Value of Redemption of Prisoners

2. "Redemption of prisoners" is one of the basic values of the Jewish people; and it appears that none more than it demonstrates the basic responsibility of everyone in this nation for the liberty of their brothers, in the sense that all of Israel is responsible for one another. That is a national duty of the first degree that each of us – and all of us together – is bound by. It was such in the period in which we were exiled from our land; and there is no measure to its significance in an era of gathering of exiles and return to our homeland. By its nature, this duty constitutes a basic component of the "glue" which unites and protects us as a nation; and there is no other value as necessary and vital to our national security. The knowledge that the nation and the people are behind each of our fighters, that none of them will be abandoned in the field and that no effort will be spared in order to return home sons who have fallen in the prison of the enemy – whatever it may take – to their homeland, is at the basis of the might of our security forces; and grants those who assure our existence, the valor and courage necessary to fulfill their duties.

Under these circumstances, there is no need to go on in order to clarify: first – the value of redemption of prisoners – which as said, is one of the basic values of the Jewish people – is counted among the components of the nation's security; and second – blocking the road to meeting the requirements of this value, is equal to harm to national security. Our enemies are aware of the strength and contribution of said value to security. Until the case brought before us, our commitment to the value of redemption of prisoners has served as a means for our enemy to extort a "price"; while in this case a real effort was made by them to undermine the faith in this obligation and in this way to cause damage, direct damage, to a vital component of our security.

The Normative Framework: Detention Authority

3. The petitioners are held in detention by power of the provisions of section 2(a) of the statute, of which this is the language inasmuch as it relates to our matter:

"2 (a) Where the Minister of Defence has a reasonable basis to assume **that reasons of national security** . . . **necessitate that a certain person be held in detention**, he may. . . order the detention of that person. . ."[emphasis mine, Y.K.]

The basis for those who negate the authority to detain the petitioner by authority of said section 2(a), is the approach which says: that the detention authority established in this section relates only to the detention of a person who constitutes – himself – a danger to national security; when his detention serves as a means to prevent the coming of the – as said, personal – danger which would, by nature, be entailed in his release. I do not accept this constricting approach; and to my approach, it does not arise from the language of the statute or the purpose of its legislation. Indeed, in most of the cases in which use has been made to date of said detention authority, it was a matter of one who himself constituted a – personal – danger to national security. Indeed, this fact, on its own, is not sufficient basis for said approach. Determining the scope of the authority is properly done based on the text of the law and its

purpose; when of course one is not to ignore the duty not to infringe on man's basic right to liberty, by means of the detention, except to the extent that there is no other recourse.

The text of the statute refers to the detention of a "certain person" for "reasons" of national security [which "necessitate" holding a person in detention], without any characterizing addition to "reasons" or the character of the "detainee"; and it is not possible, therefore, to base on the language of the statute the stance that it is a matter only of "reasons" which are based in "personal dangerousness" of the detainee. To my approach, this is sufficient to undo the foundation of the construction which limits the detention authority only to those who constitute a danger themselves; had it been the will of the legislator, it can be presumed that he would have given it explicit expression in the language of said section 2(a), or in another clarifying provision.

The absence of "restricting" words around the phrase "reasons" and particularly around the phrase "a specific person" -- such as: "reasons of **risks** to national security" and "a certain person who **endangers** national security" teaches that the said constricting meaning was not being considered by the legislator. The general language that was used in said section 2(a) tells us that the legislator was of the opinion that it is to be left to the court to determine the extent of the detention authority, according to the range of "reasons" that the changing security reality presents; and this, in order for it to be able to apply it in **every place** that reasons of national security necessitate detention of the same person whose imprisonment can fulfill those "reasons". The expression "for reasons of national security", when it stands alone without a characterizing addition, reflects an intention to protect national security from **any** "**harm**", in the broader meaning of the term; and restricting the detention authority based on this expression only to those who "personally" endanger national security, deviates from "construction" of what is written and spills over to add limiting words that are not found in it.

This situation is also necessitated, in my view, by the purpose of the law. As a rule, the purpose is learned, *inter alia*, from the words that were said in this context in the framework of the legislative process, whether in the explanatory notes which accompanied the draft law and whether in the *Divrei Knesset* which reflect the discussion which preceded its passing. I am not oblivious to the fact, that in the *Divrei Knesset* we find reference to the dimension of the personal dangerousness; and that they do not have an explicit reference as to its application in other circumstances as well. However, in the framework of the reference, it was not said that the dimension of personal dangerousness will be the only – and necessary -- criterion to apply the provisions of the law; and under the circumstances, it appears that the reference to the said dimension is anchored in the fact that "personal dangerousness" is a clear concretizing example for the use of the detention authority according to the statute. That is all, and no more.

Review of the *Divrei Knesset* in their entirety – and in their light, of the text of the statute – shows that the purpose of the legislation was: creating an emergency tool for protection of national security (or "public safety", which is not the issue here), in circumstances in which less extreme measures are not useful; and this through the detention of a person in administrative detention, as a last resort for safeguarding security from harm that the detention has the ability to cope with. Administrative detention is by its nature a "preventative" detention which is characterized by the fact that it is intended to **prevent** harm and not **punish** for it. But, the fact that the detention is "preventative" by its nature, does not necessitate the conclusion that the single criteria for applying it is rooted in the "personal" dangerousness of the detainee to national security; and its "preventative" character does not rule out making use of it as a means of applying pressure on those who wish to harm security, by blocking the road to redemption of prisoners, in order to change their decision.

Punitive imprisonment – as opposed to preventative – by its nature refers to the denial of the liberty of one who bears responsibility for committing an act that carries a punishment. Therefore, only one who bears personal responsibility for committing that act will be imprisoned; since the rule is that each person will be punished for their crime. But, when it is

a matter of preventative detention it is not the "crime of" the detainee that is at the basis of his detention, but rather the ability of the detention to prevent harm to national security. As such, there is nothing to prevent the "crime of" another being at the basis of the detention; as long as – as will be explained later –the detainee links himself by his behavior or actions to the crime of the "other".

According to my approach, therefore, one is not to rule out circumstances, in which reasons of national security necessitate detaining one whose imprisonment is necessary as an emergency means to advance implementation of the value of "redemption of prisoners". This, subject to the fact that – as is required by the Basic Law: Human Dignity and Freedom – the right of every person to liberty rules out detaining him without the existence of a "link" between his behavior and actions and the purpose of the detention.

Under these circumstances, although it is a matter of preventative detention – as opposed to punitive – I agree that not **every person** can be detained by authority of the law, but only one who "links" himself with his behavior to the grounds for his detention. As opposed to those who rule out the detention authority as to one who does not constitute a "personal danger" to security, it is sufficient, according to my approach, for there to exist a "link" – willingly and by free choice – between the detainee and the grounds and purpose of the detention; and there is no need for the detainee – himself -- to pose a "security risk". Such a link is self-evident where it is a matter of one who poses a "security risk" due to his own activity; while when it is not a matter of detention against the background of personal activity, such a "link" may be dictated by the existence of an organizational link between the detainee and the activities of others. This -- as derived from what has been written above – when that activity harms security, and the imprisonment of the detainee, given his link to others, is the last means left to safeguard against it.

In the case before us – as will be detailed below – the petitioners "linked" themselves to the grounds for their detention, in that they joined with the terrorist organizations in whose hands the navigator Ron Arad has fallen; and as such, have a link sufficient to hold them in administrative detention for the purposes of creating pressure on the leadership of their organizations to reveal what has become of him.

In conclusion, national security has many faces, and the law establishes administrative detention as a **uniform** emergency means to protect it, be the nature of the harm that it is dealing with what it may be. In such a situation when the law uses general wording which leaves room for broad construction of its application, we will miss the target of the purpose of the legislation – protection of national security – if we specifically choose a limiting construction.

It would not be superfluous to mention in this context that this is not a lone case where the law allows – in a time of emergency – taking emergency measures against persons to whom no personal action against national security is attributed, where the -- personal -- "crime "is rooted only in the existence of a "link" between them and those taking such action. Thus, for example, the law "reconciles" itself with the taking of deterrent measures – demolition of homes – against family members of terrorists, lest they give them shelter – in their homes – and this despite the fact that they themselves are not partners to the acts of the terrorists and their "link" to the harm to security is rooted only in their willingness to provide the latter with shelter as said. It appears, that without the existence of said "link", it would not be possible to apply the demolition authority to family members of terrorists according to the provisions of regulation 119 of the Defence (Emergency) Regulations 1945. As to this matter see the judgment of the President in HCJ 2006/97[17]. There it was said, *inter alia*:

> "We are aware of the fact that demolishing the structure damages the shelter of the first petitioner. . . this is not the purpose of the demolition order. It is not punitive. Its purpose is to deter. However, the result is difficult for family members. The respondent thinks that this is essential in order to prevent further injury to innocent people. He held that **pressure by families may deter the**

> **terrorists**. There is no total assurance that indeed this means is efficient, but in the framework of the **few means that remain for the State in order to defend itself** against "living bombs" this means is not to be derided." (Emphases mine – Y. K.).

Finally, I am not oblivious to the fact, of course, that there are rules for war – and one exists between us and the organizations which hold our navigator –and the law of nations determines the permitted and the prohibited and arranges relations between warring parties; and I am aware of the fact that as members of the community of cultured nations we are obligated by said rules, even where the opponent is not a nation but a terrorist organization that ignores those rules. However, in my view, in the context discussed here, our commitment to the rules of war does not deny the authority that the law grants as to detaining the petitioners where other means have exhausted themselves; and this, taking into consideration its purpose – preventing harm to national security – against the background of our basic commitment to the core value of redemption of prisoners.

From the General to the Specific

4. The petitioners number amongst the members of hostile terrorist organizations, which declared an all out war against Israel and do not recoil at any means to advance their issue. The navigator Ron Arad, the uncovering of whose fate is the purpose for which the petitioners are detained, fell in the hands of said organizations in the course of an operational activity. About a year after Ron Arad fell in the hands of those organizations all traces of him disappeared and a dark curtain was brought down on his fate, no information was given about him to his family or his nation and all efforts made in this connection did not bear fruit.

Distancing the petitioners from their families and holding them in detention was intended to create pressure on the leadership of said organizations – **of which the petitioners are members** – to change their decision and clarify where Ron Arad is held, what his fate has been since he fell in their hands. At the foundation of the detention of the petitioners are the following two things: first – the presumption that the desire to preserve their image as ones who are concerned for the welfare of their friends will motivate the leadership of the organizations to take action for the release of their friends; and second – and this appears to be primary – the presumption that the family members of the petitioners – as all family members – will apply heavy and weighty pressure to the leadership of their organizations, to remove the cover of secrecy that has been draped over the fate of Ron Arad and thereby bring about the release of their sons. If they cannot do this on their own, they will recruit the voice of the public in their country and outside of it to help them. From the private perspective the families of the detainees have gained – in fact –a "joint" interest in exposing what has happened to Ron Arad; under the circumstances, it was thought, that the families of the detainees would "cooperate" – for their own reasons – and contribute at least to opening a crack in the wall of silence behind which said organizations have entrenched themselves.

Under these circumstances, using the term "hostage" – which has been much used in the context being discussed here – is not suited to the holding of the petitioners in detention. At the core of the classic meaning of the term "hostage" lies -- the real and tangible – "threat" of harm to the bodily welfare and even the lives of those held as such, in order to prevent their "friends" from undertaking this action or the other in the framework of their ongoing activity. In such circumstances, the holding in detention constitutes a "fighting means" in the struggle between two opposing sides; when its illegitimacy is rooted, primarily in the inhumane threat it entails. While here: the petitioners are not subject to any threat; and their detention is not equated with the use of a "weapon" which requires the opponent to refrain from any activity or to change his ongoing activity.

The use of the term "bargaining chip" without a further clarification that the "bargaining" is none other than creating pressure to provide information, is significantly off the mark of the precise description of the manner of the detention of the petitioners. In its pure meaning "**bargaining chip**" constitutes an "asset" that one party holds in the course of "bargaining and

sale" with the goal of forcing the opponent to moderate his demands. Absent negotiation with those organizations, it is not to be said that we are "trading" in the petitioners. Meaning, according to my view, the petitioners are being held for one single purpose, and that is: moving the leaderships of the organizations with a connection to the matter – including states involved in the case – to open a portal in the wall of silence; and to hand over to the family, to the people of Israel and the entire world information as to the fate of our navigator. This is not a matter of "haggling" as to the conditions of the return of Ron Arad, but of "pressure" to expose details that have been hidden until now with a glaring degree of inhumanity.

Indeed, even when detention is directed only at creating pressure to expose details – when no risk to life or bodily wellness hovers over the petitioners – it contain, in itself, a severe injury to the liberty of the petitioners; and such injury, indeed, is not consistent with the humanistic principles of cultured nations and with the basic rules on which our state is founded. However, in my view, where a terrorist organization takes steps of heartlessness, cruelty and inhumanity, which are expressed in placing a complete black-out on the fate of a fighter of ours that fell in their hands in the course of an operational activity, a "balance" is necessitated on our part between, the basic humanistic principles in the struggle with enemies who are after our lives, and the interest of redemption of prisoners which is of utmost importance to us. Such a balance justifies and legitimizes holding in detention by law the fighters of a terrorist organization connected to the matter; when the purpose is applying pressure on the organization – via the families of detainees – to expose what has become of the fate of our fighter. This is the least – and in fact the entirety – that we can do, without causing an injury which exceeds the proper proportionality in our commitment to the humanistic principles of freedom and liberty. If we do not do this, we find that we are acting amiss toward our fighters and the security of our state; and at the same time, we encourage terrorist organizations to violate and shatter every basic human rule, even when this does not have the potential to contribute anything or half of anything to advancing its purposes.

One who joins a terrorist organization cannot claim to have clean hands and not to bear **personal responsibility** for the behavior of his leaders, in all that concerns the black-out that has been placed regarding what has happened to our navigator; and the claim cannot be heard from him, that he is to be related to as any innocent peace-seeking citizen who has been uprooted from his family and is held behind lock and key through no fault of his own.

In the clash between the injury to the basic right of every person to liberty and the injury that terrorist organizations cause to the basic human value of providing information as to a detainee in their custody the latter has the upper hand. **We have not demanded of the terrorist organizations to refrain from activity by "threat" of injury to "hostages" from among their friends; although they are ostensibly being held as "bargaining chips" we have not presented the petitioners as "assets" to be traded with another "asset"**. All that we ask is this: basic information as to what has happened to a fighter from among our fighters who has fallen in their hands.

Under these circumstances, the severe criticism directed against us by the petitioners and their families, needs to be directed at the leaderships of the terrorist organization which the petitioners joined and whose words and goals they adopted; when before their eyes must be the fact, that all that is being sought of their leaders, is limited, at the first phase at least, to providing information as to the fate of a fighter that has fallen in their hands.

As these words are being written, I am not oblivious to the fact that the definitions of the terms "hostages" and "bargaining chips" in the conventional international law arena have been broadened such that it is possible to include within them the holding of the petitioners in administrative detention for the narrow purpose stated above. This does not change my position which is rooted in construction of our domestic law; as for my view, in the special circumstances of the case, we are not obligated to apply the provisions of conventional international law, in the face of the shameful and inhumane behavior of the terrorist organizations who hold the key to solving the mystery of the "disappearance" of Ron Arad.

These organizations and their friends trample with an outstretched foot – by their behavior in this context –the rules of basic human behavior; and this is sufficient to prevent their friends – the petitioners – from raising their voices and crying out against the legality of their detention.

Conclusion

5. I accept that even for the above limited purpose there is a limit and a proportion to detention; and at a certain point in time, when it appears that holding the petitioners in detention is not effective, the foundation for its justification is undermined. When more than ten years of detention have passed, without any sign pointing to a change in the position of the organization to which the petitioners belong, in all that relates to removing the black-out from what has happened to our navigator, a heavy question mark is placed on the effectiveness – and therefore on the justification – of the detention. In these circumstances, an additional extension of the detention is conditioned upon bringing proof which points to the existence of a genuine, real, and tangible chance that continued detention is necessary for changing the stubborn position of the terrorist organizations in this episode. Absent such evidence, there will be no escape from the conclusion that the detainees are to be released, as their detention will have been proven to be useless.

And here, from the material brought before us in the two discussions that took place recently I have been impressed that there appear to be first signs of change as stated in the position of organizations related to the matter; and there is a real chance that the change will bring, finally, provision of information for which the petitioners are being held in detention. This fact has been supported – soon after the first of the two hearings -- in the words of the secretary of the *Hezbollah* organization, Sheik Nasrallalla, who said in the media: that "**I am sure and certain that the movement will discover what has become of Ron Arad's fate**. We have been following this matter with great seriousness and we are full of confidence and optimism"; and that "we are not giving up on achieving a result in the case of the navigator Ron Arad. We are following the matter and hope that **all the prisoners of the *Hezbollah* in Israel will be released**." (See for example the *Globus*: from January 21, 2000; emphases mine, J.K.).

Unfortunately, we have not heard in the last discussion held on this episode, of the hoped for breakthrough; and ostensibly this heralds retreat to the old position. However, I have been convinced that we must not rush to learn from the lack of advancement that real hope of achieving that breakthrough is lost; and this, taking into consideration that negotiation of this type is characterized by "ups and downs" which are directed at wearing down the opponent. As for myself, it appears to me, that the door to the negotiation is not closed; and it is proper to examine the effectiveness of the continued detention against this background. The significance of releasing the petitioners now is that we have reached the conclusion that there is no more use in holding them. The latest developments do not necessitate this conclusion: and if it turns out that we failed, where will we find ourselves.

If my opinion is heard, I would propose to my colleagues to delay the hearing one further time; and go back and hear from the security forces details as to the developments that will take place in said negotiation, in two months from today.

Justice J. Türkel

1. The path to the decision in the question before us was difficult and agonizing, simply put. From the start, when I read the judgment of the Supreme Court in ADA 10/94[1] which was placed before us in this further hearing, I was of the opinion – as was the minority opinion there, which is the majority opinion here – that the Minister of Defence is **not authorized** by power of section 2(a) of the Emergency Powers (Detentions) Law 5739-1979 (hereinafter: "the statute"), to order the administrative detention of a person in order to advance the release of prisoners and missing persons from among the security forces. However, "the wind turns and turns; round it the wind returns"(Ecclesiastes 1,6 [51]), and at the end of the road I found myself standing in the place where those holding the majority opinion there – which is the minority opinion here – stood, and similarly held by President M. Shamgar and Justices G.

Bach and T. Tal, in different decisions, that the Minister of Defence **is indeed authorized** to do so.

2. The primary reason for the change in my approach is that according to the objective purpose of the law, we have before us **two** reasonable constructions of the term "reasons of national security" from which a determination must be made.

One interpretation which emerges from the previous judgment of President A. Barak in ADA 10/94 [1]in which he said, *inter alia*, that: "it is true that the term national security can withstand many interpretations and many meanings" and that "I accept, in this matter, the position of the respondent, according to which just as the welfare of IDF soldiers frequently constitutes a consideration of national security, so too the welfare of missing persons and prisoners, including return to their homeland, constitutes a reason of national security." His conclusion there was that the severe damage to human dignity by the detention of the petitioners "is necessitated by the policy and security reality, and reflects the proper balance under the circumstances between the liberty of the individual and the need to preserve national security."

The second interpretation emerges from his opinion in the case before us, which was supported by five judges in this panel, and in it – valiantly and in open heartedness worthy of praise – he changed his mind and reached an opposite conclusion; meaning, that the purpose of the statute (the objective purpose) "leads to the conclusion that the purpose of the statute is only to apply to situations in which the administrative detention is necessary due to the danger posed by the detainee himself."

3. In determinations such as these, sometimes the legislator himself leads the way, as he did for example, in section 34u of the Penal Law according to which "where a law is subject to several reasonable interpretations according to its purpose, the matter will be determined by the interpretation that is most lenient with the one who is to bear liability according to that law." (On this matter see, *inter alia*, the words of President A. Barak on interpretation in criminal law in 6696/96 *Kahane Binyamin v. State of Israel* [31]; S.Z. Feller *Foundations in Criminal Law*, Vol. A, 1984 [37] p. 176 and further; M. Gur Aryeh, 'Proposed Penal Law (Introductory Part and General Part) 5752-1992' [45] at p. 9 and on). However, at times, the choice between interpretations is done according to the relative weight of the values which are placed on the scales, as in the case before us. As to this I stated elsewhere:

> "After all this, I wonder what is the point in trying to weigh the competing values in the scales of the law, or in trying to follow 'one of the paths of the law', when the weight of the values changes according to the person applying the law, when it is possible to choose between several paths and when one path may even lead to different results. Even in the opinions of those of my colleagues who are of my opinion, more than one 'legal path' is presented whereby one may reach the result that they reached, which is no less 'legalistic' than the paths followed by those who disagree with them. If this is the case, what did those who followed this path achieve thereby?
>
> Moreover, if there is indeed more than one 'legal path', how does one choose between the different paths and the different destinations to which each path leads? Is this choice also dictated by 'the law'? In complex issues, like the one before us, there is no legal geometry that necessitates unequivocal results. Unlike my colleagues who think this, I cannot point to **one** solution, or to a 'more correct' solution, that can be applied in the case before us. The opinions before us illustrate well how different values can be put in the place of each variable in the chosen formula. Instead of the findings on which judges espousing one viewpoint rely, one can reach the opposite findings."[CFH 2401/95 *Ruth Nahmani v. Daniel Nahmani* [32] at 739, see also pp. 734-741]. (See A. Barak, *Interpretation in Law*, Vol. 1, *Rules of General Interpretation* (1994) [38] at pp.

36-38; and , *Ibid, Vol. 2, Statutory Construction* (1993) [36] at pp. 555-558; I. Englard, *Introduction to Jurisprudence*, [39]at pp. 95-97).

My colleague Justice Cheshin sees in the command of redemption of prisoners "a command of the highest degree" which is tied to the fact that "all of Israel (and in our matter: not only Israel) are responsible for one another." Justice Kedmi holds similarly to him that "'Redemption of prisoners' is one of the basic values of the Jewish people; and it appears that none more than it demonstrates the basic responsibility of everyone in this nation for the liberty of their brothers, in the sense that all of Israel is responsible for one another." In their approach, the interpretation of the term is also derived from this. I also hold as they do.

4. I wish to add to the uplifting words of Justices Cheshin and Y. Kedmi. The protection of the dignity and liberty of every person and protection of these basic constitutional rights (see section 2 and 4 of the Basic Law: Human Dignity and Liberty) is dearer than dear, however, in the episode before us it does not stand up **against** the protection of national security in the limited meaning of the term, as it is interpreted by the majority opinion holders. In my eyes, the dignity and liberty of the detainees from among the fighters of the enemy are placed on the scales, one facing the other, against the dignity and liberty of our prisoners and missing persons; those who are in trouble and in imprisonment today and those who will, we hope not, be in trouble and imprisonment in the future. Weighing these – which is at the core of the interpretive process – is not done within a legal laboratory but in a melting pot of values, including national ones, and feelings of human compassion. When I come to weigh among these, I cannot but determine – albeit with sorrow and pain – that the dignity and liberty of our fighters is dearer to me than those of the enemy fighters. This consideration tilts the scales toward a broadening interpretation of the term "reasons of national security".

5. Therefore, the question is asked whether the use made by the Minister of Defence of the authority to detain the petitioners – some of them from May 16, 1991 and most of them from September 1, 1992 – is "proportional" or perhaps "not proportional" (compare *Yoma* 21 p. A [52])? In other words, after eight or nine years have passed has the measure been filled to the rim and the detention no longer to be continued?

My answer to this is that when it has been declared before us by the senior commanders in charge of handling the subject of prisoners and missing persons that there is an end and there is hope – and not in the distant future – we are not entitled to reject their professional opinion which is weighted more than our assessment. When it is a matter of life and death – and the matter before us is one of genuine life and death – the small candle smoldering before us in the dark is not to be extinguished before it has gone out, which we hope it will not, on its own. Therefore I would delay the decision until they have come and told us that all hope is gone.

6. I have reached the end of the road that began with my view that the Minister of Defence is not authorized by authority of section 2(a) of the statute to order the administrative detention of a person in order to advance the release of prisoners and missing persons from among the security forces, and its end is in my conclusions of today that the law authorizes him to do this and that the use he is making of this authority does not go beyond that which is proportional. I wish I could reach the conclusion that two interpretations of the term "reasons of national security" could live side by side – as though they are "opposites united at their root" (H.N. Bialik, "He Peered and was Injured") – and I wish I could avoid any decision on the matter, however, as judges we are not entitled to spare ourselves from the law and we are not free to be released from reaching a decision.

7. If my opinion were heard, we would leave the judgment of ADA 10/94 [1] as is for now and postpone the continuation of the hearing to two months from today, in order to hear from those in charge of dealing with the matter of the prisoners and missing persons whether holding the petitioners in detention still has benefit for advancing their release.

Justice D. Dorner

1. I agree with the judgment of my colleague, President Barak, in the further hearing. My opinion has remained as is since it was expressed by me – it was then a minority opinion – in ADA 10/94 [1]. I disagree with my colleagues, Justices Cheshin, Kedmi, and Türkel.

My judgment in ADA 10/94 [1], that the state is not entitled to hold the petitioners in detention by authority of the Emergency Powers (Detentions) Law 5739-1979 (hereinafter: "the Detentions Law"), was based on the factual foundation that the State presented. According to this foundation, the purpose of the detention of the petitioners is to make use of them as bargaining chips in the course of the negotiation for the return of the imprisoned navigator Ron Arad and other prisoners and missing persons. However, in light of the fact that the petitioners were members in organizations which fight against us in Lebanon, I added, that "this does not present a position on the question. . . as to the authority to detain the appellant by authority of other laws, such as international law" (in section 3 of my judgment).

However, the State, which prosecuted the petitioners for membership in a hostile organization, did not argue in this further hearing that they are to be viewed as prisoners of war. It continued to tie its authority to detain the petitioners to the Detentions Law and repeated the same factual foundation, according to which the petitioners do not endanger national security and are held in detention only as bargaining chips to advance the release of our prisoners.

Against the background of this factual foundation, I wrote in the judgment on appeal:

> "We must ignore . . . the membership of the appellants before us in hostile organizations and their past activity against Israel. They have been punished for this membership and this activity, and these are not the grounds for their detention. Is it that because the law does not explicitly prohibit the detention of family members of the enemy's individuals, or other individuals whom for one reason or another the enemy might have an interest in their release, that we can interpret it as enabling their detention? The position of my colleague President Barak leads to interpreting the law as enabling detention, for an unlimited time period, of any person, as long as the detention benefits, if only indirectly, national security. Such sweeping and unlimited authority is not even recognized by the rules of war in the realm of international law. I cannot recognize it in the realm of Israeli law" [section 2 of my judgment].

2. Citizens who are held in detention as bargaining chips are hostages as defined in section 1 of the International Convention against the Taking of Hostages 1979. The detention of hostages is absolutely prohibited by this treaty. It has been established as follows in section 1 of the treaty:

> "Any person who seizes or detains and threatens... to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage, commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention."

Israel signed this treaty on November 19, 1980 and even added its comment in this language:

> "It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to article B of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their additional Protocols, without any exception whatsoever."

Detention of citizens of an enemy state as hostages for any purpose was already absolutely prohibited thirty years earlier, in article 34 of the Fourth Geneva Convention (Relative to the Protection of Civilians During Times of War) 1949 (hereinafter: "the Geneva Convention"). This includes their detention for the purpose of improving the conditions of prisoners of war,

or in order to exchange them for prisoners of war, acts that were acceptable in prior times. See, for example, English Manual of Military Law (1929) at 464.

There are those who believe that the severe prohibitions in the Geneva Convention, which were declared in section 147 of the Convention, including the prohibition on holding hostages, have, over the years, attained the status of customary international law. See Yoram Dinstein, 'Report on the Application of Customary International Law Concerning Armed Conflicts in the National Legal Order', *National Implementation of International Humanitarian Law - Proceedings of an International Colloquium at Bad Homburg June 17-19*, (M. Bothe - ed., Dordrecht, 1990) [50].

A basis for their approach is found in the words written by the Appellate Committee in the matter of the extradition of Pinochet to Spain, which were quoted in agreement in the judgment of the House of Lords in that matter. And it was written as follows:

> "[T]he taking of hostages, as much as torture, has been outlawed by the international community as an offence... [I]nternational law has made plain that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone ... [T]he contrary conclusion would make a mockery of international law." (See also A. Barak, *Interpretation in Law*, Vol. 3, *Constitutional Construction* (1984) [40]at p. 323; Anne F. Bayefsky, *International Human Rights Law* (1992) [47] at p. 14).

In this way civilians are distinguished from prisoners of war whom it is permitted to hold until the end of the war and the return of the prisoners of war of the holding state. See article 118 of the Third Geneva Convention. But, as said, the position of the State in our matter is, that the petitioners are not prisoners, and they are held by authority of the Detentions Law.

3. As we know, according to our legal system, the absorption of rules of customary international law is direct, and they are part of local Israeli law. See, for example, HCJ 606/78 *Eyov and others v. Minister of Defence* [33]. Ratification of the International Convention which only anchors customary law does not turn what is stated in it to part of domestic law. For this, adoption of the convention by law is necessary. However, case law has established an interpretive presumption according to which the laws of the state and the norms of international law to which the State of Israel is committed are in agreement, and that the laws of the state will be interpreted – as much as possible – as consistent with international law. See, for example, CA 562/70 *Alkotov v. Shahin* [22] at p. 80; CrimA 437/74 *Kwan v. State of Israel* [34] at p. 596. This is the case, in general, and all the more so in matters that relate to basic rights.

4. In any event, whether the international prohibition on holding hostages is customary or conventional, it appears to me that there is no need for any interpretive effort in order to reach the conclusion that Israeli law does not permit the holding of hostages.

Even in the international laws of war it is absolutely prohibited for warring forces to balance the security needs of the state, including the need to guarantee the welfare of the prisoners of the warring force and their return from imprisonment, against the injury to the liberty of the citizens of the enemy state by holding them as bargaining chips. All the more so, that a broad interpretation of municipal law, such that it will include the authority to hold people in detention for the purpose of their serving as bargaining chips in the negotiations to release prisoners, is not appropriate.

5. And in fact, in my opinion, there is no reasonable way to interpret the Detentions Law such that it will include such authority.

This was not the intent of the legislator, as emerges from the text of the Detentions Law literally and the legislative history, which teach us that the purpose of the law was just to enable the detention of people who endanger national security or public safety, and this when it is not possible to achieve this purpose within a criminal procedure. Interpreting the law as though it authorizes detaining people in order to use them as bargaining chips also contradicts

the principles of the legal system in the State of Israel, a democracy which protects basic human rights.

In our matter, the purpose of the detention of the petitioners – advancing the release of Ron Arad and the other prisoners and missing persons – is as worthy as can be. However, it cannot on its own grant detention authority. The words of the stand-in President Chaim Cohn are appropriate here:

> "Let no one think that these are no more than formal semantics, which come to undermine a security operation of great value: the regulations were intended to serve the state and its agents as a means of fighting against enemies from within, who come to do their evil damage to public safety; and how different the fighting of the state from the fighting of its enemies, as the one fights while keeping the law, and the other fights while breaching the law. The moral strength and the substantive justness of the fighting of authorities are entirely dependent on protecting the laws of the state: in giving up this strength and the justness of its fighting, the authorities serve the purposes of the enemy. The moral weapon is no less important than any other weapon, and may even be more important – and there is no more efficient moral weapon than the rule of law. It is better that all who need to know, will know, that the rule of law in Israel will never succumb to its enemies."

[HCJ 320/80 *Kawasame v. Minister of Defence* [35] at p. 132.]

6. In my judgment in the appeal the subject of this further hearing I noted that even if the Detentions Law enabled detention for the purpose of using detainees as bargaining chips, it is not appropriate to extend the detention in this case. As, I have not found that a reasonable possibility existed – and all the more so near certainty – that the discontinuation of the detention will undermine the possibility of releasing Ron Arad or other prisoners or missing persons. Since the judgment on appeal approximately two and a half years have passed. During this period neither Ron Arad nor any other prisoner or missing person has been released. Unfortunately, the time that has passed has not increased the degree of reasonableness of the possibility that the detention of the petitioners would bring about the release of our prisoners and missing persons.

Therefore, I share the views of President Barak, Vice-President Levin, and Justices Or, Mazza, and Zamir, that the petitioners are to be released from their detention.

It has been decided as per the judgment of President Barak, against the opposing opinions of Justices M. Cheshin, Y. Kedmi and J. Türkel.

4 Nisan 5760

April 12, 2000