At the Supreme Court of Israel sitting as High Court of Justice

HCJ 5100/94
HCJ 4054/95
HCJ 5188/96

Before:	The Hon. President D. Beinisch The Hon. Justice M. Naor The Hon. Justice S. Joubran
The Applicants:	
The Petitioner in HCJ 5100/94:	1. The Public Committee Against Torture in Israel
The Petitioner in HCJ 4054/95:	2. The Association for Civil Rights in Israel
The Petitioner in HCJ 5188/96:	3. HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger
v.	
The Respondents:	1. Government of Israel by the Government Secretary 2. Head of the Israel Security Agency, Office of the Prime Minister 3. Israel Security Agency 4. Government of Israel
	Application under the Contempt of Court Ordinance
Date of Hearing:	14 Tamuz, 5769 (July 6, 2009)
Counsel for the Applicants:	Avigdor Feldman, Advocate
Counsel for the Respondents:	Shai Nitzan, Advocate

Judgment

The petition before us is a proceeding of an Application under the Contempt of Court Ordinance, in which it is alleged that in the interrogations carried out by the Israel Security Agency [ISA, formerly known as the General Security Service, or GSS, translator] the holdings made in the judgment given in HCJ 5100/94, HCJ 4054/95 and HCJ 5188/96 have been violated in recent years by virtue of the fact that there is a protocol which establishes interrogation methods of a type that has been disqualified by a decision of this Court.

Counsel for the State has asked that the petition be rejected as the Contempt of Court Ordinance does not apply to the circumstances of this matter; this both because according to the argument, there is no effective contempt of the judgment and the order issued by the Court, and it is not violated; and because of a contention of *laches* which relates to the interpretation of the judgment as given a decade ago in a directive issued by the Attorney General. It was further argued before us that the Contempt of Court Ordinance could not be applied to the state in a proceeding which is not a civil one.

Without making a finding on the complex argument that it is not possible to hold Contempt of Court proceeding against the state, we believe that under the circumstances of the matter, the arguments brought by the Petitioners are not suitable for a Contempt of Court proceeding. The judgment the Petitioners allege has been violated is of a declarative nature. What is permissible and what is forbidden as a consequence of this judgment cannot be decided according to rules pertaining to contempt of court, as it constitutes an interpretation of the operative paragraph in which it was established that -

> [W]e declare that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position (which includes the combination of various methods, as mentioned in paragraph 30), force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the "necessity" defence, found in the Penal Law, cannot serve as a basis of authority for the use of these interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of this kind. Our decision does not negate the possibility that the "necessity" defence be available to GSS investigators, be within the discretion of the Attorney General, if he decides to prosecute, or if criminal charges are brought against them, as per the Court's discretion.

Counsel for the State argued before us that the judgment is implemented and upheld, that the Attorney General is in charge of this matter and that he receives a report after the fact if and when interrogation methods are used and the "necessity" defense is required. It was also argued

that if there are cases in which there is "necessity" due to the existence of a danger, colloquially referred to as "ticking bomb" – they are isolated and rare. Counsel for the State denied the existence of a protocol that establishes extraordinary methods for this "necessity" in the "bureaucratic" manner alleged by the Petitioners.

The Petition for contempt proceeding did not provide a sufficient foundation to establish the serious argument presented by the Petitioners and the framework of these proceedings do not allow clarifying their arguments. If indeed there is merit to their arguments, they should be clarified but not in contempt proceeding. It is presumed that Counsel for the Petitioners will know how to draft his arguments, if indeed they have a factual foundation, and find the right way to approach the authorities in charge of enforcing the law to exhaust the proceedings and if he is not satisfied, the grounds for legal action against improper procedures, if and inasmuch as such procedures exist, are known to Counsels for the Petitioners, as is the proper legal way to examine them.

As a aside, we would like to comment that the language used in the petition was extreme and in some parts inappropriate, both in the request to take the enforcement measure of incarceration under Contempt of Court Ordinance against the Prime Minister and the Head of the ISA, and in the direct and hidden threat to interrogators and their superiors and even more so to lawyers, a threat which appears in paragraphs 137 and 138 of the petition. This Court believes it is its role to ensure the enforcement of the law and to defend human rights but does not fulfill this role in a threatening atmosphere, and the Petitioners should know that such conduct will not prevail.

For the reasons detailed, the petition to apply the measures stipulated in the Contempt of Court Ordinance to the Respondents is rejected.

Given today 14 of Tamuz, 5769 (July 6, 2009) before Counsels for the parties.

President Justice Justice