1. M. Odeh
2. A. S
3. A. A. S.
4. The Association for Civil Rights in Israel

v.

1. Commander of IDF Forces in Judea and Samaria
2. Commander of IDF Forces in the Gaza Strip

In the Supreme Court sitting as the High Court of Justice
[21 November 1989]
before Vice-President M. Elon, and Justices T. Or, E. Matza

Petitions for order nisi.
D. Simon, on behalf of the petitioners;
N. Arad, head of the High Court of Justice Division, State Attorney's Office, on behalf of the respondents.

J U D G M E N T

The Vice-President M. Elon

1. There are four petitioners and two petitions in the matter before us.

One petition is –

> **to grant an order nisi directing the respondents to appear and show cause why they do not immediately notify the petitioners about the arrest of their relatives and where their relatives, whom the respondents are apparently holding, are being detained (hereafter: "the detainees"), and why they do not notify the petitioners about every place to which the detainees will be moved in the future, if they will be moved to another location.**

The petitioners in this petition are, first and foremost, the first three petitioners, whose relatives are being held by the respondents.

The second petition, as to which the fourth petitioner dedicates most of its argument, does not relate to a specific detention, but rather it asks, generally, why –

(the respondents) do not meet their duty to give notice about the arrest and place of detention of everyone who is detained by them in the territories occupied by IDF forces.

2. The First Petition

In their petition, the first three petitioners described the circumstances of the detention of their relatives and of their lengthy and unsuccessful efforts to determine the place where they were being held. In this matter, Petitioner 4 added that its office receives, from time to time, requests from relatives of detainees to locate them. It then contacts the office of the legal advisor of the respondents, which responds, from within one to seven days, and indicates the location where the detainees are being held. Mr. Simon, learned counsel for the Petitioners, states that, "it takes an average of four days to obtain an answer from the respondent."

As regards the first petition, Ms. Arad, learned counsel for the state, informed us, in the state's response of 20 September 1989, that

notification on the location where relatives of the petitioners were being held was provided to their counsel, Dan Simon, on 30 August 1989, thus meeting the objective for which the petition was filed.

In the present matter, counsel for the litigants did not argue this point regarding the specific detainees, because, as stated, the matter has been resolved, and the petitioners require no further relief from this court. However, we think it should be mentioned that, for about one and a half months, the petitioners did not know where their relatives were being detained. This fact deserves criticism and we hope and are certain that, in light of the lessons the respondents learned from this, as will be explained below, this phenomenon will not recur.

3. The Second Petition

A. As mentioned, this petition involves the failure of the respondents' obligation to give notification of the arrest and place of detention of a person detained by them in Judea and Samaria and the Gaza Strip. This obligation of the respondents is set forth in Section 78A(b) of the Order Regarding Defense Regulations (Judea and Samaria) (No. 378), 5730 – 1970, which states:

> **Where a person is detained, notification of his arrest and whereabouts shall be made without delay to a relative, unless the detainee requests that such notification not be given.**

The obligation to give such notification stems from a fundamental right accorded to a person who is lawfully arrested by the competent authorities, to inform his relatives of his arrest and his place of detention so that they will be apprised of what befell their detained relative, and how they are able to proffer him the assistance he requires to safeguard his liberty. This is a natural right derived from human dignity and general principles of justice, and accrues both to the detainee himself and to his relatives, and from the reasons set forth in Section 78A (c) of the said order:

> **At the detainees request, notification as stated in subsection (b) will be given also to the attorney whose name is provided by the detainee.**

B. The said sections were enacted by the military commander in February 1988. The petitioners argue that the respondents do not meet their obligations set forth therein. The respondents have indeed posted in Civil Administration offices in Judea, Samaria, and Gaza Strip a list of names of the detainees, but, the petitioners contend, this arrangement is problematic. These lists do not include the names of all detainees, but only those who have recently been detained, and only those who are held in detention facilities linked to military administration installations, and do not include the names of detainees who were moved to fixed detention facilities in various sites. More than once, these lists were removed and were not properly maintained for public perusal.

C. Ms. Arad, the state's learned counsel, agreed that there are times that the system for which the respondents are responsible has difficulties in properly meeting its obligation to provide notification, particularly –

In light of the events of the uprising when, as a result of the increase in acts of violence and breaches of the peace in the regions, the number of detainees grew appreciably, and it was necessary to place them in holding and prison facilities, with the detainees being moved among the facilities. In all these

sites, difficulties arose as regards application and implementation of the order's provisions.

D. To meet their obligation to provide notification more precisely and to provide information to relatives of the detainees, the respondents issued a detailed procedure, titled "Notification of Detention to Families of the Detainees and to the Red Cross." The basic elements of this procedure were stated in the response on behalf of the State Attorney's Office, as follows:

> **A. A method of reporting was established between the detention facilities and a control center in which information is gathered on detainees and on the movement of detainees among the various detention facilities.**
>
> **The control center was charged with providing a daily report on the situation of the detainees, inter alia, to the military governors in the Civil Administration districts.**
>
> **B. A procedure was established in which each detainee is given a postcard to enable him to write to his relatives and thereby notify them of his whereabouts.**
>
> **C. In addition to the above, daily lists of detainees are published in the Civil Administration districts regarding the detainees being kept in holding facilities in the districts at the time.**

In the said response, the State Attorney's Office also mentioned that changes and further improvements had recently been made in the said provisions of the procedure, the intention being to ensure that proper notification is indeed provided, within a short period of time as possible, to the detainees' relatives. The main things being done in this regard are the following:

> a. Mailing of postcards – when a detainee is received in a holding facility or detention facility, he fills out a special postcard that contains notification of his arrest, the detention facility, the date he was taken into the facility, and the name and address of the person to whom the detainee wishes the postcard to be sent.

The postcards are sent daily from the detention facility to the local post office, which takes the actions necessary to dispatch and distribute them in the region.

b. Provision of lists of detainees by the holding facilities

1. The commander of the holding facility is responsible for providing the Civil Administration officer in the district in which the holding facility is situated with a daily list of the detainees in the facility and of the detainees who were transferred that day to other detention facilities, noting the facility to which he was transferred.

2. Where a detainee from another residential district appears on the list, the fact is noted on the list, and the name of the detainee will be provided to the Civil Administration officer of that district, indicating his name and place of detention, in the daily list of detainees that he publishes.

3. In the Gaza Strip region – lists are provided daily to the Civil Administration by the detention facilities; the lists state the detainee situation on that day, the names of detainees received, the detainees transferred to another facility, and the names of detainees who were released. These lists are posted in each and every district.

From the Ketziot detention facility, reporting lists will be provided to the Civil Administration – in similar manner.

4. At all times, a list containing names is posted, in Arabic, on the district's bulletin board, of the detainees located in the holding facility, as well as a list indicating the detainees who were transferred from the holding facility to other detention facilities – over the past seven days.

5. The lists are posted in a protected place from which they cannot be removed, and the public has continuous access to them.

6. Residents who do not find their relative's names on the lists complete a form in which they supply complete details of their

missing relative. The Civil Administration officer makes the necessary checks to locate the detainee and responds to the family as soon as possible.

c. The Control Center gathers reports and data on the persons held in the various detention facilities.

d. Publication – the district governors will inform the residents of the conveying of notification on the detention by means of postcards and the lists, the location in which they are placed for perusal, and the possibility of requesting the Civil Administration officer to locate a relative whose name does not appear on the lists.

e. In exceptional cases (such as where the detainee required special medication), notification by telephone is given to his family, or to another person close to him, regarding his detention and his whereabouts.

f. Within a month from the publication of the procedure a comptroller body will be established to conduct an inspection of the way the procedures are being upheld in the field and which will submit the inspection's findings to the Major-General's Head of Staff within two months of its establishment

g. It should be mentioned that, regarding notification by means of postcards, a comparable provision is found in Article 106 of the Geneva Convention on the Protection of Civilian Persons in Time of War, 1949, which states:

> **As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card similar, if possible, to the model annexed to the present Convention informing his relatives of his detention, address and state of health. The said cards shall**

be forwarded as rapidly as possible and may not be delayed in any way.

4. As stated in the procedure, upon his arrival at the holding facility or the detention facility, the detainee is requested to complete the aforesaid details on a postcard that is provided to him for that purpose by the detention authorities. If necessary, the detaining authorities complete the details, as provided to them by the detainee. Also, the detaining authorities must ensure that the postcard is sent rapidly to the addressee to provide the detainee's family with notification without delay about the detention, "unless the detainee requests that such notification not be given" (Section 78A(b), mentioned above).

5. We are satisfied that the said procedure in its entirety increases the efficiency in notifying the detainees' relatives in a proper and reasonable manner. Mr. Simon, learned counsel for Petitioners, agreed that the said provisions represent a significant and meaningful improvement, but he is of the opinion that more can be done to improve them. In this regard, he requested that the petition remain open, also for the purpose of checking whether and the degree to which the new procedure meets expectations.

6. We do not grant Mr. Simon's request. As stated above, the respondents decided to establish a control body, given the task of checking and monitoring the said procedure in the field. As Ms. Arad, learned counsel for the state, told us, this body will soon be appointed by the commanding officer, and in addition to monitoring implementation of the procedure, persons will be allowed to submit suggestions or requests to the commanding officer to improve the notification procedure. He will consider them, and will make recommendations, at his discretion, to the relevant officials, and it is improper to leave the petition before us open to achieve this purpose.

7. As mentioned above, the said procedure in its entirety improves in a proper and reasonable way the process of conveying notification to the detainees' families, so that they are informed of the arrest and the place in which he is detained as soon as possible, taking account of the conditions currently prevailing in the areas, as stated above. In doing so, the second petition is also satisfied.

We deny the petition.

The Respondents will bare the costs of the Petitioners for the amount of 2,000 NIS, linked with interest from today until its payment in actual.

Justice T. Or

1. I agree with the result reached by my distinguished colleague, the vice-president, which ultimately resulted in denial of the petition. However, I deem it proper to add a few comments.

2. The son of Petitioner 1 was arrested on 5 July 1989, the son of Petitioner 2 was arrested on 6 July 1989, and the son of Petitioner 3 was arrested on 13 July 1989. None of the three petitioners received any notification concerning the place of detention of their sons, and their independent efforts to discover their place of detention also failed. Therefore, they filed their petition herein on 10 August 1989. The State Attorney's Office received the petition on 13 August 1989. It was only on 30 August 1989 that Petitioners' counsel received notification of the whereabouts of the three detainees, and it may be assumed that the filing of the petition herein contributed to notification ultimately being given to the families. As counsel for the State Attorney's Office argues in her written response, the section of the petition relating to the detention of the relatives of Petitioners 1-3 was thereby met. However, it seems to me that, in light of the above facts, the State Attorney's Office's response should have clarified and explained what or who was the reason for the great delay in notifying the relatives about the said detainees' place of detention. No such explanation was provided, even though in three instances the provision set forth in Section 78A(b) of the Order Regarding Defense Regulations (Judea and Samaria) (No. 378), was not met. Involved here is the fundamental right of a person who is arrested to have his relatives know of his arrest and of his whereabouts. Notification is also required to enable them to provide him with assistance while he is being detained, a situation in which his ability to help himself and to ensure that his rights are safeguarded is limited.

   Everybody is aware of the responsibility of the authorities charged with ensuring the safety and security in Judea, Samaria, and Gaza, a complex and difficult function. This function also entails detaining persons to achieve the aforesaid objectives. Although the said defense legislation in the territories includes obligations that the authorities must meet, such as that set forth in the said Section 78A(b), it goes without saying that the test of meeting this obligation is in its execution.

Indeed, the respondents are aware of the snags that occur in notifying the detainees' families, and sought to rectify the situation, as elucidated in the judgment of my distinguished colleague, the vice-president. This is a welcome development, and it is to be hoped that the amendments to the procedures that have already been implemented, and those that remain to be implemented, in the light of lessons learned from experience and from the criticism relating to the implementation of giving of notification, will ensure that further cases do not occur in which an unreasonable period of time passes before a person's arrest and place of detention are made known.

3. In light of the new provisions of the procedure regarding "Notification of Detention to Families of the Detainees and to the Red Cross," which my distinguished colleague mentioned, and in light of the respondents' intention to check within a short time their efficacy, while being willing – based on the findings of the review that will be conducted – to correct everything that requires correction, I join the opinion of my distinguished colleague, the vice-president, that "the second petition" should also be denied. I believe that the respondents should be given a reasonable period to examine the method of providing notification to the detainees' relatives and to rectify whatever is found to require correction. Counsel for the petitioners, too, thought it was reasonable to wait and see the manner in which the new provisions operate and are implemented, and that hearing on the petition should be conducted only after some time has passed. It seems to me that there is no reason to leave the petition pending for this purpose, for if, after some time has passed, it is found that the matter has not been corrected and a proper solution has not been reached, and the conditions so justify, the door will be open for a new petition to be filed, based on the conditions at that time.

4. Whereas the matter of the procedure's provisions are under review and examination, I deem it proper to draw the relevant authorities' attention to two points:

   A. The said Section 78A(b) sets forth the obligation to provide notification regarding the arrest and location of a detainee to a relative (subject to the limitation stated at the end of the section). According to the wording of the section, the duty to provide the notification lies ostensibly on the detaining authorities, and it is insufficient for them to provide a postcard to a detainee so that he can fill it out and they will then send it through the mail. Clearly, if he does not provide the name and address of a relative, the official responsible will be prevented from notifying the detainee's relative. But when

the latter provides the requisite details, the relevant detaining officials must ensure that the notification is delivered to the said relative.

I should emphasize that, although in most cases, the detainee himself will take advantage of the postcard handed over to him, and will fill it out, and if the detaining authorities mail it – the detainee's relative will know about the detention and where he is being held. There are instances in which this does not occur. Sometimes, the detainee is in a physical or psychological condition that makes it impossible to rely on his being properly aware of his right, and thus may not exercise it. There are also liable to be cases in which his postcard will not be dispatched for reasons not dependent on him. Therefore, the detaining authorities must not only verify that the postcard is sent to the detainee. They must also take additional; reasonable steps to ensure that, in those cases in which there is a fear that sending the postcard is not itself sufficient to guarantee delivery of the notification about the detention, notification is in fact delivered to the detainee's relative, "unless the detainee explicitly requests that such a notification not be given" (the language of the end of the said Section 78A(b)).

I did not neglect the provision of Article 106 of the Geneva Convention on Civilian Persons in Time of War, which my distinguished colleague mentioned, regarding the sending of postcards by a detainee. But the provision of Section 78A(b) came to add to the Article 106 as regards the obligation of the detaining authorities, and augmented the detainee's right regarding the delivery of notification to his relative. This provision is binding, and the respondents must act in accordance therewith.

B. The obligation to notify a detainee's relative must be carried out "without delay," as stated in the said Section 87A(b). It seems to me that under normal circumstances, when it is possible and does not entail limitations or difficulties – whether technical or security-related – the obligation should be executed by means of notification by telephone to a relative of the detainee, thereby avoiding unnecessary delay in conveying the information.

In this regard, it should be mentioned that in the response of Mister Yitzhak Rabin, Minister of Defense, of 29 June 1989, to the Speaker of the Knesset, following the conclusions of the Constitution,. Law and Justice Committee on the subject, "Cessation of Attorneys Appearing before Military Courts in

Judea and Samaria," the Minister of Defense related to the matter of "notification to a family on detention of a person." In this context, he reported to the Speaker of the Knesset:

> **It seems to me that there has been improvement in this area. However, consideration is being given to the possibility of taking an additional step forward by providing telephone notification to families where possible (see Appendix P/6 to the petition).**

The provisions of the procedure instituted by the respondents mention the matter of providing telephone notification to the detainee's family about his arrest and his whereabouts. This notification is given only in exceptional cases. It may be desirable to consider expanding use of this easy and rapid notification in all cases where it is possible, where the said limitations and difficulties do not exist, and not only in exceptional cases.

5. As stated, I join the conclusion of my learned colleague, the vice-president, that the petition should be denied, with the respondents bearing the costs.

Justice E. Matza

Like my two distinguished colleagues, I, too, believe that the petitions should be denied, with the respondents bearing the costs. It is assumed that the respondents, as part of their efforts to improve the prior procedures as much as possible, will also seriously consider the useful comments of my distinguished colleague, Justice Or.

It is decided as stated in the opinion of Vice-President Elon.

Given today, 21 November 1989.