In the Supreme Court sitting as the Court of Criminal Appeals

Crim. App 3660/03
Crim. App 3765/03

Before:	The Honorable President A. Barak The Honorable Justice A. Procaccia The Honorable Justice S. Jubran
The Appellants in Crim. App. 3660/03:	1. Sheikh 'Abd al Qarim 'Obeid 2. Mustafa Dib Mar'i Dirani
The Appellant in Crim. App. 3765/03:	Fawzi Muhammad Mustafa Ayub
	v e r s u s
The Respondent:	State of Israel
	Appeals of the decision of the District Court in Tel Aviv – Yafo in Misc. App. 92690/03, of 10 March 2003, given by the Honorable Judge Z. Caspi
Date of the session:	23 Nissan 5768 (2 May 2005)
On behalf of the Appellants in Crim. App. 3660/03:	Attorney Zvi Rish
On behalf of the Appellant in Crim. App. 3765/03:	Attorney Hisham Abu Shahadeh
On behalf of the Respondent:	Attorney Shai Nitzan

J U D G M E N T

The President A. Barak

The appeals before us deal with the application of the appellants to nullify the Internment of Unlawful Combatants Law, 5762 – 2002, for the reason that, they argue, it contravenes the Basic Law: Human Dignity and Liberty and international humanitarian law.

1. The appellants in Crim. App. 3660/03 are Sheikh 'Abd al Qarim 'Obeid (hereafter – 'Obeid), a Lebanese citizen who served in a senior position in the Hezbollah organization, and Mustafa Dib Mar'i Dirani (hereafter – Dirani), he, too, a Lebanese citizen, who served as head of the military arm of the AMAL organization and later collaborated with Hezbollah. Pursuant to his function in the AMAL

organization, Dirani was responsible for holding captive the navigator Ron Arad, who was captured by the organization in October 1986. 'Obeid and Dirani were captured in Lebanon and brought to Israel. 'Obeid was imprisoned in Israel in 1989, and Dirani was imprisoned in 1994. At first, the two were held in administrative detention under the Emergency Powers (Detentions) Law, 5739 – 1979 (hereafter – the Detentions Law). Their detention was extended from time to time. On 12 April 2000, the Supreme Court held, by majority opinion, that a person could not be held in administrative detention, under the Detentions Law, where he does not constitute a threat to state security, when the purpose of the detention is that the person serve as a "bargaining chip" in negotiations over the release of security forces held captive or missing (Crim. Reh. 7048/97, *Flunis v. Minister of Defense,* P. D. 54 (1) 721). Following our judgment, the Knesset enacted (on 14 March 2002) the Internment of Unlawful Combatants Law, 5762 – 2002 (hereafter – the Internment of Unlawful Combatants Law or the Law), and the legal basis for internment of 'Obeid and Dirani changed. Consequently, beginning on 16 June 2002, they were held under an internment order given by the chief of staff pursuant to the provisions of section 3(a) of the Law (see, also, HCJ 10154/03, *Arad v. Attorney General* (not reported)). The appellant in Crim. App. 3765/03, Fawzi Muhammad Mustafa Ayub (hereafter – Ayub), arrived in Israel from Canada, and a short while later traveled to Hebron. During actions of IDF forces in the city, he was captured, and on 21 October 2002, an internment order was issued against him under the Law, similar to that of 'Obeid and Dirani.

2. On 6 March 2002, 'Obeid and Dirani petitioned this court, arguing that the Internment of Unlawful Combatants Law is illegal, in that it does not meet the limitations clause of the Basic Law: Human Dignity and Liberty and contravenes rules of international law (HCJ 2055/02, *'Obeid v. Minister of Defense* (not reported). Their petition was denied (on 12 December 2002), on grounds that the petitioners have alternate relief, in the form of an action before the Distinct Court, which is empowered to conduct judicial review of the internment order, in accordance with section 5 of the Law, and in this framework it can also examine their arguments regarding the legality of the Law. As a result, 'Obeid and Dirani directed their claims to the District Court, which in any event had already begun to conduct judicial review in their matter, as required under section 5 of the Law. Ayub also was joined to these proceedings.

3. The District Court in Tel Aviv (Misc. Appl. 92690/02, Judge Z. Caspi) rejected (on 10 March 2003) the appellants' arguments, holding that the Internment of Unlawful Combatants Law does not contravene rules of international humanitarian law. The judgment also held that the Law fulfills the conditions of the limitations clause in the Basic Law: Human Dignity and Liberty, even though it infringes the right of liberty and dignity of the internee. In the appeals before us, which were filed in accordance with section 5(d) of the Law, the appellants repeat the arguments they made in the District

Court and attack its decision. They request that we nullify the Law or sections of it. They also request that we order the release of the appellants from detention.

4. The hearing on the appeals was held on 1 June 2003, and at the end, it was determined that the appeals would be heard by written briefs, which would supplement the briefs in the files. After the briefs were filed, the respondent made a motion (on 4 November 2004) to dismiss the appeals, on the grounds that they were moot and had become theoretical. The respondent stated that, in the meantime, while the appeals were pending, the appellants had been released from internment, on 29 January 2004, and were returned to Lebanon. They were returned in a deal for the release of Israeli captives and abducted persons from Lebanon. In the deal, the bodies of three IDF soldiers who had been abducted on Mt. Dov and the live citizen Elchanan Tenenbaum were returned to Israel. Along with the appellants, other prisoners were released, among them three other internees who were being held pursuant to the provisions of the Law. At the present time, the respondent updates us, no persons are being held in Israel pursuant to the Law. It contends that this court does not hear questions that have become theoretical, and even more so when the court is requested to nullify a law, which is clearly done with caution and great restraint. Therefore, given that all the appellants have been released from internment and are no longer in Israel, and no one else is interned pursuant to the Law, the questions arising on these appeals are purely academic and should not be heard.

5. The appellants object to dismissal of the appeals, and request that a judgment be given on the merits of the appeals. In the response submitted by counsel for 'Obeid and Dirani (on 14 December 2004), it is argued that, although his clients have already been released and are no longer in Israel, a real risk still exists that a person will be interned under the Internment of Unlawful Combatants Law, whose nullification is requested. He notes that, when important and fundamental matters are involved, which go beyond the matters of the relevant sides to the matter, it is proper to hold a hearing on the fundamental principles, even with respect to a theoretical matter in the case of the specific litigants. He argues that the Law raises fundamental constitutional questions relating to the foundation of the democratic regime in Israel, and moreover that these questions are likely to arise in the future. Therefore, for the sake of efficiency, it is illogical to dismiss the appeal, when all the briefs have already been submitted. Ayub's counsel, too, objects to dismissal of the appeal, despite his release and exit from Israel. He joins the arguments of the other appellants and adds that, in his opinion, a theoretical question is not involved here at all, in that decision on the appeal has a direct effect on the possibility of a future compensation suit against the state, should the Law be nullified.

6. After studying the material before us, we have concluded that it is not proper at the present time to hear the appeals on their merits, inasmuch as the questions, which are not simple, that the appellants raise have become theoretical in the case under review (see HCJ 4969/04, *Adalah – The Legal*

Center for Arab Minority Rights in Israel v. Commander of IDF Southern Command (not reported); HCJ 2406/05, *Beersheva Municipality v. National Labor Court* (not reported)). The established precedent is that this court does not hear cases, even cases that are important and involve fundamental principles, when they become theoretical and academic (HCJ 6055/95, *Tzemach v. Minister of Defense*, P. D. 53 (5) 241, 250 (hereafter – *Tzemach*); HCJ 1853/02, *Nawi v. Minister of Energy and National Infrastructures* (not reported); HCJ 4827/05, *Adam, Teva v'Din – Israeli Association for Environmental Protection v. Minister of the Interior* (not reported)). Indeed, there are a number of exceptions to this rule. They apply when refusal to hear important questions that have become theoretical will result in the court being unable to hear them ever (HCJ 9279/04, *Halfin v. Head of the Executioner's Office* (not reported)), or when the court cannot, in practical terms, make a holding of the law except where it is presented as a general question that is not related to a particular case (*Tzemach*, 250). However, the case before us does not come within these exceptions. The appellants were released from internment. They are not located in Israel. Their matter has, therefore, been resolved and is now moot. No other persons are being interned under the Law. The question of their internment at this time is no longer relevant. These comments are reinforced by the far-reaching relief that they request – nullification of a statute. Nor does the argument made by Ayub, whereby the appeal must be decided to enable him to file a compensation claim in the future justify a hearing of the matter on its merits. This argument was only raised now, and in any event dismissal of this appeal does not prevent him from filing a future claim, if he so wishes. It goes without saying that dismissal of the appeals does not negate the possibility of judicial review of the constitutionality of the Law. This can be done in proceedings under the Internment of Unlawful Combatants Law (or by indirect attack in a civil proceeding), and this has indeed been done in the proceeding held before the District Court. Clearly, nothing prevents in principle this question being raised before this court (in accordance with the procedural rules) provided there is a need to decide it specifically, and not in general (and see Crim. App. 7175/98, *National Insurance Institute v. Bar Maimon Ltd. (in dissolution)* (not reported); Crim. App. 8351/03, *A. v. State of Israel* (not reported)).

Therefore, the appeals are dismissed.

The President

Justice A. Procaccia:

I concur.

Justice

Justice S. Jubran:

I concur.

Justice

It is decided as stated in the judgment of the President A. Barak.

Given today, 4 Elul 5765 (8 September 2005).

The President Justice Justice