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At the Supreme Court Sitting as the High Court of Justice

HCJ 474/02

Before: **Honorable President D. Beinisch**
Honorable Justice S. Joubran
Honorable Justice U. Vogelman

The Petitioner: **Siham Thabet**

v.

The Respondent: **Attorney General**

Petition for *Order Nisi*

Representing the Petitioner: Adv. Naila 'Atiya Iskander

Representing the Respondent: Adv. Shai Nitzan

Judgment

President Beinisch

The Petitioner seeks in her petition that we instruct the Attorney General (hereinafter: **the Respondent**) to launch a criminal investigation into the death of her deceased husband Dr. Thabet Thabet (hereinafter: **the Deceased**), and bring the Prime Minister and the Chief of the General Staff at the time of the incident to trial.

Factual background

1. On December 31, 2000, the Deceased left his home in Tulkarem, entered his vehicle and started on his way. Shortly thereafter, according to the Petitioner's account, while driving his car, the Deceased was shot by IDF forces. As a result of this shooting, the Deceased was hurt in the upper body and died. Following the aforesaid incident, Physicians for Human Rights, an NGO, contacted the Prime Minister and the Minister of Defense. At the same time, the Petitioner contacted the office of the Attorney General demanding he instruct a criminal investigation of the Prime Minister and the Chief of the General Staff at the time due to their responsibility for her husband's death.
2. On February 8, 2001, the assistant to the Minister of Defense responded to the letter sent by Physicians for Human Rights. In his letter, the assistant described the Deceased as having headed the Tandheem in Tulkarem and related that a terrorist cell which repeatedly fired at Israeli settlements and IDF soldiers had operated under his command. On July 1, 2001, the Head of

Security Matters at the State Attorney's Office and counsel to the Attorney General responded to the Petitioner's letter as follows: "Further to my letter of March 15, 2001, I hereby inform you that your communication with respect to your client's demand to launch an investigation, which was raised in your referenced letter, has been examined by the Attorney General and the decision reached upon completion of the examination was that there was no cause or justification to order an investigation into the matter." The Petition at bar is directed against the decision not to launch an investigation.

It should be stated at this early stage that the petition has undergone a number of changes and transformations, including as a result of the judgment delivered in [HCJ 769/02 **The Public Committee Against Torture in Israel v. Government of Israel**](#) (not yet reported, December 14, 2006), hereinafter: the **targeted killings** case or the **general petition**). As such, we shall first briefly address the various iterations of the petition and the proceedings that predated it in this Court.

3. On January 9, 2001, the Petitioner, through present counsel, filed her first petition against the Prime Minister and the Minister of Defense. In this petition, the Petitioner demanded that Israel stop committing "executions" (in the harsh language used in the petition) of residents of the West Bank and the Gaza Strip without providing them with an opportunity to stand trial, plead their innocence and defend their freedom (HCJ 192/01 **Siham 'Adel Yousef v. Prime Minister and Defense Minister**, hereinafter: **the first petition**). In that petition, the Petitioner described the killing of her late husband and presented arguments regarding the unlawfulness of targeted killings in general. After the first petition was filed and before the first hearing was held, counsel for the Petitioner filed another petition in a similar matter in which she presented arguments identical to those of the first petition. This petition was filed on behalf of MK Muhammad Barakeh and it too included a description of the circumstances of the Deceased's death (HCJ 5872/01 **Muhammad Barakeh v. Prime Minister Ariel Sharon et al.** (unreported, January 29, 2002). The hearing of these petitions was joined, but a day before the scheduled hearing, counsel for the Petitioner filed a motion to have the first petition deleted. The motion was granted and the petition was deleted.
4. On January 29, 2002, having heard lengthy arguments by the Petitioner in HCJ 5827/01, this Court rejected the petition (Justices **E. Mazza**, **M. Cheshin** and **E. Levy**). The Court held: "It seems to us that the Response on behalf of the Respondents provides an exhaustive answer to the Petitioner's arguments. The Respondents' choice of means of warfare to be used for preempting murderous terrorist attacks is not one of the issues in which this Court sees fit to intervene. This is all the more so with respect to a petition that lacks any concrete foundation and seeks a sweeping remedy". Exactly two weeks before the aforesaid judgment was delivered, on January 15, 2002, the Petitioner's current petition was filed.

Parties' arguments and the proceedings in the petition

5. The petitioner claims that IDF soldiers and security forces are responsible for her husband's death. Her position is that the latter did so under orders from the government and senior ranking military officials, with the Respondent's approval and without providing her deceased husband the opportunity to prove his innocence and defend his life. In this context, the Petitioner claims that IDF soldiers and security forces acted on the basis of suspicions only, *ultra vires* and in breach of Basic Law: Human Dignity and Liberty. The Petitioner also stresses that the Deceased could have been taken into custody on many different occasions, while on his way to various destinations and while crossing military checkpoints. She adds that the fact that Israel refrained from arresting, interrogating and trying the Deceased and opted for an operation with the objective of killing him constitutes, in her opinion, a flagrant breach of criminal Israeli law, Israeli basic laws and international law. On the factual aspect, the Petitioner describes the Deceased as a person who

provided assistance to soldiers who had taken a wrong turn and fell into the hands of an angry mob in Tulkarem just two weeks before he was killed. It should be noted that in her arguments, the Petitioner ignored the dire security situation at the time of the incident, the murderous terrorism rampant in Israel, the large number of victims and the hundreds of deaths and injuries about which the Respondents elaborated in their response.

6. In his response to the petition, the Respondent rejected the Petitioner's allegations for a number of reasons. First, the Respondent addressed the deterioration in the security situation which had occurred in the Judea and Samaria Area and Gaza Strip since September 2000, with a particular emphasis on the severe harmful effects of the murderous wave of terrorism that plagued Israel and its classification as hostilities for all intents and purposes. According to the Respondent, the murderous acts were carried out by active terrorist organizations, including Hamas, Islamic Jihad and the Tandheem, which was headed by her deceased husband. On this issue, the Respondent referred to his response to the first petition and to the petition submitted in HCJ 5872/01. The Respondent later specified that the counter-terrorism policy implemented by the security establishment was composed of many different measures and actions including: improved operational deployment, arrests, legal action and an attempt, which failed at the time, to institute cooperation with Palestinian security agencies. The Respondent also noted that targeted killings were consistent with international law and that in the context of hostilities, the laws of war permit targeting a person who is positively identified as active in carrying out fatal terrorist attacks against Israeli targets. It was also argued that civilians who directly participate in hostilities lose their immunity as protected persons and become legitimate targets for attacks intended to thwart their intentions to commit future hostile activities. Third, the Respondent argued that targeted killings were a rare step, employed only for the purpose of saving lives and when security officials and the IDF believe there is no other option. It was also clarified that military operations were considered at the highest levels and their approval was examined vis-à-vis the provisions of international law regarding the laws of war.

The State also argued that the petition must be rejected out of hand as it concerned combat operations during war time, which are not subject to judicial review and are non-justiciable. This argument was rejected on its merit in the judgment in the **targeted killings** case.

With respect to the circumstances of the Deceased's death, counsel for the Respondent noted that the Attorney General, to whom the request for a criminal investigation had been addressed, was in receipt of the relevant security officials' response to the Petitioner's demands. Upon completion of the review of the matter, the Attorney General decided that there was no reason or justification to order an investigation as requested since there was no suspicion that a criminal offense had been committed. In this context, counsel for the Respondent stressed that the material presented to the Attorney General was classified and that he was therefore unable to present it in the response given in open court and could do so only *ex parte* and *in camera*. However, in his response, the Respondent did refer to the letter the assistant to the Defense Minister had sent Physicians for Human Rights, in which he stated that the Deceased headed the Tandheem of Tulkarem and was in command of a cell that carried out shootings at IDF soldiers and Israeli settlements. The letter indicates that the Deceased arranged for arms and ammunition to be supplied to the cell and that three IDF soldiers were seriously injured in one of its terrorist attacks. Finally, the Respondent claimed that the Petitioner had failed to prove that there was any flaw in the Respondent's decision, let alone one of the rare flaws that would move the court to consider intervention in the Attorney General's decision not to order a criminal investigation

7. On January 29, 2002, the Court held a hearing (Justices **E. Mazza**, **M. Cheshin** and **E. Levi**). On June 25, 2002, the Court ruled that the petition would be heard jointly with the **general petition** on targeted killings. However, thereafter, parties filed a number of motions on consent to delay the

hearing of the current petition until the judgment in the **general petition** was delivered. On March 12, 2007, after the judgment in the **targeted killings** case was delivered, the Court instructed parties to file notice within 30 days with regards to their position on the petition at bar in view of the holdings in the aforesaid judgment. The Petitioner's response was very brief and stated that she "insists on the remedy sought as detailed in the petition". On December 21, 2007, counsel for the Respondent delivered his position that the judgment in the **general petition** supported the Attorney General's decision not to grant the request. Counsel added to this by attaching unclassified investigative materials on the Deceased's "work" as the head of the Tandheem terrorist organization in Tulkarem.

8. In view of the unclassified information presented along with the supplementary notice and in view of the position of counsel for the Respondent, the Court instructed the Petitioner to file a detailed notice on her behalf relating to the ramifications the **targeted killings** judgment had for her case. On May 25, 2008, this supplementary notice was received. In her notice, the Petitioner repeated most of the arguments made in the Petition, while focusing on the argument that a more proportionate measure was available. The Petitioner also sharpened her criticism of the choice to kill the Deceased rather than bring him to justice, as the security establishment had done with other individuals involved in terrorism. In addition, the Petitioner argued that at the time her updating notice was submitted, the Respondent still had not presented his account of the Deceased's death and that this raised some questions. The Petitioner also requested that the Court examine the level of the information which formed the basis for the decision in the Deceased's case, whether this information was reliable and to what extent the Deceased's actions were ongoing and life threatening. On a more general level, the Petitioner noted that to the best of her knowledge, the military was still carrying out targeted killings which failed to meet the holdings of the judgment on the **general petition**.

Despite the Court's decision that the "Respondent would be able to file a response to this notice", the Petitioner's notice received no response from the Respondent. On July 26, 2010, the Respondent was instructed to submit his current position on the petition, including reference to the ramifications the **general petition** had for the case at hand. On September 21, 2010, counsel for the Respondent replied that he saw no reason to respond to the statements made in the Petitioner's updating notice as the Respondent's position was detailed in his updating notice of December 12, 2007 and that he maintained that it was possible to deliver a judgment based on the notices that were on file with the Court.

Deliberation and ruling

9. As aforesaid, this Petition initially challenged the Respondent's decision not to launch a criminal investigation into the targeted killing operation in which the Deceased perished on December 31, 2000, based on the assumption that targeted killings are unlawful *per se*. However, the question of the lawfulness of targeted killings, including the related issues of principle, was resolved in a different petition (HCJ 769/02), and therefore, parties were requested to relate to the impact of that ruling on the case at hand. In the **general petition**, the Court held that targeted killing operations cannot be dismissed prospectively and on a wholesale basis and that the lawfulness of such actions must be examined in each individual case according to the criteria established by the Court (the **targeted killings** case, §60 of President **A. Barak**'s opinion). We shall briefly note that in the context of the **general petition**, the Court was required to consider the question of the applicable international law and the interpretation of the provision contained in Article 51(3) of Protocol I of the Geneva Conventions, 1977 which sets forth:

Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

In its judgment, the Court formulated the interpretative criteria for the provision contained in Article 51(3) according to its three components: taking part in hostilities (*ibid.*, §33), taking direct part in hostilities (*ibid.*, §§34-37) and “for such time” (*ibid.*, §§37-40), in view of the need to define who are civilians who “take a direct part in hostilities” and ascertain the period of time during which they lose their protections.

10. The criteria formulated in the judgment indicate that a targeted killing must not be undertaken unless a number of significant conditions are met. It was held that not all involvement in terrorist activity constitutes taking direct part in hostilities and that such activity is only that which is linked to the core of the hostilities themselves, in other words, activity which, on the one hand is not limited to physical attack itself but, on the other, does not include indirect assistance. The Court established an additional condition which instructs that a civilian who is taking a direct part in hostilities may not be attacked if a less harmful measure is available. As for the intelligence which forms the basis for a decision to carry out a targeted killing, the Court ruled that this information must be the most accurate and reliable information and that a retrospective examination must be carried out with respect to the accuracy of the target’s identification and the circumstances of the attack on him (*ibid.*, §40). Such examination can only be performed on an individual basis and, for the most part, depending on circumstances, only retroactively. In addition to the aforesaid conditions, the Court also held that that an attack on a civilian who is taking a direct part in hostilities which results in harm to innocent civilians who are in the vicinity of the target must meet the test of proportionality with respect to these innocent civilians as well. Finally, the Court saw fit to emphasize that when a targeted killing is carried out under the specified qualifications, within the confines of the international law of armed conflict and according to customary humanitarian law as interpreted by the Court, the action does not constitute arbitrary deprivation of life, but rather a life-saving measure.
11. In addition to the aforesaid, in the judgment, the Court also addressed the question of how to examine the actions taken by the IDF in the context of a targeted killing and whether these actions were in conformity with the provision contained in Article 51(3) of Protocol I to the Geneva Conventions as interpreted by the Court. On this issue, the Court ruled that the examination must be performed by a special committee that would have the appropriate tools for doing so rather than by this Court. The Court specified:

[A]fter an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent. (*Ibid.*, §40 of President **A. Barak**’s opinion)

And:

Having determined in this judgment the provisions of customary international law on the issue before us, we naturally cannot examine its realization in advance. Judicial review on this issue will, by nature, be retrospective. Second, the principle examination must be performed by the examination committee, which according to international law must perform an objective retrospective examination. **The review of this Court can, by nature, be directed only against the decisions of that committee, and only according to the accepted standards regarding such review.** (*Ibid.*, §59 of President **A. Barak**’s opinion) (Emphasis added – D.B.)

12. As noted above, parties were requested to provide their positions on the ramifications the judgment in the **general petition** had for the matter at hand. However, despite our instruction, they made no reference to the outline presented by the Court with respect to establishing a special committee. The Petitioner, on her part, did not see fit to request an individual examination of the incident which is the subject of the petition by the special committee. The Respondent did not present the full circumstances and details of the incident that motivated the petition. In this state of affairs, it is clear that this Court is not the appropriate forum nor does it have the required tools for examining the circumstances of the incident in which the Deceased was killed. However, the Petitioner did raise a number of questions in her petition, which were left unanswered in the Respondent's submissions. These questions mostly relate to the circumstances under which the deceased was killed and whether they met the criteria established in the **targeted killings** judgment. These questions, if and inasmuch as they can be clarified, should have been clarified by the professional forum which was to have been established for this purpose, although, in the circumstances of the matter at hand, no such forum was established before our judgment in the **targeted killings** case was delivered.
13. We are aware of the fact that the **targeted killings** judgment and the instructions it established do not directly apply to the operation which is the subject of the petition herein, as it predated the judgment by a number of years and as such, the judgment was not binding on the Respondent at the time. Despite this, in view of the questions raised by the Petitioner and in view of the Respondent's position that the **targeted killings** judgment supports his position, the Petitioner's matter could have been referred for examination by the special committee as held in the **targeted killings** judgment (see and compare: HCJ 8794/04 **Yoav Hess et al. v. Military Advocate General**, §11 of my judgment (unreported, December 23, 2008). Such a request was not made in the context of the later arguments submitted by the Petitioner and it is doubtful that such clarification is practicable today considering the circumstances and conditions in place at the time of the incident. As stated, we were not requested to take a position on this issue.
14. The petition is therefore dismissed without a costs order.

President

Justice S. Joubran:

I concur.

Justice

Justice U. Vogelman:

I concur.

Justice

Ordered as per the opinion of President D. Beinisch

Given today, 25 Shvat 5771 (January 30, 2011)

President

Justice

Justice