HCJ 9441/07

Mahmad Mesbah Taa Agbar

v.

1. IDF Commander in Judaea and Samaria
2. Military Appeals Court
3. General Security Service
4. Military Prosecutor

HCJ 9454/07

Tariq Yusuf Nasser Abu Matar

v.

1. IDF Commander in Judaea and Samaria
2. Military Appeals Court
3. General Security Service
4. Military Prosecutor

The Supreme Court sitting as the High Court of Justice
[20 December 2007]
Before Justices E.E. Levy, E. Rubinstein, Y. Danziger

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: In 2007, an administrative detention order was made against the petitioner in HCJ 9441/07 on the ground that he was active in the Hamas organization and presented a threat to security in the territories. The order was made for six months and was subsequently renewed for an additional period of six months.

In 2006, an administrative detention order was made against the petitioner in HCJ 9454/07 on the ground that he was active in the Popular Front terrorist organization and presented a threat to security in the territories. The order was made for six months and was subsequently renewed for two further periods of six months.

The petitioners claimed that there was no evidence to show they presented a threat to security. The respondents argued, on the basis of privileged evidence, that the two petitioners did indeed present a threat to security.

Held: The main difficulty in administrative detention cases is that much of the evidence is privileged, because of the concern of revealing sources and intelligence methods and witnesses' fears with regard to appearing in court. The risks in these contexts are real. A detainee does not have a proper and complete opportunity of defending himself against what is alleged against him; he is not shown most of the evidence, he cannot examine it and he is unable to conduct a cross-examination. This requires the court to be especially careful and to examine the evidence brought before it very carefully. When doing so, the court should regard itself as being a 'temporary defence counsel.'

Administrative detention is the last resort. Because of the manifestly problematic nature of administrative detention, every effort should be made to bring the detainee to a criminal trial.

In the specific cases, the evidence against the petitioners was sufficiently serious to justify their continued detention.

Petition denied.

Legislation cited:

Administrative Detentions (Temporary Provision) (Judaea and Samaria) Order (no. 1226), 5748-1988.

Administrative Detentions (Temporary Provision) (Judaea and Samaria) Order (Amendment no. 30) (no. 1555), 5765-2005, ss. 4(b), 6(a).

Defence (Emergency) Regulations, 1945.

Emergency Powers (Detentions) Law, 5739-1979, ss. 2, 2(a), 2(b), 4, 4(c) 5, 6, 7.

Law and Admininstration Ordinance, 5708-1948, s. 9.

Israeli Supreme Court cases cited:

[1] ADA 8607/04 *Fahima v. State of Israel* [2005] IsrSC 59(3) 258.

[2] ADA 2/82 *Lerner v. Minister of Defence* [1988] IsrSC 42(3) 529.

[3] ADA 1/88 *Agbariyeh v. State of Israel* [1988] IsrSC 42(1) 840.

[4] HCJ 5784/03 *Salama v. IDF Commander in Judaea and Samaria* [2003] IsrSC 57(6) 721; **[2002-3] IsrSC 289**.

[5] ADA 8788/03 *Federman v. Minister of Defence* [2004] IsrSC 58(1) 176.

[6] ADA 1/82 *Kawasmah v. Minister of Defence* [1982] IsrSC 36(1) 666.

[7] ADA 2/86 *A v. Minister of Defence* [1987] IsrSC 41(2) 508.

[8] HCJ 4400/98 *Braham v. Judge Colonel Shefi* [1998] IsrSC 52(5) 337.

[9] ADA 4794/05 *Ofan v. Minister of Defence* (unreported).

[10] HCJ 2320/98 *El-Amla v. IDF Commander in Judaea and Samaria* [1992] IsrSC 52(3) 346.

[11] CrimA 889/96 *Mazrib v. State of Israel* [1997] IsrSC 51(1) 433.

[12] ADA 6183/06 *Gruner v. Minister of Defence* (unreported).
[13] HCJ 5100/94 *Public Committee against Torture v. Government of Israel* [1999] IsrSC 53(4) 817; **[1998-9] IsrLR 567**.
[14] HCJ 5555/05 *Federman v. Central Commander* [2005] IsrSC 59(2) 865.
[15] HCJ 5994/03 *Sadar v. IDF Commander in West Bank* (unreported).
[16] HCJ 297/82 *Berger v. Minister of Interior* [1983] IsrSC 37(3) 29.
[17] CrimFH 2316/95 *Ganimat v. State of Israel* [1995] IsrSC 49(4) 589.
[18] HCJ 1546/06 *Gezawi v. IDF Commander in West Bank* (unreported).
[19] HCJ 3722/06 *Gitt v. IDF Commander in West Bank* (unreported).
[20] HCJ 5287/06 *Zatri v. Military Prosecutor* (unreported).
[21] HCJ 2233/07 *A v. IDF Commander in Judaea and Samaria* (unreported).

American cases cited:
[22] *Rasul v. Bush*, 542 U.S. 466 (2004).
[23] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

English case cited:
[24] *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58 (decision of 13 December 2007).

Jewish law sources cited:
[25] Babylonian Talmud, *Sanhedrin* 6b.

For the petitioner in HCJ 9441/07 — J. Boulus.
For the petitioner in HCJ 9454/07 — R. Mahagna.
For the first respondent — I. Amir.

JUDGMENT

Justice E. Rubinstein

Background and proceedings

1. These are two petitions in which the petitioners are petitioning the court to order that the administrative detention orders made against them be set aside. The petitions were heard on the same day and give rise to similar questions, so this judgment is being given in respect of both petitions.

(a) The petitioner in HCJ 9441/07 (hereafter: the first petitioner), who was born in 1973, was detained on 29 March 2007, for six months, on the ground that he is active in the Hamas organization and is involved in activity that supports terrorism. On 5 April 2007 the order and the term stipulated therein were approved by a Military Court judge (ADC (JS) 1729/07). The decision states:

> 'I have been shown reliable, quality, and updated intelligence information that indicates a definite risk to the security of the territory should the detainee be released, and the involvement of the detainee in current activity that endangers the security of the territory and the security of the public.'

The first petitioner's appeal against this decision was denied by the Military Appeals Court in the territory of Judaea and Samaria on 9 May 2007 (ADA 2252/07). On 7 September the administrative detention was extended until 6 March 2008. On 9 September 2007 the detention order was approved (ADC (JS) 3077/07) and on 29 October 2007 the petitioner's appeal against that decision was denied (ADA 3733/07).

(b) The petitioner in HCJ 9454/07 (hereafter: the second petitioner), who was born in 1989, was arrested on 15 September 2006 on the grounds of being active in the Popular Front terrorist organization. On 20 September 2006 an administrative detention order was issued against him for six months, and this was extended from time to time. On 10 September 2007 the military commander in the territory extended the administrative detention order until 13 March 2008. On 18 September 2007 the order and the term stipulated therein were approved (ADC (JS) 3138/07). In the decision the judge said that —

> 'I have been shown quality, updated intelligence information that indicates a definite risk to the security of the territory should the detainee be released, and the involvement of the detainee in grave activities in support of terrorism in the Popular Front prior to his detention.'

The second petitioner's appeal against this decision was denied by the Military Appeals Court on 17 October 2007 (ADA 3780/07).

The arguments in the petitions

2. According to the first petitioner, the decision of the military commander is unreasonable in the extreme. He claims that the detention was based on old and unreliable intelligence information, and it amounts to a punitive act because the petitioner is a Hamas activist. He also argues that

since the order was made in his case, he has not been interrogated and his rights have been seriously violated, because the information on which the order was based is privileged and he is not allowed to examine it. Finally he argued that a more proportionate alternative was not considered in his case.

The second petitioner claims that he has no criminal or security record, that no additional intelligence material was collected in his case after his detention, that the possibility of indicting him in a criminal trial rather than administrative detention was not considered, and that no investigation effort was made to obtain evidence that would allow this. He argued that the longer his detention lasts, the greater the amount of evidence that is needed to justify the continuation of the detention. The second petitioner denies any activity in the Popular Front organization or that he planned to carry out a revenge attack for the death of 'martyrs,' as alleged against him. He claims that the activity under discussion was the desire of a group of students to honour the memory of one of the 'martyrs' in the school where he studied.

He argued that weight should attach to the passage of time since he was detained, his youth (he was detained before he turned seventeen), the fact that no security incidents were reported in the past in the area where he lives, and the calm that he claims currently prevails given the commencement of political negotiations.His family also expressed a concern that in prison the second petitioner will associate with undesirable elements, go astray and not continue his studies.

3. The respondents argue that the petitions should be denied. With regard to the first petitioner, they claim that 'This is a petitioner who is a Hamas activist and endangers the security of the territory. These reasons necessitate the administrative detention of the petitioner, and there is no other measure that can neutralize the risk that he presents.' With regard to the second petitioner, they claim that this is 'a petitioner who is involved in serious terrorism-supporting activity in the Popular Front, and therefore he endangers the security of the territory. These reasons necessitate the administrative detention of the petition, and there is no other measure that can neutralize the risk that he presents.' Therefore the respondents argue that there was no flaw in the decisions of the authorities that approved the detention orders with respect to the petitioners.

4. (a) At the hearing before us, counsel for the first petitioner argued at length that the state's reply is a standard reply that disguises an excessive use of the measure of administrative detention by means of expressions such as 'terrorism-supporting activity.' The interrogations that are carried out as a

result of the courts' decisions were not real interrogations but merely sham interrogations, even though the GSS knows very well how to conduct an interrogation. Questions were also raised with regard to the evidence, i.e., whether the information on which the state relied was accurate or not.

(b) Counsel for the second petitioner claimed that his client's interrogation amounted to only three or four questions. The fact is that the second petitioner is an inexperienced twelfth-grade high-school student. Older and more important persons than he were not detained. Not enough was done to indict him in a criminal trial. It was argued that the background to the arrest of the second petitioner, who comes from an ordinary family, was the fact that, together with friends at school, where social and political activity takes place, he sought to conduct a students' assembly in memory of someone who was killed by the IDF.

(c) Following the oral pleadings of counsel for the state, which reiterated its written pleadings, at the request of counsel for the petitioners we reviewed the privileged material *ex parte* and conducted a dialogue with representatives of the State Attorney's office and the defence establishment.

(d) To complete the picture we should point out that the first petitioner was interrogated by the police on 26 March 2007. He was suspected of belonging to and being active in the Hamas organization. The first petitioner, who refused to sign, denied any connection to the organization and described himself as a taxi driver who was a graduate of the An-Najah University in the field of Islamic law. He was asked, *inter alia*, whether he recruited a certain person (whose name was mentioned) to Hamas, and he answered no. He also denied that he introduced that person to a military activist, he denied that he was a teacher of religious studies, except for classes at the mosque, and he confirmed that he took part in religious studies. He was asked specifically about certain persons.

(e) In his interrogation on 12 June 2007, the second petitioner was suspected of activity against the security of the territory and of military activity in the Popular Front. He also refused to sign the statement since it was written in Hebrew. He denied the suspicions (incidentally, in his interrogation he said that he had also been interrogated previously), and he claimed that collaborators lied about him for payment. He denied that he intended to carry out military activity as revenge for the death of a 'martyr'; he also said 'that if there is anything against me, take me to the Russian Compound [Police Station] for interrogation, and I will prove to you that I am innocent.'

Deliberations

5. This Court has said:

> 'An administrative detention order that is made against someone is an exceptional measure that is taken by the competent authority, and it lies outside the ordinary set of laws that lay down the prior conditions for detaining a person. Administrative detention violates personal liberty. This violation is justified under the law only when special and exceptional conditions that require the use of this extreme and unusual measure are satisfied… For the purpose of administrative detention, a balance should be struck between the values of safeguarding the liberty and dignity of the individual and the need to protect the security of the state and the public. This balance is naturally a difficult one, but sometimes it is unavoidable because of the security realities of the state and society. When striking this balance, care should always be taken to ensure that the administrative detention order is used proportionately' (ADA 8607/04 *Fahima v. State of Israel* [1], at p. 262, *per* Justice Procaccia).

This Court regards itself as duty-bound to remind itself of the foregoing from time to time. Administrative detention is the last resort, and it should remain so. The authorities therefore have a duty, notwithstanding the considerable burden that it imposes on them, to try to prosecute detainees in a criminal trial. This is also the reason that we patiently deal with such petitions which constantly come before us, even though in reality they are applications for leave to appeal to a third instance, and some of these petitions have no merit. Counsel for the petitioner does not always know the real facts, and they are disclosed in the privileged evidence. Indeed, our experience in very many administrative detention cases, if truth be told, is that the privileged material that we are authorized to see under the law at the request of the petitioners is usually serious and *prima facie* justifies detention, but it is based on methods of collecting information that cannot be disclosed because it may strongly harm the security interest in general or specific persons. There are of course exceptions to this, and in these cases a the dialogue in the courtroom occasionally persuades the state representatives to change their position. But it is quite likely that in certain cases additional efforts to interrogate suspects would produce evidence that would allow a prosecution, without revealing what cannot be revealed.

Administrative detention and a criminal trial

6. Hear it bears mention that in a series of judgments this Court has called for the use of criminal trials to be preferred to the use of administrative detention. The ordinary criminal trial should certainly be preferred to the use of a power given to the Minister of Defence or the military commander in the territories to issue an administrative detention order (ADA 2/82 *Lerner v. Minister of Defence* [2] (*per* President Shamgar); ADA 1/88 *Agbariyeh v. State of Israel* [3] (*per* Justice Shlomo Levin); see also HCJ 5784/03 *Salama v. IDF Commander in Judaea and Samaria* [4], at p. 727 {296-297 (*per* President Barak); ADA 8788/03 *Federman v. Minister of Defence* [5] (*per* Justice Grunis). This position is obviously based on the fact that a criminal trial allows greater protection of the defendant's rights. For this reason, this Court has issued a call — which, as will be explained below, has been heard — to interrogate all administrative detainees, *inter alia* in order to examine the possibility of bringing them to trial. Indeed, from a theoretical viewpoint, the criminal trial and the administrative proceeding are intended to serve different purposes. Whereas the criminal trial is retrospective and seeks to call a person to account for offences that have already been committed, the administrative proceeding is prospective and seeks to prevent the commission of offences. The preference for criminal trials should be understood in three different contexts. First, in a criminal trial evidence is presented to the defendant and he has the opportunity of responding to it. Second, it sometimes happens that prospective plans in themselves constitute a criminal offence, such as forming an unlawful organization, offences of conspiracy and attempt. Third, in many cases criminal activity in similar contexts in the past testifies to a future threat. This was mentioned by the president of the Jerusalem District Court, Judge Yehuda Cohen, who said: 'I am of the opinion that the detainee's past, namely the offences that are attributed to him, is a warning light for the future' (cited by President Yitzhak Kahn in ADA 1/82 *Kawasmah v. Minister of Defence* [6]). For this reason, the criminal trial is preferable to the administrative proceeding, and that is why a proper interrogation is needed. For the reasons that will be explained below (see paragraph 9), the court that scrutinizes the administrative detention is shown intelligence evidence that testifies to past activity, but since its disclosure will almost certainly undermine security in the territory, there is no alternative but to rely on it as a basis for preventative detention that is prospective.

On administrative detention in Israel and the territories

7. (1) Administrative detention in Israel proper is governed by the Emergency Powers (Detentions) Law, 5739-1979 (hereafter — the Emergency Powers (Detentions) Law or the law). The explanatory notes to the draft law (the draft Emergency Powers (Detentions and Miscellaneous Provisions) Law, 5738-1978, *Draft Laws*, 5738, 294) described the draft law as a solution to the criticism that had been levelled against the Defence (Emergency) Regulations, 1945, which were introduced in an attempt to subdue the Jewish underground organizations during the British Mandate. It was said that although —

> '… in the state of siege in which the state has found itself since its establishment, special measures are necessary to ensure the proper defence of the state against persons who plan to destroy it, nonetheless the existence of the extreme regulations that are still in force should not be acceptable, even though democratic countries employ similar regulations in less difficult circumstances.'

It was therefore proposed to that an Israeli law should be enacted to 'satisfy security needs while safeguarding important principles of the rule of law.' The use of the Emergency Powers (Detentions) Law is contingent upon the existence of a state of emergency under s. 9 of the Law and Administration Ordinance, 5708-1948, which, as is well known, has never been cancelled, because of the position in which Israel has been placed since it was declared when the state was founded. Section 2 of the law provides that the Minister of Defence may order administrative detention for a period that does not exceed six months if he has 'a reasonable basis for assuming that reasons of state security or public security require a certain person to be held in detention' (s. 2(a) of the law). The Minister of Defence may extend the period of detention from time to time by an additional six months (s. 2(b) of the law). Admittedly, on each occasion it is only possible to extend the order by six months, but there is no limit upon the number of extensions. If a person is arrested, he should be brought within 48 hours before the president of the District Court, who may approve the order, set it aside or shorten it. If he does none of the aforesaid, the detainee shall be released (s. 4 of the law). If the order is approved, the detainee should be brought within three months before the District Court for a *de novo* hearing (s. 5 of the law). An appeal of the decision shall be heard before the Supreme Court by one justice (s. 7 of the law).

(b) Administrative detentions in the territories are governed by the Administrative Detentions (Temporary Provision) (Judaea and Samaria) Order

(Amendment no. 30) (no. 1555), 5765-2005 (hereafter — the Administrative Detentions Order), which was originally the Administrative Detentions (Temporary Provision) (Judaea and Samaria) Order (no. 1226), 5748-1988, that underwent many changes over the years, especially with regard to the periods of time stated therein. The detention order is issued by the military commander in the territory or someone who has been authorized by him. In this arrangement also the initial period of detention may not exceed six months, but the military commander is entitled to extend it from time to time.

(c) One of the differences between administrative detention in Israel and administrative detention in the territories lies in the timing of the judicial review. According to the provisions of the Administrative Detentions Order, the detainee should be brought before a military judge within eight days of the time of his arrest. In one case this period was extended to 18 days, such as during the 'Protective Shield ' operation and the difficult struggle against suicide bombers in 2002. This is different from the law applicable in Israel, which, as stated above, requires the order to be subjected to judicial review within 48 hours. The grounds for setting aside a detention order are set out in s. 4(c) of the Emergency Powers (Detentions) Law and in s. 4(b) of the Administrative Detentions Order, and they are both worded in the same way, namely that it has been proved that 'the reasons for which it was made were not objective reasons concerning the security of the territory or the security of the public, or that it was made in bad faith or as a result of irrelevant considerations.' There are also provisions with regard to periodic judicial review. Both under the law that applies in Israel and under the law that applies in the territories, the judge may depart from the rules of evidence if he thinks that it is necessary to do so in order to discover the truth and to dispense justice (s. 6 of the law, s. 6(a) of the Administrative Detentions Order). These provisions naturally relate to the type of evidence that is used in such cases; the court inspects privileged material *ex parte*. Judicial review in the territories is exercised by a Military Court judge and his decision may be appealed before a judge in the Military Appeals Court; finally, petitions are frequently filed in this Court. The detainees are entitled to representation by lawyers, which they actually receive.

The nature of judicial review

8. (a) To complete the picture we should mention that the Emergency Powers (Detentions) Law was preceded by Regulation 111 of the Defence (Emergency) Regulations, according to which the military commander was

entitled to issue an order that a person should be placed in detention, without any trial, if he thought 'that it was necessary or beneficial to make the order in order to safeguard the welfare of the public, to protect the State of Israel, to maintain public order or to subdue an uprising, rebellion or riot.' The same applied to detention in the territories before the Administrative Detentions Order was enacted. In ADA 2/86 *A v. Minister of Defence* [7] Justice Bejski accepted the approach of Prof. Y.H. Klinghoffer (in his article, 'Preventative Detention for Security Reasons,' 11 *Hebrew Univ. L. Rev. (Mishpatim)* 286 (1981)), that since the law was enacted with its requirement of judicial review, we are no longer dealing with an administrative act; the court said (*ibid*. [7], at p. 513) 'that the judicial review that is required by the provisions of the law is a safeguard against the arbitrariness of the administrative authority.' I should mention the remarks of Prof. Klinghoffer in that article: '… the great principle of the rule of law, which provides that a person should not be deprived of his personal liberty unless a judge has so decided, is to some extent satisfied.' In view of the aforesaid, the court does not merely examine, as it used to do, the legality of the administrative order, while refraining from replacing the discretion of the administrative authority with its own discretion, but it exercises independent discretion (*per* Justice Bejski, in *A v. Minister of Defence* [7], at p. 515; Klinghoffer, *ibid*., at p. 287). The scope of the review carried out by the president of the District Court when he considers an administrative detention is greater than the discretion given to the court in other contexts, when it examines the decisions of an administrative authority (HCJ 4400/98 *Braham v. Judge Colonel Shefi* [8], *per* Justice Or), and the same is true of the jurisdiction of the Supreme Court when it hears an appeal against a decision of the president of the District Court (for a comprehensive analysis of the Emergency Powers (Detentions) Law and the judicial discretion thereunder, see *Federman v. Minister of Defence* [5]; ADA 4794/05 *Ofan v. Minister of Defence* [9], *per* Justice Adiel). The authority of the military courts in the territories should be regarded in the same way (see para. (c) below).

(b) We should add that the Minister of Defence also does not have the authority to extend an administrative detention after the court decides that it should be shortened, subject to certain exceptions (HCJ 2320/98 *El-Amla v. IDF Commander in Judaea and Samaria* [10], at p. 362, *per* Justice Zamir). In that case, emphasis was placed on the importance of thorough and effective judicial review: 'Judicial review is the guardian of liberty, and it should be carefully protected' (*ibid*. [10], at p. 350, see also at p. 360); for a criticism of this approach, see A. Sharon, 'Administrative Detention: Limits of Authority

and Scope of Review,' 13 *Mishpat veTzava (Law and the Army: IDF Law Review)* 205 (1999). See also my article, 'Security and Law: Trends,' 44 *HaPraklit (Israel Bar L. Rev.)* 409 (2000), which is also included in my book, *Paths of Government and Law — Public Law Issues in Israel* (Hebrew) (2003), at pp. 263, 270. For a discussion of the subject of administrative detentions and a critique of Prof. Klinghoffer's approach regarding the status of the court, see E. Gross, *The Struggle of Democracy against Terrorism: Legal and Moral Aspects* (2004), at p. 289. I should add that, ultimately, even if the theoretical basis for the powers may be disputed, it is clear that the court, whether civil or military, is limited to the evidence brought before it, and 'a judge only has what his eyes see' (Babylonian Talmud, *Sanhedrin 6b* [25]). It may also be said that the power is regarded as 'jointly' exercised by the minister and the president of the court.

(c) As stated, the court has also applied the criteria practised in Israel to administrative detentions in the territories (*El-Amla v. IDF Commander in Judaea and Samaria* [10], at p. 361:

> 'It would appear that despite the differences between the Emergency Powers (Detentions) Law that applies in Israel and the Administrative Detentions Order that applies in Judaea and Samaria, there is no basis for distinguishing in this respect between judicial review of a detention order under the Emergency Powers (Detention) Law and judicial review of a detention order under the Administrative Detentions Order.'

There is much logic in this, since, from a substantive viewpoint, what difference is there between a loss of liberty in Israel and a loss of liberty in the territories (in this regard, see also the article of N. Benisho, 'Criminal Law in Judaea, Samaria and the Gaza Strip: A Brief Description and Trends,' 18 *Mishpat veTzava (Law and the Army: IDF Law Review)* 293 (2005), on the subject of the general trend of equating the law in Israel and that of the territories.

Administrative detention: evidentiary issues and privileged information

9. (a) The main difficulty that gave rise to administrative detentions lies first and foremost in the evidentiary sphere. In practice, much of the evidence in these cases is privileged, usually because of the concern of revealing sources and intelligence methods and witnesses' fears with regard to appearing in court (E. Nun, 'Administrative Detention in Israel,' 3 *Plilim (Israel J. of Crim. Justice)* 168 (1993), at p. 170). The risks in these contexts are real (see also Gross, *The Struggle of Democracy against Terrorism: Legal and Moral*

Aspects, at pp. 298-299). Notwithstanding, it should be remembered that in this situation a detainee does not have a proper and complete opportunity of defending himself against the allegations against him he is not shown most of the evidence, he cannot examine it and is unable to conduct a cross-examination. This requires the court to be especially careful and to examine the evidence brought before it very carefully; the court should appoint itself 'temporary defence counsel' (CrimA 889/96 *Mazrib v. State of Israel* [11], at p. 463 (*per* Justice M. Cheshin) and act as 'an advocate for the detainee, and examine the material brought before it scrupulously and thoroughly' (*Federman v. Minister of Defence* [5], at p. 187; ADA 6183/06 *Gruner v. Minister of Defence* [12], *per* Justice D. Cheshin). The court has also said:

> '… and when the defence establishment operates within the limits of the law, with its hands tied in various contexts for good and proper reasons of human rights (see the remarks of President Barak in HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [13], at p. 845 {605}, on democracy and security), privileged material that is not shown to the person involved is a tool that cannot be avoided… Obviously, this imposes a special and enhanced duty on judicial authorities in the military courts and this Court, when these matters come before it (and they do so almost on a daily basis), to examine the material brought before them with care, as they act as a kind of advocate on behalf of the person for whom the material is privileged' (HCJ 5555/05 *Federman v. Central Commander* [14], at p. 869).

(b) With regard to the evidence, the court should direct itself in accordance with the following:

> 'Information relating to several incidents cannot be compared to information relating to a single incident; information from one source cannot be compared to information from various sources; and information that is entirely based on the statements of agents and informers only cannot be compared to information that is also corroborated or supported by documents filed by the security services or by intelligence obtained from carrying out special operations' (HCJ 5994/03 *Sadar v. IDF Commander in West Bank* [15], *per* Justice Mazza).

Therefore the court not only hears counsel pleading for the Minister of Defence, but also explanations from members of the General Security Service (*Federman v. Minister of Defence* [5], at p. 189). The quantity and quality of

evidence that is required in order to justify the administrative detention can and should change with the passage of time; evidence that was sufficient to justify the making of the administrative detention order may not be sufficient to justify an extension of that detention, and evidence that will justify an extension of an administrative detention order may not be sufficient to justify a further extension thereof (see *Salama v. IDF Commander in Judaea and Samaria* [4]). The security establishment should therefore take into account new relevant material (HCJ 297/82 *Berger v. Minister of Interior* [16], at p. 44, *per* Justice Barak), and it should continually act in order to obtain evidence, so that it may discover the truth in so far as that is possible.

The war against terrorism — the United States

10. (a) Other countries too have contended with the problem of the war against terrorism, especially in recent years. The United States, for example,underwent a difficult legal odyssey since the terrorist attacks on 11 September 2001, and initially whoever was captured in Afghanistan or other places in the pursuit of Al-Qaida personnel who were behind the 11 September attacks was held at the Guantanamo Bay base outside the United States with a minimum of rights, according to the approach that these detainees were not subject to judicial review in the United States. For a brief description of the historical perspective of aspects of administrative detention at a time of crisis in the United States itself, see my article, 'Public Law in Times of Crisis and Times of War,' in my book, *Paths of Government and Law — Public Law Issues in Israel*, *supra*, at pp. 18, 20 (Hebrew). But in 2004 the United States Supreme Court decided in *Rasul v. Bush* [22], contrary to the administration's position, that the Federal courts had jurisdiction to consider the detentions of alien nationals at Guantanamo Bay within the scope of *habeas corpus*, and the administration did not have the power to deny them access to the court. In terms of the Israeli experience — and unfortunately we have been compelled to acquire such experience over decades — granting a right of standing in the High Court of Justice to detainees who are situated in the occupied territories has been recognized for a very long time, since the decision of Attorney-General Meir Shamgar (later president of the Supreme Court) after the Six Day War not to argue the lack of a right of standing. Since then, the cases of detainees in the territories have been heard by this Court. See M. Shamgar, 'Legal Concepts and Problems in Military Government in the Territories Administered By Israel 1967-1980,' *The Israeli Military Government –The Initial stage*, vol. l (M. Shamgar, ed.) at pp. 13, 56; E. Nathan, 'The Power of Supervision of the High Court of Justice over Military Government,' *ibid*, at p. 109; D. Shefi; 'The Reports of the U.N. Special Committee on Israeli Practice

in the Territories,' *ibid*, at pp. 285, 306-308. See also J.M. Seltzer, 'From a Chessboard to the Matrix: the Challenge of Applying the Laws of Armed Conflict in the Asymmetric Warfare Era,' in *War and Peace in the Jewish Tradition* (L. Schiffman, J.B. Wolowelsky (eds.), R.S. Hirt (series editor), 2007). But the pendulum between personal rights and national security in the United States did not reach equilibrium after *Rasul v. Bush* [22], as we shall briefly explain (incidentally, I should point out that the expression of 'rights vs. security' that is commonly used in legal discussions is problematic, since the rights of victims and the public as a whole to security and life are also rights, but they are located on the 'security' side of the equation, and therefore perhaps the correct expression is 'rights vs. rights,' or the balancing of individual rights against the rights of the public in the war against terrorism; see by analogy the remarks of President Shamgar in CrimFH 2316/95 *Ganimat v. State of Israel* [17], at pp. 620-621).

(b) Following *Rasul v. Bush* [22], the United States administration decided to establish a network of military commissions for judicial proceedings relating to the detention of alien combatants. The United States Supreme Court considered this in *Hamdan v. Rumsfeld* [23]. It held in 2006 that the commissions had not been established with the necessary congressional authorization, and they therefore were not valid. It also held that the commissions did not provide the necessary procedural safeguards. Following this decision, the Military Commissions Act was enacted the same year. This law approved the commissions, and it also deprived the courts of power to hear *habeas corpus* petitions of detainees from Guantanamo Bay and persons in similar positions. Admittedly an appeal was permitted to the Court of Appeals in the District of Columbia (Washington D.C.), but under very limited conditions, including a presumption that the evidence before the commissions is accurate and complete. Currently, a third case is being heard (*Boumediene v. Bush* (D.C. Cir., 2006)), in which it is claimed by detainees at Guantanamo Bay that the procedure laid down in the Military Commissions Act that was passed after *Hamdan v. Rumsfeld* [23] does not sufficiently protect the rights of detainees with regard to evidence (hearsay testimony), representation by defence counsel and interrogation techniques. The administration argued in reply that the rights given to detainees under the Military Commissions Act were extensive. The Federal Court of Appeals accepted the administration's position that in the absence of constitutional rights there was nothing improper in the fact that the Military Commissions Act of 2006 denied the Federal courts *habeas corpus* jurisdiction; therefore the detainees' claims were not heard on their merits. The United States Supreme Court did not agree initially

to hear the case, but it changed its mind and the matter is currently under consideration. The key question is whether the detainees are entitled under the United States Constitution to the right of *habeas corpus* and the right to a fair trial, since jurisprudential history in the United States allows an 'adequate substitute' to 'formal' *habeas corpus* by means of a 'suspension clause,' when that substitute is 'adequate and effective.'

English case law — effective control and imperative reasons of security

11. Recently the House of Lords gave judgment in *R (Al-Jedda) v. Secretary of State for Defence* [24]. It was held in the judgment, which concerned detainees in Iraq who were being held by British forces, that they were being held under the effective command and control of the United Kingdom rather than the United Nations, as the Secretary of State argued. Notwithstanding, it was held that the UK was entitled to detain persons for 'imperative reasons of security,' while ensuring that the detainees' rights under article 5(1) of the European Convention on Human Rights (which concerns detention) were not infringed to any greater extent than was inherent in such detention.

The criminal investigation

12. (a) This Court has on several occasions addressed the necessity of conducting a proper interrogation of someone held in administrative detention soon after being detained, in which the information that can be disclosed is shown to him. This should be regarded as a basic right:

> 'Our approach… is based on the fundamental outlook regarding the rights of a person held in administrative detention, no matter how serious his actions are believed to be…
>
> Within the basic scope of human dignity — and the rules concerning this apply to everyone, even to persons suspected of the most serious, despicable and depraved offences, whose perpetrators are as far removed from respecting human beings as the east is distant from the west — there is a duty to interrogate a person soon after his detention, and to disclose to him whatever information can be shown to him and is not privileged material that cannot be disclosed. The purpose, beyond allowing him to claim that he is a victim of mistaken identity and other similar claims, is that a person should not be detained without being given an opportunity, even if he makes no use of it, to present his side of the case in order to show, and to try and persuade the authorities, that there is no justification for his detention. As

> stated, what is shown to him should reflect the most that the unprivileged material allows to be disclosed. There is no need to speak at length about the fact that administrative detention is a serious sanction, because in view of the privileged nature of the evidence the detainee cannot contend with all of the accusations against him, and the court should act as his advocate (see *Federman v. Central Commander* [14], at p. 869)… Procedural rights are not luxuries; they also do not impose any real burden on the system (to remove doubt, they should exist even if they did impose a real burden)' (HCJ 1546/06 *Gezawi v. IDF Commander in West Bank* [18], at para. 6 of my opinion).

See also HCJ 3722/06 *Gitt v. IDF Commander in West Bank* [19] and HCJ 5287/06 *Zatri v. Military Prosecutor* [20], where Justice D. Cheshin, after considering the reported or planned establishment of permanent arrangements for conducting interrogations at places of detention, said the following:

> 'We would like to point out that the interrogation of the administrative detainee should admittedly be done on the basis of the unprivileged material, but it should be done by someone who is familiar with the details of the privileged material. There is no real purpose or significance to a meaningless interrogation. A proper interrogation should be practical, credible and effective, in a sincere attempt to obtain evidence to bring the administrative detainee to a criminal trial. To this end, the interrogator should have in his possession the privileged material relevant to the case.'

We should add that a proper interrogation should obviously not be conducted merely for the sake of appearances; it is precisely because of the manifestly problematic nature of administrative detention that, as aforesaid, every effort should be made to bring the detainee to a criminal trial.

(b) There are some interrogations where we see that the documentation is not satisfactory from the viewpoint of the effort made to obtain evidence that may be used for a criminal prosecution. Indeed, today — following the rulings of this Court — there is greater awareness of the need to carry out interrogations, and we have been informed of concerted efforts to do this. We are still of the opinion that there is room for improvement in this regard, to make the interrogations sufficiently meaningful. Although the evidence is mainly privileged for the reasons mentioned, in some cases there is a clue or room to manoeuvre that enables the conduct of a more through interrogation

even though we are constantly being told of priorities and budgetary problems. Sometimes we even wonder why someone who is presented to us in privileged evidence as a person of considerable importance, or even a leading figure, is not interrogated in the framework of a comprehensive intelligence interrogation rather than a brief police one. For example, we should point out that in the present case, as far as the first petitioner is concerned, he was asked in the police interrogation of 26 March 2007 about the fact that someone, whose name is mentioned, said (admittedly in the year 2000) 'that you recruited him to the Hamas organization.' The first petitioner denied this. We do not know the significance of the passage of time in this context, but in such a case the current 'criminal' implications of this matter should be examined more thoroughly. Returning to the general principle, there is in our opinion room for more extensive and more thorough interrogations in order to reduce the number of administrative detainees.

On the art of striking a balance

13. Ultimately, in conditions of an unceasing war against ongoing terrorism, in which, day by day and hour by hour, both the security establishment and the court are called upon to strike a balance between security needs and human rights, it would appear that the use of the measure of administrative detentions is still an unavoidable necessity, but we should ensure, in so far as possible, that the use made of it is proper and proportionate. The art of striking a balance between the serious violation of individual liberties and the security of the public is complex:

> 'The longer the period of administrative detention, the greater the weight of the detainee's right to his personal liberty in the balance against public interest considerations, and the greater the burden on the competent authority to prove the necessity of continuing to hold the person in detention' (HCJ 2233/07 *A v. IDF Commander in Judaea and Samaria* [21], *per* Justice Procaccia).

It is not superfluous to mention that administrative detention anticipates a future danger; it is not essentially a punitive measure, but a preventative one (*Gruner v. Minister of Defence* [12]; *Fahima v. State of Israel* [1]). Given this purpose of administrative detention, it is self-evident, as we have said, that orders that extend the period of administrative detention should be examined in accordance with the length of the detention and the extent of the threat that the detainee presents, or. as Justice Grunis said, a probability test should be conducted to examine whether harm to security is almost certain (*Federman v. Minister of Defence* [5], at p. 188). Ultimately —

> 'Everything depends on the circumstances of the case. In each case the evidence before the security authorities should be examined in order to ascertain the extent of the threat presented by the detainee to see whether it justifies his continued detention. For example, the nature of the suspicions against the detainee, the strength of the existing evidence against him and similar considerations should be taken into account (*Salama v. IDF Commander in Judaea and Samaria* [4], at p. 728{297}) , *per* President Barak).

Morality and combat in a Jewish and democratic state

14. Israel, which is both a Jewish and a democratic state, has outlooks on combat morality that are based on Jewish law. As Rabbi Aharon Lichtenstein said ('The Combat Morality of our Ancestor Abraham,' 2006, Yeshivat Har Etzion web site): 'We should continue to follow the path outlined by our ancestor Abraham [i.e., the manner in which he conducted his war] — to be sensitive to morality and justice even during war and combat that are just and right in themselves; see also Yaron Unger, 'Do not Fear, Abraham — On Combat Morality in Israel,' *Portion of the Week* (A. HaCohen, M. Vigoda, eds.), at p. 230; A. HaCohen, 'I Am for Peace, But When I Speak, They Are for War — Law and Morality in Times of War,' *ibid*., at p. 260.

Conclusion

15. Our intention in this judgment was merely to outline once again the judicial policy with regard to administrative detentions, and to mention once again, in addition to the fact that administrative detention is an unavoidable necessity, the duties of conducting a real interrogation, the need for great care in judicial scrutiny of privileged material, and the issue of proportionality. It would not be superfluous to also reiterate that bringing someone to a criminal trial, where it is possible, is far preferable to administrative detention.

From the general rule to the specific case

16. As we have said, with the consent of counsel for the petitioners, we examined the privileged evidence in their cases *ex parte*, and we conducted a dialogue with the representatives of the State Attorney's office and the security establishment. We have been persuaded that there is a real basis to the respondents' claim regarding the petitioners' activity, according to updated information. We also considered the young age of the second petitioner, but the seriousness of the position could be seen from the material that we have seen, and the position is not as his counsel claimed. At the end of the day, we see no grounds for intervention in the decisions of the military courts, and we

are unable to grant the petitions, subject to what was stated above. There is no order for costs.

Justice E.E. Levy
I agree.

Justice Y. Danziger
I agree.

Petition denied.

11 Tevet 5768.

20 December 2007.