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At the Supreme Court Sitting as the High Court of Justice

HCJ 7439/23

Before: Honorable Justice N. Sohlberg
Honorable Justice Y. Willner
Honorable Justice R. Ronen

The Petitioners: 1. _____ Alwahed
2. _____ Alwahidi
3. HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger

v.

The Respondents: 1. Israel Defense Forces
2. Chief Military Police Officer
3. Commissioner of Israel Prison Service
4. Commissioner of Israel Police

Petition for *a writ of Habeas Corpus*

Representing the Petitioners: Adv. Nadine Abu Arafah

Representing the Respondent : Adv. Matan Steinbuch

Judgment

Justice N. Sohlberg:

1. The petition concerns the request of Petitioner 3, HaMoked: Center for the Defence of the Individual, to order the Respondents to disclose information concerning the whereabouts of Petitioners 1-2 (hereinafter: the **Petitioners**) and the identity of the body holding them. The Petitioners, residents of the Gaza Strip, were allegedly arrested by the security forces on October 7, 2023, in the Erez Checkpoint area. It is alleged that the two Petitioners "**journalists, arrived to the Erez Checkpoint area on October 7, 2023, to document the occurrences during the war. While doing their work, the Petitioners were arrested by the Israeli security forces. Their detention had been documented**

by their families in videos which were posted on the media." It is further requested to order the release of Petitioners 1-2, to the extent that they are indeed held by the security forces in Israel unlawfully. In addition, HaMoked requests to order Respondent 2 to hold in its possession **"updated information concerning the detention and whereabouts of each detainee, resident of the Gaza Strip, who was detained during the war"**; or alternatively, to disclose information concerning the body holding such information; on the individual level, to the extent that Petitioners 1-2 are indeed held in Israel, it is requested to register their place of detention.

2. As a basis for Respondents' obligation to disclose information concerning the whereabouts of Petitioners 1-2, HaMoked refers to Section 53(a) of the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria Area) (No. 1651), 2009 (hereinafter: the **Order regarding Security Provisions** or the **Order**) which concerns disclosure of information to detainee's relatives about their detention and whereabouts. The Section reads as follows: **"If a person is arrested, notice of his arrest and location shall be given without delay to a person related to him, unless the detainee requested that such notice not be given"**. In addition, HaMoked refers to judgments given by this court, which according to HaMoked impose on the Respondents an obligation to inform the families of the detainees of their whereabouts.
3. In a decision dated October 11, 2023 I requested the Respondents to submit their response to the petition. In their response, the Respondents request to dismiss the petition *in limine*, making reference to their principled position in H CJ 5243/14 **HaMoked Center for the Defence of the Individual v. Israel Defense Forces** (August 4, 2014).
4. In said case, the petition of HaMoked (petitioner 3 in the case at hand) was heard requesting to obtain the details and whereabouts of Palestinians, residents of the Gaza Strip, who had been detained by the security forces in combat in Operation 'Protective Edge' ('Zuk Eitan'). In its response in the above case (from 2014), the state argued that **"the military owes no obligation to the petitioner, to disclose to it any piece of information concerning Gaza residents who were detained in the course of the ground activity of IDF forces in Operation 'Protective Edge' and who are held in the incarceration facilities under its responsibility"**. The state also argued in said response that the arrangements pertaining to detention in Israel or in the Judea and Samaria Area cannot be applied to the state of combat in Gaza, considering the different legal status of these areas and the fact that the Gaza Strip is currently a hostile territory, controlled by a terror organization, not under the effective control of Israel and to which the laws of belligerent occupation do not apply. Said petition was deleted at the time with petitioner's consent and with the recommendation of the court **"following Respondent's response and in view of what we heard from Respondent's legal counsel."** In the case at hand the Respondents reiterate their above position.
5. In addition, the Respondents refer to the response of the State Attorney's Office which had been given at the time to HaMoked – before the petition in HaMoked case was submitted (in 2014) – according to which the state allowed, in said circumstances and *ex gratia*, to turn contact solely on an individual level to the incarceration control center on behalf of Respondent 2, for the purpose of receiving information concerning the whereabouts of a Gaza resident whose relatives suspect has been arrested. The above,

inter alia, subject to proving a connection between the person requesting the information and the alleged detainee, making it clear that in circumstances of combat it is unavoidable that the duration of the individual examination process shall be longer than usual. In this context the Respondents in the petition at hand argue that this option, which was given at the time *ex gratia*, is not at all relevant to the case at hand since even the Petitioners do not claim that Respondent 2 had been contacted on behalf of the families of Petitioners 1-2, but solely claim that a "**work colleague**" of the two had contacted HaMoked in their matter. The Respondents note that also with respect to detentions made in the Judea and Samaria Area, the recipients of information concerning the identity and whereabouts of the detainee are only their relatives.

6. With respect to the remedies pertaining to the registration of the detainees' location – on both the general and individual levels – the Respondents argue that the Petitioners made no effort to substantiate their premise that there is no documentation of Gaza Strip residents held in Israel; the Respondents state further that this argument has already been answered at the time (in 2014) in the framework of the response to **HaMoked's** petition, which led, with the court's recommendation, to its deletion.
7. On October 18, 2023, I accepted HaMoked's request to reply to Respondents' response. HaMoked argued in its reply that HaMoked's case at that time (in 2014) concerned a request to receive the details of all Gaza residents detained in Israel, while the petition at hand seeks to obtain individual information about Petitioners 1-2, and therefore no inference can be drawn from said case to the case at hand. HaMoked has also referred to Respondents' "**undertaking**", which was allegedly given in H CJ 289/09 **Atar v. Israel Defense Forces** (January 25, 2009) according to which an effort shall be made to transfer the details of detainees from Gaza held in Israel "**within 48 hours**" from their arrival to Israel. In addition, reference was made by HaMoked to Respondents' consent which was given in the context of their response in H CJ 5226/14 **Abu Reida v. Israel Defense Forces** (July 31, 2014), to enable the submission of individual requests in the matter of detainees, Gaza residents, held in Israel to the incarceration control center on behalf of Respondent 2. In addition, HaMoked argued that for the purpose of submitting an individual request as aforesaid – which was allowed at the time to the detainees' relatives – "**their colleagues or anyone acting on behalf of their family... should be regarded as their relatives**".
8. I have considered the arguments which were raised in the petition and my conclusion is that the petition should be dismissed.

In these terrible days, the state of Israel conducts a difficult war against those seeking to destroy it, members of the Hamas organization controlling the Gaza Strip, which sent its murderers, along with a bloodthirsty mob, on the morning of October 7, 2023 (*Simchat Torah* holiday) - to destroy, kill and massacre the young and the elderly, babies and women.

9. According to HaMoked, when the war broke out, on October 7, 2023, Petitioners 1-2 were detained by the security forces in the Erez checkpoint area. Now, in the midst of the war, HaMoked requests that we order the Respondents, the security forces, to disperse

the fog of war, locate Petitioners 1-2 among the detainees of the war and transfer to it information concerning their whereabouts and the body holding them.

10. HaMoked relies as aforesaid on the provisions of the Order regarding Security Provisions. However, the provisions of the Order are not relevant to the case at hand, for two reasons: first, we see that according to the Order the information is disclosed to the detainee's "**relatives**". In the case at hand, the body seeking the information is HaMoked, which does not act and does not claim to act on behalf and following the request of the relatives of the alleged detainees. Even according to HaMoked itself, the request was made by a "work colleague" of Petitioners 1-2. In its reply to Respondents' response, HaMoked tried to 'improve' its version and argued that the families of Petitioners 1-2 have also joined the request in retrospect; however, the above was argued unconvincingly, without any support, and accordingly – HaMoked's reply has mainly focused on the attempt to 'expand' the circle of relevant addressees, beyond the relatives of the alleged detainees. This expansion is not anchored in the language of the Order.
11. **Second**, the Order regarding Security Provisions is not at all applicable to the case at hand. It applies only to the **Judea and Samaria area** and was published by virtue of the powers of the military commander in that area and the special provisions of the law applicable thereto. Hence, there is no room to discuss the provisions of the Order, without expressing an opinion on the content of its provisions on their merit. Furthermore, the judgments referred to by HaMoked to substantiate Respondents' obligation to give notice of the whereabouts of detained Palestinian residents – all concern the detention of Palestinians, residents of the Judea and Samaria area only, and are not relevant to detainees residents of the Gaza Strip, as aforesaid.
12. Petitioners 1-2 are the residents of the Gaza Strip (one from Tel al-Hawa neighborhood and the other from Jabalia), a foreign and hostile entity, controlled by the murderous terror organization - Hamas. The two are nationals of an enemy territory. On several occasions this court has clarified the fundamental difference between the legal framework which applies to the Judea and Samaria area – from which the Petitioners tried to derive the right they argue for – and that which applies to the Gaza Strip. We shall remind briefly: since the IDF forces have left the Gaza Strip area in 2005, Israel no longer effectively controls it. The state of Israel no longer maintains in the Gaza Strip a permanent military presence; Israel does not exercise therein governmental powers; and there is another governmental body in the area having the ability to exercise them. Accordingly, the obligations entrenched in international law according to the laws of belligerent occupation which were assumed by Israel, have terminated. The transition from a security presence and effective control to a physical separation from the Gaza Strip was translated, on the legal level, to transition from the application of the laws of belligerent occupation to the application of the laws of war and the rules of Public Law (HCJ 9132/07 **Albasioni v. Prime Minister**, paragraph 12 (January 30, 2008); CA 993/19 **A. v. State of Israel - Ministry of Defense**, 31-30, 114 (July 5, 2022); Roy Scheindorf and Eran Shamir-Borer "(Non) applicability of the laws of belligerent occupation to the Gaza Strip", **Tel-Aviv University Law Review** (*Iyunei Mishpat*) 43, 403, 408-421 (2020)). It should also be noted that in 2007, following the violent takeover of the Gaza Strip by the terror organization Hamas, and the escalation in the hostile terror activities against Israel and its citizens, the Gaza Strip was declared an "enemy territory"

by the Ministerial Committee on National Security Affairs on September 19, 2007, (decision B/34 of the Ministerial Committee on National Security Affairs "The Policy of Israel *vis-a-vis* Gaza (Military and Civil)"), for the purpose of section 5B(a)(1) of the Civil Wrongs (State Liability) Law, 1952.

13. Hence, HaMoked failed to meet the burden to point at a legal source obligating the Respondents to provide to **it** information regarding the whereabouts of Gaza Strip residents detained in Israel, who were arrested in the course of an act of war, particularly that which was imposed on us in the terrible circumstances of October 7, 2023.
14. There is no need to emphasize that I do not discuss in this context other legal aspects pertaining to the holding of detainees from Gaza who took part in hostile activities against the state of Israel, which are not relevant at this time (see, for instance, the Incarceration of Unlawful Combatants Law, 2002 and the regulations promulgated thereunder).
15. Indeed, in previous proceedings (**HaMoked** (August 4, 2014); **Abu Reida**) which were discussed as aforesaid in connection with the Operation 'Protective Edge' the state expressed willingness to enable the submission of an individual request to the incarceration control center, with respect to detainees who were arrested in the course of a military operation of Israel in Gaza, solely by family members of the detainees, and subject to proving their said connection. This possibility, it was emphasized at the time, is given *ex gratia*, making it clear that it does not constitute any commitment for similar conduct in future military operations, in Gaza or in any other hostile territory. Even in **Atar**, which was heard in the course of Operation 'Cast Lead', the Respondents stated that "an effort shall be made" to give the names of detainees arrested in combat within 48 hours – namely, an effort and not an obligation, and the above – should clearly be read subject to the individual security circumstances which existed at that time. It should also be noted that in the **Atar** judgment, it was clarified by this court that "**there is no room to determine that information concerning the identity of those captured in the course of combat shall be given within the same period of time which is routinely required in normal times**" (paragraph 3).
16. Despite these emphases, the Petitioners are now trying to capitalize on said willingness which was shown in **completely different circumstances** than those of the current situation and bind the Respondents thereto. Said willingness, it should be reminded, focused only on the detainees' relatives rather than on third parties such as HaMoked or "**work colleagues**". Considering my determination that it is a possibility which was offered *ex gratia*, in different circumstances, which is not entrenched in the law itself, I see no room to accept Petitioners' argument that the circle of the persons authorized to contact the incarceration control center should be expanded to include parties who are not family members; accepting this argument shall be like a tower floating on air.
17. As our ancient enemies have said: "**We have heard that the kings of the house of Israel are merciful kings**" (Kings A 20; 31); The possibility given to the relatives of detainees from the Gaza Strip, in the past, in completely different circumstances, who had been detained in the course of an armed conflict, to request information about them, is nothing but an act of grace, offered *ex gratia*, exercisable by the security forces at their absolute discretion.

18. In addition, Petitioners' request to obligate the Respondents to hold in their possession **"updated information concerning the detention and whereabouts of each detainee resident of the Gaza Strip, who was detained during the war"**, and particularly with respect to Petitioners 1-2 – has no room and should be dismissed. The Petitioners made no effort to establish any factual infrastructure which can lead to the conclusion – or at least, raise the suspicion – that such documentation does not exist, neither generally nor particularly. On the contrary: as stated in Respondents' response, it has already been clarified at the time in response to HaMoked's petition from 2014 – **"that as a matter of routine, in the incarceration facilities operated by the state authorities all the detainees held therein are registered, including detainees, Gaza Strip residents, who were brought thereto during the operation."** We are satisfied with the above.
19. Therefore, this petition should be dismissed.

J U S T I C E

Justice Y. Willner:

I concur.

J U S T I C E

Justice R. Ronen

I concur.

J U S T I C E

Therefore it was decided to dismiss the petition as stated in the judgment of Justice **Noam Sohlberg**. The Petitioners shall pay Respondents' costs in the sum of NIS 8,000.

Given today, 16 Heshvan 5784 (October 31, 2023).

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