

## At the Supreme Court Sitting as the High Court of Justice

HCJ 9021/23

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

The Petitioners: \_\_\_\_\_ Wadi and 61 Petitioners in a list

v.

The Respondents:

1. Israel Defense Forces
2. Chief Military Police Officer
3. Commissioner of Israel Prison Service
4. National Security Council
5. Attorney General
6. Military Advocate General

Petition for *an Order Nisi*

Representing the Petitioners: Adv. Nadine Abu Arafe; Adv. Nadia Daqqa

Representing the Respondent : Adv. Matan Steinbuch

## Judgment

### Justice R. Ronen:

1. In the Petition before us the families of the Petitioners – 62 Gaza Strip residents – request four remedies; **the first** that we order the Respondents to inform the Petitioners' families by whom and where the Petitioners are held and by virtue of which law; and to the extent that the Petitioners are held in an undeclared incarceration site – that we order to release them; **the second** that it shall be decided which body is responsible for providing information about the holding place of the Petitioners and others in their condition; **the third** that to the extent that the Petitioners are held in a detention facility which until now has not been used as a declared detention facility, we instruct the Respondents to present the order declaring it an incarceration facility; and **the fourth** that we order the Respondents to enable the Petitioners to meet with lawyers.
2. As is known, on Saturday, October 7, 2023, a murderous terror attack was launched against the state of Israel and its citizens by the terror organizations in the Gaza Strip.

Since then the state of Israel has been conducting a difficult war against the Hamas organization which controls the Gaza Strip. During the war the security forces have arrested Gaza Strip residents suspected of being involved in acts against the state of Israel. Some were arrested in Israel, some in the Judea and Samaria area and some over the course of combat in the Gaza Strip.

3. The Petition at hand was preceded by three additional petitions which have also requested information concerning Gaza Strip residents held by the security forces in Israel. Said petitions concerned Gaza Strip residents who were allegedly arrested while present within the territory of Israel. The first petition was filed on October 11, 2023 on behalf of two Gaza Strip residents and HaMoked: Center for the Defence of the Individual (HCJ 7439/23, hereinafter: the **First Petition**). On October 31, 2023 a judgment dismissing the petition was given (Justice N. Sohlberg with the concurrence of Justice Y. Willner and with my concurrence). First, it was held that the Order concerning Security Provisions [Consolidated Version] (Judea and Samaria Area) (No. 1651), 2009 (hereinafter: the **Order concerning Security Provisions**) – that the Petitioners had, *inter alia*, relied on – provides that the information shall be given to the detainee's "relatives" and therefore the information may not be given to HaMoked. Beyond that it was held that the Order does not apply to detainees who are residents of the Gaza Strip, which is defined as an enemy territory, and that the Petitioners did not point to another legal source obligating the Respondents to provide information concerning the whereabouts of Gaza Strip residents who were arrested in Israel in the course of a military action. In this context it was emphasized that the willingness expressed by the state in previous cases to allow the submission of individual requests to the Incarceration Control Center (hereinafter: the **Incarceration Control Center**) concerning detainees who were arrested in Israel in the course of a military action was made *ex gratia*, as an act of grace, in totally different circumstances, at the exclusive discretion of the security bodies.

On October 22, 2023 the second petition was filed (HCJ 7637/23, hereinafter: the **Second Petition**). This petition was also filed by HaMoked, and in addition on behalf of ten Gaza Strip residents. Following the decision of the court (Justice **K. Kabub**) dated October 24, 2023, the Respondents clarified that for the purpose of receiving information about the detainees their attorneys can contact Respondent 4 – the National Security Council (hereinafter: the **National Security Council**). Following the above, a request was submitted to the National Security Council on behalf of the petitioners in the Second Petition. The National Security Council responded and informed that said Gaza Strip residents were indeed in the custody of the authorities of the state of Israel and their detention place was given. Following the above, on October 30, 2023 the petitioners in the Second Petition submitted an application to delete it while reserving all of their arguments.

In a judgment dated November 6, 2023 (Justice **Y. Willner**, Justice **O. Grosskopf** and Justice **K. Kabub**) it was held that in as much as the petition concerned the individual cases of the petitioners, it became redundant and should be dismissed. The court even referred to the First Petition and emphasized that the solution in petitioners' matter was given *ex gratia*. With respect to the general remedies which were requested – it was held that they should be dismissed on their merit, *inter alia*, in view of this court's decision in the additional petition.

4. On November 2, 2023 a third petition was filed (HCJ 7946/23, hereinafter: the **Third Petition**) by HaMoked and on behalf of 568 Gaza Strip residents who have allegedly stayed in Israel under permits and were arrested by the security bodies in Israel after the war broke out. It was argued that with respect to 15 of the petitioners a preliminary request had been submitted to the National Security Council, according to the Second Petition. The petition was transferred for Respondents' response with respect to said petitioners. In Respondents' preliminary response, information was given, *ex gratia*, concerning the whereabouts of said 15 petitioners. Accordingly, in a judgment dated November 13, 2023 (given by Justice **O. Grosskopf**, Justice **A. Stein** and by me) it was held that the petition had been exhausted and should be deleted.
5. The Petition at hand, in which similar remedies are requested as aforesaid, was filed on behalf of 48 Gaza Strip residents who have allegedly been arrested by the security forces. The Petition refers to different categories of petitioners – petitioners who were arrested in the Gaza Strip (including two minors); and others (14 Gaza Strip residents who have been arrested in the territory of Israel or in Judea and Samaria). It was alleged that Petitioners' families had no information about their holding place.

According to the Petition, following requests submitted to it by Petitioners' families, HaMoked contacted the National Security Council (which as recalled, the Respondents argued in the Second Petition, was the body which should be contacted for this purpose) for the purpose of receiving information about the Petitioners. On November 22, 2023 the National Security Council's response was received stating that it was no longer the appropriate body for this purpose. It was further stated that the lawyers representing the Gaza Strip residents who were staying in Israel – either lawfully or unlawfully – before the war broke out and were therefore arrested, may contact the IDF through an e-mail address which was provided to them in that letter. *Prima facie*, said address belongs to the Anatot incarceration facility.

Accordingly, HaMoked wrote on November 23, 2023, November 30, 2023, December 10, 2023 and December 17, 2023 to said e-mail address. In response to said requests, HaMoked was advised that the Petitioners were not held at the Anatot facility. In addition, HaMoked wrote to Respondents 5-6 – the Attorney General and the Military Advocate General; and to the Director of the HCJ Department at the State Attorney's Office who replied that the HCJ Department was not handling pre-HCJ proceedings concerning the tracing of detainees who are Gaza Strip residents.

The Petitioners argue that the failure to provide information about the holding place of detainees who are Gaza Strip residents is contrary to international law and to Israeli law. According to them, the failure to regulate the legal framework by virtue of which Gazan residents are held in custody, and at the very least to disclose it to the public, may lead to the violation of their rights.

6. The Respondents argue that the Petition should be dismissed *in limine* since it is comprehensive and since it pertains to Petitioners whose cases differ from one another, including in term of the laws governing their arrest, if and to the extent arrested. The Petitioners include individuals who were held by virtue of the Defence (Emergency)

Regulations (Iron Swords) (Custody and Removal of Illegal Aliens Who Are Residents of the Gaza Strip) 2023, some of whom have long been returned to the Gaza Strip (including Petitioners 50, 53, 54, 60 and 61); Others are held in Israel by virtue of the Unlawful Combatants Law, 2022 or as detainees by virtue of arrest warrants.

In addition, the Respondents argue that the Petition should be dismissed *in limine* since it does not refer to the previous petitions and does not deal with the holdings of this court in the exact same matters. Accordingly, the Petitioners did not refer to the substantial holdings of the court in the previous proceedings and in fact, they are trying to cause the court to re-visit the exact same matters. Moreover – some of the Petitioners were among the petitioners in the previous petitions and therefore the *res judicata* doctrine applied to their case. In their above conduct, the Petitioners have violated the disclosure obligation and the obligation to come to court with clean hands.

The Respondents argued further that the Petition should be dismissed *in limine* since the remedies requested therein were not supported by an appropriate factual and legal infrastructure. In this context they argued that a power of attorney on behalf of Petitioners' families was not attached to the Petition. Therefore, HaMoked has no authority to act on their behalf. The data presented in the Petition do not enable the Respondents to identify those standing behind each one of the requests.

The Respondents have also argued that the military has no obligation to provide HaMoked any information about Gaza Strip residents who were arrested in the course of the military actions, and that said consent was given in the past *ex gratia*. It was also stated that in the circumstances of the difficult war currently conducted by the state of Israel, it was decided that such information shall not be provided to private applicants or to public petitioners who contact the military bodies through the e-mail address or the Incarceration Control Center of the Military Police.

7. At their request, the Petitioners were allowed to reply to Respondents' preliminary response. In their reply, the Petitioners have reiterated their argument that the Respondent should inform the families of the Petitioners whether they are held by Israel; and if so – where. They have reiterated the argument that the detainees' right that information shall be given about their arrest is also connected to additional basic rights including the right to legal representation and appropriate incarceration conditions. According to them, in the absence of any response from the Respondents, they had no alternative but to file the Petition at hand and the previous petitions.

In contrast to the Respondents, the Petitioners argued that in the first petition it was not held that the Respondents had no obligation to provide information concerning detainees who are Gaza Strip residents. It was also emphasized that in the Petition at hand, HaMoked was not a party to the proceeding but was only representing the families of the Petitioners. It was also clarified that all Petitioners' families confirmed that they have not yet received any update on Petitioners' whereabouts. The Petitioners added that in the second and third petitions the Respondents notified that the competent authority which was authorized to provide the requested information was the National Security Council. Moreover, the fact that the Respondents referred to laws by virtue of which Gazan residents have ostensibly been arrested, while said laws included arrangements

regulating attorney visits, shows that the Respondents have an obligation to provide information about the detainees' holding place, since said information is essential for the purpose of implementing the above arrangements.

The Petitioners have also argued that Respondents' position according to which they do not have an obligation to provide the information requested in the Petition is contrary to the words of Prof. Aharon Barak in his opinion in the decision given by the International Court of Justice in The Hague on January 26, 2024. In this context they have argued, *inter alia*, that it emerges from his opinion that the legal situation in Israel guarantees detainees in Israel their basic rights; and that the state of Israel considers itself bound by the humanitarian provisions of the Fourth Geneva Convention which obligates, *inter alia*, to provide information about the identity and holding place of detainees.

### **Deliberation and Decision**

8. Having reviewed the Petition and the Response, we are of the opinion that the Petition should be dismissed *in limine*.

As aforesaid, the Petition refers to 62 different Petitioners whose factual circumstances vary one from the other. Therefore, the normative framework for ruling on their arguments is different. Accordingly, some of the Petitioners on whose behalf the Petition was filed are Gaza Strip residents who have allegedly been arrested in the Gaza Strip. Among those – some have allegedly been arrested as combatants. Other Petitioners were arrested within the territory of Israel; and others – in the Judea and Samaria area. It was also stated in the Petition that some of the Petitioners are minors. Notwithstanding the above, the Petition does not specify the particular circumstances of the arrest of each one of the Petitioners – their identity; where they have been arrested; in which circumstances; whether they are combatants or not; if they stayed in Israel – have they been staying in Israel lawfully; and the like.

Parenthetically it should be noted that the Petitioners have also failed to include in the Petition details concerning the requests submitted to HaMoked – who contacted it, their relation to the Petitioner and by virtue of what has HaMoked been given a power of attorney to file a petition on their behalf. Even if the Petitioners were unable – due to the circumstances of the war – to attach a power of attorney as required by law, details should be provided concerning the request submitted to HaMoked, if any, *in lieu* of presenting a power of attorney in writing.

For comparison purposes it should be noted that unlike the Petition at hand, in the second petition the petitioners have specified, for instance, with respect to each one of the petitioners – their identity, where they were on October 7, 2023, when contact with them was lost and who has contacted HaMoked and requested its assistance to obtain information about them. Hence, these are details that in said petition could have been obtained and specified, and that in the opinion of the petitioners in the second petition were relevant to be included in their petition. As aforesaid, the Petition at hand does not include any such details.

The details of each one of the Petitioners and the circumstances of their arrest may affect the legal arrangements which apply to each one of them. Without expressing an opinion concerning the set of laws which applies in each one of the cases, these laws should be examined only after all the relevant circumstances of the arrest are available. Only after the concrete circumstances of each one of the cases are clarified, the rights of each one of the Petitioners may be examined according to the specific set of circumstances applicable to them. The above applies to the right to receive information concerning the whereabouts of each Petitioner (as requested in the first remedy); to the identity of the bodies which should provide such information – to the extent that there is a right to receive it (as requested in the second remedy); and to Petitioners' right to meet with lawyers (as requested in the fourth remedy).

9. It has been held by case law more than once that the matters of different petitioners should not be brought together in the same petition (see for instance: HCJ 2336/05 **Khalifa v. Minister of the Interior** (November 17, 2005); HCJ 5733/18 **Jerar v. Commander of Military Forces in the West Bank** (October 4, 2018)). It was similarly held that as a general rule, this court shall not examine petitions involving different matters, given that “the factual and legal infrastructure necessary for their substantiation is different. Such is the case even if they share a common issue (HCJ 5584/21 **Liran-Shaked v. Ministry of Health**, paragraph 4 (August 17, 2021); HCJ 3514/22 **Sibush v. President of the Supreme Court**, paragraph 3 (May 29, 2022)), in view of the difficulty to discuss and make a decision in a petition in such circumstances.

As aforesaid, this is the case in the Petition at hand. While all the Petitioners are allegedly held in Israel and remedies in the Petition were requested with respect to all of them. However, as was clarified above, the Petition concerns different Petitioners whose matters vary one from the other. The factual basis concerning each one of the Petitioners is different and consequently the legal framework which applies to them could be different. The Petition involves different matters which may be in the responsibility of different bodies. The difference between the different categories of the Petitioners concerns, as aforesaid, each one of the remedies. Therefore, the examination and decision in the matter of each one of the Petitioners may be different in a manner which makes it difficult to examine the Petition in its current form. The above is reinforced by the fact that the Petitioners failed to specify with respect to each one of them the entirety of circumstances which are relevant for determining the set of laws which applies to them, unlike the way in which at least one of the previous petitions was submitted.

10. In view of all of the foregoing, the Petition is dismissed. In the circumstances of the matter – there is no order for costs.

Given today, 9 Adar A 5784 (February 18, 2024).

Justice

Justice

Justice

