

HCJ 5784/03
HCJ 6024/03
HCJ 6025/03

1. _____ **Salama**
 2. _____ **Farg**
 3. _____ **Abu Hassen**
- v.
1. **Israel Defence Force (IDF) Commander in Judea and Samaria**
 2. **Judge of the Military Appeals Court**
 - 3.

The Supreme Court Sitting as the High Court of Justice
[August 11, 2003]
Before President A. Barak, Justices J. Turkel and E. Rivlin

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

Facts: Based on classified evidence tying them to terror organizations, detention orders were issued against the three petitioners. The orders were extended by respondent, and these extensions were confirmed by the Military Appeals Court. Petitioners claim that the extensions are not legal. They argue that respondents should corroborate the suspicions against them with further investigation. This would allow the detention orders to be replaced by a criminal proceeding.

Held: The Court noted that the basic premise of administrative detention is the need to prevent future danger to the security of the state of public safety. Administrative detention is not meant to be used in place of criminal proceedings. Such detention infringes the fundamental freedoms of the detainee. As such, in reviewing administrative detention orders, court must carefully and meticulously examine the evidence against the detainee. In extending a detention order, the security authorities must examine current and up-to-date evidence against the detainee. In light of these principles, and in light of the evidence upon which the

administrative detention orders were based, the court held that the decision of the Military Appeals Court to confirm them was a proper exercise of its judicial discretion.

Israeli Statutes Cited:

Emergency Authority Law (Detentions), 1979

Israeli Supreme Court Cases Cited:

- [1] HCJ 7015/02, *Ajuri v. Commander of IDF Forces in the West Bank*, IsrSC 56(6) 352
- [2] AA 2/82, *Lerner v. Minister of Defense*, IsrSC 42(3) 529
- [3] HCJ 554/81, *Branssa v. OC Central Command*, IsrSC 36(4) 247
- [4] Crim FH, 7048/97 *Anonymous v. Minister of Defense*, IsrSC 54(1) 721
- [5] AA 4/94, *Ben Horin v. The State of Israel*, IsrSC 48(5) 329
- [6] HCJ 4400/98, *Braham v. Judge Colonel Sheffi*, IsrSC 52(5) 337
- [7] AA 2/86, *Anonymous v. Minister of Defense*, IsrSC 41(2) 508
- [8] HCJ 3239/02, *Marab v. IDF Commander in Judea and Samaria*, IsrSC 57(2) 349
- [9] HCJ 5994/03, *Seder v. IDF Commander in the West Bank*, IsrSC (unreported decision)
- [10] HCJ 297/82, *Berger v. Minister of the Interior*, IsrSC 37(3) 29
- [11]

Israeli Books Cited:

- [12] II B. Bracha, *Administrative Law* (1996)
 - [13]
- For petitioners 1-3—Tamar Peleg-Shrick
For respondents 1-2—Anar Helman; Yuval Roitman

JUDGMENT

President A. Barak

The three petitions before us deal with the question of the legality of

the extension of petitioners' administrative detention.

Facts, Proceedings and Arguments

1. Petitioner in HCJ 5784/03 [hereinafter – petitioner 1] lived in Ramallah and worked in the Palestinian Authority's Ministry of the Environment. In 1998 he served a sentence for his activity in the Jibril terror organization. Petitioner 1 was detained in Ramallah on March 12, 2003. He is being held in administrative detention (since March 18, 2003), pursuant to a warrant issued by the Commander of the IDF Forces in Judea and Samaria [hereinafter – respondent]. His detention was extended by six months (until February 16, 2003), after which (on March 4, 2003) respondent issued another warrant extending the detention for a further six months (until September 15, 2003). Hearings regarding the second extension were held before the Military Court in Ketziot on March 17, 2003. During the hearing, in which petitioner was represented by an attorney, it was brought to his and his attorney's attention that the classified information regarding his case ties him to the Jibril terror organization. After hearing the classified information concerning the petitioner, the Military Court authorized the extension of the administrative detention order. The Military Court noted that the detainee had been in administrative detention for a prolonged period of time, and that this fact necessitated "particular care in assessing the military intelligence which led to his detention." Nevertheless, it was decided that the classified information presented a case of real danger to the security of the area and to public safety if petitioner 1 were to be released. The Military Court of Appeals dismissed petitioner's appeal (on May 4, 2003). It decided that the classified information pertained to a considerable period of time, and that the picture it painted justified the extension of petitioner's administrative detention.

2. Petitioner in HCJ 6024/03 [hereinafter - petitioner 2] lived in the Ramallah Al Jalzoon refugee camp. Due to the suspicion of his involvement in the Popular Front terror organization he was placed in administrative detention between the years 1994-1996. Petitioner 2 was

detained April 9, 2002 and interrogated by the security forces. Respondent ordered his administrative detention on April 24, 2002. His detention was extended (for the first time) until April 7, 2003. Respondent then ordered a second extension of the detention (until October 6, 2003). The Ketziot Military Court authorized the extension (on April 13, 2003) after hearing the arguments presented by petitioner 2. It ruled that the classified information was reliable, and tied petitioner 2 to the Popular Front terrorist organization. It ruled that the information pointed to the petitioner as posing a real danger to the security of the area. The Military Appeals Court dismissed the appeal submitted by petitioner 2 on June 16, 2003.

3. Petitioner in HCJ 6025/03 [hereinafter - petitioner 3] lived in the Jenin district, and did not have a criminal or security record. He was detained on October 5, 2001, and was sentenced to 45 days imprisonment for illegal entry into Israel. During the course of this sentence, respondent issued an order to place petitioner 3 under administrative detention. On April 16, 2003 respondent extended this detention for the third time, until October 27, 2003. The order was issued due to the suspicion that petitioner was an activist in the Hamas terror organization. The Ketziot Military Court authorized this extension (on April 29, 2003) after hearing petitioner's arguments. The court acknowledged that the respondent had been under administrative detention for an extended period of time but decided that, in light of the classified information presented, he still posed a security threat to the region; accordingly, the court ruled that his detention could be extended. The Military Court of Appeals dismissed the appeal submitted by petitioner 3 (on June 4, 2003). It was determined that the classified material was reliable, and substantiated the danger presented by petitioner 3 to an extent that justified prolonging his administrative detention.

The petitions in this case contest the extensions of these administrative detentions.

The Arguments

4. Petitioners claim that there is no legitimate reason to extend the detention orders, and that their extension is against the law. They point to the clear violation of their basic rights by their extended administrative detention. They argue that the option of administrative detention should not be used where the detainee can be prosecuted by criminal trial. According to them, no substantial effort was made to investigate the acts they are suspected of having committed, nor was any new intelligence gathered about them; therefore, they should, after a time, be released. Petitioners argue that the Military Courts should have forced the security forces to corroborate the suspicions against them with further investigation, and to condition the authorization of the extension orders upon further investigation. According to them, this would have enabled proper criminal proceedings to replace the use of administrative detention. In addition, petitioner 3 points out that he has no record of being suspected of committing hostile acts, and so the prolonged detention is unjustified.

Respondent claims that the extension of the administrative detentions is legal. Furthermore, he argues that it is not the place of this court, the Supreme Court, to act as another level of appeal above the Military Courts. As to the merits of petitioner's arguments,, respondent argues that the evidence against each of the petitioners justified the extension of their administrative detention, notwithstanding the length of detention time. Regarding the obligation to investigate the evidence, respondent maintains that the evidence accumulated against petitioners is reliable and from diverse sources. In the investigations carried out by the security forces, however, no unclassified information was gathered which could be used in criminal proceedings.

The Normative Framework

5. Respondent's authority to order administrative detention is based on the Administrative Detention Order (Temporary Provision) (Judea and Samaria) (no. 1226), 1988, which has been occasionally amended. Pursuant to this order, respondent can order an administrative detention if

there is “a reasonable basis to suppose that the security of the area or of the public necessitates a certain person to be held in detention.” Section 1(a) of the order. According to the order, respondent shall not exercise this authority “unless he believes it to be absolutely necessary for clear security purposes.” Section 3 of the order. The detention order should be for no longer than six months. Respondent may order “from time to time the extension of the original detention order, for a period of no longer than six months.” Section 1(b) of the order. Respondent’s authority on this matter is subject to judicial review. A person who is placed in detention pursuant to this order must be brought before a judge with legal training within 18 days of his detention. The judge may authorize or refuse the detention, or shorten the duration of the detention. Section 4(a) of the order. The judge’s decision can be appealed to the Military Appeals Court. Section 5(a) of the order. These procedures also apply to decisions concerning the extension of detention time. Section 1(a) of the order. In the framework of these proceedings, the detainee has the right to be represented before the Military Courts by an attorney.

6. Petitioners’ principal argument is that the legality of extending administrative detentions is dependent upon a systematic investigation conducted by the security services to gather evidence; this would allow criminal proceedings to replace administrative detention, enabling each detainee to confront the evidence brought against him. Petitioners claim that administrative detention cannot be extended so long as an investigation of this kind is not being conducted. Indeed, it is preferable to take criminal steps against someone suspected of hostile activity of a security nature, rather than use the procedure of administrative detention. HCJ 7015/02 *Ajuri v. Commander of IDF Forces in the West Bank*, [1] at 373. In criminal proceedings the defendant, suspected of terror activity or of being an accomplice to such activity, can confront the evidence brought against him, a defense that is sometimes not possible in administrative proceedings. Nevertheless, it must be remembered that for reasons of protecting intelligence sources, it is not always possible to use criminal proceedings. Furthermore, it should be noted that administrative detention and criminal procedure work on separate plains. The basic premise is that administrative detention is meant to prevent future danger

to the security of the state or to the public safety. Administrative detention is not meant to be a tool used to punish previous acts, or to be used in place of criminal proceedings. AA 2/82 *Lerner v. Minister of Defense*, [2] at 531. The authorities could gather reliable evidence that would justify placing a person under administrative detention “without the possibility of calling witnesses that would testify to what they saw or heard.” HCJ 554/81 *Branssa v. OC Central Command*, [3] at 251. Therefore, the use of administrative proceedings should not be conditioned on an investigation that could have bearing on the criminal plain.

7. All this, however, does not bring this case to its conclusion. This court has maintained that the purpose of the Emergency Authority Law (Detentions) of 1979 is to protect the security of the state but, at the same time, to also safeguard man’s dignity and freedom. *See* Crim FH 7048/97 *Anonymous v. Minister of Defense*, [4] at 740. This applies to the detention orders in the present case. The order did indeed come to protect the public’s safety and the security of the area, as per section 1(a) of the order. However, it is clear that the administrative detention severely violates the detainees’ freedom. The purpose of the order is to ensure that this violation is within legal and constitutional boundaries. Therefore, the order sets up judicial review over the decision to order administrative detention or to extend it. The information and evidence presented by the security forces should be “carefully and meticulously” examined. AA 4/94 *Ben Horin v. The State of Israel*, [5] at 335 (Levin, J.). Judicial review over the detention proceedings is significant. In the context of this review, the detainee is afforded the right to legal representation. The Military Court and the Military Appeals Court can question the reliability of the evidence, and not merely decide what a reasonable authority might be expected to decide, on the basis of the evidence presented. HCJ 4400/98 *Braham v. Judge Colonel Sheffi*, [6] at 346. This review is an internal and integral part of the administrative detention order’s legality, and of the legality of its extension. *See* AA 2/86 *Anonymous v. Minister of Defense*, [7] at 515-16; HCJ 3239/02 *Marab v. IDF Commander in Judea and Samaria*, [8] at 368-69. Furthermore, respondent’s decision to place a person under administrative detention, and the extension of that

detention, is subject to the supervision of the Supreme Court. This Court indeed is not an address for appealing the judgments of the Military Court or the Military Appeals Court. Nevertheless, in carrying out its judicial review, this Court takes into account any grave violation of the detainee's human rights; this violation is given full weight when examining the reasons that brought the security forces to issue an order of administrative detention, as well as when examining the discretion of the Military Courts.

8. The necessity of finding the right balance between the security of the state and the protection of the detainee's human rights does not merely find expression in the existence of a channel of judicial review. It also finds expression in the manner of the activity of the security authorities, when they decide whether to place someone in administrative detention, or to extend that detention. This is especially true regarding the administrative evidence upon which these decisions are based. As Justice Mazza recently noted:

Evidence regarding a number of events is not the same as evidence regarding one specific event; evidence from one source is unlike information gathered from different sources; information based solely on agents and informers is not the same as information which is reinforced by documents obtained by the security services or by intelligence gained through special means.

HCI 5994/03 *Order v. IDF Commander in the West Bank*, [9] at para. 6 (Mazza, J.). The strength of the evidence necessary to justify administrative detention could change over time. Evidence that would justify issuing an order of administrative detention might not constitute sufficient cause to extend that detention. And evidence justifying an extension of administrative detention might be insufficient for a further extension. The security services must assess whether the administrative evidence brought against the detainee justifies extending his detention. It is their responsibility to take into account new relevant information that can be obtained by reasonable means. HCI 297/82 *Berger v. Minister of Interior*, [10] at 44. At the same time, this does not mean

that a lack of current evidence would warrant, in and of itself, a dismissal of an extension; it all depends on the circumstances of the case. In any event, the evidence presented by the security services must be examined in order to assess whether it proves the danger of the detainee in a measure that justifies his further detention. The severity of the suspicions, for example, as well as the strength of evidence, among other things, must be taken into account. There will be cases in which a lack of current evidence relating to the detainee would be detrimental to the respondent wishing to extend the administrative detention. In these cases, we would say that the evidence gathered by the security services does not justify holding the detainee in administrative detention any longer. *See* II B. Bracha, Administrative Law 304 (1996) [11].

From the General to the Particular

9. The petitioners in this case are at the stage where an extension of their administrative detention has been requested. For petitioners 1 and 2 this would be a second extension, while for petitioner 3 it would be a third. The situation demands that we closely examine the evidence used to extend the detention. Petitioners and their legal representatives appeared before us. With their consent, we were exposed to the evidence upon which the decision to extend their detention was based. Respondent presented further evidence, relating to petitioners, in addition to the evidence that existed at the time the order of administrative detention was issued. The picture that emerges regarding petitioner's arguments is that the security services have not been negligent in gathering evidence against them; on the contrary, such additional evidence continued to be collected. In light of the evidence, we are convinced that respondent did not act amiss in his decision to extend petitioners' administrative detention, nor was the Military Courts' decision to authorize this extension flawed in a way that would justify the intervention of this Court. Along with the Military Appeals Court, we were persuaded that the evidence existing today against petitioner 1 paints a "reliable, complete and consistent" picture, which justified the extension of his detention. *See* page 2 of the Military Appeals Court's judgment of May 4, 2003. Furthermore, concerning petitioner 2, we concur with the Military

Court, who regarded the evidence tying him to the Popular Front terror organization as being “very reliable.” *See* page 3 of the Military Court’s judgment from April 13, 2003. The same can be said of petitioner 3, whose security record indeed is less grave than the two other petitioners. The Military Court took caution in light of the extended period of time petitioner has been in administrative detention. *See* page 1 of the Military Court’s judgment from April 29, 2003. However, given the evidence with which we were presented, we found no cause to intervene in the conclusions of the Military Appeals Court, whereby “the administrative detention is the only means of neutralizing the danger of the appellant.” Page 2 of the Military Appeals Court’s judgment of June 4, 2003.

In light of the above, the petitions are denied.

Justice J. Turkel

I concur.

Justice A. Rivlin

I concur.

August 11, 2003