HCJ 6204/06

Dr Yossi Beilin
v.
1. Prime Minister of Israel
2. Government of Israel

HCJ 6235/06

Guy Yoren
and 25 others
v.
1. Ehud Olmert, Prime Minister
2. Government of Israel
3. Minister of Finance

HCJ 6274/06

Movement for Quality Government in Israel
v.
1. Government of Israel
2. Minister of Defence
3. Minister of Finance
4. Finance Committee of the Knesset
5. Foreign Affairs and Defence Committee of the Knesset

The Supreme Court sitting as the High Court of Justice
[1 August 2006]
Before Justices D. Beinisch, A. Procaccia, E. Arbel

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

Facts: On 12 July 2006, the Hezbollah organization carried out an offensive operation inside the territory of Israel, as a result of which eight Israel Defence Forces (IDF) soldiers were killed and two other soldiers were kidnapped and taken over the border into Lebanon. In response, the IDF began military operations in Lebanon, and the State of Israel was attacked at the same time with thousands of missiles and Katyusha rockets, which caused death and injuries to dozens of Israeli citizens in the north of Israel, as well as substantial damage to property.

The petitioners argued that the government was constitutionally required to make a declaration of war and that it should have taken action to compensate the residents in the north of Israel for the economic losses that they suffered from the Hezbollah attacks.

Held: What constitutes 'starting a war' is a complex question. The definition of 'war' cannot be separated from the foreign affairs of the state. A government decision that can be interpreted as a declaration of war is likely to have extreme consequences in the sphere of international relations. In any case, the government complied with all the constitutional formalities that would be required by a declaration of war.

The Knesset and the government have enacted legislation to address the compensation of the residents of the north of Israel. There has therefore been a change in the legal position since the petitions were filed. In so far as these arrangements do not satisfy the petitioners, the doors of the court will be open to them.

Petition denied.

Legislation cited:

Basic Law: the Army, s. 2(a).

Basic Law: the Government, ss. 4, 40, 40(a), 40(b), 40(c).

Civil Defence Law, 5711-1951, ss. 9C(b)(1), 9C(b)(3).

Customs Ordinance [New Version], s. 211(c).

Declaration of Death Law, 5738-1978, s. 1.

Penal Law, 5737-1977, s. 99.

Property Tax and Compensation Fund Law, 5721-1961, ss. 35-38B.

Property Tax and Compensation Fund (War Damage and Indirect Damage) Regulations, 5733-1973.

Property Tax and Compensation Fund (Payment of Compensation) (War Damage and Indirect Damage) Regulations (Temporary Provision), 5766-2006.

Protection of Workers in a State of Emergency Law, 5766-2006.

Israeli Supreme Court cases cited:

[1] CrimA 6411/98 *Manbar v. State of Israel* [2001] IsrSC 55(2) 150.

[2] HCJ 5128/94 *Federman v. Minister of Police* [1994] IsrSC 48(5) 647.

[3] HCJ 5167/00 *Weiss v. Prime Minister* [2001] IsrSC 55(2) 455.

[4] HCJ 3975/95 *Kaniel v. Government of Israel* [1999] IsrSC 53(5) 459.

[5] HCJ 963/04 *Laufer v. State of Israel* [2004] IsrSC 58(3) 326.

For the petitioner in HCJ 6204/06 — H. Ashlagi, H. Peretz.

For the petitioners in HCJ 6235/06 — Y. Goldberg.
For the petitioner in HCJ 6274/06 — T. Medadluzon.
For the respondents in HCJ 6204/06 and HCJ 6235/06 and respondents 1-3 in HCJ 6274/06 — E. Ettinger.
For respondents 4-5 in HCJ 6274/06 — R. Scherman-Lamdan.

JUDGMENT

Justice D. Beinisch

The three petitions before us were filed against the background of the state of hostilities in which Israel has found itself since 12 July 2006, when the hostilities began between Israel and the Hezbollah organization, which is operating against the IDF and against the citizens of the State of Israel from the territory of Lebanon.

The background to the petitions

1. On the morning of 12 July 2006, the Hezbollah organization carried out an offensive operation inside the territory of Israel, as a result of which eight IDF soldiers were killed and two other soldiers were kidnapped and taken over the border. Following this attack, the government adopted a decision on the same day, in which, *inter alia*, it decided the following:

> 'Israel must respond with the severity required by this offensive operation, and it will indeed do so. Israel will respond in a forceful and determined manner against the perpetrators of the operation and the parties responsible for it, and it will also act to frustrate efforts and activity directed against Israel' (government decision no. 258).

Within the framework of that decision, the government approved the recommendations presented to it by the security establishment, and it also authorized the prime minister, the Minister of Defence, the various deputy prime ministers and the Minister of Public Security to approve the specific operations presented by the security establishment for implementation. Since 12 July 2006, the IDF has been carrying out massive military operations in the territory of Lebanon, and the State of Israel has been attacked at the same time with thousands of missiles and Katyusha rockets, which have caused death and injuries to dozens of Israeli citizens in the north of Israel, as well as substantial damage to property. On 13 July 2006, the Minister of Defence

appeared before the Foreign Affairs and Defence Committee of the Knesset, and at that session descriptions were given by the minister and by intelligence and operations officers. It should also be stated that on 15 July 2006 the Minister of Defence decided to make use of the power given to him under s. 9C(b)(1) of the Civil Defence Law, 5711-1951 (hereafter: the Civil Defence Law) and he declared the existence of a 'special situation on the home front.' This declaration has significance with regard to granting powers to give orders concerning defence of the home front against military attacks. On 16 July 2006, the government convened a second time to discuss the security position and it also considered, *inter alia*, the special situation on the home front. The government decided, *inter alia*, that it would consider extending the order made by the Minister of Defence within 48 hours of the date of the declaration after it had received the recommendations of an inter-departmental committee chaired by the director-general of the Prime Minister's Office (government decision no. 273). The next day, on 17 July 2006, the prime minister made a statement with regard to the security situation before the Knesset. In his statement in the Knesset he announced, *inter alia*, that:

> 'Extreme, terrorist, violent elements are disrupting the life of the whole area and putting its stability in jeopardy. The area in which we live is threatened by these murderous terrorist groups; it is an interest of the whole area — and an international interest — to control them and to stop their activity… We will continue to act with all our power until we achieve this… In Lebanon we will fight in order to achieve the conditions that the international community has determined, and this was given a clear expression only yesterday in the decision of the eight leading nations of the world:
>
> The return of the hostages Ehud (Udi) Goldwasser and Eldad Regev.
>
> An absolute cessation of hostilities.
>
> The deployment of the Lebanese army throughout Southern Lebanon.
>
> The removal of Hezbollah from the area by implementing United Nations resolution no. 1559.
>
> Until then, we will not cease to act.
>
> On both fronts we are speaking of self-defence operations in the most fundamental and basic sense. In both cases we have an

> interest whose importance and significance go far beyond the scope of the individuals concerned.'

On the same day, the government also adopted decision no. 282, in which it was decided, *inter alia*, to extend the declaration of the Minister of Defence concerning 'a special situation on the home front' in accordance with the power given to the government under s. 9C(b)(3) of the Civil Defence Law. The government also decided 'to apply to the Foreign Affairs and Defence Committee of the Knesset and to ask for its approval to extend the period during which the declaration is valid until the date on which the government will decide to cancel the declaration.' It should also be pointed out that the Foreign Affairs and Defence Committee of the Knesset held two additional sessions with regard to the situation. At the session that took place on 18 July 2006, the chief of staff, the Home Front Commander and the Head of the Research Division in the Intelligence Branch appeared before the committee. At the session that took place on 26 July 2006 the prime minister gave the committee a report concerning the security position. An additional government decision that is relevant to the petitions before us is decision no. 309 that the government adopted on 23 July 2006. This decision approved the draft Protection of Workers in a State of Emergency Law, 5766-2006 (hereafter: the Protection of Workers in a State of Emergency Law), which was intended to prevent the dismissal of workers who are unable to go to work during the period of the hostilities. With regard to the economic loss caused to Israeli residents as a result of the current security position, we were told in the response to the petitions that was filed on behalf of the attorney-general that on 27 July 2006 an agreement was signed between government representatives, the General Federation of Labour and the Manufacturers Association of Israel. This agreement was intended, *inter alia*, to regulate matters concerning employment relations that were affected by the security position and the directives of the security forces. The aforementioned agreements in the sphere of labour relations were enshrined in an agreement that the government regards as a collective agreement, and the government also gave notice of its intention to table a draft law in order to apply the provisions of the aforesaid agreement to all the workers in the economy. The Minister of Finance also announced, within the framework of the agreement of 27 July 2006, that he intended to submit, for the approval of the Finance Committee of the Knesset, the Property Tax and Compensation Fund (Payment of Compensation) (War Damage and Indirect Damage) Regulations (Temporary Provision), 5766-2006 (hereafter: the Property Tax Regulations, 2006), which would provide, *inter alia*, a mechanism that would allow

compensation to be given to towns that were not considered border towns under the Property Tax and Compensation Fund Law, 5721-1961 (hereafter: the Property Tax Law) and the regulations enacted thereunder. The Property Tax Regulations would also determine the areas and periods in which employers would be entitled to compensation from the state for indirect damage, and would also determine the amount of the indirect damage. On 31 July 2006, the Finance Committee of the Knesset did indeed approve the aforesaid regulations, and on the same day the Knesset also passed the Protection of Workers in a State of Emergency Law, whose purpose, as aforesaid, was to protect workers who were absent from their work because of the security situation.

The petitions

2. As stated, three petitions were filed against the background of the events arising from the hostilities, and these were heard jointly before us on 30 July 2006. All of them concern the legal steps required by the situation that has arisen. In the petition filed by the petitioner in HCJ 6204/06, MK Dr Y. Beilin argues that the government of Israel acted unlawfully in that it did not make a decision to start a war in accordance with s. 40(a) of the Basic Law: the Government, even though Israel has *de facto* been in a state of war since 12 July 2006. The petitioner also argues that, contrary to the provisions of s. 40(c) of the Basic Law: the Government, the government did not deliver a notice of its intention to start a war to the Foreign Affairs and Defence Committee of the Knesset, nor did the prime minister give such a notice to the plenum of the Knesset. The petitioner emphasizes that the matter at issue in the petition is not the question whether the decisions made by the political leaders concerning the war were justified, but whether they complied with the constitutional obligations imposed on them with regard to the manner of making the decision to start a war. The petitioner also addresses in his petition the economic ramifications that he claims are the result of not making a declaration of war. The petitioner therefore requests that the respondents make use of the power given to them in s. 40(a) of the Basic Law: the Government, and that the government should decide to make a declaration of war. The petitioners in HCJ 6235/06, who are business owners in Haifa and Tiberias, request that a state of emergency should be declared in Israel that will have immediately effect in the area of Haifa and the north, and that the government shall be liable to enact emergency regulations in order to prevent the collapse of the petitioners' businesses and to enable them to continue to survive from an economic viewpoint during the emergency

period. The petitioner in HCJ 6274/06, the Movement for Quality Government in Israel, requests that the respondents should exercise the powers given to them under the law in order to give real financial compensation to the workers and their employers, especially in the north of Israel, who have been harmed economically by the military hostilities taking place at this time. According to the petitioner, the respondents are liable to compensate financially those citizens who have been harmed economically by the war and the refusal of the respondents to exercise their powers amounts to a shirking of the state's duty to the residents in the line of fire, which is unreasonable and results in an unequal division of the economic burden, as well as undermining the values of solidarity and collective responsibility.

Deliberations

3. Let us first consider the arguments of the petitioner in HCJ 6204/06 with regard to the relief he is seeking that a state of war should be declared. These arguments are based on the provisions of s. 40 of the Basic Law: the Government, which states the following:

'Declaration of war

> 40. (a) The state shall not begin a war other than by virtue of a government decision.
>
> (b) Nothing in this section shall prevent military operations that are required for the purpose of the defence of the state and the security of the public.
>
> (c) A notice of a government decision to start a war under subsection (a) shall be delivered to the Foreign Affairs and Defence Committee of the Knesset at the earliest opportunity; the prime minister shall also deliver the notice at the earliest opportunity to the plenum of the Knesset; a notice of military operations as stated in subsection (b) shall be delivered to the Foreign Affairs and Defence Committee of the Knesset at the earliest opportunity.'

Section 40(a), which according to the petitioner is the relevant section in this case, was intended to ensure that the State of Israel would not begin a war without a decision of the government, which has collective responsibility

to the Knesset (see s. 4 of the Basic Law: the Government). Section 40(c) of the Basic Law: the Government provides that the government should give notice of a decision that it makes under s. 40(a) of the Basic Law to the Foreign Affairs and Defence Committee of the Knesset, and that the prime minister should also give the notice at the earliest opportunity to the plenum of the Knesset. These provisions are a tangible expression of the responsibility of the government to the Knesset.

In his arguments before us, counsel for the petitioner, Advocate Ashlagi, discussed at length the constitutional importance of the aforesaid s. 40(a), and how important it is that the government should act according to law and carry out the constitutional processes required by the Basic Laws, which are the basis for the government's collective responsibility to the Knesset. The state argued before us, in so far as the current conflict between Israel and Hezbollah is concerned, that the government saw no reason in the present situation why it should make use of its power under s. 40(a) of the Basic Law: the Government; according to its outlook, it is carrying out military operations in accordance with s. 40(b) of the Basic Law: the Government, and the government decision of 12 July 2006 was made accordingly.

4. The constitutional propriety of the proceedings whereby a government decision is made with regard to starting military activity in Lebanon is what lies at the heart of the petition of MK Y. Beilin. According to the Basic Law: the Government, the government is the executive authority of the state and it has collective responsibility to the Knesset. By virtue of its role as the executive authority of the state, the government is responsible for managing the foreign affairs of the state and by virtue of its status and according to s. 2(a) of the Basic Law: the Army, the army is subservient to it. Part of the democratic character of our system of government is that all the security authorities are subservient to the government, whereas the government, as aforesaid, is responsible to the Knesset (see, in this regard, A. Rubinstein and B. Medina, *The Constitutional Law of the State of Israel — the Organs of Government and Citizenship* (sixth edition, 2005), at pp. 979-981; M. Kremnitzer and A. Bendor, *The Basic Law: the Army* (Commentary on the Basic Laws edited by I. Zamir, 2000), at pp. 44-45). Indeed, in order to uphold the principles of our system of government, it is very important that no significant military operations are carried out without a government decision and without parliamentary scrutiny. This is also the premise underlying the provisions of s. 40 of the Basic Law: the Government; the provisions of the section are intended to ensure that there is no departure

from the basic principles concerning the responsibility of the government on behalf of the state for military operations and also to ensure that the government is responsible to the Knesset for carrying out such operations. The provisions of ss. 40(b) and (c) of the Basic Law: the Government were also enacted to this end; these provide the exception to the rule in s. 40(a) and the duty of reporting to the Knesset. It should be emphasized that s. 40(a) of the Basic Law did not define what constitutes 'starting a war' within the meaning of the section. This is a complex question that is multi-faceted. The definition of the concept of 'war,' when we are speaking of the government's powers with regard to military operations, cannot be separated from the foreign affairs of the state and the functioning of the government in the sphere of international relations. Therefore, the interpretation of the concept of 'war' in this context, which has ramifications in the international sphere, is based mainly on the rules of international law. A decision of the government that can be interpreted as a declaration of war is likely to have extreme consequences in the sphere of international relations, and indeed in the international sphere formal declarations of war have not been customary in recent decades. It is not superfluous to add that according to international law a formal declaration of war is not a condition for the existence of a state of war or an armed conflict, nor is it required for the application of the rules of international law concerning the manner of conducting the fighting (see C. Greenwood, 'Scope of Application of Humanitarian Law' in D. Fleck, *Handbook of Humanitarian Law in Armed Conflicts* (1999), at p. 43; I. Detter, *The Law of War* (second edition, 2004), at pp. 9-17; R. Sabel, *International Law* (2003), at pp. 423-424).

It should be noted that in Israeli law there is also no binding connection between the existence of a state of war, with all of its legal ramifications, and an official declaration of the government to start a war. The expression 'war' appears in various pieces of legislation and the interpretation given to it depends on the purpose of the legislation and the legislative environment in which the expression appears, rather than on the formal proceeding of a declaration of starting a war (see, for example, s. 99 of the Penal Law, 5737-1977, concerning the offence of aiding an enemy in a war; s. 1 of the Declaration of Death Law, 5738-1978, concerning the definition of the term 'killed'; s. 211(c) of the Customs Ordinance [New Version], concerning the commission of an offence of smuggling during a state of war. See also CrimA 6411/98 *Manbar v. State of Israel* [1], at pp. 194-197). In support of his arguments, counsel for the petitioner contends that in the last few days steps have been taken to effect a large-scale call-up of reserve forces. He also

argued that the Minister of Defence said publicly that we are at war and all of these show that we are indeed speaking of a war within the meaning of s. 40(a). This argument is not convincing, because it has no legal foundation. Large-scale military operations, firing by hostile forces (including a terrorist organization) on a civilian population, the civil population's feeling of emergency and threat and the casualties suffered as a result of military operations on both sides of the border all lead to a security situation in which the State of Israel is regarded by the public as in a state of war. It should be emphasized that even from a legal perspective, for the purpose of various laws, the current security position may be considered a state of war. But this is insufficient to establish a basis for making a declaration to start a war for the purpose of the provisions of s. 40(a) of the Basic Law: the Government. The provisions of s. 40(a) say that 'The state shall not *begin a war* other than by virtue of a government decision' (emphasis supplied). In the circumstances that have arisen, the government is entitled to determine that the military operations that it decided to carry out do not constitute 'starting a war' but merely military operations that constitute self-defence in response to aggression. The government acted in this regard within the framework of its clear authority in accordance with the broad discretion given to it with regard to all matters of foreign and defence policy (see and cf. HCJ 5128/94 *Federman v. Minister of Police* [2]; see also HCJ 5167/00 *Weiss v. Prime Minister* [3], at pp. 471-472, and the references cited there).

We should also add that the concern expressed by counsel for the petitioner with regard to a violation of the constitutional purpose of the provisions of the section has no foundation. Even though the government decided that the military activity in Lebanon falls within the scope of the provisions of s. 40(b) of the Basic Law, *de facto* it also carried out all of the procedures stipulated in the law that are relevant to a decision under s. 40(a). The decision to carry out military operations against the Hezbollah organization was made by the government as a whole. The Foreign Affairs and Defence Committee was given a report about this decision, and several reports were also given to the committee with regard to the developments that took place. These reports satisfy the requirement that the government's decision is subject to parliamentary scrutiny. In this way, the government *de facto* discharged its duty even in accordance with the more stringent requirements of s. 40(a). We should also add that the fact that no use was made of s. 40(a) of the Basic Law is of no significance for the purpose of the economic compensation and aid required by the residents of the north of the country. For this reason, the manner in which the government acted in

making the decisions under discussion is consistent with its powers and the scope of discretion given to it, and it does not give rise to any ground for our intervention (cf. HCJ 3975/95 *Kaniel v. Government of Israel* [4], at p. 493; HCJ 963/04 *Laufer v. State of Israel* [5], at pp. 334-335).

5. The question of determining the method of compensating the residents of the north of the country, which was raised in all the petitions before us, is a serious question that deserves the immediate consideration of the government and the Knesset. There is no doubt that the residents of the areas that lie within range of the continual shooting carried out by the Hezbollah without respite are entitled to be compensated by the state for the direct and indirect damage suffered by them. A large sector of the population has been harmed and is confined to reinforced rooms and shelters. Ordinary life — business, trade, agriculture and industry — has been disrupted. Workers have been prevented from going to their places of work and employers have been reduced to economic difficulties. All of this requires the special attention of the government and the Knesset in order to find appropriate solutions. We see from the statement of counsel for the Attorney-General that at the very moment steps are being taken by the government, which will also be submitted for the approval of the Knesset, and these will include various compensation arrangements for the residents of the north. It can also be seen from this statement that there are also proper legal tools in existing legislation (see ss. 35-38B of the Property Tax Law, and the Property Tax and Compensation Fund (War Damage and Indirect Damage) Regulations, 5733-1973), and in so far as adjustments are required for the current situation the government will take steps to initiate legislation and to enact regulations immediately. The Knesset has notified us that there are private bills pending before the Knesset, and these are intended for the same purpose. The government also gave notice, as we said above, that on 27 July 2006 it reached an agreement with the General Federation of Labour and the Manufacturers Association of Israel with regard to the regulation of employment relations between workers and employers that are affected by the current security position. The agreement also contains a mechanism that will allow compensation for towns that are not currently considered 'border towns' under the Property Tax Law and the regulations enacted thereunder. It should be noted, however, that this agreement is valid for a period that ended on 31 July 2006 and it was argued before us that the agreement does not encompass all of the problems that have arisen as a result of the military operations. In any case, in view of the statements given to us with regard to the steps being taken for this purpose, it can be assumed that the government

will indeed act as quickly as possible in order to ensure an immediate reduction of the damage caused to the residents of the north and proper compensation for the severe economic harm caused to them. And so, as we said above, on 31 July 2006 the Knesset passed the Protection of Workers in a State of Emergency Law, which concerns the protection of workers' rights in the current security situation. On the same date, the Finance Committee of the Knesset also approved the Property Tax Regulations, 2006, whose purpose is to regulate the compensation for certain aspects of the economic loss of residents of the north resulting from the military operations. The provisions of the law and the regulations enshrine the provisions of the agreement that was signed on 27 July 2006. Therefore, in so far as the petitions relate to the lack of compensation arrangements, there has been a change in the legal position since the petitions were filed. In so far as the arrangements that have been made do not satisfy the petitioners and their dissatisfaction is well-founded, the doors of this court will be open to them. In concluding our judgment, we should point out that with regard to the claims of the petitioners in HCJ 6235/06, who are requesting that a state of emergency should be declared and that emergency regulations should be enacted, there is no need for the relief sought by them. The Knesset already decided on 31 May 2006 to extend the state of emergency that has existed in Israel since it was founded by another year, by virtue of the power given to the Knesset in s. 38 of the Basic Law: the Government. Moreover, the petitioners also did not succeed in showing any reason why the measure of enacting emergency regulations should be adopted in order to regulate the granting of compensation to which they claim they are entitled.

For these reasons the petitions should be denied.

Justice A. Procaccia

I agree.

Justice E. Arbel

I agree.

Petition denied.

7 Av 5766.

1 August 2006.