

The Supreme Court sitting as the High Court of Justice

HCJ 4169/10
HCJ 4193/10
HCJ 4220/10
HCJ 4221/10
HCJ 4240/10
HCJ 4243/10

Before: The Honorable President D. Beinisch, The Honorable Justice M. Naor, The Honorable Justice U. Vogelman

Petitioners in HCJ 4169/10: Yiftach Cohen; Omer Shatz, Itamar Mann
Respondents in HCJ 4169/10: The Minister of Defense; The Minister of the Interior; The Minister of Public Security

Petitioners in HCJ 4193/10: Adalah – The Legal Center for Arab Minority Rights in Israel; Public Committee Against Torture in Israel; Physicians for Human Rights
Respondents in HCJ 4193/10: The Minister of Defense; The Military Advocate General; The Israel Prison Service; The Israel Police; The Immigration Authority

Petitioners in HCJ 4220/10: Al Jazeera Satellite Network; Othman Al Bukhairi; Abas Naser; Muhammad Fal; Ali Sabri; Andrei Abu Khalil; Jamal Al Shial; Wasima Bin Salah
Respondents in HCJ 4220/10: The Israel Defense Forces; The Minister of Defense; The Minister of Public Security

Petitioner in HCJ 4221/10: Yekutiel Ben Yaakov

Respondents in HCJ 4221/10: The Israel Police; The Israel Prison Service; The Government of Israel; The Minister of Defense; The Prime Minister

Petitioner in HCJ 4240/10: Shurat Hadin – Israel Law Center

Respondents in HCJ 4240/10: The Attorney General; The Prime Minister; The Minister of Public Security; The Minister of the Interior; The Israel Police

Petitioners in HCJ 4243/10: 1. Almagor – Terror Victims Association; Y.S. – Navy commando (res.); D.B. – Navy commando (res.) and bereaved brother; Pniel Krichman; Yekira and Zecharia Komemi; Aviva and Rahamim Komemi; Tzila Rahamim; Moshe Keinan; Briana and Shmuel Hilberg

Respondents in HCJ 4243/10: The Prime Minister; The Minister of the Interior; The Attorney General; The Inspector General of the Israel Police

Petitions to grant an order nisi

Date of hearing: 20 Nisan 5770 (June 2, 2010)

For the petitioners in HCJ 4169/10: Itamar Mann; Yiftach Cohen; Omer Shatz

For the petitioners in HCJ 4193/10: Fatima El Ajou

For the petitioners in HCJ 4220/10: Zaki Kamal; Kamal Zaki Kamal

For the petitioner in HCJ 4421/10: Himself

For the petitioner in HCJ 4240/10: Nitsana Darshan Leitner

For the petitioners in HCJ 4243/10: Sharon Avni; Shira Greenberg

For the respondents: The State Attorney Moshe Lador; Osnat Mandel;
Dina Zilber; Hila Groni

Judgment

President D. Beinisch:

1. In view of the control of the Gaza Strip by the Hamas organization, Israel has taken various measures designed to prevent direct access to the Gaza Strip, among them a blockade of the Gaza Strip which, as declared by the State, is designed to prevent the infiltration of weapons and arms to the Hamas organization, which, for years, has carried out acts of shooting and terrorism at Israeli territory for the purpose of harming civilians.

2. In recent weeks, announcements have been publicly made by various organizations, among them organizations that declared themselves to be acting for humanitarian purposes, regarding their intention to arrange a flotilla of ships which, they claimed, were designated to transfer foodstuffs and materials as humanitarian aid to the residents of the Gaza Strip. Israel, for its part, made efforts to prevent the flotilla from reaching the shores of Gaza and breaching the blockade in such manner. The State proposed to the organizers of the flotilla, among others, that the cargo – which was supposed to reach Gaza – be unloaded from the ships and transferred directly to Gaza via Israel. This proposal was rejected.

In the early hours of May 31, a number of ships approached the shores of Israel to implement the flotilla's plan. As decided by the political echelon, the IDF prepared to take measures to prevent the entry of the ships into the Gaza Strip as stated. In the framework of an operation that was designed to stop the ships, soldiers landed on the deck of the ship Mavi Marmara, the largest ship in the flotilla. The soldiers met with a violent and severe response from the flotilla participants on the ship. The soldiers were attacked with knives, clubs and iron rods. Attempts were made to seize the soldiers' personal weapons and they were violently attacked. One of the soldiers was even thrown off the deck of the ship. The soldiers were forced to respond to defend their lives and, unfortunately, the operation ended with unexpected loss of life – nine people were killed and both soldiers and flotilla participants were injured. The operation concluded with the ships being halted and their passengers removed and detained in Israel.

3. That same morning, when the results of the operation became known, the petition in H CJ 4169/10 was filed with this court (hereinafter: *the First Petition*), in which four attorneys filed the petition as public petitioners. It should be noted that at the opening of the hearing before us, the petitioners gave notice of the request of attorney A. Feldman, who was among the petitioners, to strike his name from the petition. The petition ascribed grave and illegal acts to the State of Israel and the petitions sought a remedy of habeas corpus to free all the detainees. It is evident in the petition, which was hastily filed, that, notwithstanding the fact that the petitioners knew nothing about the actual events, they were quick to cast the gravest aspersions on the actions of the IDF forces, while using inappropriate language. Notwithstanding that stated, because

the relief sought was the release of the detainees, the petition was not stricken in limine at that stage, and the State's response was requested by the following day.

During the course of that day and the following day, a number of additional petitions were filed with court. In HCJ 4193/10, which was filed on behalf of the Adalah organization and other human rights organizations, the petitioners requested information on the detainees and their whereabouts, as well as details on the injured and the dead. This petition was also filed as a public petition. Another petition (HCJ 4220/10) was filed by the Al Jazeera television network and in the name of journalists acting on its behalf who had been arrested on the ship. This petition requested the release of the network personnel who had participated in the flotilla. It should be noted that during the hearing that we held, it transpired that this petition was superfluous since the petitioners had already been released.

4. On June 1, 2010, the government issued a statement that all the foreign flotilla participants would be released and returned to their countries. After this statement was issued, three additional petitions were filed with this court: HCJ 4221/10, which was filed on behalf of Mr. Yekutiel Ben Yaakov; HCJ 4240/10, which was filed by Shurat Hadin – Israel Law Center; and HJC 4243/10 filed by Almagor – Terror Victims Association. In these three petitions, the remedy sought was to bar the release of the foreign flotilla participants, with the main argument being that these were people who had committed an offense, who were required both for investigating the facts and the circumstances surrounding the incident and for a decision about arraignment for trial.

In view of the remedy sought, which related to the question of the release of a large number of detainees, we conducted an urgent hearing and deliberated all the petitions together before the panel at that session, and within two days of the filing of the First Petition.

5. Before the hearing, the State submitted a written response in which it protested the description of the events in the First Petition and pointed out the distortion of the facts therein. In essence, the State addressed the legality of the blockade and referred to an alternative remedy set forth in the relevant provisions of the Entry into Israel Law, 5712-1952, with regard to the foreign participants in the flotilla and the relevant provisions of the law pertaining to the criminal proceedings of investigation and detention with regard to the Israeli suspects who participated in the event. During the day, proximate to the time of hearing the petitions, the State completed its statement and submitted a decision formulated by the attorney general, which stated that on the day of the event, May 31, 2010, the attorney general ordered the opening of an investigation on suspicion of offenses committed on the deck of the ship Mavi Marmara, including the offense of the grave attack on IDF soldiers, disturbing the peace, endangering the lives of soldiers, seizing weapons and so forth. The attorney general further stated that the next day, the ministerial committee on national security matters convened and conducted a long and exhaustive discussion of the security, political, legal and other aspects of the affair. At the end of the discussion, the senior political echelon recommended “to enable the immediate deportation of all the foreigners who had arrived on the flotilla, who were suspected of committing criminal offenses. This is recommended for clear political reasons pertaining to foreign relations and the security of the State of Israel.” In his decision, the attorney general noted that he had

discussed the matter with the state attorney and other senior officials at the Ministry of Justice and other government ministries, at the end of which he decided, as stated, to allow the immediate deportation of all the foreigners from Israel.

6. During the hearing before us, State Attorney Moshe Lador, appeared together with senior attorneys. It should be noted that due to the nature of the proceedings which we conducted, we sought not to address the claims pertaining to the legality of the blockade, nor with the factual events during that grave incident, the full details of which had not been presented to us. Claims pertaining to the detention of Israelis suspected of committing offenses while participating in the flotilla were also not adjudicated before us, as they should be argued in individual hearings on the criminal arrest proceedings before the competent courts. The hearing focused on the urgent remedies sought which pertain to holding the foreign detainees. The state attorney stated that all the foreigners who wished to do so could be released from detention and, in effect, those who had not yet left the country were on their way to the airport. The wounded whose medical condition allowed for it, were also removed to their countries of origin. Apparently, two of the wounded remained in the hospital because their condition did not enable them to be flown back to their country. The state attorney further stated that the names of all the wounded had been submitted to the relevant consulates and, with regard to those who came from countries that do not have diplomatic relations with Israel, the details were provided to the Red Cross. It should be noted that the State did not see fit to acquiesce to the request to provide details in this matter to counsel for the Adalah organization, as the details had been provided to the relevant entities. However, the possibility arose that if a specific, substantive application were to be made to obtain details

regarding one of the casualties or the wounded, the State would examine the possibility of providing counsel for the Adalah organization with the requested details. It further transpired that the remaining details requested by the Adalah organization regarding the place in which the detainees were being held were resolved. The Adalah organization's counsel also made claims with regard to the detainees' ability to meet with attorneys. During the hearing it was made clear that there had been no intention to prevent such a meeting, and many detainees had actually already met with attorneys. Due to the need to release hundreds of people quickly, not all the detainees may have had the opportunity to meet with an attorney.

The position of the attorney general to release all the foreign participants meant that the main remedy sought in the First Petition was already granted. In the course of the arguments, in view of the response of the state attorney and the comments of the court, the petitioners retracted the style of the scathing verbal attack that they had employed in the petition.

7. As stated, three of the petitions were filed against the attorney general's decision to release the foreign detainees. Each one of the petitioners argued before us at length about the importance of keeping the detainees in Israel for the purpose of conducting an exhaustive investigation regarding the grave events that occurred on the ship, and regarding the need to exercise the full rigor of the law or, at least, to investigate details which, they claim, would constitute defense arguments for the IDF soldiers.

We did not find any ground for intervention in the decision of the attorney general. The decision to release the detainees is in the realm

of the attorney general's discretion. In a long series of judgments, this Court has ruled that the scope of intervention in the attorney general's discretion in decisions pertaining to investigation or prosecution is limited to exceptional and unusual instances. Due to the unusual nature of the event and the circumstances entailed therein which, aside from the criminal aspects, also encompass political aspects pertaining to the State's foreign relations, the attorney general was entitled to consider these aspects. The developments that have ensued in the international arena indicate that a particular political sensitivity exists in everything pertaining to the handling of the matter by the enforcement entities. The attorney general noted that he consulted with all the relevant government entities and after taking into account the fact that nine flotilla participants were killed and several dozen were wounded, he reached the conclusion that the public, political and security interests outweigh the interests of criminal enforcement. We did not find in this decision, which was reasoned as stated, and in the considerations underlying it, any cause for intervention.

Wherefore, after we were convinced that the main remedies sought in some of the petitions were superfluous, and in the absence of cause to intervene in the decision of the attorney general, we have decided to deny the petitions.

Given this day, 20 Sivan 5770 (June 2, 2010).

The President

Justice

Justice