

1. Tamara Fish-Lipschitz
  2. Miriam Gorov
- v.
1. The Attorney-General

The Supreme Court Sitting as the High Court of Justice

[April 9, 2003]

*Before President A. Barak, and Justices D. Dorner, Y. Turkel*

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

Petition denied.

For the petitioners—Nitzana Darshan-Leitner

For the respondent—Yochi Gensin

## JUDGMENT

### **President A. Barak**

1. On February 25, 2002, the late Mr. Avraham Fish was driving in his car. His wife, petitioner no. 1, and the late Mr. Aharon Gorov, the husband of petitioner no. 2, were passengers in the car. Adjacent to the community of Nokdim, Mr. Fish's car was ambushed, and shots were fired at the car. Mr. Fish and Mr. Gorov were killed by the shots. Petitioner no. 1, who was pregnant, was wounded.

2. On March 29, 2002, the Israeli government decided to carry out military operations in the area as part of "Operation Protective Wall." The goal of these operations was to prevent terrorist activities in Israel and in the area. In the context of these operations, soldiers of the Israel Defense Force entered the city of Bethlehem. After their entrance into the city, about 30-40 armed Palestinians broke into the Church of the Nativity and fortified themselves in the basilica of the Church. Among these Palestinians were Ibrahim Mussah, Aslam Abyaat, Abdul Daud Muhammad Abdul Kadar and Anan Muhammad Hamis Tanaga [hereinafter the wanted parties]. The Palestinians, including the wanted parties, shut themselves in the church for a long period of time, during which were citizens, priests and religious figures were also in the church. During this period, intensive negotiations were taking place to find a peaceful solution which would allow the citizens and religious figures to leave the area and allow for the exit of the wanted parties from the church. This was to be done without forceful entry into the church, with all the international and religious implications entailed in such an entry. Ultimately, under international patronage and mediation, an agreement was reached. According to the agreement, Palestinians were to leave the area unarmed, while some of them would be moved to Gaza and the others, including the wanted parties, would be moved to various foreign States without having been arrested by the State of Israel.

3. On 3.12.2002, the petitioners approached this Court. Their petition claims that in an investigation made by the IDF after the attack during which the petitioners lost their loved ones, it was found that the wanted parties were responsible for the attack and executed it. The petitioners' main claim is that despite the agreement to release the wanted parties, after they had been moved to the foreign countries who had agreed to accept them, the State was obligated to demand that they be extradited. This is not only due to the severity of their actions against the deceased and other wounded parties, but also for the purpose of upholding rule of law and equality before the law. Petitioners assert that the wanted parties were not pardoned and their status as wanted persons did not change as a result of the agreement.

4. The respondent requested that we deny the petition. The respondent asserted, at the outset, that with regard to the wanted parties: regarding Anan Muhammad Hamis Tanaga, security forces have found no indication which ties him to the execution of the terrorist attack attributed to him; regarding Abdallah Daud Muhammad Al Kadar, security forces have no evidence upon which they may found criminal charges relative to his involvement in the terrorist attack which has been attributed to him; regarding Ibrahim Mussah Aslam Abyaat, there does exist evidence which connects him to the execution of the terrorist attack being discussed. However, due to agreement, under which the wanted parties left the Church of the Nativity, there is no basis to request that he be extradited, or the extradition of the other wanted parties. In his response, the respondent elaborated upon the background of the agreement which was reached with regard to the evacuation of the Palestinians – which included the wanted parties – from the church. The agreement which allowed the wanted parties to leave the church was reached under international patronage and with the intervention of the Pope. The agreement was a realistic necessity due to the significance of the continuation of the siege on the church and the need to find a solution which would prevent severe damage. The option which was chosen – the banishment of the wanted parties, and thus their exile - was meticulously investigated and found to be appropriate, especially due to its harsh significance for the wanted parties from a penal point of view, and its deterrent significance for others. Respondent asserts that this sanction is more severe than imprisonment. Moreover, the contents of the agreement which was reached are would be in conflict with a request of the State of Israel for the extradition of the wanted parties. Part of the agreement includes an “understanding” that the wanted parties will not become involved in terrorism in the future and will not return to Israel or the area. Thus, despite sharing in the sorrow caused to the petitioners in the loss of their loved ones, on this basis, the denial of this petition was requested.

5. After examining the materials before us and the arguments of the parties, we have come to the conclusion that the petition should be denied. There is no conflict that the reality which led to the agreement under which the wanted parties left the area of the Church of the Nativity is not humanitarily, religiously, operationally or nationally simple.

Some manifestations of this difficult reality may be found in proceedings which were held by this Court. See H.C.J. *Custodia Internationala De Tara Santa v. State of Israel* IsrSC 56(3) 22; H.C.J. *Almondi v. Minister of Defense* IsrSC 56(3) 30, 33-34. The agreement regarding the exit of the wanted parties and the Palestinians was drawn up against this background. Political and international considerations were weighed, as were long and short term security and deterrence interests, including the severity of the sanction of banishment beyond the boundaries of the State of Israel. The petitioners are not claiming against the validity of the agreement, but rather principally against the failure to request the extradition of the wanted parties after the agreement's fulfillment. However, as may be understood from the respondent's response, the two are inseparable. The decision regarding the exit of the Palestinians and the wanted parties is necessarily a decision not to charge them and thus not to request their extradition. Such was not only decided but also agreed upon under the patronage of international agents who were partners in the agreement. Under these circumstances, we have found no cause for our intervention in the respondents decision not to begin extradition proceedings against the wanted parties, of which there is no foundation to prosecute two of them in any case. Compare H.C.J. 5329/97 *Kugan v. ???* IsrSC 51(5) 67. Indeed, the reality in which we live, a reality of terrorism and terrorist attacks, of pain and sorrow, often leads to decisions which demand the balancing of various considerations and choosing from amongst unsatisfying alternatives. These decisions do not always have the power to comfort the petitioners or others whose worlds have been shattered. However, so long as these decisions are properly founded, and the balancings are appropriate and in accordance with the law, they do not establish a cause for the intervention of this Court. Thus, the petition should be denied.

**Justice D. Dorner**

I agree.

**Justice Y. Turkel**

I agree.

Petition Denied  
April 9, 2003