

HCJ 5627/02

- 1. Ahmed Saif**
- 2. Reuters Israel Ltd**
- 3. Middle East Productions Co. Ltd**

v.

- 1. Government Press Office**
- 2. Director of Government Press Office, Mr Danny Seaman**
- 3. IDF Commander of Judaea and Samaria**

HCJ 8813/02

**Al-Jazeera Satellite Channel and others**

v.

**Prime Minister and others**

The Supreme Court sitting as the High Court of Justice

[25 April 2004]

*Before Justices D. Dorner, E. Rivlin, S. Joubran*

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

**Facts:** At the end of 2001, the Government Press Office decided that it would no longer give press badges to Palestinian journalists who were residents of Judaea and Samaria, because of the security risk. The petitioners in the two petitions challenged this policy.

**Held:** The court held that the refusal to give press badges to Palestinian journalists who were residents of Judaea and Samaria, without any consideration of the individual cases of the persons applying for a press badge, could not be justified on security grounds alone. The respondents had not considered the right of freedom of expression that conflicted with the security grounds.

Petitions granted.

**Legislation cited:**

Basic Law: Human Dignity and Liberty.

Basic Law: Freedom of Occupation.

**Israeli Supreme Court cases cited:**

- [1] HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdouda Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785.
- [2] HCJ 591/88 *Taha v. Minister of Defence* [1991] IsrSC 45(2) 45.
- [3] HCJ 509/80 *Youness v. Prime Minister's Office* [1981] IsrSC 535(3) 581.
- [4] HCJ 5936/97 *Lam v. Director-General of Ministry of Education, Culture and Sport* [1999] IsrSC 53(4) 673; **[1998-9] IsrLR 537**.
- [5] HCJ 399/85 *Kahana v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255.
- [6] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.

For the petitioners in HCJ 5627/02 — Y. Resnick, Y. Yaari.

For the petitioners in HCJ 8813/02 — Z. Kamal.

For the respondents — A. Helman.

## JUDGMENT

### **Justice D. Dorner**

1. At the end of 2001, the first respondent, the Government Press Office (hereafter: the Press Office) decided that, as of the beginning of 2002, it would no longer issue press badges to Palestinian journalists, nor would it extend the validity of badges that had already been issued. The director of the Press Office, Daniel Seaman (the second respondent) explained the decision in an article that was published on 19 August 2001 on the Ynet website. He wrote:

‘To date, the Palestinians have enjoyed a right that is granted only to Israeli citizens — the almost automatic right to receive an Israeli press badge... since until the establishment of Palestinian autonomy, its residents were under the auspices of the State of Israel, it was incumbent upon Israel to treat them along the same lines as residents of the State of Israel. Now the Press Office has

decided to make the status of residents of the Palestinian Authority comparable to that of all foreign journalists... The events of the past year were indeed a factor in the decision. These events include: staging and directing filming in accordance with the instructions of the Palestinian Authority; creating deliberate provocations in the vicinity of security forces and deliberate disruption of their work; false reports that stir up a desire for revenge; praise for, and glorification of, acts of suicide and murder; incitement to murder Israeli citizens and the destruction of the State of Israel. We do not delude ourselves; it is clear that these actions will continue. But the Government Press Office has decided that they will be done by people who do not carry a press badge of the State of Israel.'

A petition was then filed by the Al-Jazeera television network and 19 correspondents that worked for it, some of whom are residents of East Jerusalem holding Israeli identity cards, and some of whom are residents of Judaea and Samaria, to order the Press Office to issue press badges to the correspondents. This petition, HCJ 6166/02, was struck out, in view of the State's clarification that applications from correspondents holding Israeli identity cards would be considered on their merits, and that press badges were not issued to residents of Judaea and Samaria who did not have a permit to work in Israel.

2. But it transpired that the Press Office also refused to issue press badges to those residents of Judaea and Samaria who do hold permits to enter and work in Israel. This is the reasons for the petitions before us, which are directed against this refusal. We have decided to consolidate the hearing of the petitions, and have issued orders *nisi* with regard thereto.

HCJ 5627/02 concerns the case of Ahmed Saif, who has worked for the Reuters news agency in Israel since 1990, and is the assistant director of Reuters television in Israel. Saif has permits to enter and work in Israel. He held a press badge that was issued by the Government Press Office for 11 years. The badge was renewed every two years. According to the petitioners in this petition — Saif and his employer, Reuters — the refusal is based on irrelevant considerations of preventing criticism of Israel by Palestinians. At the request of the petitioners, we heard from the editor-in-chief of Reuters, Mr Paul Holmes, who came from New York. Holmes explained the importance of the press badge for Mr Saif's work, and emphasized that the sweeping refusal of the Press Office to issue press badges to residents of Judaea and Samaria,

without a consideration of each case, was intended to force Reuters to employ someone else, who was not a resident of Judaea and Samaria.

In HCJ 8813/02, the Al-Jazeera station and ten journalists employed by it renewed their petition. In the petition, Al-Jazeera indicated its desire to cover events in Israel and, by so doing, to provide a platform for the leaders of the State of Israel that would enable them to convey messages to Arab countries. It said that it recently conducted a television interview with the President of the State of Israel with correspondents, photographers and technicians to whom the Government Press Office now refuses to issue press badges.

In its reply, the State of Israel explained the refusal by its fear of harm to government officials in Israel at press conferences or at government ministries, in view of the fact that a press badge facilitates access to these places. In its opinion, an individual security check cannot negate the danger of a resident of Judaea and Samaria, since this danger derives from the very residency. In any event, the petitioners, who are not citizens or residents of Israel, do not have the inherent rights that are granted within the State of Israel, and the State of Israel certainly is not liable to issue press badges to residents of Judaea and Samaria, enemies of the State.

In the affidavit in reply, which was provided by Seaman, it was further stated that in his opinion 'beyond the obvious security reasons, and the fact that the conflict between Israel and the Palestinians is also taking place on the battlefield of international public opinion, there is no reasons to issue GPO (Government Press Office) press badges to residents of Judaea and Samaria, which will be exploited by the other side within the framework of the battle for international public opinion. Nevertheless, Seaman said that, in view of the security situation, it is unnecessary to address these additional considerations, and that the clear security considerations are sufficient in order to justify the denial of press badges to residents of Judaea and Samaria.

During the hearing, the State of Israel formulated a procedure that enables Palestinian journalists who are residents of Judaea and Samaria, subject to security checks, to receive a permit to enter and to work in Israel as journalists. But this procedure makes participation in press conferences and entry into government ministries conditional upon the filing of special applications *immediately prior to the event* in which the journalist wishes to participate. The petitioners explained that this procedure is not a substitute for a press badge that allows immediate coverage, which is the heart of a journalist's work, and that facilitates the receipt of current and up-to-date information.

3. In view of the position of the State of Israel, which defended its refusal on security grounds alone and, notwithstanding Seaman's aforesaid affidavit, denied that the decision was made also on the basis of considerations that do not concern security matters, I will consider the legality of the decision on the assumption that it was indeed based solely on security grounds.

4. The rules of administrative law bind State authorities in all of their executive acts, both vis-à-vis Israelis and vis-à-vis foreigners. This is the law when the authority — including a military commander of an area held under belligerent occupation — is operating outside of the borders of the State of Israel. See, for example, HCJ 393/82 *Jamait Askan Almalmoun Altaounia Almahdoua Almasaoulia Cooperative Society v. IDF Commander in Judaea and Samaria* [1], at pp. 792-793, where it was held that exercising the authority of a military commander of an area that is under belligerent occupation vis-à-vis the local population must comply with the 'principles of Israeli administrative law concerning the use of executive power by a civil servant.' See also HCJ 591/88 *Taha v. Minister of Defence* [2], at pp. 51-52. This is *a priori* also the law when an Israeli authority exercises its powers, whether vis-à-vis Israelis or vis-à-vis foreigners, within the borders of the State of Israel.

Indeed, when exercising its discretion, the authority may, in certain cases, take into account the fact that the person with whom the authority is dealing is a foreigner, who is not a citizen or a resident of the State of Israel. Thus, for example, the Basic Law: Freedom of Occupation grants freedom of occupation only to citizens or residents of the State of Israel. Notwithstanding, in other cases this consideration is irrelevant or of limited relevance. Thus, most of the rights provided in the Basic Law: Human Dignity and Liberty are given to everyone.

In our case too the Press Office, like other State authorities, must uphold the rules of administrative law in its actions vis-à-vis the petitioners, notwithstanding the fact that they are not citizens or residents of Israel. In my opinion, in view of the fact that they are foreigners, the demand that the journalists who filed the petition have an entry permit into Israel, as well as a work permit, if such a permit is in fact required of all foreign journalists, is a reasonable one. But the current position of the State of Israel, which is based on security grounds, is that it is not liable to issue a press badge to Palestinian journalists who are residents of Judaea and Samaria as such, even if they hold permits to enter and to work in Israel, without any need for an individual

consideration of each application. This position is the subject of our review in this petition.

5. Engaging in the profession of journalism does not require a licence, which would be prejudicial to freedom of expression. The profession is therefore a free one, and anyone who wishes to engage in it may do so. Press badges are not issued pursuant to statute. Indeed, the refusal to issue press badges does not prevent those who have been refused them from engaging in the profession, but it does make it significantly more difficult for them to do so. This is because the badges are required for obtaining information from the authorities, which is essential for engaging in the profession of journalism. This difficulty prejudices the possibility of expressing oneself and of obtaining information. Indeed, approximately twenty years ago it was held that ‘the freedom of the citizen to obtain and distribute information is equivalent to the freedom of expression’ (*per* Justice J. Türkel in H CJ 509/80 *Youness v. Prime Minister’s Office* [3], at p. 594). President M. Landau, in the same judgment, was of the opinion that those applying for a press badge had at least an economic interest deserving protection. This is what he said in his opinion, *ibid.*, at p. 592:

‘There is no dispute that press badges are of practical importance, from two viewpoints:

(a) Persons who hold them benefit from the services of the Government Press Office, in the form of the dissemination of information that the Press Office wishes to disseminate, as well as participation in press tours that are conducted by the Press Office. (b) The badge, in practice, gives its holder a preferential status “above the common people,” in access to central and local governmental authorities and to various sources of information.’

In our case, it is possible to leave undecided the question whether receiving a press badge is part of the basic right of freedom of expression. Cf. H CJ 5936/97 *Lam v. Director-General of Ministry of Education, Culture and Sport* [4], at pp. 683-686. But it can be established with certainty that giving such a badge to persons involved in journalism is part of a protected social interest in a free press and open comment. This interest is not merely that of journalists, television and radio networks, newspapers or news agencies. This is a general public interest, that serves, *inter alia* — in addition to the self-fulfilment of those who wish to express themselves — the discovery of the truth, the democratic process and social stability. See and cf. H CJ 399/85 *Kahana v. Broadcasting Authority Management Board* [5], at pp. 270-279.

The authorities — including the Press Office — must take this interest into account and give it appropriate weight in their decisions.

6. As we have seen, the position of the State — which refuses to issue press badges to Palestinians who are residents of Judaea and Samaria as such — is based on security considerations. Indeed, security is a fundamental value in our society. Without security, it is not possible to protect human rights and other protected interests. But like human rights, even this value is not absolute; a balance is required between the interest of maintaining security and other protected rights and interests that conflict with it. This was discussed by President A. Barak:

‘In this balance [between human rights and security needs] human rights cannot receive complete protection, as if there were no terror, and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy’ (HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [6], at p. 383 {120}).

Indeed, in a state of war, a country does not allow the residents of the country fighting it to enter and work in it, and it certainly does not issue press badges to citizens of that country. But the relationship between the State of Israel and the Palestinians who are residents of Judaea and Samaria is more complex. The director of the Press Office explained the giving of press badges to Palestinians in the past on the grounds that it was ‘under the auspices of the State of Israel.’ Even today large parts of Judaea and Samaria are subject to belligerent occupation, movement within Judaea and Samaria is controlled by Israel, and the dependency of the residents of Judaea and Samaria on Israel continues. This background constitutes the basis for the permits that the State of Israel gives to residents of Judaea and Samaria, to the extent that the security and the political situation allows this, and subject to a security check of each application to enter and work in Israel.

7. In our case, the total refusal to give press badges to Palestinians who are residents of Judaea and Samaria — including those who hold permits to enter and work in Israel — shows that the work of balancing the concerns of expression and information against security concerns was not done at all and in any event the balancing that was made is unlawful. Even establishing a procedure for obtaining a permit to work as a journalist, which was formulated in the course of the hearing, and which *prima facie* is not an appropriate substitute for a press badge that allows for ongoing and immediate coverage, does not repair this defect.

A refusal to give a press badge without any examination of the individual case, because of the danger inherent in all Palestinian journalists who are residents of Judaea and Samaria — including those entitled to enter and work in Israel — is the most prejudicial measure possible. This measure is strongly prejudicial to the interest of a free press, and could be prevented by individual security checks that are justified in order to mitigate the individual security risk presented by the residents of Judaea and Samaria, in so far as such a risk exists with regard to residents who have successfully undergone the checks required in order to receive permits to enter and work in Israel.

Indeed, it is always possible to argue that the mere fact that a Palestinian journalist is a resident of Judaea and Samaria creates a special security risk if that journalist holds a press badge. This risk exists even if that journalist holds entry and work permits as aforesaid, even if he has undergone additional, special security checks, for the purpose of obtaining a press badge. Notwithstanding, this special risk is slight and theoretical, and it does not justify a definite violation of the protected interests of freedom of expression and information, and a distinction — which is in practice a discrimination — between foreign Palestinian journalists and all other foreign journalists.

8. The arbitrary nature of the total refusal is well illustrated in the case of the petitioners before us. As we have said, Saif is currently authorized to enter and work in Israel. This petitioner has held a press badge for years and holds an important position in an international agency, and no one argues that, during all of the years that he has worked, there has been any hint of a security risk. Even the petitioners from the Al-Jazeera television station were found safe enough to conduct a television interview with the President of the State of Israel.

I therefore propose that we make the orders that were made in the two petitions absolute, in the sense that, subject to individual security checks, the press badge held by Saif will be renewed, and press badges will be given to Al-Jazeera personnel, if they receive permits to enter and work in Israel.

The respondents shall be liable for the costs of the petitioners, in a total amount of NIS 10,000, for each of the two petitions.

**Justice E. Rivlin**

I agree.

**Justice S. Joubran**

I agree.

Petitions granted.

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25 April 2004.