

Before the Supreme Court sitting as High Court of Justice

HCJ 4797/07

Before: The Honorable Chief Justice (ret.) A. Grunis
 The Honorable Chief Justice M. Naor
 The Honorable Deputy Chief Justice E. Rubinstein

The Petitioner: Association for Civil Rights in Israel

v.

The Respondents: 1. Airports Authority
 2. General Security Services
 3. Ministry of Transportation

Petition for the granting of an order nisi.

Date of hearing: 1 Kislev 5775 (Nov. 23, 2014)

For the Petitioner: Auni Bana, Adv., Dan Yakir, Adv.

For the Respondents: Chani Ofek, Adv.

Facts: The petition concerned the security procedures for screening Israeli citizens at Israeli airports. The Petitioner's primary claim was that Israel's Arab citizens are generally subjected to stricter security checks than Israel's Jewish citizens. The Petitioner argued that employing ethnicity as a criterion for the rigorousness of airport security screening of Israeli citizens is fundamentally unacceptable. The petition was submitted in 2007, but the decision was delayed in light of changes that the Respondents implemented in the security procedures, primarily comprising the introduction of new technology for the inspection of checked baggage, which was the subject of main concern of the passengers, as well as additional steps adopted to reduce distinctions among passengers in the security procedures. In light of those developments, the Respondents argued that the

petition should be dismissed. In their view, the claims in regard to the security procedures in place at the time the petition was submitted were no longer relevant, while the claims advanced in regard to the new procedures were not yet ripe for decision. The Petitioner demanded that Court decide upon the fundamental issue it had raised, and advanced additional claims in regard to the changes that had been adopted.

Held: The High Court of Justice (*per* Chief Justice (ret.) A. Grunis, Chief Justice M. Naor and Deputy Chief Justice E. Rubinstein concurring) dismissed the petition for the following reasons:

The Respondents had made considerable progress towards increasing equality in the security procedures. It was clear that significant efforts were being devoted to the implementation of technological solutions that would reduce, to the extent possible, the differences in the security procedures applied to different passengers, and significantly limiting the public element that formerly characterized the screening of certain passengers, while maintaining the appropriate level of security that is indisputably required in regard to air transport. It is only natural that such changes require time, and are dependent upon the cooperation of many parties. Under the circumstances, the Court ruled that the petition had exhausted itself. The authorities should be permitted to complete their work and collect data in regard to the effect of the changes that had been made before subjecting the fundamental question to judicial review. In this regard, the Court emphasized that achieving the correct balance between the need for air transport security and the reasonable functioning of the airports, and the protection of individual rights is an especially difficult task, particularly in Israel's current security situation. It should also be borne in mind that a terrorist attack upon an airplane could result in the loss of many lives.

If, in the future, the Petitioner finds that the changes instituted have not brought about the desired result, and that the distinction – particularly the public distinction – among Israeli citizens persists in the airports, the Court's gates will remain open. That will also be the case if the implementation of the planned changes in the airports does not proceed at a reasonable pace, in accordance with the timetable presented by the Respondents.

The petition was therefore dismissed without prejudice. In light of the important contribution of the petition to advancing the changes in the field of security procedures in Israeli airports, the Respondents were ordered to pay the Petitioner's costs in the amount of NIS 30,000.

Judgment

Chief Justice (ret.) A. Grunis:

1. The subject of this petition, which was submitted in 2007, is the security procedures for screening Israeli citizens in Israeli airports. The Petitioner's main claim is that Arab citizens of Israel are generally subjected to more intensive inspection than Jewish citizens of Israel. In the opinion of the Petitioner, employing ethnicity as a criterion for deciding the extent of the screening to which citizens are subjected at the airports is fundamentally flawed.

2. The Petitioner is the Association for Civil Rights. Respondent 1 is the Israeli Airports Authority. Respondent 2 is the General Security Service, which advises the Airport Authority in the field of security. Respondent 3 is the Ministry of Transport. On March 3, 2011, an order nisi was granted, ordering the Respondents to show cause as to why security screening for all citizens at the airports should not be carried out in accordance with equal, relevant and uniform criteria (D. Beinisch, CJ, E. Rivlin, DCJ, and M. Naor, J). On May 23, 2011, the Minister of Defense signed a security-interest immunity certificate in accordance with sec. 44 of the Evidence Law [New Version], 5731-1971, in regard to the details of the procedures and guidelines for security screening at the airports. Information in regard to the details of the procedures was presented to us at various stages in the proceedings. The information was presented *ex parte* due to its sensitivity and the danger to state security posed by its disclosure.

3. In the course of the proceedings, we learned that, in 2006, the General Security Service and the Airports Authority began a broad administrative examination of the security-inspection procedures. In the course of that process, changes were adopted in regard to the screening of Israeli citizens in Ben Gurion Airport (hereinafter: *Ben Gurion*) in order to reduce the differential aspect of the inspections, *i.e.*, to promote uniformity in the security procedures applied to all Israeli citizens. The primary change relates to the procedure for screening baggage intended for the airplane's baggage hold (hereinafter also: *checked baggage*), which was the subject of most passenger complaints. A new technological system was developed (Hold Baggage Screening – HBS) that allows for the inspection of all the checked baggage in a separate, non-public area, without the presence of the passengers, and its direct transfer to the baggage hold. The inspection by the new technology is performed at various security levels in accordance with threat levels. In addition to the plans regarding the new technology, other changes were introduced at Ben Gurion in 2008, such as changes in the security procedures at the vehicle entrances to the airport and at the terminal entrances. In their answer to the order nisi, the Respondents claimed that the new security procedures will serve to alleviate the sense of discomfort and humiliation attendant to the rigorous inspection of a passenger's baggage in the main passengers' hall, the detaining of the passenger and the conducting of public screening in the presence of other passengers waiting in line. They added that they intended to begin operating the HBS system in the course of 2013, subject to operational exigencies. It should be noted that the Respondents presented more optimistic timetables in earlier responses. The Respondents further emphasized that there is no uniform, strict level of screening for all Israeli Arab citizens. They maintained that, in practice, most of that population undergoes quick, simple screening, and the planned changes will help to further simplify the procedure. Moreover, the Respondents explained that the level of screening

is not based upon a single criterion, but rather upon a mix of criteria, based upon empirical data and professional threat assessment that indicate the potential threat level posed by a particular passenger.

4. In light of the significant change expected in the screening procedures, this Court (D. Beinisch, CJ, E. Rivlin, DCJ, and M. Naor, J) decided to postpone its decision on the fundamental issues raised by the petition, in order to allow time for the integration of the new system and the gathering of data in regard to the effect of the changes upon the security screening procedures. The Court decided to leave the petition pending, and the Respondents were ordered to submit an updated response in six months. The decision stated, *inter alia*:

“The application of a security profile to an Israel citizen in a manner that would justify conducting stricter security screening, even without concrete information in regard to that citizen, raises significant problems. We are doubtful whether the use of a security profile that is based upon sweeping, general characteristics, and that relies upon a passenger’s being a member of a specific ethnic group as a sole characteristic, is legitimate. [...] Indeed, although a person does not have a vested right not to be subjected to security screening at the airport, it is a person’s right that such screening be applied equally, based upon equal, uniform criteria. No one doubts that since the phenomenon of widespread, intensive terrorist attacks began, many countries are confronted by the question of the legitimacy of profiling potential threats through tagging that is based upon origin or ethnicity. Such tagging, of course, raises particular difficulties when we are concerned with citizens whose equal rights must be respected. Even in the instant case, although high-level screening is not applied to all the Arab citizens of the state, the existence of sweeping, general criteria for threat assessment – to the extent that those are indeed the factual circumstances, and we are not ruling on that – raises a problem that justifies a more in-depth examination on the basis of the relevant data” (para. 5 of the decision).

5. On Nov. 22, 2012, the Respondents informed the Court that the integration of the HBS system at Ben Gurion was proceeding, despite operational difficulties. They estimated that the technology would become operational in accordance with the timetable that was presented to the Court, that is, already in the course of 2013. The Respondents emphasized that the Airports Authority is prepared, in principle, to introduce the technology into the security procedures of the domestic airports, as well, subject to exigencies. Thus, they stated, an advanced technological system was put in place in the Eilat airport in the second half of 2011, which makes it possible to inspect checked baggage behind the scenes and without the involvement of the passengers. They are also trying to implement the screening procedure, as far as possible, in Ben Gurion, although there are differences in this regard between the two airports. At the Uvda airport, which serves only international flights, there is a uniformly strict screening procedure for all passengers, most

of whom are foreign nationals. Both the Eilat airport and the Uvda airport are scheduled for relocation to a new site in Timna, where the new screening procedure being implemented in Ben Gurion will be fully adopted. As opposed to that, the Haifa airport and Tel Aviv's Sde Dov airport present significant infrastructure problems. Nevertheless, advanced technological systems have been installed at the terminal entrance for the inspection of both carry-on and checked baggage. It should be noted that there is an intention, in principle, to relocate Sde Dov. The Respondents further informed the Court that, in addition to the technological changes, the operation of the "Security Center" ("*Mokdan*") will be expanded. The purpose of the Security Center is to provide security services to foreign business travelers, and guests of government ministries and Israeli companies, in order to simplify the process for them. The data of the Security Center are shared with the domestic airports and the Israeli carriers flying to Israel. According to the Respondents, this service has significantly reduced friction with sensitive populations in the security screening process.

6. On Sept. 18, 2013, the Respondents submitted an updated affidavit. In that affidavit, the director of Ben Gurion informed us of a delay in the timetable for integrating the HBS technology, and therefore the implementation of the new security procedures would only begin in March 2014, at the earliest. According to him, the reason for the delay was that the foreign companies involved in the project had not met their commitments. The Respondents emphasized that as soon as they became aware of the delay, a number of steps were taken to mitigate it. According to the Respondents, the Airports Authority made the necessary changes required of it in Ben Gurion in terms of construction and infrastructure, as well as the recruitment and training of manpower, and it was, therefore, prepared, in principle, to incorporate the system on the intended date, had a working system been supplied by the foreign companies. In accordance with the amended timetable presented by the Respondents, examinations and other actions in preparation for the full implementation of the system in Ben Gurion will be carried out between March and July of 2014. The running-in stage of the system will begin in July 2014, and six months later, the system will be fully transferred from the foreign companies to the Airports Authority. The Respondents emphasized that further delays were possible due to the complexity of the integration process and the possibility of unforeseen developments.

7. In an additional notice, dated Nov. 14, 2014, the Respondents updated the Court that due to recent developments in the integration of the HBS system, it appeared that the system would indeed be fully operational in March 2014, and that it would be finally transferred to the Airports Authority in December. The Respondents explained that the HBS system would be put into use only in Terminal 3 in Ben Gurion, and not in Terminal 1. Terminal 1 was designated to serve domestic flights, after the opening of Terminal 3, but in 2011, it was decided that it would also serve low-cost international flights. The Respondents further noted that, as of 2014, a project will commence for the introduction of a system like HBS in Terminal 1, and that the expected timetable for this is two years, subject to operational exigencies. That estimate was later amended, and the current projection for the introduction of the system in Terminal 1 is 2017. The

Respondents emphasized that the changes made in Ben Gurion in regard to the vehicle entrances and the entrances to the terminals will also apply to Terminal 1.

8. On Dec. 20, 2013, a hearing was held on the response to the petition before a three-judge panel (A. Grunis, CJ, and M. Naor and E. Arbel, JJ). At the end of the hearing, it was decided that it was not yet time to rule upon the petition, in light of the progress in integrating the changes in the security system in Ben Gurion, despite the delays. The Respondents were ordered to submit an update by April 30, 2014. Accordingly, in notices dated April 28, 2014 and November 2, 2014, the Respondents confirmed that the HBS system began operation in Terminal 3 of Ben Gurion as of March 2014. According to the Respondents, there is a possibility of limited recourse to the “old” screening procedure in cases of breakdowns and due to operational needs. The Respondents noted that the initial experience gained from operating the system was positive, and that it appeared that the system allowed for the required level of screening from a security perspective, while mitigating the attendant intrusion of strict screening of passengers in public. They reiterated that they intend to introduce the new technology in Terminal 1. In addition, The Respondents provided other details concerning additional steps taken, in addition to the installing of the HBS, to reduce the differences between passengers in the screening procedures. Thus, they stated, advanced screening devices had been purchased that would reduce the need for the physical examination of passengers. They added that such gates had been purchased for Ben Gurion, and an additional purchase was planned for the Eilat airport.

9. In light of the above developments, the position of the Respondents is that the petition should be dismissed. In their view, the claims made in regard to the security screening procedures in place at the time the petition was submitted are no longer relevant, while the claims regarding the current changes are not yet ripe for a decision. The Respondents are of the opinion that they should be allowed time to evaluate the effects of the changes upon passenger screening procedures. However, the Respondents expressed their commitment to continuing their efforts to reduce the offense caused to individuals by security screening procedures in the airports. According to the Respondents: “The treatment of the broad issue raised by the petition is over but not completed. The Respondents are committed to continue and persist in implementing technological solutions, while diminishing the injury caused by public exposure and the character of strict security screening” (see para. 4 of the Respondents’ notice of April 28, 2014).

10. The position of the Petitioner has consistently been that the question raised by the petition concerns the lawfulness of the use of the criterion of ethnicity as a basis for adopting differential screening methods for a specific group of Israeli citizens. In its view, this is a fundamental question. The problem in the very distinction on the basis of ethnicity will not be resolved, it argues, even if all the changes in the security procedures detailed above are fully implemented. The Plaintiff argues that even the Respondent admits that the technological and other changes will not lead to uniformity in the security procedures, and at most, they will lessen the discomfort

felt by Arab citizens in the airports. The Petitioner also criticizes the HBS system itself. In its view, it is unclear what criteria are employed for deciding whether to carry out a physical inspection of hand luggage that has been scanned by the new system. According to the Petitioner, the changes adopted do not address other elements of screening that discriminate against Arab citizens, such as the inspection of the hand luggage of passengers, their pre-check-in questioning in Israel and on flights of Israeli carriers flying to Israel. In addition, the Petitioner complains of the recurring delays in the date for the planned implementation of the HBS system in Ben Gurion, and that as far as Terminal 1 and the other domestic airports are concerned, there are only intentions for future implementation of the new technology. The Petitioner also argues that it is unclear what contribution the Security Center – which provides services to government ministries and companies – makes to advancing equality between Arab and Jewish citizens of Israel in the security screening process. In addition, the Petitioner emphasizes that introducing screening devices that perform full-body scans raises significant problems, in and of itself, due to the infringement of privacy attendant to their use.

11. On Nov. 23, 2014, another hearing was held before this Court. In the course of that *ex parte* hearing, we were presented with classified information in regard to the changes made in the security screening procedures. In light of that information, and in light of all the developments made over the years that this petition has been pending, we are under the impression that the Respondents have gone a long way in increasing equality in the screening process. It is clear that significant efforts have been made to implement technological solutions that will limit differences in the screening process, to the extent possible, while maintaining an appropriate level of security, which is indisputably required in the field of air transport. By their very nature, such changes demand time, and are contingent upon the cooperation of many parties. As noted, the HBS technology is currently operating in Terminal 1 of Ben Gurion, which is the main hub of Israel's air transport. That technology enables the examination of checked baggage without a need for the passenger's presence, and while significantly reducing the public exposure that formerly characterized the screening of certain passengers. A similar system is planned for Terminal 1. While the screening process is not identical for all passengers, and some baggage undergoes greater scrutiny, the distinction is based upon technological indicators. Although recourse to the "old" screening process may occur in cases of breakdowns, that possibility is reserved for exceptional cases in which the need may arise in order to ensure the proper functioning of Ben Gurion. Changes have also been made in the domestic airports, which include the introduction of new technologies. Some of those airports are slated for relocation, and according to the Respondents, the screening procedures currently employed in Terminal 3 will be implemented at the new locations. In addition to the changes in the system for screening checked baggage, scanning gates will be employed to reduce the need for the physical inspection of passengers. Those changes are in addition to earlier technological changes in the screening procedures at the vehicle entrance of Ben Gurion and at the entrances to the passenger terminal.

12. Under these circumstances, we are of the opinion that, at present, the petition has exhausted itself (and compare: H CJ 2467/05 *Gorenberg v. Director of the IDF and Defense Establishment Archives* (Jan. 13, 2010); H CJ 1254/10 *Anonymous v. Population, Immigration and Border Crossing Authority – Ministry of the Interior* (April 4, 2012); H CJ 3091/99 *Association for Civil Rights in Israel v. Knesset* (May 8, 2012)). The Petitioner's claims in regard to the screening procedures prior to the introduction of the HBS system and the other changes have been rendered superfluous. Looking to the future, it is as yet too early to evaluate the effect of those changes upon the extent of harm to individual rights involved in the screening process. We must wait and see whether the significant changes introduced will, indeed, help reduce expressions of distinction among different groups of Israeli citizens in the airport screening process. We should note that the case before us is not one in which the authorities have sat on their hands and refrained from correcting a situation that poses an unnecessary infringement of individual rights. The Respondents are aware of their responsibility to address this issue, and expressed their intention to implement and initiate additional changes in the screening process, which are intended to contend with the problems raised in the petition. We are of the opinion that the authorities should be permitted to complete their work and collect data in regard to the effect of the changes that have been implemented, before subjecting the fundamental questions to judicial review.

13. We are aware of the Petitioner's stance that any distinction between Israeli citizens that is based upon ethnicity – even if it is “behind the scenes” and not visible – infringes human dignity, equality, freedom of movement and privacy. As opposed to that, the alternative of strict, uniform screening of all passengers also raises significant problems, and according to the Respondents, such screening cannot be implemented without causing extreme harm to the proper functioning of the airports and to the effectiveness of security screening. Finding the appropriate balance between the need for the security of air transport and the reasonable functioning of the airports, and protecting individual rights is a particularly difficult task. We must bear in mind that an act of terrorism carried out against an airplane may result in the loss of many lives. Israel is not the only country faced with this challenge, although it cannot be denied that it also faces certain unique problems due to the nature of the security threats with which it must contend. For the reasons stated above, we are not ruling upon the fundamental issue at this time. If, in the future, the Petitioner finds that the changes instituted have not brought about the desired result, and that the distinction – particularly the public distinction – among Israeli citizens persists in the airports, the Court's gates will remain open. That will also be the case if the implementation of the planned changes in the airports does not proceed at a reasonable pace, in accordance with the timetable presented by the Respondents.

14. The petition is, therefore, dismissed without prejudice. In light of the important contribution of the petition to advancing the changes in the field of security procedures in Israeli airports, the Respondents will pay the Petitioner's costs in the amount of NIS 30,000.

Chief Justice (ret.)

Chief Justice M. Naor:

I concur.

Chief Justice

Deputy Chief Justice E. Rubinstein:

1. I concur in the opinion of my colleague the former Chief Justice. We are concerned with one of the most sensitive subjects in the relationship between the state and its Arab citizens, as my colleague observed in para. 13. The situation in which the State of Israel finds itself requires a very delicate balance. On the one hand, in addressing security screening, we are treating of human dignity as such, and to say more would be superfluous. On the other hand, the heavy burden placed upon the security authorities by the security situation that surrounds us cannot be ignored. This is nothing new. In Mapp 6763/06 *Khiat v. Airports Authority* (2006), I had the opportunity to state (at para. 10):

“We are concerned with a sensitive matter. It is doubtful whether there is another nation that is called upon to make such a delicate balance between the need for equality for all the citizens of the state – not merely in words but in action – and security needs that none, including the petitioners, dispute. The subject of the security screening of Israel’s Arab citizens in various places – one of a collection of subjects that require fair and balanced treatment – arises from time to time over the years. In a lecture that I delivered at the Faculty of Law in Jerusalem on May 25, 2002, when I was still serving as Attorney General, I noted – in the midst of terror – that ‘I am personally conducting a constant dialog with the security services in regard to security screening, in order to prevent unnecessary harm to the human dignity of Arabs, even in times of stress. I do not relent on that subject, even at this time’ (“The State and Israeli Arabs: The Struggle for Equality in the Framework of an Agonized Jewish and Democratic State” (In Memory of Justice Haim Cohn), 3 *Kiryat Mishpat* 107, 112 (5763) (Hebrew), reprinted in my book *Paths of Governance and Law*, 293, 298 (Hebrew)). I believe that awareness of this subject, in the instant case in which we are concerned with the airports, as well, has already penetrated to some degree, and has found a place in the public agencies, as it should.”

2. Indeed, as my colleague has shown, the Respondents are striving to improve screening in this regard in various ways. The Respondents should be encouraged in every way to continue in those efforts to the extent possible. As a Jewish and democratic state, we should be particularly sensitive. As stated, I concur with my colleague.

Deputy Chief Justice

Decided as stated in the opinion of Chief Justice (ret.) A. Grunis.

Given this 19th day of Adar 5775 (March 3, 2015).