HCJ 5228/14

Petitioner: B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories

v.

Respondents:
1. Broadcasting Authority
2. Director General of the Broadcasting Authority
3. Appeals Committee under reg. 6 of the Broadcasting Authority Regulations
4. Minister of Communications

Attorneys for the Appellants: Hagai Kalai, Adv.; Gilad Barnea, Adv.

Attorneys for Respondents 1 - 3: Moti Arad, Adv.; Meirav Eliahu, Adv.

Attorney for the Attorney General: Shosh Shmueli, Adv.

The Supreme Court sitting as High Court of Justice

4 Av 5774 (July 31, 2014)

Before: Justice E. Rubinstein, Justice N. Hendel, Justice U. Shoham

Petition for an Order Nisi

Mini-Ratio: The infusion of political matter into advertisements should be limited to the utmost extent. Even under the approach that does not entirely preclude informational broadcasts as opposed to political persuasion, a broadcast of a partial list of the names of Palestinian children killed in Operation Protective Edge would clearly fall within the scope a “prohibited broadcast” under rule 2(7), as being “on a matter which is the subject of public political-ideological controversy”, inasmuch as it is intended for political persuasion and not purely informational.

Broadcasting – Content of broadcasts – Political advertisements

Communications – Broadcasting Authority – Commercials

Constitutional Law – Individual rights – Freedom of expression

A petition seeking to quash the decision of the Broadcasting Authority to preclude the broadcasting of a commercial by B'Tselem comprising a partial list of the names of Palestinian children killed in the course of Operation Protective Edge. The dispute concerned whether this commercial constituted a prohibited broadcast under rule 7(2) of the Broadcasting Authority (Radio Advertisements and Announcements) Rules, 5753-1993, concerning – inter alia – "a broadcast on a matter which is the subject of public political-ideological controversy".

The High Court of Justice (*per* E. Rubinstein J., N. Hendel and U. Shoham JJ. concurring) denied the petition, holding:

In accordance with the case law, the infusion of political matter into advertisements should be limited to the utmost extent, in keeping with the view that paid advertising, *per se*, does not fall within the scope of freedom of expression. Even if the case law has not hermetically barred advertising of a political character that is not of a persuasive nature, that approach has been significantly restricted in holding that the dominant factor test must be narrowly construed so as to prevent the infiltration of a political current into advertising. At the end of the day, we are concerned with the "reasonableness and common sense" test, and there is no need for a new test. The ruling in the *Hamateh Lehatzalat Ha'am Veha'aretz* case is sufficient, and the narrower it is construed the better. Even under the approach that does not entirely preclude informational broadcasts as opposed to political persuasion, a broadcast of a partial list of the names of Palestinian children killed in Operation Protective Edge would clearly fall within the scope a "prohibited broadcast" under rule 2(7), as being "on a matter which is the subject of public political-ideological controversy", inasmuch as it is intended for political persuasion and not purely informational. In this regard, Hendel J. added that the timing of the broadcast – during a period of combat – intensifies not only the purpose of the broadcast, but also its objective significance. In conclusion, the Court noted that the relevant authorities would be well advised to establish clear procedures in this matter.

Judgment

Justice E. Rubinstein:

1. Does the broadcasting of an advertisement by B'Tselem that comprises partial lists of the names of Palestinian children killed in "Operation Protective Edge" constitute a prohibited

advertisement under rule 7(2) of the Broadcasting Authority (Radio Advertisements and Announcements) Rules, 5753-1993, which concerns, inter alia, "a broadcast on a matter which is the subject of public political-ideological controversy"? That is the question before the Court in this petition.

Background

2. On July 16, 2014, B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories (hereinafter: B'Tselem) requested that Shapam-Afikim Ltd. – through which the Broadcasting Authority carries out advertising on Israel Radio broadcasts – approve a broadcast on its behalf. This is the content of the broadcast:

> In the course of Operation Protective Edge, the following children were killed: Muhammad Malekeh, two years old; Siraj Al-'Al, 8; Basem Kaware, 10; Amal al-Batsh,2; Saher Abu Namus, 4. A partial list. B'Tselem.

Similarly, the requested broadcasts included additional lists of children.

3. On July 17, 2014, a reply was sent to B'Tselem by Advocate Tomer Karni, Deputy Legal Advisor of the Broadcasting Authority, stating that he was of the opinion that the broadcast was prohibited as it fell within the scope of the prohibition established under the said rule 7(2). Advocate Karni's decision stated:

> While the broadcast comprises facts (on the assumption that the details are correct), nevertheless, we are clearly concerned here with part of a political campaign. The reporting of the names of casualties belongs in a news broadcast, where it is subject to the recognized rules for journalistic coverage and reporting, and not in the framework of an advertisement financed by a third party. It is also clear that the purpose of the broadcast is not merely journalistic reporting, but the communication of a particular political message. The war situation further emphasizes this. In light of the above, I am of the opinion that the broadcast falls within the scope of the prohibition under rule 7(2) of the advertisements rules, a broadcast which is the subject of public political-ideological controversy.

4. Pursuant to that decision, B'Tselem filed an appeal under rule 6 of the Broadcasting Authority Rules. We would note procedurally that – under rules 3-5 – the decision is to be made by the Director General, and the appeal is to be submitted to an appeals committee (rule 6). The appeal argued that while it would be proper for the names to be reported in the news broadcasts, the various Israeli media outlets, among them Israel Radio, "are absolutely and unreasonably strict in not identifying Palestinian casualties by name", and therefore B'Tselem must purchase advertisements "in order to inform the public of these facts".

5. Rather than conduct a hearing of the appeal, on July 22, 2014, in a letter headed "Appeal of the Prevention of a Broadcast on Israel Radio and Unlawful Rejection of the Broadcasting of the names of Killed Palestinian Children", the Director General of the Broadcasting Authority, Mr. Yoni Ben Menachem, rejected the appeal, under unclear authority (unless it is seen as a reconsideration of the decision of Advocate Karni) for the stated reason that "although the advertisement comprises facts, the context of the matter is the subject of political controversy, and it is therefore my opinion that the requested advertisement cannot be broadcasted." It was noted that the decision was based upon rule 7(2), and that B'Tselem had the right to appeal the decision before the appeals committee headed by the Chairman of the Authority, Dr. Amir Gilat. An additional appeal was submitted that very day.

6. On July 23, 2014, the appeals committee held an urgent telephone conference with the participation of: Amir Gilat, Geulah Avidan and Yaakov Borofsky, together with the Director General of the Broadcasting Authority and Advocate Karni. The committee decided to reject the appeal, holding that, for the following reasons, there was no defect in the Director General's decision: we are concerned with a political broadcast intended to circumvent the news broadcasts; the seemingly neutral reading of the names has a political cast due to B'Tselem being political in character; it is highly probable that the broadcast will raise political controversy in a time of war; the broadcast impliedly supports the position of the Hamas that Israel is responsible for the deaths of civilians in the Gaza Strip; the absence of mention of Israeli casualties, and the statement "partial list" point to a lack of objectivity or, alternatively, to political protest; broadcasting the advertisement would open the door to demands by other parties seeking to use the advertising platform; the use of advertising to circumvent the news broadcasts should not be permitted.

In light of the appeals committee's decision, on July 28, 2014, B'Tselem submitted the current petition asking to quash the Broadcasting Authority's decision to forbid the broadcast.

Pleadings

7. The petition argues that the dominant factor of the precluded broadcast is factual, that therefore the broadcast meets the test established in the case law, and Respondents 1 -3 do not have the authority to prevent its broadcast. B'Tselem also disagrees with defining the broadcast as "controversial" inasmuch as, in its view, the broadcast is purely informative. It is argued that since the Broadcasting Authority does not fulfill its duty to provide balanced public broadcasting, B'Tselem seeks to expose the public to relevant information by means of the advertisement. It is further argued that disallowing the broadcast breaches the public's right to know and receive information needed to form its opinion and position. It is further stated that the decision to preclude the broadcast is discriminatory, inasmuch as similar broadcasts were recently made on behalf of the Mateh Lehosen Leumi, supporting the fighting, and by the Chabad-Lubavitch Youth Movement, calling for donning *tefillin* [phylacteries]. From a legal perspective, it is argued that, in accordance with the case law, freedom of expression and the public's right to know justify the broadcast. We are not concerned with the portrayal of a spectrum of opinions in accordance with the "fairness doctrine", but rather with revealing information without any attempt at persuading, and therefore the matter does not deviate from the bounds of the case law. It is argued that the very fact that revealing the information may lead to controversy does not constitute grounds for preventing it, and in any case, we are concerned with giving the public access to information that is not provided to the public by the majority of communications media.

8. On July 28, 2014, Justice Zylbertal scheduled the appeal for a hearing on July 31, 2014, and the Respondents were asked to respond to the petition by July 30, 2014.

9. In their preliminary response (July 30, 2104), Respondents 1 -3 argued that freedom of expression does not grant a right to its realization specifically by means of paid political advertising, and that the high road for airing political expression – as established by the case law – is by means of the broadcasts themselves and not by means of advertising. It was further

argued that on July 23, 2014, B'Tselem uploaded the advertisement on YouTube and garnered some 300,000 views and some 900 shares, such that B"Tselem cannot claim an infringement of freedom of expression. It was also argued that the broadcast was purely political and therefore prohibited under the provisions of the law and by the case law. Moreover, inasmuch as the broadcast is intended to agitate the public and bring about a change in Israeli public opinion in regard to the operation, it was argued that the broadcast did not meet the test of a predominantly non-political character, that is, the requirement that the primary purpose of the broadcast be the providing of information and not an attempt to persuade. As for the claim of discrimination as compared to other broadcasts (of Chabad and the Mateh Lehosen Leumi), it was stated that upon review, it was decided that they would not be rebroadcasted.

10. The petition was originally filed against the Minister of Communications, who is responsible for the Broadcasting Authority. The state requested (July 30, 2014) that the Minister be removed from the petition due to a lack of authority in regard to the content of broadcasts (the Minister was removed in our decision following the hearing on July 31, 2014). In a decision handed down on July 30, 2014, it was decided that the state would be represented by the Attorney General.

11. In the hearing, B'Tselem's attorneys argued that the broadcast was intended to balance and provide a more complete report, particularly in regard to uninvolved children who are harmed, as a moral consideration. It was contended that the purpose was the humanization of the narrative, and that B'Tselem has no agenda, and that its sole interest is in human rights and a voice that must be heard. The broadcasts meet the case-law criteria, and moreover, other broadcasts were permitted, as noted. It was further argued that the case law permits purely factual presentations, as opposed to political advocacy, in broadcasts, and that the Petitioner's emphasis is upon freedom of expression and human rights.

12. The Broadcasting Authority argued that the legality of the rules having already been established, the construction of rule 7(2) is that of a reasonable person listening to the broadcast. In this case, it is clear that the purpose was political shock. Moreover, even facts can be politicized. Thus, following the reasoning of the Petitioner, it would be conceivable to request a that a broadcast about the children killed by terrorism be aired on the eve of a release of terrorists, or that in another context, a list of Arab villages destroyed in 1948 be read. The rules,

it was argued, prohibit broadcasts with such connotations. Moreover, information concerning the children killed in the course of the operation are, in any case, the subject of vast coverage on media sites and social networks. In addition, the prior broadcasts regarding which a claim of discrimination was raised (of Chabad and the Mateh Lehosen Leumi) were broadcast by mistake – although in response to our question, we were informed that there is no examination procedure for such cases. It was further argued that the source of B'Tselem's data is unclear.

13. The State Attorney's Office requested time to consult with the Attorney General in person.

14. The parties agreed that the hearing would be deemed as if an order nisi had been granted.

Response of the Attorney General

15. In presenting his position, the Attorney General stated (Aug. 4, 2014) that there are no grounds for intervention in the decision to preclude the broadcast. It was argued that political expression should not be permitted in advertisements inasmuch as it is not possible to ensure balanced broadcasting in that context, as required by the "fairness doctrine", and the fear that only money will talk. It was further argued that the requested broadcast also does not meet the "dominant factor" test in light of the politically freighted message delivered by the "dry" facts. It was argued that it is proper that the dominant factor test be narrowly construed, perhaps even more so than in the past (para. 27), and that this construction is grounded upon the narrow approach presented in HCJ 7192/08 *Hamateh Lehatzalat Ha'am Veha'aretz v. Second Authority for Television and Radio* (2009) (hereinafter: the *Hamateh Lehatzalat Ha'am Veha'aretz* case). "Thinner than thin" distinctions should not be made in regard to different types of information, and the "dominant factor" test should be left for clear cases of actually manipulative information, and not applied to broadcasts intended to deliver a message about a controversial issue (para. 28).

16. In its response to the position of the Attorney General (Aug. 6. 2014), B"Tselem stated that, in effect, the Attorney General and the Respondents were seeking to change the rule set down in HCJ 10203/03 *Hamifkad Haleumi v. Attorney General*, IsrSC 62 (4) 715 (2008)

[English translation: http://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general] (hereinafter: the *Hamifkad Haleumi* case) which established the legality of the Broadcasting Authority (Radio Advertisements and Announcements) Rules, inasmuch as that case stated, *per* (then) Justice Naor writing for the majority (para. 59 at p. 795), and pursuant to a previous case (HCJ 10182/03 *T.L. Education for Peace Ltd*. v. *Broadcasting Authority*, IsrSC 59 (3) 409 (2004)), that "the proportionality of the Rules is reinforced by the interpretation of the Rules in HCJ 10182/03 *Education for Peace*, which permitted the broadcast of political advertisements provided that the focus be exclusively on the factual message". It was averred that HCJ 7144/01 *Gush Shalom v. Broadcasting Authority*, IsrSC 56 (2) 887 (2002), which adopted the test of the interpretation that the hearer might give to the broadcast, was overturned pursuant to the *Education for Peace* and *Mifkad Haleumi* decisions. As argued, the test is therefore that of the dominant factor, and there is no room for the claim that a broadcast should be precluded for being contrary to the government's position, and the same applies in regard to the claim that BTselem is a political organization, which would constitute an attempt to categorize advertisers in accordance with their ideological views. It was further argued that the "actual informational content" test suggested by the Attorney General, would infringe freedom of expression inasmuch as "the right to deliver a political message in a commercial broadcast is grounded in the constitutional right to freedom of expression" (para. 18), and "it is unacceptable to construe the Broadcasting Authority Rules as permitting the preclusion of presenting information to the public simply because publicizing the information might led to public debate or criticism of governmental actions". It was argued that the test recommended by the Attorney General raises constitutional problems, is discriminatory, and infringes the rights of equality and freedom of expression. Further arguments also concerned a double standard for various broadcasts (from the right as opposed to the left) in light of the aforementioned broadcasts that were permitted. In conclusion, it was argued that the Respondents and the Attorney General are attempting to overturn or change the *Hamifkad Haleumi* rule, and their position is liable to prevent the exposure of facts "that might arouse public debate, because they are inconvenient for the government and raise doubt as to the justification of its action" (para. 36). It was stated that insofar as the intention is to overturn the *Hamifkad Haleumi* and *Education for Peace* rules, an expanded panel is requested. In the opinion of the Petitioner, the test is that of influence, i.e., if the Authority intends to preclude a broadcast due to controversy, it must bear the burden of

proving that the information was fairly expressed in public broadcasts. It was further stated that the broadcast in question meets the dominant factor test, that it concerns facts, and also that there is no requirement of balance in broadcasts (in response to the Respondents' claim that the broadcast concerns only Palestinian casualties). It was further argued that B'Tselem is willing to present all of the Palestinian casualties and not just a partial list, and that the broadcast would not state the name "B'Tselem". The Petitioner requested that it be awarded costs for its contribution to improving the procedures of the Broadcasting Authority.

Decision

17. We will begin by stating that we have reached the conclusion that the petition should be denied, as the requested broadcast – which we listened to attentively – falls within the scope of a "prohibited advertisement" under rule 2(7) of the Rules, in that it concerns "a matter which is the subject of public political-ideological controversy". In accordance with the case law, which will be presented in brief below, the infusion of political matter into advertisements should be limited to the utmost extent, inasmuch as they are a commercial tool intended for commercial purposes, i.e., subsidizing the budget of the Broadcasting Authority. This Court has addressed this matter in the past, and the trend of the case law is to distinguish, as far as possible, between commercial advertisement and advertisement of political matters that are by their nature – as is the nature of politics – the subject of controversy. And even if they are presented from a viewpoint that appears innocent and purely factual, they generally have an inherent message, and that message is the spirit of the broadcast, which is to say, the words of the message must be take account of their spirit in order to understand whether or not the broadcast is controversial. Indeed, even if the case law has not hermetically barred advertising of a political character that is not of a persuasive nature, such an approach has been largely limited such that the crack in the doorway is very narrow. As we shall explain, the trend of the case law shows a limiting tendency that we see as very appropriate in every way. Moreover, even under the approach that does not entirely preclude informational broadcasts as opposed to political persuasion, when one listens to and watches the broadcast under discussion in terms of its nature and message, and not merely in terms of its "dry" words, it is plainly and clearly controversial in that it is intended on its face to persuade, and thus falls within the scope of rule 2(7). In our view, there is no need for a new test.

The construction of the *Education for Peace* rule given in the *Hamateh Lehatzalat Ha'am Veha'aretz* case, decided in 2009 (incidentally, in regard to "a broadcast from the right" as opposed to the current "broadcast from the left") is, at present, the last word in the case law in this field – which incidentally, receives no mention in the Petitioner's response other than noting that a particular, factual broadcast was permitted therein – and is sufficient for the matter at hand. Moreover, we are not of the opinion that the *Gush Shalom* case has been consigned to the dung heap of history following the decisions in the *Education for Peace* and *Hamifkad Haleumi* cases, as we shall address below. Advertising is not part of the marketplace of ideas, which is the role of the broadcasts themselves, and the borderline between information and persuasion, more often than not, marks a distinction without a difference.

18. This is the place to state clearly, first, that *as human beings we are deeply saddened by the death of innocents in Gaza, and all the more so of children.* I had the opportunity to write in the past (see my 2002 article "Public Law in Times of War and Crisis" in my book *Netivei Mimshal Umishpat* (5763 – 2003) (Hebrew) following Operation Defensive Shield and the claims about a massacre in Jenin:

> Combat in which the enemy employs civilians in various ways, is particularly difficult. However, the IDF, which conducted a hard battle and paid the price in its soldiers' blood, did not massacre Palestinians. Those who say so are guilty of a blood libel in the best tradition.
>
> Indeed, there must be empathy for the Palestinians and their losses. A compassionate person feels the pain of others. They pay a high price for their leadership, such as it is. Their losses, too, are to be regretted. Anyone who daily sheds tears for the bereavement of the daughters of his nation, anyone who cannot but join in the pain and grief of the people of his nation, must also feel the pain of others … but the real, moral, public and legal address guilty of those crimes is Yasser Arafat, who sent people to butcher Israeli citizens mercilessly and with chilling cold heartedness. It is important to state this in a clear voice.

Israel, a Jewish and democratic state fighting a cruel enemy that treats the blood of Israeli and Palestinians with equanimity, fights in self-defense and in the defense of its citizens, its cities and their security, and as we see in the fighting in Operation Protective Edge, for the defense and

security of *large parts of the state*. However, Israel *is also aware, and must be aware*, of the suffering of innocents on the other side, among them children, both in the planning and operational stages, in the proportionality of military operations as far as possible, and in terms of humanitarian relief. Educating the military forces in this regard has always been the duty – and I, myself, devoted considerable time to this as Attorney General – of the civilian and military legal advisers of the government and the IDF. Indeed, the distress of citizens who are used, along with their homes, for military purposes by terrorist organizations, and who are therefore harmed in the course of battle, is not unknown to Israel, and Israel cannot but address it. Even if some of those citizens are not innocent, and offer aid to the terrorists, it is reasonable to assume that many others do so under duress and in fear, or have no interest in the fighting, and see the words of Deputy President H. Cohn in HCJ 320/80 *Kawasmeh v. Minister of Defense*, IsrSC 35 (3) 113, 132, and see HCJ 5290/14 *Kawasmeh v. Military Commander* (Aug. 11, 2014), para. 25, *per* Danziger J.

19. In the context of Jewish law, I would add that Rabbi Shlomo Goren writes (*Meishiv Milhama*, v. I (5743) (Hebrew) in the chapter "Combat Morality in light of the Halakha", 3:14): "However, notwithstanding the express biblical commandment to do battle, we are commanded to show compassion for the enemy and not kill even in war, except when there is a self-defense need that requires conquest and victory, and not to harm the non-combatant population, and it is certainly prohibited to harm women and children who do not take part in the fighting". And see the words of Rabbi Shaul Yisraeli in "Reprisals in light of Halakha" (Hebrew) (following the Qibya operation in 1953) in *Tzomet Hatorah Vehamedina* 3 (5751 -1992), 253, which addresses all the aspects of the question. Similarly, in a recent lecture on "Harming Innocents in War" (*Mas'ei*, 5774) (Hebrew) in which Rabbi Asher Weiss addressed the subject in light of recent events, he stated his view that even if "in principle, one need not refrain from killing the murderers even if innocents may be killed alongside them, nevertheless, one must endeavor to prevent the deaths of those who did no wrong, although when it is not possible, they too will be killed with those who must be killed…" (pp. 7-8). And see Yosef Achituv, "The Wars of Israel and the Sanctity of Life," in I. Gafni & E. Ravitzky, eds. *The Sanctity of Life and Martyrdom - Studies in Memory of Amir Yekutiel* (5753 -1992), 255, 259-260.

20. It is also our impression that no inconsiderable expression has been devoted to the suffering of the Palestinian population and to what is happening in Gaza in the Israeli media, in all its forms, on the Internet, and as noted, on social networks, even if there are those who are of the view that, in the framework of freedom of thought and expression, broader media coverage is needed. No one is hiding the destruction and the death of civilians. Details of the number of casualties in the Gaza Strip, even if generally without their names, are regularly provided by the media as supplied by official medical sources in Gaza, as far as we can tell, and this Court dwells among its people [2 Kings 4:13] and it, too, listens and watches.

21. We will take the bull by the horns, i.e., does reading the names of killed children in a broadcast fall within the scope of "a matter which is the subject of public political-ideological controversy", which is prohibited under rule 7(2)?

22. In the *Education for Peace* decision, given some ten years ago (2004), the opinion of Justice Hayut, following the decision in HCJ 1893/92 *Reshef v. Broadcasting Authority*, IsrSC 46 (4) 816, 820 (1992) (*per* Barak J.), addressed the "dominant element" of a broadcast, that is, whether it is primarily composed of information without presenting a position or an element of persuasion (see pp. 418-419). The subject was addressed in the *Hamifkad Haleumi* case, and in the main opinion, *per* Justice Naor writing for the majority, it was noted, inter alia, (as was more extensively quoted in HCJ 7192/08 *Hamateh Lehatzalat Ha'am Veha'aretz v. Second Authority for Television and Radio* (2009), para. 29, and see the following paragraphs there), that "the means adopted by the Rules to realize this goal [of the fairness doctrine – E.R.] is the total prohibition of the broadcast of political messages in the framework of advertisements". The constitutionality of the rules with which we are concerned was established in the *Hamifkad Haleumi* case, in which several justices – including dissenters – pointed out the circumscribed approach to the application of freedom of political expression to advertising broadcasts. It was stated that – on the contrary – the broadcasting of political advertisements might infringe equality ("the wealthy will broadcast"), both in regard to the fairness doctrine (with which we are not directly concerned in this case), and in regard to the commercial purpose of advertising (see, e.g., para 3 (p. 797) *per* Levy J., para. 3 (p. 842) *per* Hayut J., and para. 43 (p. 869) *per* Procaccia J.).

23. In the *Hamateh Lehatzalat Ha'am Veha'aretz* case, there were broadcasts related to the remembering of Gush Katif that referred to the "Gush Katif expulsion", and we stated (para. 25 of my opinion) that "we are not concerned with commercial advertising at all – it is saturated with political content, which is its dominant factor… we are concerned with the disengagement from Gush Katif, which is undisputedly a matter of public controversy, legitimate, painful controversy that has not yet ended … that being the case, it is beyond our comprehension how the authorities originally considered permitting the broadcasts: were they thinking of the monetary consideration, did they do it in order to avoid dispute with political bodies and in the pursuit of peace? Under them – the provisions of the law – commercial advertising and political controversy are mutually exclusive …". The judgment extensively surveyed the prior case law, and it can be read there.

24. We are not of the opinion that the aforementioned quote of Justice Naor in para. 59 (p. 795) of the *Hamifkad Haleumi* case should be understood, as suggested by B'Tselem, as a conclusive, "final" interpretation granting "authorization of political advertising". The *Hamifkad Haleumi* case concerned the constitutionality of the Rules, and that statement was part of reasoning in that context. The statement did not "adopt" political advertising, but rather addressed the "dominant factor" test in the *Reshef* and *Education for Peace* cases, distinguishing between facts and attempts to persuade in those contexts within the boundaries of freedom of expression. However, as opposed to B'Tselem's claim, several judges, as noted, took exception to political advertising in the *Hamifkad Haleumi* case.

25. At the end of the day, we are concerned with the "reasonableness and common sense" test (HCJ 524/83 *Association for the Wellbeing of Israel's Soldiers v. Broadcasting Authority*. IsrSC 37 (4) 85, 89 *per* S. Levin J.); and see *Gush Shalom v. Broadcasting Authority* at p. 893, where Justice Strasberg-Cohen noted in a related matter – a petition to broadcast advertisements warning IDF soldiers against the perpetration of war crimes – "The connotation of the advertisements is political-ideological and not, as the Petitioners claim, purely informational." Reasonableness and common sense have not yet, we hope, abandoned us, and there is not an iota in the *Hamifkad Haleumi* judgment to the contrary. Indeed, as noted, the doorway has not been hermetically sealed before informational advertisements as opposed to persuasion, but the

differences between the two are slight, and they require that, in the scope of that reasonableness and common sense, we act with utmost restraint.

26. I will quote para. 35 of the *Hamateh Lehatzalat Ha'am Veha'aretz* case, which summarizes the approach adopted by the Court and which should also guide us in the matter before us:

> In my opinion, what arises from the majority opinion in the *Hamifkad Haleumi* case, with which I humbly agree, is as we stated above – the restriction of the "political space" in advertising to a minimum, in accordance with the view that paid advertising does not, in and of itself, fall within the sphere of freedom of expression. I would add that, in my opinion, in light of the *Hamifkad Haleumi* rule, the rule established in the *Education for Peace* case should be narrowly construed. Indeed, that does not infringe the essence of freedom of expression, and we are not concerned here with Orwell's Big Brother (*1984*). Freedom of expression, which is dear to all who seek democracy and a free marketplace of ideas, remains as it was, protected and encouraged as far as possible, even in the spirit of the prophets of Israel quoted by the Petitioner, and other prophets who courageously railed at the gates against power, and there is no need to elaborate. But the field of advertising, which is not a level playing field – and this must be particularly emphasized – and where the wealthy can control the message absorbed through repeated broadcasts, is not its natural place. As for myself, I would be contented if political subjects would not be granted a foot in the door of advertising, as some of my aforementioned colleagues expressed it, and no more need be said. This, as such matters are generally controversial by their nature. But even under the approach that permits informational advertising, that is not what we are concerned with here. In any case, in my opinion, looking to the future, in view of the *Hamifkad Haleumi* judgment, the authorities must narrowly construe any intrusion of political matters into commercial advertising, by scrupulously examination … as stated, this is the approach that should be adopted in similar cases, to the right and to the left, center, religious, Haredi [ultra-Orthodox], secular, Arabs, or any other body or party, for if not, there will be no end to the matter, and it is clear to all what type of "commercial" advertisements

might result. The basic question is not, therefore, this or that terminology, but the nature of the advertisement.

My colleagues Justices Joubran and Danziger concurred.

27. As for the matter at bar, knowledge is easy for one who understands [Proverbs 14:6], and it is clear that, although we are deeply saddened by their deaths, reading a list of the names of children killed serves a political rather than purely informational purpose. Its purpose, which requires no arcane knowledge to ascertain, is to urge the public to cause the government to end the IDF's operation in Gaza due to the casualties among the civilian population, and among children in particular. Can one say that this – i.e., the continued combat – is not a matter of political controversy? Even under the dominant factor test – which, as noted, must be narrowly construed so as to prevent the infiltration of a political current into advertising – that factor in the matter before us is plainly public-political persuasion, and saying that it is purely informational is, with all due respect, preposterous. Justice Strasberg-Cohen's aforementioned statement in the *Gush Shalom* case is appropriate here. The context is as clear as the noonday sun. We repeat: the place for such political matters is not in advertising, and the Broadcasting Authority must avoid such matters by a very wide berth. There is, therefore, no need for a new test, but rather the ruling in the *Hamateh Lehatzalat Ha'am Veha'aretz* case is sufficient, and the narrower the better. The facts of the matter at bar thus fall clearly within the scope of the existing rule. The proper place for the matter raised by B'Tselem is in the regular media broadcasts that now inundate us, and there is no reason to assume that opinions at odds with that of the government and its approach will not be heard, as they are indeed heard.

28. Before concluding, we should address the Petitioner's claim, which the Respondents acknowledge to be of merit, that the Authority broadcasted two commercials of a "persuasive" nature by the Mateh Lehosen Leumi and Chabad. As noted, the Authority's legal advisor informed us that this was an error and that they would not be rebroadcasted. Without addressing the fine points of the content of those broadcasts, and to each his own tastes, the question that must be asked is how the Authority – which is bound by the precedents of this Court – and its legal advisors did not apply the rulings in the *Hamateh Lehatzalat Ha'am Veha'aretz* case and its predecessors under which advertisements must be scrupulously examined. How can such "scrupulous" examination be conducted without a simple review procedure in an authority that

has – if we understood correctly – placed the matter in the hands of a commercial company? The absence of such a review procedure leads to the type of blunders that occurred here. We reiterate that we do not know if the motive of the Authority and its proxies in accepting commercials is financial or otherwise, but it is obligated to uphold the rules under which it operates, and not selectively. We require that a procedure be established within 60 days. In this regard we would note that just recently the Knesset adopted the Public Broadcasting Law, 5774-2014 (S.H. 2471, 15 Av 5774, Aug. 11, 2014), and Chapter 12 thereof treats of commercials and sponsorships. Section 70 concerns the broadcasting of paid commercials and sponsorship notices that that the Public Broadcasting Corporation is permitted to broadcast on the radio (ss. (a)), and the Council, in consultation with the Director General, is required to establish rules, inter alia (ss. (b)(1)), "in regard to prohibitions and restrictions upon commercials and sponsorship notices". In accordance with sec. 75, the Council is to establish rules "in regard to prohibitions and restrictions" inter alia, for commercials, as detailed there. Section 76 establishes the appointment of a supervisory subcommittee, inter alia, in regard to commercials. One may hope that what we have stated here will be taken into account in the framework of those new rules, and the supervision established under the Law.

29. In view of all the above, we do not grant the petition, and we make no order for costs.

Justice N. Hendel:

The subject requiring our decision is whether it would be appropriate to intervene in the decision of the Respondents not to broadcast a commercial by the Petitioner that comprises a reading of the names of Palestinian children who were killed in the course of Operation Protective Edge. The legal question before us is whether such a broadcast is prohibited for being "a broadcast on a matter which is the subject of public political-ideological controversy" (rule 2(7) of the Broadcasting Authority (Radio Advertisements and Announcements) Rules, 5753-1993.

Needless to say, the Court takes no pleasure in expressing a position in regard to a "public political-ideological controversy", and all the more so in all that regards a military operation and the resulting questions that naturally arise among the public. However, there is a

clear difference between the Court's taking a position in regard to a political or ideological controversy – which, in my opinion, is not required by this Petition – and the decision required in the framework of High Court review of whether a particular broadcast concerns a political or ideological controversy that, therefore, must be precluded. Taking a stand on a controversy is one thing, and recognizing the existence of a controversy is something else.

The matters that are being publicly addressed as a result of the operation in Gaza are, indeed, important and complex. But the Court's room and realm rightly stand beyond the theater of this dispute. Precisely because, at times, the Court is called upon – pursuant to its function – to decide agonizing matters, it must, I believe, exercise restraint in its approach to such matters, which need not be decided in the Petition at bar.

Broadcasting a commercial is not a regular aspect of freedom of expression. We should bear in mind that the Authority's broadcasts belong to the public sphere. This collective proprietorship supports an approach that would preclude controversy from this arena. We are not concerned, for example, with a privately owned newspaper or with a demonstration. This refraining from political and ideological controversy in the framework of the Authority's broadcasts was subjected to the constitutional review of this Court (HCJ 10203/03 *Hamifkad Haleumi v. Attorney General*, IsrSC 62 (4) 715 (2008) [English translation: http://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general]), and the Petitioner does not argue against it.

The Petitioner's claim is that because what is concerned is the providing of information – names and ages – the broadcast should not be characterized as controversial. In rejecting this argument, and in addition to the case law summoned by my colleague Justice Rubinstein, one may refer to the context test. Words and facts have power. Selecting only particular facts from the entire mosaic was not performed randomly. Its purpose was to deliver a message and connect with the public. Another aspect of context, which in my view facilitates this decision, is the timing of the broadcast – during a period of combat. This is not to say that timing alone constitutes a condition. However, it intensifies not only the purpose of the broadcast, but also its objective significance. It would appear to me that a different conclusion, that we are concerned, as it were, with purely providing information, would bear the taint of willful blindness and deafness. Of course, the Petitioner has the right to present facts and positions in accordance with

its views. But the issue here is whether the Broadcasting Authority is the "forum conveniens" for that under the law.

In conclusion, I concur with my colleague that the Petition must be denied, and that the relevant bodies would do well to establish a procedure (and see secs. 75-76 of the Public Broadcasting Law, 5774-2014, which was just recently enacted). Even if it will be a general procedure, it would be preferable to ongoing case-by-case decisions.

Justice U. Shoham:

I concur in the opinion of my colleague Justice E. Rubinstein, and with the comments of my colleague Justice N. Hendel to the extent that they are statements of principal, although I do not believe that they are entirely necessary for the instant case.

I, too, am of the opinion that the Petition must be denied, both due to the content of the requested broadcast and due to its timing, at a time when the roar of combat has not yet subsided.

Like my colleagues, I believe that clear procedures should be established in this matter, and the sooner the better.

Given this 17th day of Av 5774 (Aug. 13, 2014).