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At the Supreme Court Sitting as a High Court of Justice

HCJ 1389/07

Before: **The Honorable Justice A. Procaccia**
 The Honorable Justice E. E. Levy
 The Honorable Justice E. Hayut

The Petitioner: Commander of the IDF forces in the Judah and Samaria region

- Versus -

The Respondents: **1. Military Court of Appeals**
 2. _____ Muhammad

Petition for the issuance of an *order nisi* and an interim order

Date of the hearing: 10 Adar 5767 (28 February 2007)

Counsel for the petitioner: **Adv. Segal El'ad Avinoam**

Counsel for the respondents: **Adv. Sa'adi Osama**

Judgment

Justice E. Levy:

1. Respondent 2, resident of the village Tira which is in the Ramallah district, was defined by the petitioner as a "senior activist in the Hamas movement in Judah and Samaria". He was initially arrested in February 2003 with the intention to press criminal charges against him and from then until September 2005 he was kept behind bars, mainly by virtue of administrative arrest orders. In July 2006, the respondent 2 was arrested once more, on the grounds that he continues to engage in prohibited activity in the framework of Hamas and is thus jeopardizing the security of the region and public safety. The detention order that was issued by the petitioner was subjected to judicial review which dismissed the respondent 2's objections against it.

2. Respondent 2, who did not accept this last decision, brought his objections thereto before the Military Court of Appeals which decided on 24 Shevat 5767 (12 February 2007) to grant the appeal and order the release of respondent 2, whilst explaining the same by the nature of respondent 2's activity in the framework of Hamas, and whilst taking the period of the administrative detention into

consideration. This decision was challenged in the petition before us, and on 27 Shevat 5767 (15 February 2007) it was decided, with the parties' consent, to remand the case to respondent 1, in order to give the security forces an opportunity to voice their arguments thereto, and also in order for it to explain its decision, either with overt or covert explanations. On 30 Shevat 5767 (18 February 2007) the Military Court of Appeals reaffirmed its decision to release the respondent and now all that remains for us to do is decide in the dispute which erupted between the parties.

3. The petitioner believes that respondent 1's decision is extremely unreasonable, since no proper weight was given therein to the foreseen danger, from respondent 2, to security in the region.

Respondent 2, who argued before us in person and via his learned advocate, Adv. Osama Sa'adi, conversely believes, that there was no fault in the Military Court of Appeals' decision, in view of the many years in which he is under detention, and in view of the fact that until now, the version of the security forces pertaining to his activity in Hamas movement and the danger posed by him was not placed under the scrutiny of the court in the context of a criminal proceeding.

In view of the urgency of the matter and with the consent of the parties we decided to hear the petition and decide the same as if an *order nisi* was issued therein.

4. Several reasons led the Military Court of Appeals to order the release of respondent 2. Firstly, it was determined that organizational activity in the framework of Hamas, which is expressed in what was defined as "spokesmanship and public relations", is attributed to this respondent. Secondly, activity of this kind, which is public by its nature, can be easily monitored, without there being a need to keep respondent 2 in custody. The learned Judge further expressed his surprise that despite the overt nature of such activity, the petitioner, the investigating and prosecuting bodies, were unable to gather evidence to indict respondent 2. Thirdly, it is not self evident that respondent 2 will return to activity in the framework of Hamas movement, and if he will do so, it will be possible to reconsider his detention.

5. In the course of the hearing before us, and after hearing the parties' attorneys and respondent 2 in person, we studied privileged material that was explained to us by the security forces. This material convinced us that the decision of the Military Court of Appeals is extremely unreasonable, and should therefore be reversed.

From the statements of the petitioner's learned advocate, Adv. A. Segal El'ad, we understood that the material which was presented to us was also before the respondent 1, and we are therefore surprised how the Military Court of Appeals did not notice that such prohibited activity which is attributed to respondent 2 does not come down to just "spokesmanship and public relations". It is our impression that the activity at bar is in varied and different areas, most of which pose a substantial danger to the security of the region and the public. Our attention was particularly drawn to recent information details, which reveal a particularly disturbing picture in all that pertains to respondent 2's role and status in Hamas movement, which clearly require his continued detention. Indeed, it appears that there is difficulty in indicting respondent 2, although this derives from the fear of exposing sources of information.

6. In view of the aforesaid, it is our conclusion that the petition should be granted and we therefore issue an absolute order by virtue of which the decisions of the Military Court of Appeals dated 24 and 30 Shevat 5767 (12 and 18 February 2007) are reversed.

Since the effect of the order which was subjected to review has long since expired, we are extending the respondent's detention until 16 Adar 5767 (6 March 2007) at 1700. If the petitioner will decide to issue an additional administrative arrest order against this respondent, we believe he would be well advised to limit the same to 90 days, since the respondent's extended detention now requires more frequent review.

Issued today, 10 Adar 5767 (28 February 2007)

Justice

Justice

Justice