

At the Supreme Court, sitting as the High Court of Justice

H.C. 9132/07

Before: The Honorable chief justice D. Beinisch
The Honorable Justice E. Hayut
The Honorable Justice Y. Eilon

The petitioners:

1. Jaber al-Basyuni Ahmad
2. Najjar Maher
3. Adalah – The Legal Center for Arab Minority Rights in Israel
4. Gisha – Legal Center for Freedom of Movement
5. Hamoked – Center for the Defense of the Individual
6. Al-Haq
7. Al-Mezan Center for Human Rights
8. Physicians for Human Rights
9. The Palestinian Center for Human Rights
10. The Public Committee Against Torture in Israel
11. Gaza Community Mental Health Program
12. B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories

Vs.

The respondents:

1. The Prime Minister
2. The Minister of Defense

Petition to issue a conditional order and an interim order

Session date:

29 November 2007

Representing the petitioners:

Attorney Noam Peleg, Attorney Professor Kenneth Mann, Attorney Fatmeh El-'Ajou, Attorney Sari Bashi, Attorney Hassan Jabareen

Representing the respondents:

Attorney Dana Briskman, Attorney Gilad Sherman

Ruling

President D. Beinisch:

1. The petition before us is directed against the respondents' decision to impose various restrictions on the supply of electricity and fuel to the Gaza Strip. On 7 November 2007, we held an urgent hearing on the petition, and in light of the state's announcement that there is no final decision to implement the reduction of the supply of electricity to the Gaza Strip, we heard arguments only with regard to the reduction of the fuel supply. During the hearing the state announced that it recognizes that it must not block the supply of essential humanitarian needs to the Gaza Strip and would thus follow up and assure that the reduction would not reach the level of harming essential humanitarian needs. At the end of the hearing, we decided that the state would submit within seven days the basic data substantiating its assessment regarding the impact of the reduction in fuel supplies to the Gaza Strip and would detail the methods of follow-up and the data analysis it plans to conduct in order to protect the humanitarian needs in the Gaza Strip.
2. On 15 November 2007, the petitioners submitted an urgent request for an interim order in the petition and, on 23 November 2007, they requested an urgent hearing on the petition in light of the state's announcement that it would begin restricting the amounts of electricity supplied to the Gaza Strip on 2 December 2007. The petitioners emphasized that, according to their argument, there is no way to limit the restriction on electricity to Gaza without resulting in power outages in hospitals and interruptions in the pumping of clean water for the civilian population, and thus the implementation of this decision would lead to certain, severe and irrevocable damage to vital humanitarian systems in the Gaza Strip, in hospitals, to water and sewage systems and to the entire civilian population. In their supplementary arguments on 27 November 2007, the petitioners presented their contentions regarding the slated reduction in electricity to the Gaza Strip, and they claimed that already today, and ever since the bombing of the local power station by the Air Force in 2006, there is a shortage of electricity in the Gaza Strip, which requires the Electricity Distribution Company in Gaza, with no other choice, to initiate electrical outages for several hours a day. According to their argument, the frequent power outages already are impairing the operation of essential systems such as hospitals, because the infrastructure in the Gaza Strip does not enable a distinction to be made between the cutoff of essential systems and the cutoff of electricity to the civilian population. In addition, they emphasized that withholding electricity from the homes of residents of Gaza makes it impossible for them to receive clean drinking water in their homes.

The petition before us therefore touches upon two main issues: reducing the supply of fuel and reducing the supply of electricity. The state's main argument in the petition is that in light of the armed confrontation in which the Gaza Strip is controlled by a terrorist organization and from whose territory terrorist activity is carried out against Israel, and in light of its contention that it no longer occupies the Gaza Strip in belligerent occupation, it has no obligation to supply fuel or electricity to the Gaza Strip beyond what is required to provide for the essential humanitarian needs of the civilian population therein. In light of the

conclusions we reached, as explained below, and in consideration of the state's declaration of its commitment to maintain the essential humanitarian needs in the Gaza Strip, we did not deem it necessary to address, at this stage, the fundamental legal questions the two sides have raised before us.

I. The Supply of Fuel

3. With regard to the first part of the petition, which addresses the reduction in fuel supplies to the Gaza Strip – fuel which the Palestinian Energy Authority buys from the Israeli company Dor-Alon – the petitioners argue, as noted above, that this cutback is harmful to the humanitarian situation in the Gaza Strip. This is because, in light of the frequent electricity outages in the Gaza Strip, the regular operation of the various systems is dependent on the supply of fuel for generators, and fuel is also needed for the regular operation of ambulances, public transportation, etc. According to the petitioners, the reduction in fuel supplies has harmed the functioning of water and sewage systems in the Gaza Strip, and the functioning of the main hospital in the Gaza Strip has also been impaired. On the other hand, the respondents claim that the reduction in the supply of fuel – gasoline and diesel – to the Gaza Strip currently stands at only 15%, a reduction that they argue, and according to the data they presented, does not harm the essential humanitarian needs required for the residents of the Gaza Strip. We were told that the existing needs for fuel use were taken into consideration in the data presented as the respondents' assessment of fuel consumption. According to the assessment, the volume of fuel supplied prior to the fuel reduction was larger than the essential humanitarian needs of the residents of the Strip, and the situation is the same today, even after a 15% reduction in the volume required and supplied previously.
4. Indeed, concerning fuel, as opposed to the supply of electricity, we were not convinced that it is impossible to distribute it according to priorities that take into consideration the humanitarian needs of the civilian population, as well as the operation of generators for running water pumps and electricity facilities in the area. The petitioners themselves confirmed that the distribution of fuel within Gaza is now being conducted by private suppliers to the highest bidder and without prioritization. In this matter, we do not accept the petitioners' argument that 'market forces' should be allowed to play their role in Gaza in regard to fuel consumption. Moreover, we do not accept the argument that there is no way to ensure that the supplied fuel would indeed be used to operate the facilities required for essential humanitarian needs. In these circumstances, if a controlled distribution of the supplied fuel is carried out in a way that gives suitable priority to the essential humanitarian needs of the civilian population, it seems that the amount supplied, even after the reduction that was decided upon, should be sufficient to provide for these needs.
5. The state's position is that some of the fuel transferred to the Gaza Strip is used, in reality, for various purposes by terrorist organizations. According to the state, given this situation, the reduction in the supply of fuel is likely, in the way it is implemented, to harm the infrastructure of terror and their ability to operate against the citizens of the State of Israel. According to this argument, the amount of fuel transferred should be enough to provide for all of the humanitarian purposes that require the use of fuel. In these circumstances, we believe that

there is no cause at this time to issue a conditional order and an interim order in regard to the cutback in fuel supply because, as noted, we were not persuaded that the respondents' decision to reduce the amount of fuel transferred to the Gaza Strip harms, at this stage, essential humanitarian needs in the Strip. This is also in consideration of the fact that the respondents have made a commitment since initiating the policy of reducing the supply of fuel to the Gaza Strip to monitor what transpires and to make sure that this cutback does not cause humanitarian damage to the residents of the Gaza Strip, as required under Israeli law and international law.

II. The Supply of Electricity

6. In response to the arguments of the petitioners in this matter, as described above, the respondents presented an updated statement in which they noted that after conducting additional work it was decided to reduce the supply of electricity in four of the ten power lines through which electricity is transmitted from Israel to the Gaza Strip. It was also decided that at this stage the reduction will not exceed 5% in any of the four lines, and will be carried out gradually in one line each week, with appropriate notification provided to the relevant Palestinian bodies. According to the respondents, this action will require the ruling authority in the Gaza Strip to manage loads and to reduce the actual consumption of electricity in the area to which the relevant line supplies electricity, and this is liable to prevent the supply of electricity for the purposes of terrorist activity, such as workshops for producing Qassam rockets, etc. In their view, if the authorities in Gaza correctly manage the consumption of electricity, the flow of electricity from Israel to the Gaza Strip should continue without interruption. On the other hand, if consumption exceeds the permitted level, the supply of electricity would stop automatically via load limiters installed on these four electric lines. The respondents emphasize that this cutback will not hurt essential humanitarian needs, which the state has no intention of harming.
7. In the hearing held on 29 November 2007, we heard supplementary arguments from each side and heard witnesses on behalf of the respondents – Colonel Shlomi Mukhtar, the head of the operations branch in the Coordinator of Government Operations in the Territories unit, and Mr. Idan Weinstock, director of the Electricity Administration in the Ministry of National Infrastructure. On behalf of the petitioners, we heard Petitioner 2, Mr. Maher Najar, deputy director of the Water Authority in the Coastal Towns Authority in Gaza. After hearing the arguments of both sides and their witnesses, and after reviewing the partial data provided to us, we deemed it appropriate to request additional data from the respondents in regard to the planned cutback in the supply of electricity, as follows:
 - A. First, we heard during the hearing from Col. Mukhtar that he had met in recent days with the deputy of the head of the Energy Authority in the Gaza Strip and other agents. According to him, they spoke with each other about the plan to cut back electricity to the Gaza Strip. The respondents are requested, if so, to submit to the court the information exchanged during this meeting or in other contacts, as well as the details provided about the humanitarian situation in the Gaza Strip and the implications of the cutback in electricity on its residents.

- B. Second, at the hearing, Col. Mukhtar noted that in the coming period an additional transformer will be delivered to the power plant, entering the Gaza Strip from Egypt, and will improve the functioning of the local power plant. In regard to this data, we would also like to receive all of the relevant information about the impact of the additional transformer on the supply of electricity to Gaza and the ability to regulate this supply.

- C. Third, the director of the Electricity Administration, Mr. Weinstock, noted a number of ways in which the Palestinian Authority could regulate the consumption of electricity in Gaza, thus enabling the control of electricity consumption and preventing excessive usage by preventing the supply of electricity for non-essential purposes while maintaining the ongoing supply of electricity for essential places such as the water company and hospitals. The petitioners, in their arguments, disputed these statements and claimed that in light of the condition of the electricity infrastructure in the Gaza Strip, there is no practical possibility of regulating in this or any other way in order to control the distribution of electricity in the Strip. In these circumstances, the respondents are asked to present to the court details about the electricity infrastructure in the Gaza Strip that actually enable the regulation of the supply of electricity to various places, and to indicate the way it is possible to conduct this regulation under the current conditions in the Gaza Strip in a way that would not harm the essential humanitarian needs of the population.

- D. Fourth, the state noted that the plan for reducing the supply of electricity is supposed to be applied to four of the ten lines carrying electricity from Israel to the Gaza Strip. However, the state did not specify in its arguments the destinations of these lines and to which places they supply electricity. Therefore, the respondents are to provide the court with details about the destinations of the electricity lines whose supply will be curtailed, while noting the various places, including essential facilities, if any, that receive their electricity supply via these lines.

This additional material is to be submitted to the court within twelve days, supported by affidavits, and the petitioners may respond to them within seven days. We assume that until the required supplementary information and the necessary clarifications are received, implementation of the plan for reducing the supply of electricity to the Gaza Strip will not commence. After receiving the affidavits and supplementary information, we will decide with regard to the continued handling of the petition.

Issued on 29 November 2007