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At the Supreme Court Sitting as the High Court of Justice

HCJ 5243/15

Before: **Honorable President A. Grunis**
Honorable Justice N. Hendel
Honorable Justice Z. Zylbertal

The Petitioner: **HaMoked - Center for the Defence of the Individual,**
founded by Dr. Lotte Salzberger

v.

The Respondent: **Israel Defence Forces**

Petition for *Order Nisi*

Session date: 8 Av 5774 (August 4, 2014)

Panel Secretary: Yelena Chechko

Typist: Galit Tubina

Representing the Petitioner: Adv. Daniel Shenhar

Representing the Respondent: Adv. Jonthan Berman

Protocol

Adv. Shenhar:

The petition concerns a very simple and legal matter regarding detainees. The right of the detainees to know where their family members are *[sic]*. The realization of this basic right in light of the current situation in the Gaza Strip...

The Honorable President A. Grunis:

Where is this basic right written during a time of war?

Adv. Shenhar:

Nobody expects in the current situation in Gaza that the respondent will transfer information to the detainees' families within two hours or so, as is normally done in Gaza. This is not the expectation. If the ground phase commenced less than two weeks ago, we would expect that by this time the families would be informed that their loved ones are incarcerated in Israel.

The Honorable President A. Grunis:

I ask what is your standing?

Adv. Shenhar:

HaMoked for the Defence of the Individual. As noted in section 9 of the petition, we can transfer the information which is essential information to the detainees' families in the Gaza Strip.

The Honorable Justice Z. Zylbertal:

Once you have a specific case and you are indeed the address you know who to turn to. Once you have a question you turn and receive an answer. Isn't it far and beyond what can be expected. If there was no response it would have been a different matter, but this is not the situation. You want to receive a status the legal basis of which is unclear, a kind of a Red Cross which concentrates all names and the state is obligated to transfer.

Adv. Shenhar:

The obligation is towards the families. The situation in Gaza, I assume that your honors are aware of the situation. They cannot know where their loved ones are. They cannot know whether their loved ones are buried under the ruins.

The Honorable Justice Z. Zylbertal:

In any event counsel knows that there is a way to contact you. They contact an organization in Gaza and they contact you.

Adv. Shenhar:

There is no connection with the organizations in Gaza right now. I hear things from the media. We are concerned with a situation in which half million people left their homes. We have the connection with the organizations in Gaza which would enable the families...

The Honorable President A. Grunis:

Counsel says that there is no connection. If there is no connection they will not notify. Once there is a specific request it will be responded. This is what the State says.

Adv. Shenhar:

If there is no specific case we are of the opinion that the law is breached. There are judgments.

The Honorable President A. Grunis:

This court never addressed such judgments of this court. Maybe we should compare it to the situation within Israel?

Adv. Shenhar:

We are aware of the difficult situation.

The Honorable President A. Grunis:

You are not aware that the same law should also be applied during a military operation in Gaza.

Adv. Shenhar:

The International Red Cross receives such requests only 12 days after the detention. This is too long. There is no one who fulfills this role.

The Honorable Justice Hendel:

You should have requested to shorten the period. I am not saying that we would have accepted it.

Adv. Shenhar:

The International Red Cross awaits the list.

The Honorable President A. Grunis:

Counsel does not represent anyone other than the organization on behalf of which it appears here. Had he represented anyone he would have joined him as a petitioner.

Adv. Shenhar:

We are concerned with many families which were detained and dispersed all over.

The Honorable President A. Grunis:

If the Red Cross established 12 days, why does the State of Israel go beyond this towards an organization which has no power of attorney from any person or family. If you had [a power of attorney] you would have filed the petition on their behalf.

Adv. Shenhar:

We only want to transfer the information to the families, The right belongs to the families and there is an obligation to transfer the information to them.

The Honorable Justice Z. Zylbental:

12 days is the maximum or is it always 12 days?

Adv. Berman:

The State of Israel does much more than it is obligated to do by law.

The Honorable Justice Z. Zylbental:

Can counsel receive information from the Red Cross?

Adv. Berman:

The Red Cross has clear working principles and it is privileged.

The Honorable Justice N. Hendel:

And the 12 day period, where did it come from?

Adv. Berman:

My colleague referred to what he referred. I cannot refer to this connection. If our position is requested, I would also like to respond to the arguments and allegations made herein including the specific response which was given and the notice which is actually given to detainees who were detained by the State of Israel. As specified in our response, we noted that anyone who is transferred to the criminal track, anyone held for a period of time which is not short is transferred to the criminal track, and accordingly notice is given to the families in Gaza. The situation in Gaza is clear. Nobody claims to have lost contact with them for unclear reasons. The police contacted more than 50% of the families of the criminal detainees. Beyond need, all of HaMoked's applications were responded to. We brought them with us. In all applications in which a name was mentioned, we did not require proof for a power of attorney and we were satisfied with the family's confirmation that HaMoked contacted it.

The Honorable President A. Grunis:

Beyond the five applications mentioned in the petition, were there additional applications?

Adv. Berman:

There were additional applications. I would like my colleague to say if there were applications which were not responded to.

The Honorable President A. Grunis:

We suggest that you accept what we heard and what was stated in the State's response, and if you have additional specific cases you should contact them and they will respond.

Adv. Shenhar:

In cases in which the families have no information, information should at least be transferred to the Red Cross?

The Honorable Justice Z. Zylbertal:

Counsel heard that there is a cooperation with the Red Cross. The Red Cross is incumbent to act as it knows.

The Honorable Justice N. Hendel:

We are talking about considerable numbers.

The Honorable President A. Grunis:

We should be precise. I understand with respect to the criminal detainees. But there are also others.

Adv. Berman:

In fact it is rare. All detainees are detained according to the Criminal Procedure Law. No permanent incarceration order was issued.

The Honorable President A. Grunis:

And a temporary order?

Adv. Berman:

Not in a situation in which people are held for a long period of time, it does not happen that they are not transferred to the criminal track. A short time is 4 days according to the Incarceration of Unlawful Combatants Law. We are talking about 96 hours. And whoever is temporarily incarcerated is either released or transferred to Criminal Procedure Law.

Adv. Shenhar:

This applies to people who are held in Israel Prison Service (IPS) facilities and are already represented by counsel. People with respect of whom incarceration orders were issued as my colleague says. The respondent says that there are no such people any more. I believe that this information is correct.

Adv. Berman:

If an order is issued according to the Combatants Law, an immediate notice shall be given to the chief superintendent to represent them.

The Honorable President A. Grunis:

We suggest that you retract the petition.

The Honorable Justice N. Hendel:

In view of what we heard.

Adv. Shenhar:

I understand that my colleague says that they do not hold people for a long period of time. I understand that this is the situation and therefore I request to retract the petition.

Judgment was given.

Typist: Galit.