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Date: 4 November 2004

AdmDA RJS 2431/04

Military Court of Appeals

Hearing held on 4 November 2004, 20 Heshvan 5765

Before Judge: Colonel Moshe Tirosh

The Respondent: _____ **Awad, ID. No.** _____

Defence counsel: Attorney Tamar Pelleg

Military prosecutor: Captain Ittay Pollack

Translator: Staff Sergeant Baha Tarbiya

Court reporter: Private Lisa Patela

The judge opens the hearing and identifies the Respondent.

Military prosecutor:

I repeat the grounds for the appeal. This appeal involves two questions. One, whether the detainee was detained solely for his activity against the fence, as the lower court found, or, as the prosecution and the GSS representative (who will present in the confidential hearing the GSS's position) contend that the order was issued because of other activity of the respondent, activity that will be described in the confidential hearing and which indicates how dangerous he is, which formed the basis for the military commander's decision to approve the request for the administrative detention order that he issued. The second question relates to the danger reflected by the detainee, which, as stated, the prosecution believes justifies his administrative detention, and results solely from activity unrelated to opposition to the separation fence. Therefore, the prosecution requests the court to hear the prosecution's comments in a confidential hearing, and also to hear the comments of the GSS representative, and to reverse the decision of the lower court and approve the administrative detention order for the entire period set forth therein.

Defence counsel:

The principle involved in this file is of extreme importance. The court will review the responses of the prosecution in the hearing before the lower court, and will undoubtedly also study the judge's decision. The gap between these two and the prosecution's contentions is gigantic. Anyone who reads the prosecution's responses in the lower court and the court's decision will understand that the order was issued because of activity opposing the fence, political activity against the fence, expressed in non-violent demonstrations, as hinted by the prosecution and said by the judge in his response. Also, it is clear that my client did not have any connection to militant terrorist activity of any kind. His actions were open, and if the court reviews another document – the declaration of another member of the local committee against the fence – the court will be convinced that my client is devoted to non-violence. That is, the fact that he did not act violently and did not incite to violence was not accidental and did not result from his concern for what might happen to him, or a result of fear. Rather, it resulted from his overall outlook, whereby it is possible to change, in this particular case, the route of the fence by non-violent acts, and that in the distant future it is possible for Jews and Arabs, Palestinians and Israelis, to live alongside each other. My colleague, the prosecutor, mentioned additional material. I know nothing about that. Even if it exists, and in this case I question the preciseness of my colleague's comments, it must be compared with the mounds of material in the confidential file about the fence and the actions opposing it, and an examination must be made whether the material, in the event it exists, which I doubt, is significant. I suggest, as an assumption and even more than that, that this material has almost zero weight in comparison with the open activity, and that this activity made its way into the confidential file, where it does not belong. This open activity – open because my client is not ashamed of it, and there is the declaration of another member of the committee regarding it – this open activity is not a criminal offense, and if it does constitute an offense, even more so.

The dispute exists along two interconnected planes: the factual plane – what is in the confidential file, part of which is already open – and what is the significance, from a security perspective, of the contents of the file. On this question, there are, inevitably, two legal worldviews. May a resident of Budrus do everything mentioned previously, and everything that Judge Agasi wrote about him, which he does not deny? My firm contention is that activity of this kind is not only permitted and does not endanger the security of the region, it is one of the pillars of Israel's security as a democratic state, and of the security of Jewish Israelis, including settlers, because it negates the other activity, because if a young man from Budrus demonstrates against the fence, he will not go and carry out an attack in the Carmel Market [in Tel Aviv]. This is a question of freedom of expression and the right to demonstrate, but there is also a question of state security. For these reasons, the prosecution's appeal should not be sustained, because it is an outlook that flies in the face of the Declaration

of Independence and the nature of the state. Woe to the state if a person is placed in administrative detention because of acts of this kind.

The case of Awad is not the first case of administrative detention. This year, two fellow members of the local committee, the Murar [ie, Mahar] brothers, were detained, one of them the maker of the declaration. The first was released by the judge who reviewed the matter. The judge did not release _____, and we appealed to the Military Court of Appeals. The judge's decision stated, in poetic terms, that the judge had been misled, and that the additional material regarding the fence was the source of the deception. In this file, the matter was reversed, the judge released [the detainee] and the prosecution appealed. I request that Your Honor be guided by the facts and principles, among them judicial policy, and deny the appeal, which has no place in the state. It would be improper for the state to approve it. The brothers mentioned above took place in the same activity, and they were detained and released in February. There is a difference between the brothers and my client, but the difference is irrelevant, and I fear that the prosecution is trying to rely on it and give it too much importance. My client was a member of Hamas and was detained for a year, while the others were alleged to be active in Fatah. Now, his acts are the total opposite of his acts taken then, something that developed gradually from 1997-1998.

I request that Your Honor read the declaration. In my opinion, it is heartrending for a few reasons. One, a person, acting out of integrity, decided to take a risk. He openly declared his activity, which proved his honesty. Thus, my client's comments are true and can be checked by the GSS. If Awad, my client is placed in administrative detention, his hope will be destroyed, because his hope is based on the Israeli government's recognition of the legitimacy of non-violence activity. I fear the results of such an approach, of such an act – the detention of Awad – for people on both sides of the border, in Judea and Samaria and in Israel. Total frustration is not far away. This frustration must be prevented, and he must be released.

Military prosecutor:

There is no danger in non-violent demonstrations against the fence. The reason that activity opposing the fence is mentioned in the context of the request for administrative detention is that we are required to present all the activity of the person whom we seek to detain. Otherwise, we would be asked why we did not mention the activity, and that some of it may be positive.

Defence counsel:

In the judgment in *Barghouti*, the presiding judge spoke of such positive activity, and that it is to be considered to the extent that it counters the negative points. I think that this is a classic case of eroding all the negative activity, if such negative activity exists. Even if we assume there is bad material, there is also good material.

The Respondent:

I did not know that I was a threat to the security of the State of Israel when I hosted Israelis in my home. I did not know that I endanger the security of Israel when I marched in a peace demonstration with Israelis and people from abroad.

I am an educated person – I have a master's degree in Hebrew, and I use my learning and thoughts to teach residents in the region to take part only in peace demonstrations. Therefore, I request the court to allow me to carry out my role in promoting peace and peace demonstrations in Budrus.

Before Judge: Colonel Moshe Tirosh

The Appellant: The Military Prosecutor (represented by Captain Ittay Pollack)

v.

The Respondent: Awad, ID No. _____ (represented by Attorney Tamar Peleg)

Appeal of the Decision of the Jurist Judge (the Honorable Judge Major Adrian Agasi)
in case No. 2628/04, of 1 November 2004
(The appeal is sustained)

Date of the hearing: 4 November 2004

Decision

Appeal of the order for administrative detention given on 27 October 2004, in effect from 28 October 2004 to 27 February 2005.

The order was given by Col. Yossi Addiri, military commander of Judea and Samaria, against the respondent "because he endangers the security of the region."

The order was judicially reviewed by the Honorable Judge Adrian [Agasi, who nullified it, delaying execution of his decision for 48 hours, which ended on 3 November 2004, at 11:00.

The Honorable Judge Agasi explained his decision in the following language:

After having reviewed the intelligence material presented in the matter of the detainee, Awad, ID No. _____, I was not convinced that the detainee constitutes an *immediate and real* threat to the security of the region and to public safety at the present time.

A review of the intelligence material indicates that the primary basis for issuing the administrative detention order is the extensive activity of the detainee in his village against construction of the separation fence. The intelligence material indeed shows that the detainee is one of the village leaders opposing construction of the fence, and that he also

encourages people (including young people) to demonstrate against it. However, action of this kind does not justify holding a person in administrative detention. On this point, I have previously held that the military commander cannot exercise his authority to order the administrative detention of an individual only because of activity of this kind.

The military prosecutor contended that the order was not only issued for activity opposing the fence, but for other activity as well. However, review of the intelligence information clearly indicates that the order was issued as a result of his persistent activity opposing construction of the fence. Therefore, I hereby nullify the order.

The military prosecution appealed against this decision.

On 2 November 2004, the matter was brought before the Honorable President, Col. Shaul Gordon, who ordered the detention of the respondent until the end of the hearing on the appeal.

The military prosecutor repeated the grounds set forth in the statement of appeal. He explained that the appeal involves two questions:

1. Whether the detainee was detained solely for his activity against the fence, as the lower court found, or, as the prosecution and the GSS representative contend, that the order was issued because of other activity of the respondent.
2. The question of the danger reflected by the detainee, which, according to the prosecution, justifies his administrative detention, and results solely from activity unrelated to opposition to the separation fence.

The military prosecutor provided the court with confidential material and requested that, at the hearing on the confidential material, a representative of the GSS appear and testify.

The military prosecutor requested that the decision of the lower court be reversed, and that the administrative detention order be approved for the entire period set forth in the order.

The Respondent's counsel deems this file to be of especial importance. She contends that a reading of the material before the lower court indicates that the order was issued because of activity opposing the fence, a legitimate political activity that was expressed in non-violent demonstrations. She contended that the evidence clearly showed that her client had no connection to militant terrorist activity of any kind, his activity was open and resulted from

his worldview. It would not be proper, she stated, to detain a person for such activity. Furthermore, she believes that such detention is not wise, because someone who acts by means of legitimate and open protest will not be drawn into illegal activity. Therefore, she contends, her client should be released. The judicial system acted in that way in the cases of two brothers who took part in the same local activity.

Review of the confidential material, together with the explanation and answers of the GSS agent nicknamed “Uri,” indicates that the material was properly classified as confidential, and should remain so.

The material includes many pieces of information, from various sources, of varying degrees of reliability.

The information may be divided into two primary groups:

A. Items relating, in one way or another, to demonstrations against the separation fence.

It should be mentioned that these involve expressions of protest, some harsh, without any information indicating violent physical activity.

B. Items that are unrelated to demonstrations against the separation fence.

According to everyone, the military prosecutor and defence counsel, the activities in Group A above are not, and cannot be, reason to detain a person in a properly-functioning state. This is so provided that they remain non-violent and retain the legitimate nature of an expression of protest.

The Activities in Group B are a matter of dangerousness assessment, looking to the future, which lies within the authority and discretion of the military commander, subject to the court’s review.

I studied, and restudied, the material of the lower court, including, as noted, the confidential material that was before it. I cannot agree with the conclusion of the lower court judge:

A review of the intelligence material indicates that the primary basis for issuing the administrative detention order is the extensive activity of the detainee in the region of his village against construction of the separation fence.

I believe that the basis for the administrative detention was precisely the information in Group B above.

However, it seems to me that the amount and severity of the information, in disproportionate to the period of the administrative detention.

