

In the Supreme Court sitting as the High Court of Justice

HCJ 1520/09

Before: The Honorable Vice-President E. Rivlin
The Honorable A. Procaccia
The Honorable Justice E. Arbel

The Petitioner: Shawan Rateb Abdullah Jabarin

v e r s u s

The Respondent The Commander of IDF Forces in the West Bank

Petition for Order Nisi

Dates of the sessions: 9 Adar 5769 (5 March 2009)
13 Adar 5769 (9 March 2009)

On behalf of the Petitioner: Attorney Micha'el Sfard

On behalf of the Respondent: Attorney Roi-Avichai Shweike

J U D G M E N T

1. The petitioner, a resident of the region, requests that he be permitted to go abroad for the purpose, he contends, of participating in a ceremony awarding a prestigious prize to "human rights defenders."

The state, due to the opposition of security officials, objects to the request. The open response filed on its behalf states that the petitioner is a senior operative in a terrorist organization, and that his going abroad is liable to be used to advance the activity of the terrorist organization in the region.

2. This is not the first time that the petitioner has filed a petition relating to his wish to go abroad. The Supreme Court studied, in the framework of the previous petitions, and we have done the same today, privileged material that was presented *ex parte* on behalf of the security

authorities. All the petitions in the past were denied. In its decision of 20 June 2007, the court found that, "The petitioner herein operates apparently as a kind of Dr. Jekyll and Mr. Hyde, spending some of his work time directing a rights organization, and another part as an operative in a terrorist organization that is not revolted by act of murder and attempted murder, which have nothing to do with rights, but quite the opposite, negate the most fundamental right of all, the most basic right, without which there are no other rights – the right to life." In its decision of 7 July 2008, the court found that, "Credible evidence exists indicating that the petitioner is a senior operative in the Popular Front for the Liberation of Palestinian terrorist organization."

3. Today, the petitioner again seeks to go abroad, to receive an award given by an organization located in Holland. His counsel requested that we take into account, in making our decision, the need to strike a proper balance between the concerns expressed by security officials – regarding which petitioner's counsel does not have sufficient details because of the privilege that protects the factual material – and the fundamental right of the petitioner to move about freely. The sweeping position of the security authorities breaches, the petitioner contends, international humanitarian law and international human rights law. It is also necessary to take into account, the petitioner argues, the enhanced right to movement that should be provided to human rights defenders.

4. Because of the special facts of the case, we do not have to consider the important fundamental questions that the petitioner raises. Indeed, it is necessary to take into account the right to freedom of movement when examining the proper proportionality of the respondent's position. However, it also cannot be ignored that the West Bank in its entirety is a closed military area, entry and exit from which requires a permit; obviously, the right to freedom of movement is examined from the perspective of the special legislation in the region which is, itself, examined from the point of view of international law. With all this in front of us, we sought to do two things: first, carefully examine the factual material used by the respondent in making his decisions. And second, examine the possibility of reconciling this material with a limited permit or with a "creative" solution that satisfies in part the petitioner's ability to enjoy freedom of movement. For this purpose, we held two sessions. In each one a thorough and comprehensive investigation was made, *ex parte*, and we examined the possibility of meeting, in a proportionate manner, the security constraints. It became clear to us that the material pointing to the petitioner's involvement in the activity of terrorist bodies is real and reliable. It also became clear that additional negative material on the petitioner had accumulated after the previous petition

was denied. This negative foundation strengthens the security authorities' position that the prohibition placed on the petitioner's exit from the country is not intended as "punishment" for his forbidden activity, but for relevant security considerations. This being the case, we did not find it proper to interfere in the decisions of the respondent not to allow the petitioner to go abroad.

5. In his arguments before us, petitioner's counsel addressed the irregularity of the procedure in which the petitioner gives his consent to the court to study privileged material. Such a hearing, *ex parte*, undoubtedly makes it difficult for petitioner's counsel to confront the claims raised on behalf of the respondent. Clearly, this deviation from the rules in adversarial hearings hampers the person representing the petitioner; it also hampers the court, which wants to conduct an open and effective dialogue with the representatives of both sides, and it turns the court, in the natural course of things, into the "representative" of the petitioner in the *ex parte* hearing. Conducting a hearing in this way hampers everyone, but, as petitioner's counsel also agreed, this is not the forum or the manner in which to consider questions that fall outside the framework of the hearing herein.

The result is that the petition is denied. No order for expenses.

Given today, 14 Adar 5769 (10 March 2009).

Vice-President

Justice

Justice