

## The Supreme Court sitting as the High Court of Justice

**HCJ 9910/08**

Presiding: Her honor, the Chief Justice D. Beinisch  
His honor, judge E. Rubinstein  
His honor, judge H. Meltzer

The petitioner: The Foreign Press Association

Vs.

The respondents: 1. GOC Southern Command, major-general Yoav Galant  
2. Minister of the Interior, Meir Shitrit  
3. Defense minister, Ehud Barak

Hearing held on date: December 31<sup>st</sup> 2008

Representing the petitioner: Adv. Gilad Sher, Adv. Ofir Tal, Adv. Neomi Westfrid

Representing the respondents: Adv. Hila Gorni, Adv. Anar Helman

### Court Ruling

The Chief Justice, D. Beinisch:

We have before us a petition for an *order nisi*, which was filed on November 24<sup>th</sup> 2008, in which the petitioner, The Foreign Press Association, requests the court to instruct the respondents to allow foreign citizens, working in Israel as foreign correspondents to enter into the Gaza Strip and to return to Israel. The petitioner announced that the reporters demanding to enter the Gaza Strip are willing to take upon themselves the commitment exempting the respondents, the state of Israel and its' institutions, from responsibility for their safety. In their preliminary response to the petition, the respondents plead that the restriction of passage to the Gaza Strip imposed on foreign correspondents was implemented in consequence of the escalation in the security situation in the Gaza Strip

in November 2008, which resulted in reduced operating hours of the Erez crossing, which serves as a crossing point for people between Israel and the Gaza Strip. The respondents plead that the reduction of operating hours at the Erez crossing is intended to reduce the risk of the lives of those working and serving in the Erez crossing, adding that the crossing is opened and permitted only in exceptional, urgent humanitarian and medical cases, coordinated in advance. The respondents stated however that the entry of foreign correspondents was made possible on several occasions during the first two weeks of December 2008.

As is well known, on December 27<sup>th</sup> 2008 the IDF commenced a military operation in the Gaza Strip. In consequence the petitioner filled an urgent request for an interim decree, pleading that in light of the change of circumstances and the fact that the military operation arouses great interest worldwide, foreign correspondents should be allowed to enter the Gaza Strip in order to cover the events. The petitioner mentioned in this context that, to the best of their knowledge, and according to several publications, the crossing point between Israel and the Gaza Strip was opened to allow the entry of merchandise and humanitarian aid even after the beginning of the operation. The respondents plead, however, that under the current circumstances and considering the significant escalation on the Israel-Gaza border, this is neither the time nor the place for the crossing points to operate on a wider scale, even if there isn't a constant, concrete and immediate risk at the crossing points. Furthermore, the respondents added, that a random review of the on-line foreign press reports shows that there is a continuous coverage from the Gaza Strip of the current events.

The hearing took place on December 31<sup>st</sup> 2008 following which we instructed the parties to inform the court on the following day, January 1<sup>st</sup> 2009, of their positions regarding the possibility of letting a small number of correspondents – a “pool” – to enter Gaza when the crossing is already made possible for other purposes. On January 1<sup>st</sup> 2009 the respondents filed a reply to the court, stating that, after considering the court's suggestion, it was decided to allow the entry of a limited number of foreign correspondents at the appointed time during which the Erez crossing is operating to allow passage in humanitarian cases. According to the procedure suggested by the respondents, the entry of eight foreign correspondents will be made possible collectively during the days in which the Erez crossing is open as aforementioned. The entry of foreign correspondents shall be executed, as was determined by the procedure, in a limited time space and shall be effectuated according to procedures of the border inspection and the security check of the Erez crossing. The respondents stated furthermore that the entry of the foreign correspondents is to be coordinated a day prior to the requested entry date with the Coordinator of Government Activities in the Territories' headquarters (COGAT's headquarters). The COGAT will examine the request and will notify the petitioner as to its' approval, according to the operation forecast of the Erez crossing on the requested date. The respondents stated furthermore that the return of the foreign correspondents from the Gaza Strip should be coordinated in advance with the COGAT's headquarters in the same manner, adding that, under the special circumstances existing today in the Gaza Strip and it's surroundings, the respondents cannot guarantee in advance the dates on which the return of the foreign correspondents could be made

possible according to the aforementioned. The respondents emphasized that “the aforementioned procedure described is subject to any essential change in circumstances, such as the extent of the risk, and is subject to any other circumstance that might influence the proper balance between the different considerations, essential to the matter”.

In response to the respondents’ reply, the petitioner stated that they find the proposed principle of our decision from December 31<sup>st</sup> 2008 acceptable in times of combat such as the current situation; however, they regard many elements in the respondents’ announcement as unacceptable. The main component of the suggested procedure, to which the petitioner objects, concerns the number of correspondents that should be allowed to enter the Gaza Strip. Pleading that in light of the need to give proper representation to the different media, and considering the fact that the foreign press members include correspondents from thirty countries, speaking at least ten different languages, twelve is the minimal number of correspondents to be allowed into the Gaza Strip. The petitioner asks furthermore, that the change of circumstances mentioned by the respondents in the procedure they established is to be the only one as a result of which the Erez crossing shall remain unopened.

After considering the parties’ pleas, we have reached the conclusion that, under the current situation in the Gaza Strip, in which wide combat operations are presently taking place, the procedure established by the respondents expresses a balance, that does not diverge from the acceptable scope given to the respondents, between the concern regarding the risk for human lives resulting from the opening of the crossing points between Israel and the Gaza Strip, the rights of the press, represented by the petitioner, to cover the events taking place in the Gaza Strip, and the public interest for such coverage, especially at time like this. Indeed, the freedom of speech and the freedom of the press, as for the public's right to know, remain unchanged even in times of war, and in a period such as this, they have an all the more special importance; however, these rights are not absolute and under the circumstances of the situation in question they are to be balanced against the predicted risk to human lives as result of opening the crossing points between Israel and the Gaza Strip. (Compare the HCJ ruling 236/82 *The Foreign Press Association vs. the state of Israel P.D. 36(2) [1982]*) We suppose, however, that if the conditions would allow it, the parties will positively reconsider the number of correspondents whose entry into the Gaza Strip would be made possible according to the procedure. Furthermore more, we would like to mention, that we do not see appropriate grounds for a judicial intervention in the decision to limit the number of foreign correspondents allowed to enter the Gaza Strip according to the procedure to eight members and not twelve, as was requested by the petitioner. In addition, we find the respondents position, stating that the procedure’s application is to be subject to changes in circumstances, to be acceptable; however, we expect the respondents to act, as much as possible, according to the procedure they established, and in consideration of the rights and interests represented by the petitioner.

In light of the above, and considering the response, even though a partial one, given to the petitioners’ claims by the established procedure, we find no grounds for maintaining

the petition pending, as was requested by the petitioner, since the circumstances have changed since it was filed. Once the fighting, taking place in the Gaza Strip at present, is over, the petitioner can apply to the respondents in order to reconsider their position according to the prevailing circumstances. The doors of this court will remain open to the petitioner should there be a reason.

Therefore, and subject to the aforementioned procedure determined, the petition is dismissed. No order for expenses will be issued.

Given today, January 2<sup>nd</sup> 2009

The Chief Justice

Judge

Judge