H.C.J 5973/92	**H.C.A. 5990/92**
H.C.J 5974/92	**H.C.A. 6043/92**
H.C.J 5975/92	**H.C.A. 6047/92**
H.C.J 5976/92	**H.C.A. 6064/92**
H.C.J 6023/92	**H.C.A. 6077/92**
H.C.J 6114/92	**H.C.A. 6089/92**
H.C.J 6170/92	**H.C.A. 6097/92**
H.C.J 6263/92	**H.C.A. 6129/92**
H.C.J 6289/92	**H.C.A. 6167/92**
H.C.J 29/93	**H.C.A. 6213/92**
H.C.J 32/93	**H.C.A. 6245/92**
H.C.J 97/93	**H.C.A. 6247/92**
H.C.J 107/93	**H.C.A. 217/93**
	H.C.A. 248/93
	H.C.A. 249/93
	H.C.A. 266/93
	H.C.A. 278/93
	H.C.A. 285/93
	H.C.A. 454/93

(H.C. 5973/92)

Association for Civil Rights in Israel

v.

Minister of Defence and others

(H.C. 5974/92)

Taher Sheritah & Others

v.

Commander of the IDF

(H.C. 5975/92)

Centre for the Protection of the Individual & Others

v.

Commander of the IDF in the West Bank & Others

(H.C. 5976/92)

Leah Tsemel & Others

v

Commander of the IDF in the West Bank and Gaza

(H.C. 6023/92)

Abed El Wahab Darawashe, M.K.

v

Prime Minister and Minister of Defence & the Other

(H.C. 6114/92)

Ahmad Muhammed Nimer Husein and Another

v.

Commander of the IDF in the Gaza Strip

(H.C. 6170/92)

S. Porath

v.

Government of Israel

(H.C. 6263/92)

Naftali Gur Arie

v.

Government of Israel and others

(H.C. 6298/92)

Darawish Nasser and another

v.

The Commander of the Central Command and another.

(H.C. 29/93)

Ibrahim Said Abu Salem and others

v.

Minister of Defence

(H.C. 32/93)

Na'ama Husein Elabori

v.

Minister of Defence and another

(H.C. 97/93)

Majhad Hamed Kadir & Others

v.

Minister of Defence and another

(H.C. 107/93)

Fares Mahmud Abu Muamar

v.

Prime Minister and Minister of Defence and another

In The Supreme Court Sitting as a High Court of Justice
[28 January 1993]
Shamgar P., Elon D.P., Barak, Netanyahu, Goldberg, Or and Mazza JJ.

Editor's Summary

Following a number of brutal acts of kidnapping and murder committed by the Hamas and Islamic Jihad terrorist organisations is December, 1992, it was decided by the Government of Israel to empower the military commanders of Judea and Samaria and of the Gaza Strip to issue orders for the temporary deportation of the leaders of these two terrorist organisations who had taken part in organising and supporting acts of terror, for a period not exceeding two years. The two commanders thereupon issued (general) temporary provisions under the Defence (Emergency) Regulations, 1945 (from the time of the British Mandate but still in force in the territories) allowing for individual temporary deportation orders to be carried out immediately after being issued. An appeal committee was also set up, which would, however, hear appeals only after the deportation had already taken place. Altogether, 400 persons were deported to Lebanon under the deportation orders.

The defence authorities (the respondents) submitted that the deportation orders were lawfully carried out even though the deportees were not given an opportunity to bring an appeal and have it heard prior to deportation, since pressing emergency conditions required the deportation to be carried out without any delay. Moreover, they argued, prior hearing could be dispensed with, since the general deportation orders made express legislative provision in that respect. Alternatively, case law of the High Court recognises emergency situations where even an inherent right like the right to hearing will not be enforced.

The petitioners argued that the deportation orders were void, both because the general order itself was void *ab initio*, in particular owing to lack of sufficient legal basis for denying deportees a prior right of hearing, and also owing to defects in the individual orders. Moreover, they submitted that the deportation was contrary to international law since the 4th Geneva Convention of 1949 relating to Protection of Civilians in Wartime prohibits deportation in general and mass deportation in particular. It was also contrary to Israeli administrative law which grants the right to a hearing prior to deportation.

An additional argument of the petitioners was that an appeal committee was not set up prior to the deportation, and that was an additional reason for invalidating the orders. The argument was rejected outright by the Court, since a committee was indeed in existence prior to the deportation (under regulations l l l and 112 of the Defence (Emergency) Regulations.

The Supreme Court held as follows:

I. The Defence (Emergency) Regulations, 1945 including Regulation l l 2 dealing with deportation is in force in Judea and Samaria, and in Gaza. Its continued force was derived first from Jordanian law and subsequently from legislation enacted by the Israeli military administration.

2. According to the Defence (Emergency) Regulations, there must be sufficient evidence to support the deportation in each individual case. This requirement has been fulfilled.

3. Regulation 112(8) of the above Regulations provides that the advisory committee set up to hear appeals against administrative detention also has jurisdiction to examine deportation orders if so requested by a deportee. That Regulation does not, however, specify whether the appeal is to be heard before or after the deportation is carried out. A reasonable interpretation would be that the right of appeal under Regulation 112(8) should be exercised prior to deportation. However, denial of a right to a prior hearing does not necessarily lead to invalidation of the deportation orders. The correct remedy would be to allow a hearing to take place after the deportation under the same conditions as would have prevailed if it had taken place prior to the deportation.

4. The High Court of Justice will examine the legality of any act of the military government in accordance with the principles of Israeli administrative law. Those principles require grant of the right of hearing, and as far as possible the hearing, so as to be fair and effective, should be held in the presence of the person concerned (in this case, the deportee). Allowing such person to appear in person, and not just by his representative, may have prevented cases of mistaken identity or other errors of which there were a number in the present matter.

5. In exceptional circumstances, the rule allowing for the right to a prior hearing can be departed from, where security needs justify such departure. However, in the present case, it is not necessary to consider whether such exceptional circumstances exist, since the rule laid down in earlier case law applies here, whereby even where there has been no prior hearing, a hearing should be held subsequent to deportation, and this should afford the deportee the opportunity to put forward his case in detail; in any event, lack of a prior hearing does not invalidate the individual deportation orders.

6. The general temporary provision orders where invalid insofar as they sought in general to replace existing principles of natural justice which require a prior hearing to take place before carrying out deportation orders, without relating to specific exceptional cases.

7. The Court concluded as follows:
   a) Lack of prior hearing did not invalidate the individual deportation orders. The Court ordered the right of hearing to be granted following the deportation.
   b) The "provisional" (general) deportations order was invalid, for reasons stated, but this did not invalidate the individual orders.

c) Submissions regarding invalidity of individual deportation orders were to be considered by the advisory committee within the scope of the (subsequent) appeals.

Israel Supreme Court Cases Cited:

[1] H.C. 513, 514/85 *Nazal v. Commander of IDF in Judea and Samaria,* 39(3) P.D. 145.

[2] Elections Appeal 1/65 *Yarador v. Chairman of Central Elections Committee,* 19(3) P.D. 365.

[3] H.C. 680/88 *Schnitzer v. Chief Military Censor,* 42(4) P.D. 617.

[4] H.C. 1361, 1378/91 *Maslam* v. *Commander of IDF Gaza Strip; Abu Judian v. Minister of Defence,* 45(3) P.D. 444.

[5J H.C. 320/80 *Kawasma v. Minister of Defence,* 35(3) P.D. 113.

[6] H.C. 672/88 *Lavdi v. Commander of IDF West Bank,* 43(2) P.D. 227.

[7] H.C. 7/48 *Karabutli v. Minister of Defence 2* P.D. 5.

[8] H.C. 25/52 *Al Galil v. Minister of interior* 6 P.D. 110.

[9] H.C. 240/51 *Al Rahman v. Minister of interior* 6 P.D. 364.

[10] H.C. 174/52 *Abu Dahud v. Governor of Acre Jail,* 6 P.D. 897.

[11] 8/52 *Badar v. Minister of interior, 7* P.D. 366.

[12] H.C. 3/58 *Berman v. Minister of lnterior,* 12 P.D. 1493.

[13] H.C. 290/65 *Altagar v. Mayor of Ramat Gan,* 20(1) P.D. 29.

[14] H.C. 654/78 *Gingold* v. *National Labour Court,* 35(2) P.D. 649.

[15] Cr. A. 768/ 80 *Shapira and Co. Netanya Contractors Ltd v. State of Israel,* 36(1) P.D. 337.

[16] H.C. 4112/90 *Israel Association for Civil Rights v. Commander of Southern Command,* 44(4) P.D. 529.

[17] Misc. App. H.C. 497/88 (H.C. 765/88) *Shachshir v. IDF Commander West Bank,* 43(1) P.D. 529.

[18] H.C. 69/81 *Abu Ita v. Commander of Judea and Samaria Region; Kanzil v. Customs Commissioner Gaza Region Command,* 37(2) P.D. 192.

[19] H.C. 358/88 *Israel Association for Civil Rights v. Commander of Central Command,* 43(2) P.D. 529.

[20] H.C. 531/79 *"Likud" Faction in Petach Tikva Municipality v. Petach Tikvah Municipal Council,* 34(2) P.D. 566.

[21] H.C. 549/75 *Noah Films Ltd v. Films Censorship Board,* 30(1) P.D. 757.

English Case Cited:

[22] *R. v. Secretary of State for Home Dept.* ex parte Hosen Ball [1977] 1 W.L.R. 766.

Jewish Law Sources Cited:

[A] Genesis Ch. 3, vv. 1-2, Ch. 4, vv. 9-10, Ch. 18, v. 21.

[B] Deuteronomy Ch. l, v. 16.

[C] Response of Harama (Rabbi Moshe Isserles) 108.

On Behalf of the Petitioner in H.C. 5973/92:

Adv. J. Shoffman; Adv. D. Brixman

On Behalf of the Petitioners in H.C. 5974/92; 5975/92;

and Respondents No. 5

Adv. A. Feldman; Adv. E. Rosenthal; Adv. L. Tsemel

in 14C 6263/92

On Behalf of the Petitioners in H.C. 6023/92; 107/93:

Adv. E. Dekoar

On Behalf of the Petitoner in H.C. 6114/92:

Adv. E. Riadh

On Behalf of the Petitioner in H.C. 6298/92, 32, 97/93:

Adv. D. Nassar

On Behalf of the Petitioners in 29/93:

Adv. G. Bolos

On Behalf of Respondents 34 in H.C. 6263/92:

U. Slonim

On Behalf of the Respondents:

Adv. J. Harish, The Attorney-General

Adv. N. Arad, Director of the High Court of Justice Department

The State Athority's Office

In the Supreme Court Sitting as High Court of Justice

JUDGMENT

Introduction

1. (a) These petitions and the applications accompanying them relate to the deportation to Lebanon on 17th December 1992 of 415 residents of Judea, Samaria and the Gaza Strip, in respect of whom, according to governmental authorities, information has been assembled to the effect that they are active in the Hamas or Islamic Jihad organisations.

According to Respondents' reply, only those whose activities reached, or exceeded, the level of responsibility for local administration (including training, operations and incitement) have been deported, and not those who were engaged merely in disturbing the peace, distributing leaflets or writing slogans.

(b) Relatives of the late Nissim Toledano and Iris Azoulai, who were victims of the above organisations, and the Victims of Terror Association joined the proceedings as respondents, requesting that the steps taken by the State remain in Force. The family of the missing soldier Yehuda Katz also joined the proceedings as petitioner and applied for the Government to declare its willingness to include an exchange of Israeli missing in Lebanon for the persons expelled. Adv. Shai Porath also joined the petitions, claiming that the Government was not competent to refuse on 25th December 1992, the request of the International Red Cross to transfer aid and supplies to the deportees at the place they are staying in Lebanon.

We would explain our position in respect of these additional petitions at the outset:

(1) Insofar as relates to the petitions of the Toledano and Azoulay families and the Association of Victims of Terror Association, their positions are the same as that of the

State, and therefore everything stated by us in this context below will also apply to those petitions.

(2) As the Attorney-General has declared before us, the application of the Katz family is being considered by the Government and we did not consider that at this stage we can go beyond that.

(3) We were dubious as regards the legal basis of Adv. Porath's petition; however, it has meanwhile become apparent that the question of medical aid for the deportees is in any event amongst those matters which the Government is at present taking up with the International Red Cross, and at this stage, therefore, consideration of the said additional petition has become superfluous.

2. Our statements will be divided into the following sections:

(a) Factual background, including a description of the Hamas organisation and the Islamic Jihad organisation.

(b) The expulsion orders which were made and the legal basis for the expulsion orders according to the Respondents.

(c) The Petitioners' arguments.

(d) Conclusion on the legality of the expulsion.

The Hamas and the Islamic Jihad

3. (a) On 13th December 1992 the Hamas carried out a brutal kidnapping and murder of the late Nissim Toledano. The same week, the said organisation caused another five deaths, the climax of acts of murder which had preceded them. Acts of kidnapping and murder expressed the central and dominant objective of the said organisation, and of the Islamic Jihad organisation and its factions, to bring about the liquidation of the State of Israel through Jihad (a holy war). Those organisations have in recent years been

responsible for the murder or wounding, by stabbing, axes, strangulation or shooting, of civilians and soldiers who have fallen in the path of the perpetrators; amongst the victims are a 15 year old girl and old people of 70 years and more. These organisations have also murdered many tens of Arab residents of the occupied territories who, according to them, were suspected of having contact with Israeli entities or of disloyalty to the personal norms of conduct which bound them according to the said organisations' philosophy.

(b) According to an expert's opinion which has been submitted to us, based to a great extent on the manifest publications of these organisations, i.e. statements quoted from them, the Hamas is a secret organisation which combines the most extreme Islamic fundamentalism with absolute opposition to any arrangement with Israel or recognition of it and preaches the destruction of the State of Israel ("Israel will arise and exist until Islam wipes it out, just as it wiped out its predecessors" - quoted from the Hamas Covenant).

The object of the organisation is the reinstatement of an Islamic state in the whole area of Palestine "from the Mediterranean Sea to the Jordan River" ("the Hamas believes that the Land of Palestine in a Muslim trust until the end of time. Neither it nor any part of it can be surrendered... This is the principle of the Islamic Sharia (Islamic law) and holds good as regards any country conquered by force by the Muslims" - quoted from the third chapter of the Hamas Covenant dated 18th August 1988). Holy War (Jihad), in the form of armed struggle, including murder, is the sole and immediate means to achieve the said goal; any accomodation with an Israeli entity amounts to surrender of the principles of the Islamic religion.

In its propaganda the organisation relies on local religious personalities who add religious decisions and interpretations as a conceptual foundation and as religious legitimation for acts of terror. Its adherents include members of the free professions who guide the organisation's activites and arrange for the supply of resources necessary for its activities. The organisation is aided by front organisations which serve as sources for mobilising manpower and for camouflaging covert action (transfer of funds, etc.).

The acts of murder and terror are in a constant process of escalation, and for taitous kidnapping for the purpose of murder, as already mentioned, is outstanding feature of the organisation's activities.

The main objectives of the organisation emerge from its proclamations. In Proclamation 91 of 5th October 1992 it was said, inter alia:

> "Hamas calls upon the masses of our Arab and Islamic people to clarify their position: rejection of the device of autonomy and rejection of the normalisation of relations with the Zionist enemy. Hamas demands that the leadership of the PLO and of all Arab countries concerned in the negotiations with the Zionist enemy withdraw from the negotiations and stand alongside the Palestinian people in its Jihad against subjugation.

Hamas congratulates the brave *Halal As Eladin Elkassem* Brigade for their success in attacks in Gaza and Jerusalem against soldiers of the Zionist occupier and calls for more heroic attacks".

In Proclamation 93 of 5th December 1992, the following passage appears:

> "Only iron will rout iron and only the strong will overcome the weak, a firm decision is a firm decision and Jihad is Jihad until Allah proclaims victory.
>
> *Your movement, the Hamas, renews its promise to continue the Jihad, despite the surrender of the docile or the violence of the occupiers and calls as follows:*
>
> (a) *On the foreign level:*
> Hamas stresses its demand that the Arab countries participating in the negotiating process, withdraw from it and not respond to the demands

> of the Zionist enemy to halt the economic boycott and normalise relations with it".

The Proclamation of 14th December 1992, following the kidnapping and murder of the Late Nissim Toledano, included the following:

> "*We emphasise that the Jihad and the death of the martyrs which Hamas has adopted as a method and strategy is the only means for the liberation of Palestine,* and it is this alone which will bring about the collapse of our enemy and shatter his arrogance. We have promised Allah to continue our jihad, to escalate it, develop it and constantly surprise the enemy by our sacred military activites. We call upon our brethren in all the Palestinian (Islamic and national) factions to escalate the activities of the Jihad and concentrate all our people's potential in the front which is fighting the enemy and to turn our pillaged land into a volcano which will destroy the conquering invaders by fire.
>
> The capture of the officer is in the context of the state of war between Palestine, our people and our brigades and the Zionist enemy, and it was not the first act, as our people is well aware - and will not be the last - with the help of the Almighty". (Emphasis in the original)

Expression of the spiritual image of the Hamas activists can also be seen from the congratulatory statements about the murder at the end of December of the Lage Haim Nahmani, which were made by the chief spokesman of the deportees, Dr. Elaziz Rantisi, on 4th January 1993.

(c) The Islamic jihad movement, with all its factions, is no different in its character and objects. It emerges from the statements of its leaders and its publications that this movement views the "Zionist Jewish entity" embodied in the State of Israel as a *prime* enemy and advocates immediate action to liquidate it, this movement too has given expression to its ambitions in dozens of acts of murder and terror.

The Deportation Orders

4. (a) Against the background of increasing Hamas activity in the first weeks of December 1992, the Government, on 16th December 1992, decided as follows:

> "456. *Security matters*
>
> *In the Ministerial Committee for National Security Matters, authority is given to make emergency regulations for the issue of immediate deportation orders for the expulsion of persons inciting acts of terror* and it is decided (by a majority, one abstention) as follows:

(a) In view of the existence of a state of emergency and in order to safeguard public security - to instruct the Prime Minister and the Minister of Defence to order and empower the military commanders of Judea, Samaria and the Gaza Strip to issue orders in accordance with vital, immediate security needs relating to the temporary deportation, without prior notice, for the purpose of deporting inciters, of those of the residents of the territory who are, by their action, endangering human life or inciting such action, for such period as determined by the military commanders, but not exceeding two years.

(b) Any person departed as aforesaid may, within 60 days, appeal against his deportation to a special committee through a member of this family or his advocate in accordance with rules to be laid down in the orders".

Following the said decision, the Commander of Central Command, who is also Commander of the IDF Forces in Judea and Samaria, and the Commander of Southern Command, who is also Commander of the IDF Forces in the Gaza Strip, published provisional orders relating to the Temporary Deportation (Temporary Provision) (Judea and Samaria Region) (No. 138l) Order, 1992 and the Temporary Deportation (Temporary Production) (Gaza' Strip Region) (No. 1986), 1992. The wording of the order in respect of Judea and Samaria is set out below:

> "*The Israel Defence Forces*

Order for Temporary Deportation (Temporary Provision)

By virtue of my power as Commander of the IDF Forces, having been satisfied due to the special circumstances presently existing in the territory, that decisive security reasons so require, I hereby order, as a temporary provision, as follows:

Definitions

1**.** In this Order -

'regulations' means the Defence (Emergency) Regulations, 1945;

'temporary deportation order' means an order pursuant to Regulation 112(1) of the Regulations, the force of which is limited to a period not exceeding two years.

Implementation of temporary deportation order

2. A temporary deportation order may be carried out immediately after it is issued.

Appeals committee

3. (a) Notwithstanding the provisions of Regulation 112(8) of the Regulations, appeal committees shall be established for the purpose of this Order whose members shall be appointed by me or by person empowered by me.

(b) A legally qualified judge of a military court shall serve as chairman of an appeal committee.

(c) An appeal committee shall have power to hear an appeal brought before it and may approve the temporary deportation order, revoke it or reduce the period specified therein.

Appeals

4. (a) An appeal against a temporary deportation order may only be made to the appeal committee within 60 days of the temporary deportation order being issued.

(b) The deliberations of the appeal committee shall be conducted in camera.

(c) Where the temporary deportation order has been carried out, the appeal committee shall consider the appeal in the absence of the deportee.

(d) The deportee shall be entitled to be represented before the appeal committee by an advocate or a relative.

5. (a) This Order shall commence on the date of its signature.

(b) This Order shall remain in force until other provision
is made by me.

6. This Order shall be referred to as the Temporary Deportation (Temporary Provision) (Judea and Samaria Region) Order (No. 138 l), 1992.
16th December 1992.

Danny Yatom, Brigadier
Commander of the IDF Forces in Judea and Samaria"

The wording of the order in respect of the Gaza Strip is similar, with some insignificant modifications, to the order published for Judea and Samaria.

(b) The said order relating to temporary expulsion is based on the provision of Regulation 112 of the Defence (Emergency) Regulations, 1945, which were made by the British Mandatory Government and are still part of domestic law in the said territories.

The relevant provisions of Regulation 112 as aforesaid provide as follows:

> **"Deportation**
>
> 112. (l) The Commander of the Israel Defense Forces in the territory shall be empowered to make an order under his hand hereinafter referred to in these Regulations as a deportation order) for the deportation of any person from the occupied territory. Any person in respect of whom a deportation order is made shall remain outside the occupied territory so long as the order is in force.
>
> (8) Any advisory committee appointed under the provision of sub-regulation (4) of Regulation 111, if so requested by any person in respect of whom a deportation order is made under these Regulations, is empowered to deliberate and make recommendations to the commander of the territory in connection with the deportation order".

There has been no dispute before us that the Defence (Emergency) Regulations, 1945, including the said Regulation 112, are part of the domestic law in force in each of the said occupied territories (as regards Judea and Samaria, see also the summary of the legislative history in H.C. 513/85 [l] *Nazal v. The Commander of the IDF Forces in Judea and Samaria,* (hereafter - the Nazal case) [l]. In the Gaza Strip, the British Mandatory law still applies in full, so that Regulation 112 is included therein.

(c) From the above quotation, it emerges that the temporary deportation order referred to the special circumstances which had arisen and to the decisive security reasons, and it provided the following main arrangements:

(1) The force of the temporary deportation is for two years at the most.

(2) The temporary deportation order under Regulation 112 of the said Regulations can be carried out on the spot, namely immediately after its issue.

(3) The right to a hearing would only be available *after* the deportation is carried out, i.e., it would be possible to submit an appeal for up to 60 days from the date of issue of the order. The 60 day limitation *was revoked* in an amendment of 13th January 1993.

(4) The appeal committee for the purposes of such an appeal would have power to make a binding decision, not merely a recommendation.

(5) The appeal would be heard in the absence of the deportee, who could be represented by an advocate or relative.

(d) Following on the orders, the commanders actually exercised the power vested in them, as follows:

In Judea and Samaria, 284 deportation orders were issued, of which 39 were for a period of 18 months and the rest for a period of 24 months. In the Gaza Strip, 202 orders were issued, of which 100 were for a period of 18 months and the rest for a period of 24 months. Of the said total number, 78 were subsequently withdrawn, but orders were added, to the effect that altogether 415 persons were expelled.

On 16th December 1992 the deportation began. It was temporarily stayed following on the first petitions, by interim orders of this court, which were set aside on 17th December 1992 together with the issue of the orders nisi.

(e) The criterion applied by the military authority which decided to carry out the deportation was an individual one; namely, the selection was personal, based on the information regarding each of the candidates for deportation. As stated in the State's written reply submitted to us:

> "49. Those involved are individuals, some of whom took part in the organisation and support of acts of violence or in the guidance, incitement or preaching of such acts. The others assisted the activites of the said organisations in the sphere of ecomomic or organisational infrastructure, the mobilisation of personnel, the raising and distribution of funds and also in the wording of proclamations and organising their circulation. "

(f) after the deportation, it transpired that the deportees included, in error, six people against whom an order had not been made, another person in respect of whom of identity an error had been made and nine persons under legal process or persons against whom court proceedings were being conducted, whom it was not intended to expel without first exhausting the legal proceedings already being taken.

The Government announced its willingness to return the said persons, and 14 of them who agreed thereto have already been returned.

The Respondents' Position

5. The position of the Respondents is that a deportation order may be duly carried out pursuant to the emergency provisions without allowing an opportunity to submit an appeal prior thereto, pursuant to Regulation 112(8) quoted above, because -

(a) in practical terms there is a necessity, namely there are pressing emergency conditions which required deportation; and

(b) in legal terms, in such circumstances, the prior hearing of an appeal could be dispensed with, because the orders of the commanders laid down an express legislative

provision on this issue permitting expulsion without prior hearing; in the alternative, the law of the State of Israel, as expressed in the precedents of this Court, also recognises exceptions which, in extreme security circumstances, permit departure from the observance of an inherent right, including that of a hearing. In this context the Respondents referred *inter alia* to the judgment of President Agranat and of Judge Sussman in E.A. 1/65 *(Yarador v. Chairman of the Sixth Knesset Central Elections Committee*, [2] and to the judgment in H.C. 680/88 *(Schnitzer v. The Chief Military Censor*, [3], at 630, opposite the letter B).

The Petitioners' Arguments

6. (a) The central argument of the Petitioners is that the deportation orders are void for a dual reason, both because the empowering order (namely the Temporary Provisions Order) is void *ab initio* and because of various defects which occurred in the course of issuing the individual orders.

With regard to the first reason, the Petitioners referred in particular to alleyed absence, of a sufficient legal basis for denying the deportee the right of prior hearing, so as to allow him to raise his objections to the deportation, *before* it takes place, before a committee operating under Regulation 112(8) of the Defence (Emergency) Regulations, 1945, and if he so desires thereafter also before the High Court of Justice (according to the limits delineated in that respect by this Court in H.C. 1361/1378/91 *Mesalem v. The Commander of the IDF Forces in the Gaza Strip, Abu Judian v. Minister of Defence* [4] at 453, opposite the letter F).

(b) The act of deportation is contrary to both public international law and to Israeli administrative law, jointly and severally:

(1) Article 49 of the Fourth Geneva Convention relate to the Protection of Civilian Persons in time of War prohibits expulsion generally and mass expulsion in particular.

(2) Israeli law grants the right to a hearing *before* deportation (H.C. 320/90, *Kawasme v. Minister of Defence, H.C. 672/88,* (hereafter, the Kawasme case) [5], *Lavadi v.*

Commander of the IDF Forces in *the West Bank,* [6] at 235,. and H.C.A. 454/88, quoted therein). This right, which is laid down in Israeli law, should not be denied by security legislation in occupied territory.

(c) Following H.C. 7/48 *(EI Karbutli v. Minister of Defence,* (hereafter, the Karbutli case) [1] it was pleaded by the Petitioners that the deportation orders are void on a further ground, namely that the committees under the Temporary Provisions Order were only set up after the deportation, i.e. they did not exist before the deportation was carried out.

We should point out already at this stage that we cannot accept this last argument. As we shall specify below, the right to apply for a hearing (or appeal) is based on the provisions of Regulation 112 as aforesaid. Sub-regulation (8) thereof, which the Petitioners continue to view as the determining provision as to the appeal, refers to the committees set up under Regulation 111(4), which have been in existence time, including the date that the order was carried out.

The Legal Conclusions

7. The following are the matters requiring examination.

(a) The validity of Regulation 112 of the said Regulations as part of domestic law.

(b) When may Regulation 112 be implemented.

(c) The right of hearing pursuant to that regulation.

(d) The exceptions to the right of hearing and the validity of the temporary provisions.

(e) The validity of the deportation orders.

(f) The implementation of the right of hearing.

8. Regulation 112 of the Defence (Emergency) Regulations, 1945, which deals with deportation, is a legal provision of law valid in Judea and Samaria and the Gaza Strip, since it is part of the law applicable in the region ("the laws in force in the country", in the words of Regulation 43 in the Aurex to the Hague Convention of 1907 concerning the Laws and Customs of Land Warfare). The continued force of the Regulation, which was made during the British Mandate, originally derived from the provisions of Jordanian law, and since the entry of the IDF Forces it has a similar derived from the Law and Administration Proclamation (No. 2), 1967 and Proclamation of the same year related to the Gaza Strip (see also H.C. 1361-1378/91, [4], at p. 455). The implementation of Regulation 112 as domestic law is, since the entry of the IDF Forces, with the power and authority of the regional commander.

The orders which were made in the present case were based on specific information in respect of each deportee, namely on individual considerations which, according to the Respondents, indicated the existence of a basis in respect of each single one of the deportees. This means that there was no *collective* order but a set of *personal* orders, each of which exists independently, and meets the requirements of Regulation 108 of the said Regulations, which is discussed below.

9. The arguments addressed to us did not justify a departure from the legal conclusion that the discretion standing behind the implementation of Regulation 112 was based on considerations contained in Regulation 108 of the said Defence Regulations (as stated therein, "if it is necessary or effectual to grant the order for the security of the public, the defence of the State of Israel, the maintenance of public order or the suppression of uprising, rebellion or riots"), provided that the individual data relating to a deportee, as presented to the Commander of the IDF Forces before making the order, give foundation for such an act. The evidence relating to each deportee should be clear, unequivocal and persuasive, see the *Naz*al case [1], at 655).

10. (a) Regulation 112(8) lays down as aforesaid that a consultative committee, appointed under Regulation 111(4) for the purposes of hearing appeals against an administrative detention order, is empowered to examine and make recommendations in

connection with a deportation order if so requested by a person in respect of whom such an order has been made.

The said Regulation does not specify whether the hearing of the appeal should be held before or after the deportation is carried out. The British Mandatory authorities which made the Regulations believed, as emerges from the way in which the Regulation was implemented, that there is *no* duty to hear an appeal before the deportation order is carried out, and the then consultative committee heard appeals (when too, in the absence of the deportee) only *after* the deportation order had been carried out. The committee under Regulation 112(8) was the same committee which acted under Regulation 111(4) and, just as it heard appeals after detention rather than before it, so it also heard appeals against deportation after, rather than before, its implementation.

As can be learnt and inferred from the case law of the early years of the State, then too it was not the practice to grant the right of hearing, in the event of an appeal, prior to eassying out a deportation order (this is for example implied from H.C. 25/52, *Jalil v. The Minister of the Interior,* [8]; H.C. 240/51, *Ta Alrahman v. Minister of the Interior,* [9]; H.C. 174/52, A*bu-Dahud v. Superintendent of Acre Prison,* [10]; H.C. 8/*52, Badar v. Minister of the Interior*, [11].

However, the developments which have occurred in constitutional and administrative law in recent decades have conferred on the right of hearing as a rule - including the right to appeal to the consultative committee under Regulation 112(8) which takes place *in advance* - the status of an established rule, and an essential means for the prior examination of the justification for the Commander to make a deportation order. The courts have viewed the prior hearing in the field of administrative law as one of the rules of natural justice (H.C. 3/58, *Berman v. Minister of the Interior*, [12] at 1503; H.C. 290/65, *Eliaar v. Mayor of Ramat Gan,* [13] at 33; H.C. 654/78, *Gingold v. National Labour Tribunal*, [14] at 654; Cr. A. 768/80, *Schapira v. State of Israel,* [15] at 363); and as regards the right of prior hearing, it was stated in H.C. 4112/90, *Association for Civil Rights in Israel v. Commander of the Southern Command,* [16] at 638, that -

> "The source and foundation [of the right of hearing] is in Jewish tradition, and the sages of Israel ancient saw it the ancient right of humanity" (Genesis, Chapter 3, Verses 11-12; Chapter 4, Verses 9-10 [a] 18, 21; Deuteronomy, Chapter 1, Verse [B] 16); and further on [16] on page 638 it is stated:

As regards the present case, it was stated in H.C.A. 497/88 (H.C. 265/88) *(Shakshir v. Commander of IDF Forces in the West Bank,* [17] at 537

> "In Aware of the grave and far-reaching determent occasioned to the person concerned by reason of an order expelling him from is place of residence, the legislature has laid down a special procedure, which is not known in criminal law, through Regulations 111(4) and 112(8) of the Defence Regulations, according to which a consultative committee, headed by a lawyer, was established, amongst its powers being to examine all the information existing against the deportee 18 including all evidence, whether unrestigated privileged, in the posession of the Defense authorities. This committee gives the deportee an opportunity to submit to it his evidence and arguments and it must also allow him to call other witnesses on his behalf, if those witnesses might affect the result of the hearing. After examining the evidence and hearing the arguments of the parties or their attorneys, the consultative committee makes its recommendation to the Military Commander as regards the outcome of the relevant order... if the Commander decides, after receiving t he opinion of the consultative committee, not to cancel the deportation order and to insist upon its implementation, it is open to the deportee submit a petition to the High Court of Justice".

(c) The legal interpretation according to which Regulation 112(8) grants a right of appeal *before* implementation of the deportation was considered at length in the *Kawasme case* [5].

The *Kawasme* case [5] involved the deportation of the mayors of Hebron and Halhoul and of the Imam of the El Ibrahimi Mosque, Rajahb El-Tamimi, following the murder in Hebron of six Jews who, on 2nd May 1980, were returning from prayers at the Cave of Machpela. Immediately upon the deportation order being made by Brigadier-General Benjamin Ben Eliezer, the three were taken from their homes, supposedly for the purpose of talks with the regional commander. They were then told that they were going to meet the Minister of Defence and instead they were flown by helicopter to the Lebanese border and there expelled over the border. Their spouses petitioned this Court against the validity of the deportation order.

An order nisi was issued pursuant to which the authorities were required to show cause "why the deportation orders should not be set aside... since they (the deportees) had not been given a fair opportunity to state their objections to the deportation orders for consideration by the committee mentioned in Regulation 112(8)... and were not allowed to appear before that committee before the expulsions were implemented.

In the *Kawasme* case the State Attorney explained in his arguments that those responsible for the deportation knew that the law prescribed with regard to Regulation 112(8), although they had decided, without consultation with legal authorities, to implement the deportation forthwith without service of an order or notice of its contents, because "a situation had arisen which obliged the immediate deportation of the said three leaders in order to prevent a dangerous escalation in the security situation in the region". The State representation also stated in court, after deportation had been carried out, that it would be willing to hold a hearing before an appeal committee.

President Landau held that, according to the rules of natural justice and in view of the wording of Regulation 112(8), the reasonable meaning of the Regulation was that there is a duty to grant an opportunity of applying to the committee *immediately* after the deportation order is made and *before* it is carried out. After the deportation has been carried out a new situation arises, when the deportee is already over the border and he is thereby deprived of his ability to object to the order and put his case to the committee.

This was also how the Regulation was understood - as emerged from the Minister of Defence's reply - in another case, being that of the deportation order in respect of Bassam Shaka, the mayor of Nablus. In the words of President Landau, "even if it had been most desirable in the eyes of the respondents, for pressing reasons of security, that the deportation be implemented without any delay, that did not justify their disregard... of the necessity to observe the law" (ibid., p. 119).

Nevertheless, President Landau *did not* see fit to set aside the deportation order. The consultative committee was already in existence at the time of the deportation and it was therefore not appropriate to conclude that the order was void on the ground that this Court applied in the case of *Karbulti (*ibid., H.C. 7/48), in which a detention order was revoked because a committee under Regulation 111(4) did not exist at the time the detention was carried out.

In President Landau's opinion, the main point is that denial of the right to apply to the committee prior to deportation require *does not* retroactive revocation of the order, but the correct remedy for the wrong is reinstatement, namely placing the petitioners in the situation in which they would have been had they not been deprived of the right to apply to the committee. In view of the evidence of open incitement against the State by the Imam El Tamimi, the court *did not* find it appropriate to extend relief to that deportee, whereas in respect of the other two (Kawasme and Milchem), a majority of the judges (the President and Judge Yitzhak Kahan) decided, as President Landau said, after much soul-searching, that a recommendation should be made to allow those two to appear before the committee after the event. Judge Yitzhak Kahan, as mentioned, agreed with the result which President Landau reached, but added that although Regulation 112(8) *does not* contain express provision that an appeal to the committee should be allowed before deportation, in his opinion the rule is that generally a person should be allowed to appeal to the consultative committee before the order is implemented. This rule is not founded on statute, but on principles laid down by the courts which oblige every authority to act fairly. Denial of the right to apply to the committee is similar to denying a person's right to a fair hearing. However, according to him, *there could be* emergency situations in which the right of hearing must bow to a contrary vital interest, which should be given priority. We shall discuss this below.

Judge Haim Cohen, dissenting, believed that the order should be made absolute, since the expulsion orders should be viewed as void in view of the manner in which the deportation had been dealt with.

The court, therefore, by a majority, decided *to discharge the order nisi*, namely to dismiss the petition, making the following recommendation:

> "...that if the committee (namely the consultative committee appointed under Regulation 111(4) of the 945 Regulations) finds that the content of the first and second petitioners' application to it, if made, is *prima facie* relevant and that it contains a clear position on the part of the petitioners whereby they intend to observe the laws of the military administration in their activities as public personalities and it also contains unequivocal reference to the statements of incitement published in their name in the media - then in the next stage the petitioners should be allowed to appear personally before the committee to allow it to gain an impression of their oral explanations, in the manner which should have been adopted initially" (ibid., pp.124- 125).

The two deported mayors indeed applied to the committee through the Red Cross in affidavits which met the requirements. Following this, they were returned for the hearing via Allenby Bridge and were arrested on the spot. The consultative committee held its hearing by the Bridge. Petitioners' counsel appeared before it and their arguments were heard, and information was submitted on behalf of the Army about their activities. The committee heard the appeal and dismissed it, and the deportation order was upheld. The petitioners applied to this Court with a new petition which too was dismissed. The deportation order was then carried out once again.

11. (a) In the present case, the Respondents have sought to modify the legal infrastructure by enacting the orders regarding the temporary provisions which expressly permit immediate expulsion, and allowing the possibility of applying to the consultative committee *after* the deportation.

(b) We have explained in the past on more than one occasion that this Court will review the legality of an act of the military administration and the validity thereof in accordance with the principles of Israeli administrative law, in order to decide whether the norms binding an Israeli public officer have been observed (HC 69,493/81,) *Abu Ita, v. Judea and Samaria Regional Commander, Kanzil v. Customs Commissioner, Gaza Region Command* [18], at 231.

It was stated there:

> "So far as this Court is concerned, the officer is not generally regarded as having fulfilled his duty if he has performed that which is necessitated by the norms of international law, since more is required of him, as an Israeli authority, and he should also act in the sphere of military administration in accordance with the rules which delineate fair and proper administrative procedures. For example, the laws of war do not disclose any principle, whether established or at least formulated, according to which there is a duty to observe the right of hearing, but an Israeli authority will not fulfil its duty... if it does not respect that duty in circumstances where the right should be granted in accordance with our norms of administrative law".

Israeli administrative law requires as aforesaid, the grant of a right of hearing, and we have already stated that the more serious and irrevocable the results of the Government decision, the more essential is it that the person affected be allowed to state his objections and give his answer to the allegations against him so as to try to refute them (see H.C. 358/ 88, *Association for Civil Rights v. Commander of the Central Command,* [19] at 540).

(c) Moreover, hearing arguments from an intermediary rather than from the person concerned is inherently deficient in value and practicality. Statements made by counsel lose some of their force when the person making the statements on behalf of another *cannot* first meet with the person concerned in order to obtain from him information, guidance and instructions, and continue consulting with him routinely in respect of the

factual allegations raised against him which are the basis of the hearing, and in respect of which his reply is sought, as he alone knows his exact case Personal appearance, before the committee of the person in respect of whom the deportation order is made, is the foundation and essence the right to a hearing.

The cases of mistaken identity, and of selection of deportees which have been discovered in the matter before us after the event, have of course made more acute the conclusion as regards the importance of giving an opportunity to put forward a regiments directly before the committee. There is a possibility - if only theoretical - that there are other cases in which it could become apparent that there was a mistake in - or non-justification for - the deportation, if the person concerned appeared before the committee and stated his case.

12. (a) The Respondents have put forward the argument that, according to the principles of administrative law, *there are circumstances in which vital interests of state security prevail over the duty to hold a prior hearing,* before carrying out the deportation order. In other words, in balancing these competing values, namely the right of hearing versus security needs and when the security circumstances are *of special weight,* the right to hearing should not be exercised in advance of carrying out the deportation but only subsequently, and the need to exercise the power immediately then constitutes an incontestable constraint. The State's argument was as follows:

> "31. Moreover, the opinion of the security authorities was, and still is, that any attempt to carry out the deportation of hundreds of people according to the previous pattern (rather than by way of immediate expulsion), whilst the deportees were still in the territories, was likely to give rise to a very services wave of incitement and violence, aimed *inter alia* at creating pressure (both domestic and international) on the State of Israel to rescuid the intention to expel them.
>
> 32. In this context, it could also be appraised, on the basis of past experience, that such a wave of incitement was also likely to spread

> beying the Palestinian street into the detention centres and prisons in Israel, in Judea and Samaria and the Gaza Strip".

In order to lay the foundation for his argument of the existence, at times of a right to depart from the major principle of granting the right of prior hearing, the Attorney-General referred *inter alia* to H.C. 531/79 *(The Likud Faction in Petach Tikva Municipality v. The Petach Tikva Municipal Council,* [20] at 576), where it is stated:

> "Principles of necessity or temporary constraints set aside the application of the rules of natural justice".

Cr.A. 768/80 [15] was also mentioned, where it was held, an p. 365-366 of the report:

> "There are cases where an administrative authority makes a decision without hearing the interested party and at the decision can be a valid one. This will happen when the interest which the decision protects in a specific case is of greater weight in the context of interests as a whole than the interest of the right to a hearing. Granted the importance of the principle of the right to a hearing, it should not be forgotten that it is only one of the generality of interests which have to be balanced and respected".

In delineating the bounds of the said exception to the existence of the rule as to a hearing in purely operational matters, in the realm of security, it was said in H.C. 358/88 [19], at 546-561:

> "There are indeed operational military circumstances in which judicial review is inconsistent with the place or time or with the nature of the circumstances; for example, when a military unit carries out an operation in the scope of which it must remove an obstacle or overcome opposition or respond on the spot to an attack on military forces or on civilians, and the operation is taking place at the time, or like circumstances in which the competent military authority sees an operational

> need for immediate action. By the very nature of the matter, in such circumstances there is no room to delay the military operation which must be carried out on the spot".

In H.C. 4112/90 [16], (at p. 640): we went on to say on this issue

> "Such circumstances existed in the case before us, where the Military Commander for a lengthy period tried many different measures until it became apparent to him that none of them could prevent an act of murder because of the narrow and winding streets of the location which did not allow the life of the victim to be safeguarded. This grave and uncontrollable situation in which human life is at risk obliges action on the spot to safeguard human life and immediately prevent the recurrence of such cases, as the Military Commander directed in the order. Among a right of argument in such circumstances, before implementing the order, involving a delay in taking action for the period necessary to hold the hearing in this Court, as described and requested in the petition, constitutes a substantial risk to human life and a real concern as to the frustration of the possibility of taking necessary action, as detailed in paragraph 7 of our judgment. In this example the supreme value of preserving human life takes priority over the value of a right to a hearing. This balance between these two values is the supreme value in our legal system".

(b) The existence of the exception was also considered by Judge Yitzhak Kahan in his separate opinion in the *Kawasme* case [5]. He referred to the statement of Judge Witkon in H.C. 549/75 *Noah Film Company v. Cinema Film Review Board*, [21], at 760), according to which:

> "There are of course situations in which the need to cancel a license or permit granted in error or without due consideration is so great and urgent that even if the rule of audi alteram partem was not complied with the court should hesitate to invalidate the decision for cancellation.

Justice Yitzhak Kahan further stated:

> "In the work of the learned author, H.W.R. Wade, *Administrative Law*, (Oxford, 4th ed., 1977, p. 451), the following was stated in this regard:
>
> > 'Sometimes urgent action may have to be taken on ground of public health or safety, for example to seize and destroy bad meat exposed for sale or to order the removal to hospital of a person with an infectious disease. In such cases the normal presumption that a hearing must be given is rebutted by the circumstances of the case. So it is also, for obvious reasons, where the police have to act with urgency, e.g. in making arrests'.

An example of a case in which - for reasons of safeguarding public security - the court in England justified infringing the rules of natural justice, can be found in the judgment in *R. v. Secretary of State for Home Department, ex parte Honsenbal*, (1977) [22]. In that case a deportation order was issued against an American journalist who had resided in England for a substantial period of time, and the Home Secretary refused to disclose all the details of the material in consequence of which the deportation order was made. In the judgment of the Court of Appeal, the petition was dismissed and the Court did not order the Minister to disclose details of the reasons for deportation. I am not sure that we would have adjudicated as the English Court of Appeal did in that case, but this instance does show that even in peaceful England, which does not face the danger of war, the court is willing to prefer a public interest of national security to the principles of natural justice. One may certainly do so when a state of emergency is involved which obliges immediate action. As the learned author J.F. Garner states in *Administrative Law* (London, 5th ed., 144 (1979):

> > 'The full panoply of natural justice does not have to be observed in a case where this would be contrary to national security'.

In the United States too it has been held on more than one occasion that the right to a hearing must give way in certain cases in states of emergency, when immediate action by the authority is necessary in order to safeguard important public interests. See B. Schwartz, *Administrative Law* (Boston - Toronto, 1976), The learned author states there *inter alia* the following at pages 210-211.

> 'In the emergency case, the emergency itself is complete justification for summary action. The right to be heard must give way to the need for immediate protection of the public.
>
> The typical emergency case involves danger to public health or safety. But the emergency exception is not limited to health or safety cases."

(c) In the Kawasme case [5] President Landau observed that if Regulation 112(8) could not be implemented in accordance with the said existing interpretation, thereof, the respondents in that case could have proposed revocation or modification of the Regulation by legislation (ibid., p. 120, opposite the letter E); so too according to Judge H. Cohen (ibid., p. 127, opposite the letter D). Obviously, those observations with regard to the possibility of legislation relate to circumstances in which it is sought to set aside the right of hearing for the purposes of *defined* exceptional cases, rather than legislation which revokes the right altogether.

Justice Y. Kahan, on the other hand, believed that "the same source that imposes a prohibition may also revoke it", i.e., whoever initiated the right to a hearing as one to be observed *ab initio,* is also the one who can - by way of precedent rather than legislation - determine in what circumstances exceptions to the rule can be recognised.

(d) The Respondents sought this time to refer in advance to the legislative option, and made the orders which are, as they are eatified, enactea "temporary provisions" permitting temporary deportation immediately after the issue of the order, the right of appeal being ancuitable only after the order is carried out. In our view the temporary provisions in the present case neither add nor subtract anything, whichever way one looks at it. If there is an exception to the right of a prior hearing, action can be taken in accordance with that

exception and there is *no* need for a temporary provision; and if there is no exception to the right of hearing, the temporary provision is in any event invalid. As regards the question whether exceptions exist to the rules relating to the right to a hearing in deportation proceedings, as we have already stated, case law is to the effect that such exceptions do exist, and they are the result of the balance between the needs of security and the right to a hearing.

We have not seen fit here to take a view on the question of whether an exception to the right of hearing existed in the circumstances herein, since we accept - according to the rule in the *Kawasme* case [5] (per Justice Landau and Y. Kahan) - that if there was no prior hearing, a subsequent hearing should be held, serving the object of giving an opportunity to the person concerned to present his case in detail, and the absence of a prior hearing does not per se invalidate the individual deportation orders.

13. Is amending legislation in the present form valid, or, in other words, can the security legislation of a military commander determine that there was no legal duty to observe the right to a hearing before the deportation order was implemented?

In view of the contents of paragraph 12 above, the question of the validity of the Temporary Provisions Order becomes *devoid of practical legal meaning:* the power to find that there is an exception in a specific concrete case, in which exigencies demand immediate action before granting the right to a hearing, is in any event inherent in the authority to exercise the power in respect whereof the right to a hearing is sought.

However, so as to complete the picture, we shall also answer the question of the validity of general legislation, such as the Temporary Provision:

If the Order purported to determine a new normative arrangement, without connection to or dependence on special concrete circumstances, the existence whereof must be examined in advance in any event, then it would be ultra vires the powers vested in the Military Commander. Security legislation cannot bring about the modification of general established norms of administrative law, which our legal system views as the fundamentals of natural justice. If the Temporary Provision sought to determine, *as a rule*, that

henceforth any expulsion order can be implemented for a limited period without granting the right to a prior hearing, then does not grant legality to the said new arrangement. Only *concrete exceptional* circumstances can create a different balance between the conflicting rights and values, and such circumstances were not detailed in the wording of the Temporary Provisions. The Order laid down a *general* arrangement which will remain in force for so long as the Temporary Provision is in force. In other words, the Order laid down a limitation as regards the duration of the deportation, although it prescribed nothing in connection with defining the exceptional concrete circumstances in which the right of hearing can be restricted. It thereby sweepingly and in an overall way abrogated the right of hearing, and such power is not vested in the Military Commander.

To conclude this point, since the Temporary Provisions sought to convert a valid general norm into another, without restriction or delineation for defined exceptional cases, the Temporary Provisions Order cannot be regarded as valid.

As already explained, that is of no significance as regards the power to make deportation orders. The expulsion orders were expressly made on the basis of the provisions of Regulation 112(1) and in reliance on the powers vested pursuant thereto. The said Order relating to the Temporary Provisions did not *create* the power to make a deportation order but referred to Regulation 112. For the purpose of the case herein, it merely sought to determine arrangements with regard to *the right of hearing;* that and nothing more. We have found that the temporary provision is of no avail. The power to refrain from granting the right to a prior hearing is ancillary to the provisions of Regulation 112 in accordance with the explanation in paragraph 12 above, without the need for specific empowering legislation.

We are therefore inherently brought back to the provisions of Regulation 112 in all its parts, including sub-regulation 112(8) thereof. This means that the power to make a deportation order exists and the hearing, by way of an appeal against the deportation order - which will take place after the order is carried out - should be conducted in accordance with Regulation 112(8), as interpreted by case law of this Court.

14. The Petitioners have argued before us that the individual deportation orders are void by reason of defects in obtaining them, apart from the lack of a right of hearing. The Respondents have disputed this.

We believe that in the present case the place for such arguments is before the consultative committee, to which the deportee may address his appeal. So long as the consultative committee has not otherwise decided, each individual order remains in force.

15. The Respondents must now make practical arrangements for implementery the right of appearance before a consultative committee operating under Regulation 112(8) of the said Regulations in respect of anyone who so requests; that is to say, that if a written application is made by a deportee through the International Red Cross or otherwise, according to which the committee is asked to hear his appeal, then the applicant should be allowed to appear personally before the committee to enable it to obtain an impression of his oral explanations and to examine his case and the justification for performing the expulsion order in respect of him. Pending the appearance before the committee, he should also be allowed a personal meeting with counsel who asks to represent the deportee before the committee.

The committee may hold its hearings at any place *where the IDF can guarantee* that they can properly take place.

For the purpose of all the aforegoing, the Respondents must make practical arrangements, details of which should be decided by the authorities charged therewith. The commencement of such arrangements was described in the States' notice submitted to us on 25th January 1993, although they should be supplemented along the lines stated here.

We have also taken note of the Attorney-General's notice of 25th January 1993, according to which further consideration of the security information concerning every deportee who files an appeal will be given within a reasonable time at the initiative of the Respondents.

16. We shall conclude by referring to what was said by Judge Olshan (as he then was) in the Karbutli case [7], at p. 15:

> "Whilst it is correct that the security of the State which necessitates a person's detention is no less important than the need to safeguard the citizen's right, where both objectives can be achieved together, neither one nor the other should be ignored".

17. In conclusion, we have unanimously reached the following conclusions:

(1) We find that as regards the personal expulsion orders, the absence of the right of prior hearing does not invalidate them. We order that the right of hearing should now be given as detailed above.

(2) The order as to temporary deportation is void for the reason detailed in paragraphs 12(d) and 13 above. This conclusion does not invalidate the individual deportation orders.

(3) The arguments against validity of the personal deportation orders, issued by virtue of Regulation 112 of the Defence (Emergency) Regulations, 1945 should, as aforesaid, be submitted to the consultative committee.

Subject as aforesaid, we dismiss the petitions and discharge the orders nisi.

Given this 6th day of Shevat 5753 (28th January 1993).