HCJ 7/48

Ahmed Shawqi al-Karbutli v. Minister of Defense and two others

At the Supreme Court, sitting as the High Court of Justice

[November 11, 1948, December 1, 1948, December 7, 1948, December 16, 1948, January 3, 1949]

Before the president (Smoira) and justices Olshan, Cheshin

Defense Regulations (Emergency), 1945 [Supplement B 1442, p. 858], Regulations 111, 111 (1) (as amended in 1946 [Supplement B 1470, p. 122]), 111 (4), 102 to 107 – Regulations of the High Court of Justice, 1937 [Supplement 678, p. 259], Regulation 6 – Palestine Mandate,• articles 1, 9, 2 – King's Order in Council (Defense), 1937 [Supplement B 675, p. 228], Article 12 – King's Order in Council, 1922 [L.L.I., Vol. C, p. 2736], articles 17 (as replaced in 1923 [L.L.I., Vol. C, p. 2762], 88, 89 – Defense Regulations, 1939 [Supplement B 914, p. 548] – proclamation of the Provisional Council of State [Official Gazette, 1, p. 3] – Law and Administration Ordinance, 1948 [Supplement A 2, p. 1], articles 11, 13 – Emergency Regulations, 1936 [Supplement B 584, p. 223] – Declaration of the Establishment of the State of Israel [Official Gazette 1, p. 1].

Habeas corpus – detention of a person under Regulation 111 (1) of the Defense Regulations (Emergency), 1945 – failure to form an advisory committee as required in Regulation 111 (4) of the aforementioned regulations.

It is possible to deviate from the rule requiring the respondent himself to make a declaration under oath, when an official subordinate to him, and not [the Respondent] himself, dealt with the matter under discussion – in such a case, the official must note in his declaration the fact that he dealt with the matter, or must explain the circumstances showing us that he is the person who can respond to the facts in the petition – when the authorized authority is accused of a malicious or arbitrary act, he is not entitled to avoid questioning in the court by assigning an emissary in his stead – Article 12 of the King's Order in Council does not prohibit examining the lawfulness of a regulation under which an order was issued, or examining whether a prerequisite required for exercising the regulation was fulfilled – the Mandate was obligatory upon the Mandatory government by force of international law and by force of the King's Order in Council – it is the court's duty to examine whether a particular order or regulation issued as an Order in Council is invalid because it contradicts the Mandate's directives – we cannot say that every law that was not explicitly revoked is considered by the Israeli legislative authority as being enacted in accordance with the Mandate and not inherently invalid – In Article 11 of the Law and Administration Ordinance, the Israeli legislature did not intend to grant legitimacy to invalid laws that contradict the Mandate's directives – the Supreme Court can level criticism against previous opinions

• See: *Legislation of Palestine*, 1918-1925, N. Bentwich, Vol. 2, p. 519.

it expressed – there is no directive in articles 2 or 9 of the Mandate's articles that prohibits the enactment of emergency regulations that are naturally liable to restrict an individual's liberty – a law does not become invalid only because the authorities used it for an unlawful purpose – the aforementioned Regulation 111 (1) does not violate the essence of the Mandate – the declaration of the establishment of the state has the status of a law for the purpose of determining the fact of the legal establishment of the state, but it does not have the status of the state's constitution – the formation of the advisory committee is a prerequisite for exercising Regulation 111 (1).

Israeli rulings cited:

[1] HCJ 1/48; 2/48 – *Dr. Herzl Kook v. Defense Minister of the Provisional Government of the State of Israel et al.; Tzipora Vinarsky v. Defense Minister et al.*; "*Hamishpat*," Vol. C, 1948, p. 307, 319, 317, 321, 315.

[2] HCJ 5/48 – *Yuval Leon et al. v. Acting Commissioner of the Tel Aviv Urban District (Yehoshua Gubernik)*: "Rulings" [*Piskei Din*], Vol. A, 1948, p. 58; "Decisions" [*Psakim*], Vol. A 1948/49, p. 14.

[3] HCJ 16/48 – *Akiva Baron v. Ministers of the Provisional Government of Israel*; "Decisions," Vol. B, 1949/50, p. 405.

[4] HCJ 10/48 – *Zvi Ziv v. Commissioner of the Tel Aviv Urban District (Yehoshua Gubernik) et al.*: "Rulings," Vol. A, 1948, p. 85; "Decisions," Vol. A, 1948/49, p. 33.

Palestine cases cited:

[5] H.C. 62/38 – *Tawfik Abdel Rahman Abu Ghaidah and an. v. The Attorney General and ors.*: (1938), P.L.R. Vol. 5, p. 453; (1938), S.C.J. Vol. 2. P. 92; (1938), Ct. L.R. Vol. 4, p.133.

[6] Privy Council Appeal 98/25 – *Jerusalem-Jaffa District Governor and m. v. Suleiman Murra and ors*.; (1920-33), P.L.R. Vol. 1, p. 71.

[7] H.C. 7/42 – *Hubert Olles v. Superintendent of Detention Camp, Mazra'a, near Acre*; (1942), P.L.R. Vol. 9, p. 126, 138; (1942) S.C.J. Vol. 1, p. 51; (1942), Ct. L.R. Vol. 11, p. 86.

[8] H.C. 27-28/40 – *Afif Canan and 6 ors. v. Chief Execution Officer, Nablus and ors*.; (1940), P.L.R. Vol. 7, p. 213; (1940), S.C.J. Vol. 1, p. 116; (1942), Ct. L.R. Vol. 7, p. 150.

Opposition to *order nisi* for habeas corpus, from November 1, 1948, addressed to the respondents and demanding that they appear and explain why they will not bring Haj Ahmad Abu Laban before this court in order to release him. *The order nisi was made final*.

Binyamini and Lorch – on behalf of the petitioner:

Haim H. Cohn – on behalf of Respondent No. 2 (the IDF chief of staff)

Justice Olshan: On November 1, 1948, this court issued an *order nisi* on a petition of habeas corpus addressed to the respondents, requiring them to appear and explain why they will not bring Haj Ahmed Abu Laban, subsequently referred to as the detainee, before this court in order to release him.

On behalf of the second Respondent only, an affirmed affidavit was submitted, given by Captain Helmer; and on the day set for hearing the case, attorney Y. Binyamini, on behalf of the Petitioner, and Mr. Haim Cohn and his assistant Mr. Hadaya, the deputy district attorney, on behalf of the Respondents, appeared before us and presented their arguments.

2. The Petitioner is Ahmed Shawqi al-Karbutli, the detainee's friend. From the words of the Petitioner's sworn statement, we learn that in late July 1948 the authorities imposed house arrest on the detainee, while at his home in Jaffa. The Petitioner does not know whether the order was issued by the military or civilian authorities. On August 16, 1948, one of the officers of the civilian police in Jaffa submitted, in the name of the general prosecutor, a request to the Magistrate's Court judge to extend the remand of the detainee. That same day, an order to extend the remand for ten days was issued and the detainee was taken from his home and jailed in the central prison in Jaffa. On August 26, 1948, the magistrate judge heard the prisoner's request, through his representative, to be released on bail and the police's request to extend the period of detention. The magistrate judge decided to extend the remand for an additional eight days and recommended to the authorized authorities that they allow the attorney to meet with the detainee in the prison. Before the eight days were over, he was released from his detention without knowing the reason for his arrest.

3. On September 12, he was arrested again and when the attorney, his representative, contacted the warden of the prison in Jaffa on the 13th in order to receive approval to see the detainee, he was told that the detainee was in the military part of the prison and that he had to contact the military police officer on this matter. Upon the advice of the deputy warden of the military prison, the attorney contacted the offices of the military governor in Jaffa, and the deputy military governor gave him a written order permitting him to meet with the detainee. When he handed the order to the warden of the military prison in Jaffa in the presence of his deputy, the warden informed him that the detainee was not "with him" and added that an order from the military governor is not binding upon him. Since then, the attorney has sent several letters to the minister of police (who responded that the civilian police is not handling the detainee's case), the army's legal service and the military governor. But all this was fruitless; the attorney did not learn the reason for the detainee's arrest and he was denied the possibility of meeting with the detainee, and that is the reason, apparently, that the petition for "habeas corpus" was submitted to this court in the name of the detainee's friend and not in the name of the detainee himself.

4. All of the facts above were undisputed in the affidavit submitted as a response to the petition. Granted, these things do not directly pertain to the heart of the matter before us. We note them in the hope that they will come to the attention of the relevant authorities. In time of warfare, the authorities sometimes find it beneficial in certain cases not to disclose the reason for a person's arrest, or make public the location of his detention. However, in the absence of a presumption that sheds light on the facts cited by the Petitioner's representative, the unavoidable impression is that there are officials who do not comprehend that an attorney who defends the interests of his client is also serving the state by doing so, by the fact that he is helping to protect the rights of the citizen, and those who are so authorized must grant him every possible assistance and not give him the runaround.

5. As noted, a sworn affidavit by Captain Helmer, the second Respondent's adjutant, was submitted on behalf of the second Respondent. The affidavit is short, and attached to it is a copy of the arrest warrant issued under Regulation 111 of the Defense Regulations (Emergency), 1945. In it [the affidavit], the declarant tells that on September 9, 1948, the second Respondent signed in his presence a warrant for the arrest of the detainee. And that in the letter dated October 16, 1948, the head of the army's legal service informed the Petitioner's representative that the detainee was arrested under the power of the Defense Regulations. There is no explanation as to why this notification was postponed for over a month. And whether the arrest warrant was delivered to the detainee himself is also unknown. At the beginning of the discussion, the Petitioner's representative objected to accepting this affidavit, arguing that under Regulation 6 of the Regulations of the High Court of Justice, 1937, the *Respondent* must submit a response, and here the affidavit was given by someone else. In response, the State Attorney argued, citing English rulings, that in the case of a "habeas corpus" petition, the Respondent fulfills his obligation if he submits to the court the document under which the arrest was conducted – like in the case before us, an order in accordance with Regulation 111. The State Attorney goes on to argue that because Captain Helmer declared that he saw the second Respondent sign the order, there is no specific need for the second Respondent to make the affidavit. At the time, we decided to overrule the objection of the Petitioner's representative and to accept the affidavit. However, we wish to emphasize that it should not be concluded from this that we accepted the State Attorney's argument in principle. The rule is that each Respondent must himself give an affidavit in order not to deny the petitioner the right to question him in court about his action that harmed the Petitioner and comprises the subject of his complaint. It is possible to deviate from this rule only in the event that the Respondent himself did not handle the matter but an official subordinate to him [handled it], or that the official subordinate to the Respondent knows all of the facts and circumstances because he took part in the action, the subject of the complaint. In those cases, the official is allowed to give the affidavit instead of the Respondent. But then, the official must include in his affidavit the fact that he was the one who handled the matter under discussion, or describe the circumstances that explain why he is the person who can respond to the facts in

the petition. The use of this principle is conditional, of course, on the circumstances of each specific case. If an authorized authority, for example, issues an arrest warrant arbitrarily and maliciously, the injured party has the right to question, within the permitted bounds, the authorized authority in court in regard to the malice and arbitrariness he alleges, and [the authority] is not entitled to evade such questioning by sending an emissary instead. The petition before us, on the other hand, does not ascribe a malicious or arbitrary action to any of the Respondents. It only states the fact that the detainee was jailed without knowing the reason why. The Respondent only had to show that the arrest was conducted legally. Presentation of the arrest warrant issued under Regulation 111 and which, according to Captain Helmer's testimony was signed by the authorized authority in his presence – is sufficient for this. Therefore, the affidavit submitted in the name of the second Respondent should not be invalidated.

6. The Petitioner's representative argues that the arrest warrant issued under the aforementioned Regulation 111 (1) has no legal validity, and offers three reasons:

First – Regulation 111 of the Defense Regulations (Emergency), 1945, was essentially invalid because the legislature went beyond the framework presented in articles 2 and 9 of the Palestine Mandate;

Secondly – Regulation 111 (1) is invalid because it stands in contradiction to the principle underlying the Declaration of the Establishment of the State of Israel;

Thirdly – On the date the arrest warrant was issued, there was no advisory committee as mandated in subsection (4) of Regulation 111 and, consequently, the entire Regulation 111 cannot be exercised in its entirety.

7. The State Attorney tried to prevent the Petitioner's representative from challenging the legality of Regulation 111 by citing Article 12 of the King's Order in Council of 1937, which stipulates that any document made under the King's Order or under regulations enacted by power of [the King's Order], are presumed to be legal; since the regulations in question were enacted under the King's Order in Council, 1937, then they are firm and valid. To support this argument, the State Attorney cited the ruling handed down in *HCJ 62/38 [5]*, and also claimed that in the ruling issued in *HCJ 1/48 (Tel Aviv), "Hamishpat," Vol. C, 1948*, [p. 307, [1] and in *HCJ 5/48*, [2] – it was already determined that the Defense Regulations (Emergency), 1945, are valid.

8. In regard to Article 12 of the King's Order in Council, 1937, we do not accept the State Attorney's argument, because the directive in this article is based on the assumption that the King's Order in Council, 1937 and the regulations enacted under its power are legal. According to Article 12, for example, we cannot invalidate an arrest warrant because of flaws discovered in it. But this does not mean that we cannot examine the lawfulness of the very regulation under which the warrant was issued, or examine whether a prerequisite for exercising the regulation was fulfilled, as mandated by the law.

9. We will now examine the arguments of the Petitioner's representative, one by one.

To support his first argument, the Petitioner's representative cites, first of all, *HCJ 5/48* [2], where this Court indicated an inclination to contend that a particular order is invalid if it stands in contradiction to the Mandate's directives. Perhaps it is somewhat peculiar that we would still be pondering the question, after the establishment of the state, of whether the Mandate was then part of the law of the land, or only "a document" that included good yet non-binding intentions. However, when we note the fact that under the Law and Administration Ordinance all of the laws from the Mandate period remain in effect, then the question of whether one of these laws was valid is not merely an academic matter – rather, it is a very practical one.

And here it seem to us that it should be stated without a doubt that the Mandate, as part of international law, was binding upon the powerful country that was assigned Mandatory rule in the land [Palestine] – moreover, by virtue of this Mandate itself, this powerful country received the reins of government in the land and held it – and that every action that it took or law that it enacted in the land in violation of the Mandate's directives also entailed the violation of both international law and the law of this land.

The King's Order in Council 1922/23 (Article 17) explicitly prohibited the lawmakers in Eretz Yisrael [Land of Israel] from issuing an order that contradicts the Mandate's directives. In this way, the Mandate was explicitly inserted into the law of Eretz Yisrael and the courts were entitled, and even obligated, to examine every case in which the question arose of *whether a particular order issued under the King's Order in Council 1922/23* was invalid because it contradicted the directives of the Mandate. The courts, as we know, did not adopt this method, for some reason, though in the well-known *Artas Springs* case,• (6), the court examined the validity of an order in light of the Mandate.

It may be argued that Regulation 111 is one of the regulations enacted under the King's Order in Council, 1937, and that this King's Order did not explicitly limit the power of the Commissioner to enact regulations in the framework of the Mandate's directives. But this argument would also lack grounds. In Article 89 of the King's Order of 1922, the king reserves the power to issue laws for Eretz Yisrael and there is again emphasis on the words "in accordance with the Mandate." Article 88 does reserve the king's right to revoke this King's Order or alter its content. But this right was never exercised during the Mandate to revoke the limitation in Article 89. That is, even the King's Order in Council (Defense), 1937, under which the regulations were enacted, should be read subject to Article 89 of the King's Order in Council of 1922/23 and the court must check whether the regulations do not violate the Mandate's directives.

• See precedent [6], which deals with expropriation under the Artas Springs Ordinance (Official Gazette No. 13, of May 25, 1925, p. 212).

10. And in regard to the first argument of the Petitioner's representative:

Regulation 111 (1) empowers the military commander to arrest any person, if he deems necessary, without requiring him to reveal the reasons, or the circumstances that led him to this conclusion. The citizen, the Petitioner's representative claims, is therefore denied any guarantee of his liberty, and is thus deprived of his most elementary right. Consequently, he adds, Regulation 111 (1) contradicts the directives of articles 2 and 9 of the Mandate, according to which the Mandatory power is responsible for creating guarantees of the citizen's civil and religious rights and instituting a legal system that ensures his rights. And therefore, it is completely invalid.

HCJ 5/48, [2], generally deals with the Emergency Regulations, 1939. And Regulation 111 (1) of 1945 was not examined in light of the Mandate's articles as in this case. In HCJ 1/48 (Tel Aviv), [1], no direct answer was given as to whether Regulation 111 (1) stands in contradiction to the directives of the aforementioned articles of the Mandate. The honorable *Justice Kantorovich* ("Hamishpat," booklet 10, p. 319 [1]) cites the proclamation issued following the Declaration of the Establishment of the State of Israel stating that "as long as laws are not enacted by the Provisional Council of State or in accordance with it, the law that existed in the land on May 14, 1948 will remain in effect"; he determines that Regulation 111 was part of what was then the law of the land and, in any case, was endowed with renewed validity by this proclamation and by Article 11 of the Law and Administration Ordinance. However, the petitioner's representative argues that Regulation 111 (1) was invalid from the outset, but the courts during the period of the Mandatory government failed to admit this, because they ignored the binding power of the Mandate. This argument should not be disregarded. The term "law" in the proclamation and in Article 11 of the Law and Administration Ordinance means – the laws of all types that were in effect, and a law that was not in effect cannot be said to exist. If Regulation 111 (1) was indeed invalid from the outset, one cannot finding anything in the wording of the proclamation or of the aforementioned Article 11 to justify the assumption that the Israeli legislative authority intended to accord the power of law to something that was not a law.

The honorable *Justice Dr. Bardaki* also does not provide a direct response to the aforementioned question. On p. 317, [1], he only concludes from the explicit revocation of the White Paper laws of 1939 vis-à-vis Jewish immigration and land (in Article 13 of the Law and Administration Ordinance) that the Defense Regulations (Emergency), 1945, were not revoked and remained in force, since they were not explicitly revoked.

However, the laws of the White Paper were in clear contradiction to the Mandate's directives and were invalid from the outset; nonetheless, the legislative authority found benefit in explicitly revoking them. This suggests that the legislative authority explicitly revoked only those laws that were so harmful to the public that it was impossible to wait until an authorized court declared them to be lacking legal validity. Thus, one cannot conclude that any law that was not explicitly revoked is considered

by the Israeli legislative authority to have been enacted in accordance with the Mandate and is not inherently invalid. These remarks are also directed at what the honorable *Judge Kantorovich* concluded from the explicit repeal of regulations 102 to 107 of the Defense Regulations (Emergency), 1945.

There is also no reason to think that the legislative authority intended in Article 11 of the Law and Administration Ordinance to grant legitimacy to laws that were invalid because they were contrary to the Mandate's directives; if such a thing was not stated explicitly, we cannot learn this by implication.

In regard to this court's rulings from the Mandate period, cited in *HCJ 1/48 (Tel Aviv)*, [1], which determined that Regulation 111 was valid because they did not regard the Mandate as binding law in general – it was already stated in *HCJ 7/42*, Palestine Law Reports, Vol. 9, p. 138, [7], that this court can level criticism against previous opinions it has expressed. See also *HCJ 27/40; 28/40,* [8]. It was noted, however, that this is not a desirable path and should be pursued only when it is impossible to do otherwise. The case before us is apt for exercising this power.

Thus, we must respond to the argument of the Petitioner's representative without relying on previous rulings.

The first article of the Mandate gave the Mandatory power full authority to legislate and administer in general (limited only by the terms of the Mandate). The second article of the Mandate mentions civil and religious rights, but it does not explain the nature of those rights. It does not provide an answer to the question: To what extent is it permissible to enact laws for the benefit of the entire public when at the same time they violate individual rights. This article was not intended to serve as a sort of article in a constitution that defines the individual's fundamental rights. The emphasis is on the last words in the article "irrespective of race and religion," and they determine the rule that civil and religious rights must be ensured irrespective of religion and race. (This is also the interpretation ascribed to Article 2 of the Mandate in the appeal of the *Artas Springs* case, [6]).

11. Neither does Article 9 of the Mandate help the Petitioner's representative. This article speaks only about the system of courts that should be formed in such a way as to ensure the rights of residents – that is, the rights they have. The courts do not create rights – that is the purview of the legislative branch. The courts only focus on protecting rights and honoring existing rights. In this article, there is no explanation or definition of the citizen's rights. Similarly, there is no directive in Article 2 or Article 9 prohibiting the enactment of emergency regulations that might, by nature, restrict individual liberty, as the court stated in *HCJ 16/48*, [3].

In regard to Regulation 111 (1) – it was enacted in 1945 only as a replacement for a similar regulation from 1936 that was designed for an emergency situation and whose very enactment, one could say, was a guarantee of individual freedom, to the extent that its objective was to ensure public wellbeing.

The same regulation during the years 1936-1939 could have served the needs of the emergency situation created by various entities who tried to force the authorities and the Yishuv to betray and renounce the Mandate's objective; then, certainly, there would be no contradiction to the Mandate. Upon publication of the notorious White Paper, which openly renounced the Mandate, an emergency situation of a different type emerged, which gave the authorities the opportunity to exercise the aforementioned regulation as an instrument of repression of every protest and revolt against the violation of the Mandatory government's commitments; therefore, the violation of the Mandate did not lie in the enactment of this regulation but rather in its malicious use for the purpose of achieving an illegal objective. And we already stated in *HCJ 5/48*, [2], that the malicious use of a law does not vitiate its validity. A law's validity does not depend on the circumstances in which it is used; that is, if the law itself is valid, it is not invalidated only because the authorities have begun to use it for an illegal objective. The law that permits a police officer to arrest a person who is committing a crime does not lose its validity only because police officers arrest innocent people. Our conclusion, therefore, is that Regulation 111 (1) does not violate the principles of the Mandate, and the first argument of the Petitioner's representative is rejected.

12. The Petitioner's representative bases his second argument on the "Declaration of the Establishment of the State of Israel" and he emphasizes the words in this declaration, that "The State of Israel … will be based on freedom, justice and peace as envisaged by the prophets of Israel." These words, the Petitioner's representative argues, promise the state's citizens individual liberty, and since Regulation 111 (1) entails denial of the individual's liberty, without any guarantee, it is invalid and should be seen as null and void.

And the court already responded to this argument in *HCJ 10/48*, [4], where it stated:

> "We cannot accept the enticing argument of the petitioner's representative. The declaration, as Mr. Shaivitz, the deputy state attorney argued, only intended to establish the fact of the founding of the state and its formation for the purpose of recognition by international law. It expresses the nation's vision and its basic credo, but does not constitute a constitutional law that rules in practice on maintaining or revoking various ordinances and laws."

The Petitioner's representative challenges the correctness of this opinion because in his view it is based on the conception that the declaration is merely a political document. The court in the aforementioned ruling did not regard the declaration as purely a political document. On the contrary, it emphasized that this document has the value of law for the purpose of establishing the fact of the legal formation of the state; however, the court did not accept the argument that this document comprises the constitution that should be used to examine the legitimacy of laws until the Constituent Assembly adopts a basic constitution, as stipulated in the declaration. Consequently, there is also no basis for the second argument of the petitioner's representative.

13. The third argument of the petitioner's representative is that subsection (4) of Regulation 111 is closely tied to subsection (1) of the same regulation, and that if a military commander issues an arrest warrant – as in the case under discussion – it has no validity as long as the advisory committee was not formed, and even if the committee was formed afterwards. (The committee was formed after the petition was submitted to this court.)

There is no need to emphasize again the severity of Regulation 111 (1), which must be accepted as long as an emergency situation demands it, and which would be rejected as unacceptable in ordinary times because it is contrary to the basic rights of the individual, or as defined by the petitioner's representative, the natural rights of the citizen. A citizen arrested under subsection (1) is provided a little relief under subsection (4), which obligates the authorities to form "for the purpose of this regulation" a committee whose role is to examine the detainee's opposition to the arrest warrant and to offer its recommendations to the military commander.

The question is, therefore, whether the formation of the advisory committee is only a directive that stands on its own, whose non-fulfillment does not diminish the power accorded to the military commander, or whether it should be seen as an order whose fulfillment constitutes an inseparable part of the authority to arrest people under Regulation 111. In other words, shouldn't Regulation 111 be seen as mandating the formation of a special mechanism that also includes the military commander, who is empowered to arrest a person, as well as the advisory committee, whose role is to clarify any objection to the arrest and offer its recommendations, and that it should not operate until the mechanism is completely formed.

A question of this sort arises infrequently. (See Maxwell's book *On the Interpretation of Statutes*, 7th edition, chapter 12, section 3). For example, if the law discussing a known topic includes an order to do something in one of its articles, without explicitly noting the consequences of non-fulfillment of this order, we must decide in such a case whether the thing that was ordered is so vital that the law cannot be applied at all without it, or whether it is not so vital. The solution should be found, of course, in the intention of the legislative authority in each individual case.

On p. 316 of that book, for example, it is stated that in the case of granting known power to someone together with a directive pertaining to conditions, regulations or some formality that needs to be met – there would be no injustice or inconvenience in our assuming that strict fulfillment is essential for acquiring that power; and consequently, that is almost certainly the intention of the legislative authority.

14. Let's see if we can discern the intention of the legislative authority. Subsection 4 makes it clear that a detainee is *entitled* to submit opposition to an arrest warrant. And it is not important at all that this right is not worth much. On the contrary, if compared to the enormous power granted to the military commander, the detainee is granted such an insignificant right of defense, we can assume that the legislative authority intended that at least this right of the detainee should be carefully protected

and not deprived. That at least one limitation would stand before the person who is granted this power, and this [limitation] is a critical review by a public committee. This right applies from the time the arrest warrant is issued against a person under the regulation. Therefore, it is incumbent upon a military commander, when using the power granted to him, to *immediately* inform the detainee that he is under arrest by power of Regulation 111 in order to enable him, if he so desires, to immediately exercise this right. Clearly, in order for the detainee to be able to take advantage of this possibility, it is essential for the advisory committee – whose formation and composition are mandated in subsection (4) – to exist at that time. Therefore, there are grounds to believe that the legislative authority, in providing such a dangerous instrument like Regulation 111 to the authorities, intended that the formation of the committee by the authorities would be a prerequisite for their use of the regulation. And there is substance in the argument of the petitioner's representative that the words "for the purpose of this regulation," which appear at the beginning of subsection (4), mean the purpose of exercising this regulation, because otherwise they could be seen as superfluous.

The question here is not whether or not the arrest warrant is invalid. Rather, [the question is] the use of Regulation 111. Prior to the formation of the aforementioned committee, this [use] entailed an illegal action.

On September 9, prior to the appointment of the committee, the authorities did not yet possess the power to use the regulation; therefore, it was as if the arrest warrant was never issued and the detention continued without an arrest warrant because no other arrest warrant was issued after the formation of the committee.

Now that such a committee already exists, and since the military commander already has the power to use subsection (1) of Regulation 111, the matter we are dealing with here could be seen as a purely formal matter. However, this is not so.

The authorities are subject to the law, like all citizens of the state. And the rule of law is one of the strong foundations of the state. Both the public and the state would be severely harmed if the authorities used the power granted by the legislative authority, even if only temporarily, in complete disregard for the limitations the legislative authority placed on the use of this power. It is true that state security, which requires a person's arrest, is no less important than the need to protect the citizen's right. But wherever it is possible to achieve both objectives, neither of the two should be ignored.

15. We hesitated to some extent before reaching our conclusion in view of the ruling in the aforementioned *HCJ 1/48 (Tel Aviv)*, [1], which discusses subsection (4) of Regulation 111. However, after further study, we learned that it would not stand in the way of our conclusion.

The ruling was handed down by the Tel Aviv District Court, sitting as a High Court of Justice, with a majority of two judges versus one. The ruling did not describe the arguments and the things that were said here should not be seen as having also been

said there. One of the two learned judges, who expressed the majority opinion, suffices with the words:

> "However, it is self-evident that the slight protection granted under section 111 (4) does not need to be canceled" (ibid. [1], p. 321).

This reveals nothing about the Petitioner's argument and the honorable judge's opinion in response to it.

The second judge, of the majority judges, focused a bit more on the argument in saying (ibid., [1], p. 315):

> "It is indeed regrettable that there was no advisory committee – as stipulated in subsection (4) of Regulation 111, which under Article 1 thereof the detainees were arrested – and which is composed of people appointed by the High Commissioner – today the head of the Provisional Government – chaired by a person in a high legal position, in the past or present, or another high government official. One of the roles of the committee is to discuss and make recommendations regarding the petitions of prisoners of this type, who are not brought before an investigating judge.
>
> "However, on the other hand, it should be noted that the lack of such an advisory committee does not necessarily diminish the broad authority granted to the military commander under subsection (1) of this regulation. Moreover, it turns out that the chief of staff and general commander of the Israel Defense Forces took action in frank consultation with his legal advisors."

These sentences do not indicate whether the argument presented in *HCJ 1/48 (Tel Aviv)*, [1], was based on the same reasons the petitioner's representative cited in arguing before us. In addition, there is no importance in the fact that the general commander "took action in frank consultation with his legal advisors." A detainee's right under subsection (4) of Regulation 111 is that his opposition will be heard by a committee whose composition is noted in the regulation itself. And no consultation by the commander with his legal advisors, even if it is frank, can serve as a replacement for the committee's recommendations.

Therefore, and in light of all of the above, we are making the *order nisi* a final order, and we order the release of Haj Ahmed Abu Laban, unless there is legal cause to arrest him.

Total expenses – 20 lirot.

Handed down on January 3, 1949.