

**Israel:  
Legality of the Decision to Release  
Convicted Palestinians in the  
Context of Peace Negotiations**

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# Israel: Legality of the Decision to Release Convicted Palestinians in the Context of Peace Negotiations

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**SUMMARY** In accordance with the High Court of Justice decision of August 11, 2013, the Israeli government had the authority to decide on entering into political negotiations and releasing Palestinian prisoners as a gesture of good will in the framework of these negotiations. The government's authority is based on its general authority in the areas of foreign affairs and national security; government decisions in these areas do not require any explicit authorization in primary legislation, nor a full-quorum vote by the government.

The Court further determined that the rights of crime victims and their families under the Rights of Victims of an Offense Law, 5761-2001, especially regarding the opportunity to object to early release of convicted felons in writing, are not fully applicable in cases where clemency is not obtained through "a regular" criminal process but rather through a political agreement.

Having reviewed the circumstances of the case, the Court held that there was no reason to assume that government members who were assigned to select prisoners for release would not give enough thought to the danger that their release could create; nor was there any reason to conclude that the method for selection that was determined in the government decision was extremely unreasonable or defective in a way that required the Court's intervention.

## I. Introduction

On August 11, 2013, the Israeli High Court of Justice rejected a petition by Almagor, the Association of Victims of Terrorism, and by members of victims' families to void a governmental decision to release Palestinian prisoners convicted of terrorism offenses as a good-will gesture during the course of renewed peace negotiations between Israel and the Palestinians.<sup>1</sup>

The petition centered on Government Decision No. 640, which had been adopted by the Israeli government on July 28, 2013.<sup>2</sup> The decision authorized the government to convene a ministerial team that would be headed by the prime minister and include the minister of defense, the minister of justice, the minister of public security, and the minister of science, technology and space.

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<sup>1</sup> H.C.J. 5413/13 Almagor v. Government of Israel (decision rendered on Aug. 11, 2013), <http://elyon1.court.gov.il/files/13/130/054/s04/13054130.s04.pdf> (in Hebrew).

<sup>2</sup> Approval of Opening of Political Negotiations Between Israel and the Palestinians in Accordance with the Prime Minister's Announcement Regarding the Negotiations and Authorization of the Ministerial Team for the Release of Palestinian Prisoners in the Course of the Negotiations, Government Decision No. 640 of July 28, 2013, <http://www.pmo.gov.il/Secretary/GovDecisions/2013/Pages/des640.aspx> (in Hebrew).

In accordance with the decision, the team would “resort to any necessary means for the release of 104 Palestinian prisoners [during the course of] negotiations between Israel and the Palestinians.”<sup>3</sup> The decision authorized the team to determine the conditions, timing, and criteria for selecting the prisoners to be released, but required the names of those selected to be publically published.<sup>4</sup>

Based on the authority provided, the team has reportedly determined that prisoners would be released in four segments with twenty-six prisoners in each.<sup>5</sup> The first group of prisoners selected by the team was released on August 14, 2013, and included Palestinian prisoners who had been convicted of murder<sup>6</sup> and, with the exception of one prisoner, who were jailed prior to 1994, the year following the signing of the Declaration of Principles on Interim Self-Government Arrangements (the Oslo Accords) on September 13, 1993.<sup>7</sup>

## II. Victims’ Right to Object to Early Release of Convicted Offenders

Basic Law: The President of the State authorizes the president “to pardon offenders and to lighten penalties by the reduction or commutation thereof.”<sup>8</sup>

Under the Rights of Victims of an Offense Law, 5761-2001,<sup>9</sup> however, victims of an offense who have so requested must be informed by the Department of Clemencies in the Ministry of Justice (DCMJ) of any requests for clemency or commutation of sentence that have been submitted to the president by persons convicted of offenses that either harmed them directly or caused the death of their spouse, parent or spouse’s parent, child, or sibling (hereafter family members).<sup>10</sup>

The Rights of Victims of an Offense Law further recognizes the right of victims and family members to express their position in writing to the DCMJ prior to the adoption of any decision

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<sup>3</sup> *Id.* ¶ a (translated by author, R.L.).

<sup>4</sup> *Id.*

<sup>5</sup> H.C.J. 5413/13 Almagor v. Government of Israel, para. 1.

<sup>6</sup> For the list of the names of the prisoners released and the names of their victims, see Attila Somfalvi, *Ministers Okay List of 26 Palestinian Prisoners to Be Released*, YNETNEWS.COM (Aug. 11, 2013), <http://www.ynetnews.com/articles/0.7340.L-4416507.00.html>; see also Ben Harris, *Who Israel Released*, JTA (Aug. 14, 2013), [http://www.jta.org/2013/08/14/news-opinion/israel-middle-east/who-israel-released?utm\\_source=Newsletter+subscribers&utm\\_campaign=6a8d8ef38d-JTA\\_Daily\\_Briefing\\_6\\_18\\_2013&utm\\_medium=email&utm\\_term=0\\_2dce5bc6f8-6a8d8ef38d-25404181](http://www.jta.org/2013/08/14/news-opinion/israel-middle-east/who-israel-released?utm_source=Newsletter+subscribers&utm_campaign=6a8d8ef38d-JTA_Daily_Briefing_6_18_2013&utm_medium=email&utm_term=0_2dce5bc6f8-6a8d8ef38d-25404181).

<sup>7</sup> Declaration of Principles on Interim Self-Government Arrangements (Sept. 13, 1993), [http://www.knesset.gov.il/process/docs/oslo\\_eng.htm](http://www.knesset.gov.il/process/docs/oslo_eng.htm); see also Israel-Palestine Liberation Organization Agreement: 1993, available at [http://avalon.law.yale.edu/20th\\_century/isrplo.asp](http://avalon.law.yale.edu/20th_century/isrplo.asp).

<sup>8</sup> Basic Law: The President of the State § 11(b), [http://knesset.gov.il/laws/special/eng/basic12\\_eng.htm](http://knesset.gov.il/laws/special/eng/basic12_eng.htm); for information on basic laws, see [http://knesset.gov.il/description/eng/eng\\_mimshal\\_yesod.htm](http://knesset.gov.il/description/eng/eng_mimshal_yesod.htm).

<sup>9</sup> Rights of Victims of an Offense Law, 5761-2001, SEFER HAHUKIM [SH] (official gazette) No. 1782, p. 183, as amended (in Hebrew), up-to-date text available at the Nevo Legal Database, <http://www.nevo.co.il> (by subscription).

<sup>10</sup> *Id.* § 10.

on clemency by the president of the state in accordance with procedures that are determined by the minister of justice and the minister of public security.<sup>11</sup> The procedures for filing requests for information and for expression of objections to clemency or commutation of sentences were prescribed in the Victims of an Offense Regulations, 5772-2002.<sup>12</sup>

### III. High Court Review of the Legality of Government Decision No. 640

The Almagor Terror Victims Organization<sup>13</sup> joined with bereaved families that had lost their loved ones in terrorist attacks in a petition to block the release of Palestinian prisoners as authorized under Government Decision No. 640. The petitioners requested that the government refrain from recommending the prisoners' release to the president of the state.

The petitioners challenged first, the procedures that were followed in the course of adopting Government Decision No. 640, and second, the reasonableness of the decision itself.

#### A. Alleged Procedural Defects Related to the Adoption of Government Decision No. 640

The petitioners argued that a decision to release terrorists who took the lives of Israeli citizens cannot be made by a limited ministerial team such as the one approved under Government Decision No. 640.<sup>14</sup> A decision of this kind, they argued, might only be adopted by the government based on a specifically expressed authority prescribed by law; and in the absence of such, by a decision of all members of the government.<sup>15</sup>

The petitioners also asserted that the victims and members of their families had not been given the opportunity to express their objection to the early release in writing, in violation of their rights under the Rights of Victims of an Offense Law, 5761-2001.<sup>16</sup>

In rejecting the petitioners' claims the respondents stated that the decision to authorize the ministerial team had been adopted following a lengthy and detailed hearing in the government plenum, a hearing in which all the data relating to the release of the prisoners was disclosed and in which the basic principles for selection were determined. They further noted that the appointment of a limited number of high-level ministers for the team served the interest of preserving the secrecy of the deliberations and of reaching "decisions in an immediate and dynamic fashion."<sup>17</sup>

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<sup>11</sup> *Id.* § 20.

<sup>12</sup> Victims of an Offense Regulations, 5772-2002, § 16, KOVETZ HATAKANOT [SUBSIDIARY LEGISLATION] 5772 No. 6196, p. 1327, *as amended* (in Hebrew), available at <http://www.http://nevo.co.il> (by subscription).

<sup>13</sup> For additional information, see *Almagor—The Victims' Voice*, ALMAGOR TERROR VICTIMS ORGANIZATION, [http://al-magor.com/en/?page\\_id=11](http://al-magor.com/en/?page_id=11) (last visited Aug. 19, 2013).

<sup>14</sup> H.C.J. 5413/13 Almagor v. Government of Israel, para. 4 (decision rendered Aug. 11, 2013), <http://elyon1.court.gov.il/files/13/130/054/s04/13054130.s04.pdf> (in Hebrew).

<sup>15</sup> *Id.*

<sup>16</sup> Rights of Victims of an Offense Law, 5761-2001, SH No. 1782, p. 183, *as amended* (in Hebrew), up-to-date text available at <http://www.nevo.co.il> (by subscription).

<sup>17</sup> H.C.J. 5413/13 Almagor v. Government of Israel, para. 5.

In response to the petitioners' claims for a right to object to the release in writing, in accordance with the requirements under the Rights of Victims of an Offense Law, the respondents asserted that this Law did not apply to the release of prisoners that takes place in the framework of political negotiations, nor does it apply to prisoners that were convicted in military courts "in the area [outside of Israeli jurisdiction]."<sup>18</sup>

Rejecting the petitioners' claims, Court President Asher Grunis, with Justice Elyakim Rubinstein and Zvi Zilbertal consenting, held that the government was authorized to adopt a decision on entering into political negotiations and on the release of prisoners, and that there was no need for an explicit authorization to this effect in primary legislation. This conclusion, according to Grunis, was based on two earlier decisions by the High Court.<sup>19</sup>

Additionally, Grunis held that, unlike a declaration of war, for which a decision of the full government is mandated by Basic Law: The Government,<sup>20</sup> a decision to release prisoners or to enter into political negotiations does not require a full quorum under any law.<sup>21</sup>

Grunis also rejected the petitioners' claim that their rights under the Rights of Victims of an Offense Law, 5761-2001 had been violated because they had not been afforded the opportunity to express their objections in writing. He reiterated the previously established principle that rights under this Law are not fully applicable to cases where clemency is not obtained through "a regular" criminal process but rather through a political agreement.<sup>22</sup>

Considering the tight time frame applicable under the circumstances, and the state's willingness to follow the established practice of allowing victims to express objections within forty-eight hours prior to release of prisoners, Grunis refused to require the state to permit victims to object in writing under the procedures established by the Law. He also concluded that there was no need to extend the period available for objections beyond the forty-eight hours period offered by the state.<sup>23</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* para. 6, referring to H.C.J. 1539/05 & 5272/05 Institute for Research of Terrorism and Assistance for Its Victims v. the Prime Minister, <http://elyon1.court.gov.il/files/05/390/015/A02/05015390.a02.pdf> & <http://elyon1.court.gov.il/files/05/720/052/G04/05052720.g04.pdf>, respectively (in Hebrew).

<sup>20</sup> Basic Law: The Government (2001) § 40(a).

<sup>21</sup> H.C.J. 5413/13 Almagor v. Government of Israel, para. 6.

<sup>22</sup> *Id.*, para 7 (referring to H.C.J. 7523/11 Almagor – Organization of Victims of Terrorism v. the Prime Minister, <http://elyon1.court.gov.il/files/11/230/075/n05/11075230.n05.pdf>) (in Hebrew). For information on this decision, see Ruth Levush, *Prisoner Swap Deals Under Israeli Law*, IN CUSTODIA LEGIS (Nov. 16, 2011), <http://blogs.loc.gov/law/2011/11/prisoners-swap-deals-under-israeli-lawwhats-the-worth-of-one-life-prisoner-swap-deals-under-israeli-law/>.

<sup>23</sup> H.C.J. 5413/13 Almagor v. Government of Israel, para 7.

## **B. The Reasonableness of the Government's Decision**

The petitioners alleged that a decision to release terrorists who had killed Israeli citizens, especially in circumstances that did not involve a prisoner-swap deal, but rather as a gesture of good will made in the framework of political negotiations was unreasonable and did not match the policies of previous Israeli governments on this issue.<sup>24</sup>

Rejecting this claim, Justice Grunis determined that decisions regarding the release of prisoners, especially decisions adopted in the course of political negotiations, are clearly within the authority and the discretion of the government based on its responsibility to further the state's foreign relations and ensure public security.<sup>25</sup> Grunis reiterated that the scope of judicial review over decisions of the kind related to this petition was very limited. Having reviewed the facts, he determined that the circumstances in this case were no different from those presented in connection with other petitions against prisoners' early release that had been rejected by the High Court.<sup>26</sup>

Considering the state's assertion that the prisoners' release in this case would be conducted in four segments over a certain period of time, and that the ministerial team would be provided with all necessary information, including a security evaluation of each of the selected prisoners before his or her release, Grunis decided that

there is no reason to assume that government members, who are responsible for the security of citizens of the state, have not given thought to the danger that can be created by the release of the prisoners, or sufficient thought about this consideration. . . . Also, and as was noted, at this time the issue of the release of Palestinian prisoners is being discussed, and [the issue] of the release of prisoners of Israeli nationality has not yet been determined.

In light of the above, I cannot accept the claim that the decision to release the prisoners in the method that was determined in the government decision was affected by an extreme lack of reasonableness, or that it suffered from another defect that requires our intervention.<sup>27</sup>

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<sup>24</sup> *Id.* para 8.

<sup>25</sup> *Id.* para 10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (translated by author, R.L.).