

Translation from the original Hebrew by Adalah

**Summary of the Israeli Supreme Court Decision in the Nabaheen case
Translation of Court released summary**

Civil Appeal 993/19 *Anonymous [Nabaheen] v. Israeli Defense Ministry*

Date of Decision: 5 July 2022

Justices of the Panel: Vice President (acting) N. Handel, Justice N. Solberg and Justice E. Grosskopf.

This ruling concerns the question of the constitutionality of the amendment [to the Civil Torts Law] that exempts the state [of Israel] from liability damages, for damages caused by it to the residents of the Gaza Strip. The appeal was rejected, while it was determined that the amendment exempting the state from tortious liability towards the residents of the Gaza Strip is constitutional.

The appellant submitted a tort lawsuit to the Be'er Sheva District Court, claiming that he was injured by IDF [Israeli army] fire, while standing near the perimeter of the fence between Israel and the Gaza Strip. The state submitted a request to dismiss the lawsuit outright, in view of what is stated in Section 5b(a)(1) of the Civil Torts Law (Responsibility of the State), 1952, namely, that the state is not liable in tort for the damage caused to "a resident of a territory outside of Israel that the government has declared, by decree, as enemy territory" and given the Civil Wrongs Order (State Liability) (Declaration of Enemy Territory - Gaza Strip) - 2014, according to which the government declared the Gaza Strip as 'enemy territory'. The appellant objected to the rejection of the claim, and claimed that the amendment to the law is unconstitutional. The District Court acceded to the state's request, ordered the dismissal of the claim outright, and in the process also rejected the appellant's claim regarding the unconstitutionality of the amendment.

Justice Noam Solberg, who wrote the main judgment, rejected the appeal, and the Vice President (Ret.) Neal Handel and Justice Ofer Grosskopf joined his conclusion. First, Justice Solberg reviewed the factual background that led to the enactment of this amendment, which exempts the state from tort liability for 'war damages', and its various incarnations, and the amendments made to it [the law] over the years. Then, he considered the possibility of exercising indirect judicial-constitutional review of a Knesset [Israeli Parliament] law, by way of a civil lawsuit, and not directly, via a petition to the Supreme Court. The Court determined that despite the inclination to minimize [the exercise of] judicial review in this way, in the case at hand, there was room to allow it. Next, Justice Solberg turned to the constitutional analysis. As is customary, in the first stage, he examined whether there had indeed been a violation of a constitutional right, and in this regard, he determined that the amendment is not contrary to international law, and is even consistent with [state] practice

accepted in parallel legal systems in the world. It was also determined that even if there was such a contradiction [with international law], this does not lead to the annulment of the amendment, since primary and explicit legislation of the Knesset has the power to override the rules of international law. Along with this, the Court determined that the amendment, which prevents the residents of Gaza from filing tort claims against the state, indeed violates the fundamental rights: the right to life, bodily integrity, dignity, liberty, property and the right of access to the courts. In this context, Judge Solberg was required to ask a fundamental, preliminary question, whether the Basic Laws [Israel's constitutional laws] are applicable extraterritorially, to places declared as enemy territory. After a thorough review, and without giving a general and binding effect to this weighty issue, it was clarified that the scope of the protection of the appellant's fundamental rights, in view of his place of residence, the Gaza Strip, which was declared as enemy territory - is limited in scope. Subsequently, after it has been determined that there was a certain infringement, Justice Solberg moved on to the second stage of the constitutional review - the constitutionality tests in the limitation clause. In this regard, he determined that the amendment meets these tests, and that it serves appropriate and worthy purposes: preventing economic or moral aid to the enemy and the adaptation of tort laws to war situations.

Further on, Justice Solberg determined that the amendment also meets the proportionality tests. First, [it] fulfills the 'rational basis' test, as was also established in a previous ruling. Second, the test of 'the least harmful means' is also met. There is no suitable alternative to the set amendment, since an alternative, in the form of an individual examination of the nature of the action that caused the damage, in relation to each and every case, does not have the power to fulfill the purposes underlying the amendment to an extent equivalent to the rule [it] established. The amendment exempts the state from liability for damages in a comprehensive manner, for actions it carried out in the Gaza Strip. The Court further determined that the amendment has several exceptions, which moderate the violation of rights, and that [its] benefit outweighs its harm. Therefore, it also passes the test of 'proportionality in the narrow sense'.

Justice Ofer Grosskopf agreed with Judge Solberg's conclusion and main reasoning that the appeal should be dismissed, because it is a tort claim regarding an incident closely related to the conflict with the Gaza Strip. Justice Grosskopf insisted that the justification for the amendment's enactment that exempts [Israel] from liability towards the residents of Gaza is based on two purposes: the purpose of adapting tort law to a war situation, on the one hand, and the purpose of withholding economic and moral aid from the enemy, on the other hand. When these two purposes are met, the amendment can be justified in the proportionality tests, which exists in the Basic Law: Human Dignity and Liberty, as far as it applies. With regard to a case closely related to the conflict situation with the Gaza Strip, both of the aforementioned purposes are met, and the state's exemption from responsibility towards the residents of Gaza can be justified in the constitutional proportionality tests. However, according to Justice Grosskopf, there is a significant difficulty in ruling out the possibility of a resident of the Gaza Strip to file a tort claim against the State of Israel, when

the wrongdoing is not closely related to the conflict situation, since in this case the purpose of adapting the tort laws to the war situation is not fulfilled.

The Vice President (Retired) Neal Hendel also concurred [in the judgment] that the appeal should be dismissed, and emphasized that we are dealing with an indirect challenge on the constitutionality of the law. It is sufficient to examine the circumstances of the present case and the parties' positions to dismiss the appeal in accordance with in Section 5b(a)(1) of the Civil Tort Law (Responsibility of the State)- 1952, since the law overcomes the constitutional barrier in this case.