At the Beer Sheva District Court **AP 50482-07-1/10**
Sitting as the Court for Administrative Affairs

In the matter of:

1. _____ **Abariqah, ID No. _____**
   Israeli resident
2. _____ **Abariqah, ID No. _____**
   Minor, by his mother, petitioner 1
3. _____ **Abariqah, ID No. _____**
   Minor, by his mother, petitioner 1
4. _____ **Abariqah, ID No. _____**
   Minor, by his mother, petitioner 1
5. _____ **Abariqah, ID No. _____**
   Minor, by his mother, petitioner 1
6. _____ **Abariqah, ID No. _____**
   Minor, by his mother, petitioner 1
7. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

all represented by counsel, Adv. Elad Cahana (Lic. No. 49009) and/or Ido Bloom (Lic. No. 44538) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben Ari (Lic. No. 37566) and/or Daniel Shenhar (Lic. No. 41065) and/or Leora Bechor (Lic. No. 50217) and/or Martin Khial (Lic. No. 54807)

Of HaMoked Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger
4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **Commander of the Gaza Strip Area**
2. **Coordinator of Government Activities in the Territories**

The Respondents

Petition for *Order Nisi*

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause, why they should not allow petitioner 1 to enter Israel with her minor children, petitioners 2-6, to visit her family.

Request for Urgent Hearing

The honorable court is requested to schedule an urgent hearing in the petition. The petitioner, an Israeli resident, stays with her husband, in the Gaza Strip. The petitioner wishes to enter Israel to visit her parents, brothers and sisters in East Jerusalem, whom she has not seen for two years. However, the respondents arbitrarily refuse to allow her minor children (the youngest one of whom is three years old) to accompany her, and in so doing they thwart the visit.

As specified above, the petitioner wishes to enter Israel with her minor children during the children's summer vacation (naturally, during the school year such a visit is quite problematic). On August 10, 2010, upon the beginning of the *Ramadan*, they will have to return to the Strip to observe the holiday in their home, together with the father of the family.

Preface: Erez Barrier – a "Glass Ceiling"

1. Petitioner's family in the Gaza Strip and the family unit from which she came, her parents' home in East Jerusalem, are separated by the Erez barrier – the barrier between Israel and the Gaza Strip, which is managed by the respondents.

2. The barrier is opened daily (with the exception of extraordinary circumstances), until afternoon hours. However, despite its open appearance, in fact, it serves as a "glass ceiling": while people such as the petitioner can freely pass through it, an "invisible hand" blocks the way of petitioner's minor children and prevents them from crossing it together with her in order to enter Israel. Said invisible hand is, of course, respondents' hand.

3. It is only evident, that this concerns a material restriction of petitioner's right to enter Israel, her own country, together with her children, her own flesh and blood. This restriction is imposed by an arbitrary decision, without any security reason, which gives rise to the suspicion that extraneous considerations are involved.

The Factual Infrastructure

A. The Parties

4. Petitioner 1, (hereinafter: the **petitioner**), who was born in East Jerusalem, is a 36 years old Israeli resident. The petitioner is married to Mr. _____ Abariqah, ID No. _____, a 50 years old Palestinian, resident of the Palestinian Authority, who lives in Rafah, in the Gaza Strip.

5. The spouses have been married since August 1990. The petitioner stays in the Strip by virtue of stay permits, as will be specified below.

6. Petitioners 2-6 are the five minor children of the spouses: _____ who is fourteen years old; _____ who is ten years old; _____ who is nine years old; _____ who is five years old; _____ who is three years old.

The petitioner has two additional children who are not parties to this petition: _____ who is nineteen years old and _____ who is seventeen years old.

The children are registered with the Palestinian Population Registry.

7. Petitioner 7 (hereinafter: **HaMoked**) is a not-for-profit association located in Jerusalem, which handles, *inter alia*, Israelis who are married to Palestinians who live in the Gaza Strip.

8. Respondent 1 is the commander of the Gaza Strip area for the purpose of sections 1 and 3b of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003, according to the authorization of the Minister of the Interior with the consent of the Minister of Defense dated February 5, 2009, and he has the authority to allow the entry into Israel of Palestinians from the Gaza Strip.

9. Respondent 2 is the coordinator of the government activities in the territories. He is responsible for the implementation of the policy of the state of Israel in the West Bank and the Gaza Strip, and is in charge, *inter alia*, of the Gaza Strip district coordination and liaison office.

B. Background – "Divided Families"

10. Since the occupation of the territories in 1967, full freedom of movement was maintained for years between Israel and the Occupied Palestinian Territories (OPT). Cultural, economic and family relations were renewed and new relations were created. Hence, many Israeli residents and citizens married OPT residents (in our case, the Strip). According to traditional customs, in most cases the women moved to live in their husbands' homes, while making it a rule to return to their families, in Israel or in the OPT, as the case may be.

11. This state of affairs was also maintained after the execution of the interim agreements between Israel and the PLO in 1995, from which point the ability of Israelis to enter certain areas in the Strip was restricted. Based on the understanding that the family unit which was established by them should be protected, a procedure which may be referred to as the "**divided families procedure**" was formulated, according to which Israeli spouses of families which are divided between Israel and the Gaza Strip, are entitled to stay in the Strip subject to the receipt of renewable entry permits.

12. From the beginning of the 2000's, the possibility to maintain family life in Israel was deprived from many of these families. The Citizenship and Entry into Israel Law (Temporary Order), 5763-2003 (hereinafter: the **Temporary Order**), and Government Resolution No. 3598, limit, to a large extent, the possibility of Israelis who are married to OPT residents to live with their spouses and children in Israel. The only possibility available for many of these Israelis is to live with their families in the territories of the Palestinian Authority, the Gaza Strip in our case, or at least visit them there.

13. The fact that said possibility exists was the underlying basis of the state's argument, in a petition which concerned the lawfulness of the Temporary Order (HCJ 7052/03 **Adalah V. The Minister of the Interior**, TakSC 2006(2), 1754, hereinafter: HCJ **Adalah**). The state argued that this provision was proportionate and constitutional, in view of the fact that it did not completely prevent the right to family life, but only limited it, since it could be realized in the OPT.

As stated by the respondents in the above case:

> [The Temporary Order] does not prevent family life, does not limit the autonomy of choosing a spouse, and does not deny the right to

> family life in principle, but rather, it does not allow the realization of the right specifically in the State of Israel.
>
> (HCJ **Adalah**; The quote taken from respondents' response appears in paragraph 14 of the judgment of President Barak).

14. From this point, the arrangements which were established in the "divided families procedure" became the only available possibility for many of the married women in the Gaza Strip, to realize their family life. In the absence of the ability to live with their spouses in Israel, and in view of the numerous limitations imposed on the registration of their children, so that they would be able to live with them in Israel, many of these women are forced to stay with their families in the Strip, while making a rule of renewing the permits granted to them and visiting their families in Israel.

15. These arrangements continued to be in force also after the execution of the "disengagement" plan, with the GOC Southern Command holding the authority to allow the entry of Israelis into the Gaza Strip, according to his interpretation of section 24 of the Disengagement Plan Implementation Law, 5765-2005. Two years ago Israel has re-published the criteria for the entry of Israelis into the Strip, including, *inter alia*, the "divided families" arrangements.

> A divided family: the entry of Israelis who are married to a resident of the Gaza Region Area will be permitted for the purpose of visiting the husband/wife.

A copy of the notice of the Gaza DCO dated July 18, 2008 concerning the criteria for the entry of Israelis into the Strip, is attached and marked **P/1**.

16. During last year, even after the termination of the war in the Strip (operation "Cast Lead"), HaMoked continued to receive positive responses to requests of Israelis to enter the Strip for the purpose of staying there with their family members, according to said criteria. In certain cases the permit was granted following a written request and in others only after a petition was filed with the court. As aforesaid, to date, these arrangements are the only ones which make it possible for the petitioner and others in her position, to realize their family life.

17. It should be noted that an Israeli who stays in the Strip under the procedure, is forced to stay in the Strip separated from her family in Israel – her parents, brothers, uncles etc. They are not allowed to enter the Strip to visit her, other than under extraordinary humanitarian circumstances. The only possible way which is available for the petitioner to see them, is to enter Israel.

C. <u>Petitioners' entries into Israel in the past</u>

18. The petitioner stays in the Strip and regularly renews her permits according to the "divided families procedure". From time to time, the petitioner enters Israel to visit her family, which cannot enter the Strip to visit her. It should be noted that a year ago, a request was submitted to allow the entry of petitioner's parents and sister into the Strip, in view of the fact that the latter suffered from enlarged liver and blood vomiting, which request was <u>denied</u>.

Copies of HaMoked's letters concerning the entry of petitioner's parents and sister into the Strip from 2009, are attached hereto and marked **P2-P/4**.

A copy of the response denying said requests is attached hereto and marked **P/5**.

19. Hence, the only possibility available to the petitioner to visit her parents is to enter Israel. In any event, the petitioner is an Israeli resident, and she is entitled to enter her country without any limitations. And indeed, it seems that in our case there is no dispute that the petitioner is entitled to enter Israel.

20. Naturally, the petitioner may not be separated from her five minor children. It is inconceivable for the petitioner to enter Israel without her minor children, leaving them behind for days and even weeks.

21. And indeed, over the years, the petitioner used to enter Israel with her minor children, with respondent's approval. The respondent always used to allow the entry of accompanying minors under the age of sixteen (like petitioners 2-6), without entry permits into Israel. Each year the petitioner used to enter her country with her children, and return to the Strip upon the termination of a one month visit.

This is clearly indicated from paragraphs 25-27 of the state's response to another petition, in which it was explicitly stated that indeed, in the past no permits were required for children such as petitioners 2-6. In said response, it was explained that the permits were required for the **benefit of the children**:

> In their petition, petitioner 7 argues that in the past, petitioners 1-6 (or any of them), entered Israel together with petitioner 7, without the need to have an entry permit as required by law. The petitioners argue that specifically when they wanted to return to the Strip, they have encountered difficulties.
>
> These difficulties stemmed from the fact that the stay of petitioners 1-6, who are residents of the Gaza Strip, in Israel, like other similar cases in which Israelis requested to enter Israel together with their infant children, was arranged on an exceptional basis, in an attempt to make it easier for the applicants, by not requiring the applicants to obtain permits which would enable the children's entry into Israel.
>
> However, over the years, the number of the requests increased, and the children who stayed in Israel without appropriate permits encountered difficulties when they tried to return to the Strip. It was therefore decided, that for the purpose of improving the service which was granted to the applicants, minors, residents of the Strip, whose Israeli parents wanted to be accompanied by during their visit to Israel, were also required to obtain a permit as required by law, according to the rule that the stay of a Gaza resident in Israel, will not be allowed without a permit.

A copy of the state's response in AP 373/08 is attached hereto and marked **P/6**.

22. Hence, two years ago, the respondent started to demand, for the first time, that accompanying minors as described above, would hold an entry permit into Israel in order to enter Israel.

23. Accordingly, Israeli parents were suddenly required to transfer requests for the entry of each child, infant or baby, to the humanitarian center at the Gaza DCO, by an application which is transferred through the Palestinian Civil Affairs Committee.

24. It should be emphasized, that even at that stage, the respondent used to routinely issue to the children entry permits into Israel – which is only obvious, considering the fact that these are children and infants who travel with their Israeli mothers, and who certainly pose no security risk.

25. Accordingly, also in petitioners' matter, entry permits into Israel were issued to petitioner's children, when she wanted to travel to Israel. Thus, for instance, on June 20, 2008 the petitioner entered to visit her family, accompanied by her children, after permits were issued to them which were in force until June 26, 2008. The purpose of the visit at that time was a routine family visit, and that was the last time in which the petitioner entered Israel and saw her family.

Copies of the permits which were issued to the petitioners are attached hereto and marked **P/7 – P/11**.

26. Currently, as the summer vacation of her children has commenced and she can travel with them to Israel for the purpose of making a visit, the petitioner wishes to exercise, once again, her right, as an Israeli resident, to enter Israel and visit her parents, brothers and sisters – whom she has not seen for two years - as part of her right to family life. Naturally, the entry of the minor children together with their mother is also required at this time.

D. Exhaustion of Remedies

27. On May 30, 2010 the petitioner submitted to respondent 1, through the Palestinian Civil Affairs Committee, an application on behalf of her minor children, petitioners 2-6, for the issue of a permit which would allow them to join her for a visit in Israel, the planned duration of which was one month.

28. On June 2, 2010, the petitioner was informed by the Palestinian Civil Affairs Committee, that the application was denied by the respondent.

29. On June 3, 2010 HaMoked wrote to the respondent, and requested him to reconsider the application. HaMoked emphasized that the petitioner has not seen her family members who were living in Jerusalem for two years, and that during that period the respondent did not allow her family members to enter the Strip and visit her. HaMoked also emphasized that the petitioner could not enter unless accompanied by her children.

HaMoked has also pointed out, as specified above, that entry permits were issued to the petitioners in the past!

A copy of HaMoked's letter to the respondent dated June 3, 2010 is attached hereto, and marked **P/12**.

30. On June 10, 2010 HaMoked received respondent's response dated June 8, 2010. The response was given in a laconic manner. No explanation was given, and it only stated that "after the application

was reviewed, the authorized personnel decided to deny it, since it does not comply with the criteria established from time to time, according to the political-security state of affairs."

The above, without explaining how an identical application was approved in the past, according to exact same criteria!

A copy of respondent's response dated June 10, 2010 is attached hereto and marked **P/13**.

31. Therefore, on June 10, 2010 HaMoked sent a letter to respondent 2, the coordinator of government activities in the territories, concerning petitioner's matter, and requested to re-examine said position, according to which minor children could not accompany their mother while visiting Israel – both in general and specifically with respect to the petitioners and several other women in her condition. HaMoked emphasized that no security matter was involved, which was the only consideration that the respondent was entitled to consider. HaMoked emphasized, that respondent's position has practically frustrated petitioner's right to enter her country and visit her family, and that it was patently unreasonable in view of respondent's own conduct in the past, and in view of the fact that an Israeli who wanted to cross the barrier in the other direction – into the Strip – could take with him accompanying minors, according to the "divided families procedure".

HaMoked has further noted in its letter, that this matter could be settled without the need to apply to judicial instances. Nevertheless, HaMoked pointed out, that if a response was not received within the next few weeks, the petitioners would have to consider the filing of a petition with the court.

A copy of HaMoked's letter to the respondent dated June 10, 2010 is attached hereto and marked **P/14**.

32. After more than two weeks have elapsed, on June 27, 2010, HaMoked applied again to respondent 2, and requested its response. HaMoked emphasized the urgency of the matter, in view of the fact that since the entry of children was requested, it could be effected only during their school vacations. HaMoked pointed out in this letter too, that should it fail to receive an answer shortly, the petitioners would have to consider the filing of a petition with the court.

A copy of HaMoked's letter to the respondent dated June 27, 2010 is attached hereto and marked **P/15**.

33. To date, HaMoked's letters to respondent 2 have not yet been answered. In view of respondent 1's position, the tight schedule during which the visit may be carried out and the duration of the time which passed since HaMoked has applied to respondent 2, the petitioners have no alternative but to file this petition with the court.

The Legal Argument

A. Respondent's obligation to respond within a reasonable time

34. As an administrative authority, respondent 2 is obligated to respond to applications submitted to him, within a reasonable period of time. It is a well known rule that the "obligation to act expeditiously is one of the basic principles of good governance." (I. Zamir, **The Administrative Authority** (Volume B, Nevo, 5756), 717).

And on this issue see:

HCJ 6300/93 **Institute for the Training of Women Rabbinical Advocates v. Minister of Religious Affairs**-, IsrSC 48(4) 441, 451 (1994);

HCJ 7198/93 **Mitrel Ltd. v. Minister of Industry and Commerce**, IsrSc 48(2) 844, 853 (1994);

HCJ 5931/04 **Mazurski v. The State of Israel – Ministry of Education**, IsrSc 59(3) 769, 782 (2004);

HCJ 4212/06 **Avocats Sans Frontiers v. GOC Southern Commend**, TakSC 2006(2) 4751 (2006).

35. It has already been ruled that when human rights were concerned, the concept of a "reasonable time frame" obtained a special meaning (HCJ 1999/07 **Galon v. The Governmental Commission for the Enquiry of the Events of the Lebanon Campaign 2006**, TakSC 2007(2) 551, 569 (2007));

And that in matters concerning human rights -

> A more expeditious regularization of the matter is expected […] a continued violation of human rights quite often broadens the scope of the injury and may result in the erosion of the right as well as in a severe and continued injury to the individual.
>
> (HCJ 8060/03 **Q'adan v. Israel Land Administration**, TakSC 2006(2) 775, 780 (2006)).

And see also:

HCJ 10428/05 **'Aliwa v. Commander of IDF Forces in the West Bank**, TakSC 2006(3) 1743, 1744 (2006); HCJ 4634/04 **Physicians for Human Rights v. Minister of Public Security**, TakSC 2007(1) 1999, 2009 (2007).

36. The respondent holds in his hands the key to petitioner's family life. In view of the circumstances of the matter, which were brought to respondent's attention, a relatively prompt response is required, since upon the beginning of *Ramadan*, the petitioner will have to return to the Strip with her children and wait one more year to visit her family in Israel – at which time she will also face the same time constraints.

B. The underlying premise – the petitioner has the right to enter her country with her children to visit her family

37. The petitioner is an Israeli resident. Her right to enter her country is undisputable. This right is explicitly entrenched in the Basic Law: Human Dignity and Liberty as well as in the international human rights law (Article 12 of the International Covenant on Civil and Political Rights (1966)). Along this right the petitioner has another right, the right to family life, that forms part of human dignity which is protected in the Basic Law: Human Dignity and Liberty – the right to visit her parents, brothers and sisters, whom she has not seen for two years, and who cannot, of their part, enter the Strip and visit her.

38. In fact, respondent 1 limits her rights, by imposing, as a condition for the realization thereof, the obligation to leave behind her minor children, who are dependent on her. It also constitutes a severe violation of petitioner's right to family life, a right which derives, *inter alia*, from the moral and

legal obligations between a parent and his child, and in view of the special connection between a mother and her minor children.

39. As has also been argued before the respondent in the applications sent to him by HaMoked, the refusal to allow petitioner's children to accompany her in her visit, forces her to make an impossible choice: she must either leave her minor children who are dependent on her behind, and in so doing, betray her moral and legal duties towards them; or give-up the connection with her family in Israel and remain trapped in the Strip. In any event petitioner's right to family life is violated. All of the above, against the backdrop of the unreasonable and disproportionate limitation imposed on her right to enter Israel.

40. The violation of petitioner's right to family life clearly arises from HCJ 7052/03 **Adalah v. The Minister of the Interior**, TakSC 2006(2), 1754. In that case it was held in a majority opinion, that a law which was enacted by the Knesset, which limited the right of Israeli residents and citizens to live with their children in Israel, violated their right to family life.

And to be precise: the application in our case does not concern permanent residency or any other status in Israel. It only concerns a request to enable the petitioner to visit her family, without separating her from her children for the duration of the visit; In addition, this is an administrative decision, which, as specified above, is not properly substantiated. It is not a law which was enacted by the Knesset; and finally, the grounds for the denial do not involve state security, but rather "criteria".

41. The right to family life, which includes, *inter alia*, the right to live together and share the same household, the parents' right to parenthood and the children's right to have a maternal or parental connection, is a well recognized right by both Israeli and international law. See in that regard: Article 12 and Article 16(3) of the Universal Declaration of Human Rights 1948; Articles 17 and 23 of the Convention on Civil and Political Rights 1966; Article 10(1) of the Covenant on Economic, Social and Cultural Rights 1966; The Convention on the Rights of the Child, 1989; Article 12 of the European Convention on Human Rights; HCJ 3648/97 **Stamka v. Minister of the Interior** IsrSC 53(2) 728, 787.

42. In the right to family life, is embedded the obligation of the state not to interfere with the family unit and not to impose a painful separation between the spouses and between the parents and their children. With respect to the separation of a child from his parents Justice Elon said:

> Our Sages said that pairing a person is as hard as parting the Red Sea (suta, B, 1 and Rashi, *ibid*). And if this is the case when pairing and bringing people together are concerned, all the more so when the separation and "tearing people apart" one from the other are concerned, which are so hard, as hard as the parting of the Red Sea.
>
> (CA 488/77 **A et al. v. The Attorney General**, IsrSC 32(3) 421, 432).

43. It should be remembered that this case concerns minors, some of whom are young infants who are dependent on their mother. The imposed separation of the mother from her children severely impinges on petitioners 2-6 and on petitioner's duties towards them, both morally and legally.

44. It should be added, that respondent's refusal to allow the children to enter Israel together with their mother, violates petitioner's right to maintain a connection with her family which lives in Israel.

45. Subordinating the realization of petitioner's right to enter Israel to a violation of her right to family life, also constitutes a violation of her right to enter Israel, a right which is explicitly entrenched in the Basic Law. The underlying premise is that an Israeli has the right to enter her country as is – with her family, property and religion. Only weighty considerations to the contrary may justify the denial of a person's right to enter with his relative (if, for instance, said relative poses a real danger). Simply stated, subordinating the realization of the right to conditions, impinges on the petitioner.

46. **The above violations of petitioner's rights must be considered by the respondent in the examination of the application for the grant of permits to petitioner's children**.

C. The discretion to allow the entry of petitioners 2-6 – the normative framework

47. It should already be clarified from the outset, that this case does not concern a petition against the Minister of the Interior pursuant to the Entry into Israel Law, 5712-1952. Our case concerns a petition against the commander of the Gaza Strip area pursuant to the Temporary Order. We are therefore concerned with different respondents, and with different arrangements. Accordingly, the considerations that each one of them may take into account, and the scope of their discretion, is different.

We shall specify below respondent's power and the scope of his discretion.

48. Section 17(b) of the Entry into Israel Law, 5712-1952, authorizes the Minister of the Interior to determine that the provisions of the Entry Law would not apply to certain classes of people.

Accordingly, the Entry into Israel Order (Exemption for Residents of the Gaza Strip)(Temporary Order) 5765-2005 provides that –

> A resident of the Gaza Strip who enters Israel from the territory of the Gaza Strip by virtue of a permit, including a general permit, which was granted by the director of the population administration or by someone authorized by the Minister of the Interior**,** is exempt from the provisions of section 7 of the Law and from the provisions of the Law concerning visa and transit or visitor's permit, so long as he fulfills the conditions of the aforementioned permit.

At the same time, the Temporary Order assigned the power to allow temporary entry of a "resident of the Gaza Strip" into Israel to the "commander of the Gaza Strip area". Section 3b of the Temporary Order provides that "the commander of the area may grant a stay permit in Israel" for one of the temporary purposes specified in the section: medical treatment; employment in Israel; **or a temporary purpose**.

It should be emphasized that the section speaks of a temporary purpose in general terms (provided it does not exceed six months), and does not limit it to a certain specific purpose. Clearly, accompanying an Israeli parent for a visit is one of the purposes which the above section refers to.

49. Section 1 of the Temporary Order defines an "Area Commander" – with regard to the Gaza Strip, as "someone who the Minister of the Interior shall authorize, with the consent of the Minister of Defence". As stated in the above Entry into Israel Order "A resident of the Gaza Strip" whose entry was permitted by someone who was authorized by the Minister of the Interior**,** is exempt from the provisions of the Entry into Israel Law, so long as he fulfills the conditions of the permit.

50. On February 5, 2009 the Minister of the Interior published, with the consent of the Minister of Defence, the "authorization of area commanders". This concerns 14 office holders, including the director of the Northern Gaza Strip District Coordination Office (item 13 of the authorization; Official Announcements and Advertisements Gazette 5913, 11 Shvat 5769, February 5, 2009).

A copy of the authorization letter is attached hereto and marked **P/16**.

51. It therefore follows that this case does not concern the exercise of the discretion of the Minister of the Interior pursuant to the Entry into Israel Law, but rather, the exercise of the discretion of the commander of the Gaza Strip area pursuant to the Temporary Order. The Minister of the Interior does not assign his power to the area commander, but only determines his identify. The powers of the area commander derive from the Temporary Order.

52. The objective of each one of these two legislative arrangements is completely different - the Entry into Israel Law was intended to regulate and cope with the immigration phenomenon (for residential and other purposes), whereas the objective of the Temporary Order, as presented by the state and as was held in HCJ 7052/03 **Adalah v. The Minister of the Interior**, TakSC 2006(2), 1754, **is a purely security objective**. Namely, respondent's considerations, in exercising his authority pursuant to section 3b, are purely security considerations.

53. It also clearly arises from the authorization letter. The respondent, the director of the Northern Gaza Strip District Coordination Office, is an administrative authority which was entrusted with the security considerations of the state of Israel. The respondent is not authorized to take into account, in making his decision, considerations other than security considerations. Such considerations would be extraneous considerations.

54. In an *obiter dictum* we would like to note that, even when the discretion of the Minister of the Interior pursuant to the Entry into Israel Law, 5712-1952 was discussed – the discretion of whom is much broader than respondent's discretion in allowing entry into Israel – restrictions were set to it:

> The aforesaid power of the Minister of the Interior in section 6 of the Entry into Israel Law appears, *prima facie*, to be a power of an absolute nature: an unlimited power, a power that extends in all directions without any limit. But as the court has already held in **Kendall** (HCJ 758/88 **Kendall v. Minister of Interior**, IsrSC 46(4) 505, 527 et seq.), there is no such thing in Israeli law as 'absolute' discretion, and even discretion which is referred to as 'absolute' is not absolute discretion at all. The same applies to the discretion of the Minister of the Interior under section 6 of the Entry into Israel Law: it is immersed in juridical restrictions which are inherent in every power possessed by the government; it yields to all basic principles and doctrines of the legal system; and the basic rights of the individual – which include, first and foremost, those rights enshrined in the Basic Law: Human Dignity and Liberty and the

> Basic Law: Freedom of Occupation - constitute an integral part of the fabric of its genetic code.
>
> (HCJ 4542/02 **"Kav LaOved" Workers' Hotline Association v. Government of Israel** March 30, 2006, paragraph 3 to the judgment of Justice Cheshin; see also paragraphs 46-47 to the judgment of Justice Levy).

55. In any event, as stated above, this case concerns the power of the Gaza Strip area commander pursuant to the Temporary Order, which all the more so, should be restricted.

56. In addition to the security considerations which the respondent must consider, the respondent is also obligated, like any administrative authority, to take into account additional considerations. The first one, as specified above, is the right of the petitioner, an Israeli resident, to family life and her right to enter her country. It is clear, that the respondent has **substantial duties** towards Israeli residents.

57. Secondly, the respondent must also consider the best interests of the civil population in the Gaza Strip. These obligations stem from his control over the maritime border and airspace of the Gaza Strip and his direct and indirect control over all of its land borders. Said control was also acknowledged by this court. It has therefore already been held long ago, that this control imposed on the respondent **substantial duties**. Accordingly, for instance, it was specifically held, with respect to the crossings from Gaza:

> In the prevailing circumstances, the main obligations of the State of Israel with respect to the residents of the Gaza Strip… also derive from the degree of control exercised by the State of Israel over the border crossings between Israel and the Gaza Strip; as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon [*ibid*, the supply of electricity from Israel – E.C.].

(HCJ 9132/07 **Al-Bassiouni Ahmed v. The Prime Minister**, TakSC 2008(1). 1213, page 1217 (2008)).

58. All of the above indicate that the respondent has substantial duties towards the petitioner and her children. These duties may be balanced only against significant security considerations. **In fact, petitioner's rights were violated arbitrarily, with no explanation or proper cause, and it seems that this decision stemmed from extraneous considerations.**

D. Flaws in respondent's decision

(i) Extraneous considerations?

59. *Prima facie*, respondent's arbitrary denial gives rise to a real suspicion that his decision is premised on extraneous considerations. In view of the severe violation of the rights of the petitioner and her children, and in view of the absence of security considerations concerning the entry of minor

children with their mother for a visit (as has already been done in the past), it seems that the considerations which guided the respondent in his decision were inappropriate considerations.

60. As specified below, this suspicion is reinforced by the fact that this is an arbitrary decision, which was given with no explanation, contrary to previous decisions, and with a substantial infringement on petitioner's rights, in a disproportionate manner and for no proper cause.

61. It should be remembered, that according to the rules of administrative law, taking into consideration extraneous considerations constitutes a material flaw in the exercise of the administrative discretion. This is most certainly the case, when the decision, which was made based on such considerations, severely violates the rights of a person.

62. **Eventually, no explanation was given – and no sensible explanation may be conceived – as to why restrictions were imposed on petitioner's right to enter her country together with her minor children, to see her parents**.

(ii) <u>Deviation from previous decisions</u>

63. As specified above, over the years, the respondent used to approve, as a matter of course, the entry of minors who accompanied their parents, into Israel. As specified in Exhibit P/6, the State's own response to another petition, for years the entry of <u>said minors into Israel did not require any coordination</u>, and they entered together with their Israeli parents and accompanied them. HaMoked handled the cases of a number of Israeli women whose lives were divided between Israel and the Strip, who entered Israel in this manner.

64. As specified above, even after the respondent has started to demand that accompanying minors would have a permit, the respondent approved, as a matter of course, the applications and issued permits. In so doing, the respondent continued to take the same course of action which was previously taken by him – acknowledging the right of Israeli residents to enter their country for a visit together with their children.

65. In fact, even in petitioners' matter, permits were issued in the past to petitioner's children. As is recalled, these permits were issued in June 2008 – **according to exactly the same criteria, which the respondent now claims that petitioner's application "does not comply with"!**

66. This constitutes an extreme deviation from respondent's previous decisions and a material change of his position concerning the entry of accompanying children into Israel, in general, and in petitioners' matter, in particular.

(iii) <u>Arbitrary and un-substantiated decision</u>

67. The above flaw is aggravated, in the absence of minimal substantiation of respondent's decision. As aforesaid, it is not clear why the exact same case does no longer comply with the exact same criteria.

68. As is known, respondent's obligation to substantiate and specify the grounds for his decision is the obligation of an administrative authority. Substantiation enables the individual to contest the decision; it provides a glimpse at the considerations which were taken into account when the decision was made, and it makes it possible to verify that all relevant considerations were taken into account, that no extraneous consideration were considered, that the decision was made in a

pertinent manner according to the circumstances of the matter, and that a reasonable balancing of all considerations was made.

69. In our case, it seems that the decision is arbitrary. Indeed, the decision was made against the backdrop of the government decision of September 2007, which imposes limitations on the movement of Palestinians from the Gaza Strip, a decision which is based on security reasons. However, the respondent must examine each case on its merits and, in the proper cases and subject to a comprehensive balancing of the circumstances, allow passage from the Strip.

70. As aforesaid, our case concerns the children of an **Israeli resident**, who wish to accompany her while visiting her country. These are minor children, with respect of whom no security consideration exists which can justify leaving them behind. It seems that the respondent has failed to examine the circumstances of the matter, and gave a laconic and un-substantiated response, "does not meet the criteria". A situation in which an administrative authority abruptly impinges on the lives of residents, without examining the circumstances of the matter, without examining whether the decision is justified in view of the circumstances and without balancing between the grounds for a general and sweeping policy and the rights of the individual in a specific case – is unacceptable.

(iv) <u>Disproportionate violation of petitioner's rights</u>

71. Respondent's decision is also inappropriate on its merits. The decision severely violates the rights of the petitioner – inherent rights, which have a constitutional status and which are protected by a Basic Law – in a disproportionate and unconstitutional manner.

72. As is known, a person's right may be violated if this is done for a proper cause, and in a proportionate manner. It is clear, that in our case no security threat is posed, neither by the petitioner – the right and ability of whom to enter Israel is not in dispute – nor by her children, minors between three to fourteen years of age. No such argument was even made by the respondent in his decision in their matter.

73. To the extent a security purpose is concerned which derives from the mere approval of the passage, in view of the above mentioned government decision, then, even if the cause is proper, respondent's decision under the circumstances of the matter is disproportionate.

74. As is known, a proportionate decision is a decision which complies with three proportionality tests, the first of which is a rational connection between the means and cause. It is not clear how respondent's refusal to allow the passage of the children with their mother to Israel, promotes the requested objective.

Does the fact that the petitioner crosses the barrier while carrying three years old Ihab in her arms or while holding the hand of nine years old Dunia, derogate from the safety of the State of Israel and its citizens?

75. It should be remembered that the purpose of the requested permit is to visit petitioner's family in East Jerusalem - for a limited period of time. What is the benefit which arises from the prevention of a short and time limited visit, which exceeds the damage caused by the separation of the petitioner from her country and parents?

76. Respondent's decision severely violates petitioner's right to enter her country and see her family, which she has not seen for two years. Should the petitioner wish to do so, she would have to leave her minor children behind for the duration of the visit. On the other hand, there is no security justification for said impingement, and surely, no other considerations exist which can justify this decision.

(v) <u>Relevant considerations were disregarded – the child's best interest</u>

77. In addition, it seems that when the application was examined, a material consideration – the child's best interest – was not taken into account. As is known, this is a significant consideration, which should be given heavy weight while the possibility to separate between a minor and his mother is considered.

78. The existence of the International Convention on the Rights of the Child (1989), which was ratified by the state of Israel in 1991, and the enactment of the Basic Law: Human Dignity and Liberty, reinforced the status of the child as an independent rights holder, and a separate legal personality.

79. Case law has emphasized on more than one occasion that when the child' best interest is examined, the above consideration should be given a considerable weight. The principle of the child's best interest is an additional consideration which the respondent should take into account, when he examines petitioner's application to enter Israel with her children.

Important to our case are the words of the Honorable Justice Silberg:

> The consideration of the child's best interest is a supreme principle… it can neither be divided nor merged or comingled with any other consideration. Since the legislator has ascended to the level of the modern approach – an approach which has been adopted by the sages of Israel for ages and ages – that the child is not an "object" of protection and custody for the enjoyment or benefit of one of the parents, but rather, he himself is the "subject", he himself is a "litigant" in this vital issue, hence, his interests cannot be ignored under any circumstances whatsoever.
>
> (CA 209/54 **Steiner v, The Attorney General**, IsSC 9(1) 241, 251 (1955)).

On the principle of the child's best interest see also:

HCJ 40/63 **Lorenz v. The Head of the Execution Office**, IsrSC 17(3) 1709, 1717 (1963);

CA 549/75 **A v. The Attorney General**, IsrSC 30(1) 459, 465 (1975);

CA 2266/93 **A v. B**, IsrSC49(1) 221, 271-272 (1995).

80. The children's best interest is that they would be separated from their mother. These are minors. Some of whom are very young. The requirement to separate them from their mother, to the extent she wishes to stay in Israel, causes them severe damage. This is substantiated by petitioner's refusal to leave her children behind, and the fact that she chose to wait together with them for the results of this petition.

(vi) <u>Extreme unreasonableness – in comparison with the grant of permission to pass from the opposite direction</u>

81. Finally, respondent's decision is extremely unreasonable. We would like to compare between respondent's decision in this case, and its "mirror image" – the passage through the Erez barrier in the opposite direction, from Israel to Gaza.

82. According to the exact same government resolution, by virtue of which petitioner's application has been ostensibly denied, restrictions are imposed on the entry of Israelis into the Gaza Strip. According to the "divided families procedure" mentioned above, Israeli men and women who are married to Palestinians who reside in the Strip, can enter the Strip, **accompanied by their minor children, up to the age of eighteen.**

83. This is also routinely done in other cases in which Israelis, who are not subject to the procedure, enter the Strip. These are humanitarian cases, in which the entry of an Israeli into the Strip is approved for the purpose of visiting a sick relative, or for the purpose of taking part in an event such as a wedding or a funeral. In such cases too, **the entry of his minor children together with him is routinely approved!**

84. As specified above, until very recently, the respondent allowed the passage of accompanying minors until the age of eighteen into Israel too – until 2008 without permits, and since then, subject to the submission of an application (and the permit was routinely granted). An absurd situation has now been created: the passage of minors up to the age of eighteen is not against the policy (in the absence of specific security considerations) – but only in one direction!

85. The underlying considerations of the "divided families procedure", according to which an Israeli parent should be allowed to take his children with him to the Strip, either for a humanitarian visit or for the purpose of meeting the other spouse, according to the procedure, apply also to our case. This concerns the recognition of the importance of the connection between the minor and his parent, especially the mother, and especially when a very young minor is involved. This recognition, that an entry is not feasible unless the child's entry is also permitted, is nowhere to be found in our case.

86. **This involves extreme unreasonableness, which brazenly exceeds reasonableness, and requires that respondent's decision be canceled, and petitioners 2-6 would be permitted to enter Israel for a visit, together with their mother**.

<u>Conclusion</u>

87. The petitioner wishes to exercise her constitutional right to enter Israel. She wishes to do that for the purpose of the realization of another constitutional right – her right to have a connection with her parents and siblings. The respondent subordinates the realization of said rights to a severe impingement on her right to family life and on her minor children. This is an arbitrary decision, which, in fact, constitutes a barrier for the realization of her rights. All of the above, without justification and without any explanation, in a manner which gives rise to a real suspicion of extraneous considerations.

88. This is a disproportionate decision, which disregards relevant considerations, deviates from previous decisions and constitutes an extremely unreasonable decision.

89. Therefore, the court is hereby requested to accept the petition and order the respondent to allow the entry of petitioners 2-6, together with their mother, into Israel.

This petition is supported by an affidavit which was signed before an attorney residing in the Strip and sent to the undersigned by fax after arrangements were made over the telephone. The honorable court is requested to accept this affidavit and the power of attorney which was also sent by fax, taking into consideration the objective difficulties of a meeting between the petitioner and her legal counsels.

In view of the aforesaid, the honorable court is hereby requested to issue an *order nisi* as requested, and after receiving respondent's reply, make the order absolute. In addition, the court is requested to order the respondent to pay petitioners' costs and legal fees.

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Elad Cahana, Adv.

Counsel to the Petitioners

July 27, 2010

[File No. 34275]