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At the Supreme Court

Sitting as the High Court of Justice

H CJ 5757/12

- In the matter of:
1. _____ **Badran, ID No.** _____
Resident of the Occupied Palestinian Territories
 2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
All represented by counsel, Advocate Talia Yehuda (Lic. No. 56918) and/or Ido Blum (Lic. No. 44538) and/or Hava Matras-Irton (Lic. No. 35174) and/or Sigi Ben-Ari (Lic. No. 37566) and/or Daniel Shenhar (Lic. No. 41065) and/or Noa Diamond (Lic. No. 54665) and/or Nimrod Avigal (Lic. No. 51583) and/or Benjamin Agsteribbe (Lic. No. 58088)
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.

West Bank Military Commander

The Respondent

Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause:

- a. Why he should not allow petitioner 1, an unwell **85-year-old woman**, to travel from the West Bank to Jordan, through the Allenby Bridge border crossing, to visit her son in Qatar, and her children and grandchildren in Jordan, perhaps for the last time in her life;

- b. Why he should not give notice of the exact date on which the security preclusion preventing petitioner 1 from leaving the West Bank expires;
- c. Why he should not specify the grounds for his refusal to let petitioner 1 leave the West Bank and present the reasons, grounds and nature of the evidence on which such refusal is based.

The honorable court is hereby requested to order the respondent to respond to this petition as soon as possible, in view of petitioner's old age and physical condition. The petitioner wishes to see, perhaps for the last time in her life, her son who was deported from his homeland and lives in Qatar, and her son and daughter who live in Jordan with their families. It should be noted that petitioner's husband, Mr. 'Atef Badran, was originally also a party in petitioners' application, but has since passed away, waiting and expecting in vain to see his children and grandchildren for the last time.

On June 21, 2012 the respondent gave notice that the petitioner was not banned from leaving her country, but when she arrived at Allenby Bridge, on July 10, 2012, respondent's representatives prevented her from leaving despite the fact that she was told that the ban had been lifted and despite her old age and physical condition.

The Factual Background

The Parties

1. Petitioner 1 (hereinafter: the **petitioner**) who was born in 1927, is a Palestinian resident of the Occupied Palestinian Territories (OPT), living in the 'Askar refugee camp near Nablus.
2. The petitioner is an 85-year-old woman who suffers from severe osteoporosis, with sharp pains in the back and legs, protracted obdormition and fractures in several vertebrae in the lumbar vertebrae. The petitioner, who required a walker in the past, recently broke her leg and is currently confined to a wheel chair. A copy of petitioner's medical record is attached and marked **P/1**.
3. Petitioner's son, Mr. _____ Badran, ID No. _____, who was born in 1966, was released in the Shalit exchange deal and was deported away from his home, family and relatives in the West Bank. It should be noted that the petitioner visited her son in prison once a month until six months before his release when her medical condition deteriorated and she had to give up these visits.
4. In addition, petitioner's children, her son _____ and daughter _____ live in Jordan with their families, and the petitioner, who last visited them two years ago, wishes to see them once again, before she may not be able to do so due to her medical condition.
5. It should be noted that in the beginning of April 2012, the petitioners requested the respondent to allow the petitioner and her husband, Mr. _____ Badran, to

leave their country. After an appeal was submitted on behalf of the couple, Mr. Badarn, who was 86 years old, passed away, while still waiting for and expecting respondent's decision which would enable him to see his children and grandchildren for the last time. Since then, the petitioner who has remained on her own has been longing to see her children and grandchildren, to take comfort in them and be with them during these difficult times. Evidently, a long waiting period does not work in her favor.

6. It should also be noted that the petitioner **has never been detained or interrogated**.
7. Petitioner 2 (hereinafter: **HaMoked**) is a registered not-for-profit association situated in Jerusalem, which promotes human rights of Palestinians in the OPT.
8. The respondent is the military commander, in charge of the West Bank area on behalf of the State of Israel which has held the West Bank under military occupation for about forty five years.

Ban on travel abroad in the OPT

9. As is known, every person has the right to leave his country. It should be pointed out that the decisions by the military commander to infringe on this right in the OPT, are governed by **international law**, which is **the sole source** for the powers of the military commander. Under this law, the military commander is obligated to protect the residents of the OPT and in particular, their right to leave the country. The limited authority the military commander has under international law to limit the movement of OPT residents, is subject to the existence of an imperative security reason properly balanced against the violated rights, as further specified below.
10. As a side note, it should be mentioned that the military legislation in the OPT also does not require any permit to travel to Jordan, and under the interim agreement as well, the ban on exit is subject to the issuance of a specific warrant by the military commander, all as described below.
11. Restricting the right of an Israeli to leave the country, for security reasons, is done in rare and extraordinary cases, by a warrant signed by the Minister of Interior, subject to a hearing, and in most cases for a period of up to six months.
12. On the other hand, in the OPT the respondent prevents many people from leaving every year, without a signed warrant and without any time limit. This is done without a hearing, orally or in writing, and in fact, without giving the person concerned a notice of the decision to ban his departure. In the vast majority of cases, a person discovers that he is "precluded from exiting" only upon reaching the Allenby Bridge border crossing, with luggage in hand and set travel plans.

13. On this issue a general petition was filed to the High Court of Justice (HCJ 8155/06 **The Association for Civil Rights in Israel v. Commander of the IDF Forces in Judea and Samaria**). Following the petition, a procedure was established to enable people to check whether they were under a travel ban preventing them from going abroad and to file an appeal against such ban. It should be noted that in said HCJ, no remedies were requested concerning the procedure and therefore the petition was deleted “without prejudice to petitioners’ right to turn to the court again in specific matters concerning the procedure.”
14. In fact, the procedure perpetuates the current state of affairs: it does not obligate the respondent to notify a person that he is banned from traveling abroad, and instead, places the burden to check whether the respondent has decided to deny travel on the individual seeking travel himself.
15. In addition, the procedure does not provide for a hearing. Instead, according to the procedure, a person who has already discovered that he was “banned” can submit, retroactively, a written appeal, which will be reviewed within a protracted period of eight weeks. On January 10, 2012, the respondent notified that as of that date applications for information regarding the existence of an exit ban, and appeals, may be submitted by fax, through an attorney, and the answer shall be delivered to the attorney.
16. It should be pointed out that even today, “exit bans” are issued without a hearing, without a signed warrant and without a time limit. On its face, the ban is issued “from now to eternity” by a person whose identity, rank and position are unknown.

Ostensibly, any low ranking official may decide to prevent a person from leaving his country.

17. **In view of the above, one can easily imagine the built-in inferiority of an OPT resident who finds out one day, on the eve of his departure, that he cannot leave the country.** On the one hand, the administrative procedure that he must undergo is cumbersome, exhausting and very long, and on the other, it hardly provides him any protection: he must cope with a decision no one knows when it was made, by whom, why and when it will expire.

Exhaustion of Remedies

18. On February 16, 2012 the petitioner and her late husband _____ arrived at Allenby Bridge, in order to leave their country and travel to Jordan to visit their son and daughter who live there, and from there to Qatar to visit their son _____. Upon their arrival, the elderly couple, 85 and 86 years old, were informed that they could not leave because they were “ISA (Israel Security Agency) precluded”. In addition, contrary to respondent’s procedures, the spouses were not informed that they could appeal respondent’s decision to prevent their exit, and they were sent away.
19. On April 5, 2012 HaMoked submitted an appeal to the Head of the Nablus District Coordination Office (DCO), Lieutenant Colonel Kobi Gretzwolf, against

respondent's decision to prevent the petitioner and her husband from leaving their country. In its letter HaMoked stressed that this was an unwell elderly couple, and that this may be the last time that they would be able to see their son _____. Receipt of the letter was confirmed over the telephone by a soldier named Daniel.

A copy of the letter to Lieutenant Colonel Gretzwolf dated April 5, 2012 is attached and marked **P/2**.

20. In the meantime, on May 12, 2012 Mr. Badran passed away, before he had the chance to see his children and grandchildren for the last time, and the petitioner remained on her own, wishing to see her children and grandchildren perhaps for the last time in her life.
21. Under these circumstances, and as nine weeks had elapsed from the date the appeal was submitted, HaMoked wrote again, on June 7, 2012, to the Head of Nablus DCO. In its letter HaMoked noted that Mr. Badran had passed away and requested that petitioner's appeal be answered **without any additional delay**, or else filing a petition with the court would be considered. Receipt of the fax was confirmed over the telephone by a soldier named Amit. A copy was sent to Major Rani Amar of the office of the legal advisor to the respondent.

A copy of the letter to Lieutenant Colonel Gretzwolf dated June 7, 2012 is attached and marked **P/3**.

22. In the evening of June 12, 2012, a letter sent by Second Lieutenant Bar Akuka, Civil Administration Public Liaison Officer, was received which stated that "the application of your client [the petitioner] to lift the security ban against travel abroad was not received by the Israeli Coordination Office in Nablus." Second Lieutenant Akuka continued to claim in this peculiar letter that the petitioner should submit the application to the Palestinian Coordination Office in her place of residence which would transfer the application to the Israeli side, where it would be reviewed by the relevant officials. Needless to say, any connection between the contents of said response and the reality or current procedures is utterly accidental.

A copy of second lieutenant Akuka's letter dated June 12, 2012 is attached and marked **P/4**.

23. Under these circumstances, on June 14, 2012, HaMoked sent Second Lieutenant Akuka a letter in which it reiterated that the appeal was indeed submitted to the Israeli DCO in Nablus, that its receipt was confirmed and that referring the petitioner to the Palestinian DCO was peculiar and unclear. In view of the above, HaMoked stressed that if an answer was not received by June 21, 2012 filing a petition with the court would be considered. The appeal, together with its exhibits was attached to the letter and sent again.

Copies of this letter were sent to the Head of Nablus DCO, and to Major Amar of the office of the legal advisor to the respondent.

A copy of the letter to Second Lieutenant Akuka dated June 14, 2012 is attached and marked **P/5**.

24. In response to HaMoked's letter, a letter was received from Second Lieutenant Akuka in the evening of June 20, 2012, which stated that "the application of your client [the petitioner] has not been received by the Israeli Coordination Office in Nablus". Second Lieutenant Akuka went on to request additional details concerning the submission of the applications. Finally, the civil administration public liaison officer "recommended" that the petitioners file an additional appeal.

A copy of Second Lieutenant Akuka's letter dated June 20, 2012 is attached and marked **P/6**.

25. On June 6, 2012 Hamoked's representative had a telephone conversation with the civil administration public liaison officer and asked for explanations regarding his peculiar letter, considering all of the documents had long since been sent to the DCO and to the civil administration public liaison office. After the conversation, Second Lieutenant Akuka said that he would look into the matter and that there was no need to re-send the application.
26. On June 21, 2012, at 1:00 P.M., an officer from the Nablus DCO by the name of Rotem, informed HaMoked's representative by phone that the exit ban against the petitioner had been lifted and that written notice in that regard would be sent at a later date.
27. Therefore, on July 10, 2012, the petitioner reached Allenby Bridge, as aforesaid, in a wheelchair, accompanied by her brother-in-law and niece. Upon her arrival, the petitioner was detained for a few hours, and thereafter, to her surprise, respondent's representatives at the bridge refused to let her leave.
28. On that same day, HaMoked's representative had a telephone conversation with the civil administration public liaison officer, to find out what happened. In that conversation, Second Lieutenant Akuka stated that "a ban against her was fed into the computer today"(!).
29. In view of respondent's outrageous conduct, the time that elapsed and obviously petitioner's age and ill health, the petitioners had no alternative but to petition the court.

The Legal Argument

The normative framework

30. Under international law, the normative premise is that the respondent is obligated to allow residents of the OPT to leave their country. As described by the scholar Zilbershats:

The joint application of the general laws concerning human rights and humanitarian law established by the Hague and Geneva Conventions to territories held under belligerent occupation lead to

the conclusion that the right to leave the country, afforded to any person under international conventions, are also afforded to the residents of territories held under belligerent occupation, whether they are citizens of the state from which the territory was taken or not.

The right to exist the country is also recognized as a customary norm under international law and therefore it becomes part of the internal law of the State of Israel. The military administration in the OPT, which is subject to the provisions of Israeli administrative law and to the provisions of customary international law, is obligated to allow the residents of the OPT to exercise this important fundamental right. (Yaffa Zilbershats *The Right to Leave the Country* Mishpatim 23 69, 86 (5744)).

This is well entrenched in international law and the judgments of this honorable court (see for instance: section 12 of the International Covenant on Civil and Political Rights, 1966; Article 43 of the Hague Regulations; H CJ 393/82 **Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF Forces in the Area of Judea and Samaria**, IsrSC 37(4) 785, 797 (1983); H CJ 4764/04 **Physicians for Human Rights v. Commander of the IDF Forces in Gaza**, IsrSC 58(5) 385, 407).

31. As is known, under the law, the respondent is the trustee of the OPT and is not the sovereign thereof. All of his authorities in the occupied territory derive from international law and are subject thereto. Clearly he does not derive his authority from the military legislation that he himself promulgates, but rather from the entire body of international law, which constitutes the sole normative basis of exercising his authority (H CJ 2150/07 **Abu Safiya v. Minister of Defense** not reported yet (dated December 19, 2009)).
32. Therefore, the authority of the military commander to prevent the exit of a protected person from the OPT, its scope and the conditions for the exercise thereof, should be examined in view of the authorities granted to him by **international law**. The authority of the military commander to limit the right of OPT residents to leave their country is premised on the Fourth Geneva Convention. Article 27 thereof, which specifies the obligations of the military commander towards protected persons in an occupied territory and provides, in its final clause as follows:

The Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

The interpretation given by the International Committee of the Red Cross to said final clause of the Article provides as follows:

The various security measures which States might take are not specified; the Article merely lays down a general provision...

What is essential is that the measures of constraint they [the States; T.Y.] adopt should not affect the fundamental rights of the persons concerned. As has been seen, those rights must be respected even when measures of constraint are justified.

(<http://www.icrc.org/ihl.nsf/COM/380-00032?OpenDocument>).

33. Article 78 of the convention defines and limits the scope of military commander's discretion when taking security measures against protected persons. Such are subject to the existence of an imperative security reason, properly balanced against the violated rights.

If the Occupying Power considers it necessary, for **imperative reasons of security**, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

(emphasis added; T.Y.)

34. The right of protected persons to leave the territory is entrenched in Article 35 of the fourth Geneva Convention (1949):

All protected persons who may desire to leave the territory... may be entitled to do so... The applications of such persons to leave shall be decided in accordance with regularly determined procedures and the decision shall be taken as rapidly as possible... if any such person is refused to leave the territory he shall be entitled to have such refusal reconsidered...

(emphasis added; T.Y.)

The scholar Pictet clarifies in his interpretation that:

It should be noted that the right to leave the territory is not in any way conditional, so that no one can be prevented from leaving as a measure of reprisals... It is therefore essential for States to safeguard the basic principle by showing moderation and only invoking these reservations when reasons of the utmost urgency so demand.

(Jean S. Pictet, Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War. P. 235-236 (Geneva, 1958)).

35. This means that the convention authorizes the military commander to limit the freedom of the individual **only if it is required for imperative security reasons**, when properly balanced and provided that it does not infringe on his fundamental rights.
36. **Needless to note that it is difficult to think of such weighty “security” reasons against an 85-year-old, elderly woman in poor health, which would justify**

preventing her from seeing her children after the head of family had passed away.

37. It should be noted that although the West Bank is a closed military zone, such a declaration is not coupled with a ban on travel abroad: according to the military legislation in the West Bank, the mere declaration of an area as a closed military zone does not limit a person's right to leave it or enter it, and for that purpose the military commander must issue specific provisions for each and every area (section 318(b) of the Order concerning Security Provisions [consolidated version](Judea and Samaria) (No. 1651), 5770-2009).
And indeed, the respondent himself declared in his response dated July 25, 2012 in the above HCJ 8155/06 that the commander of the Area decided not to demand specific permits for travel abroad.
38. In 1995, the military commander issued the proclamation concerning the Implementation of the Interim Agreement (Judea and Samaria) (No. 7), 5756-1995, which incorporated the Oslo Accords between Israel and the PLO into military legislation, thus making the provisions of the Accords part of the law in the OPT.
39. Appendix 5, Annex I to the Interim Agreement includes various provisions concerning travel abroad from the OPT including, *inter alia*, the authority to prevent a person from travelling abroad. Section I, Paragraph 4(b)(3) of the appendix provides that a person may be precluded from leaving the OPT only by a warrant (by a detention or due to the absence of documents).

Violation of Petitioners' Rights

(i) The right to freedom of movement

40. The respondent is preventing the petitioner from traveling abroad. By doing so he violates petitioner's fundamental rights to dignity and autonomy, freedom of movement and all rights deriving from the right to freedom of movement.
41. The right to freedom of movement is the engine which drives the array of a person's rights, the engine which enables a person to realize his autonomy, his choices. When freedom of movement is limited, that "engine" is damaged, as a result of which some of the choices and rights of the person are curtailed and even cease to exist. Hence, the great importance attributed to freedom of movement.
42. The right to free movement constitutes one of the norms of customary international law and is well entrenched in Israeli jurisprudence

On this matter see:

Article 12 of the International Covenant on Civil and Political Rights 1966;

Article 2 of Protocol 4 of the European Convention on Human Rights 1950;

Article 13 of the Universal Declaration of Human Rights 1948;

HCI 6358/05 **Vaanunu v. GOC Home Front Command**, TakSC 2006(1) 320, paragraph 10 (2006);

HCI 1890/03 **Bethlehem Municipality v. State of Israel**, TakSC 2005(1) 1114, paragraph 15 (2005);

HCI 5016/96 **Horev v. Minister of Transportation**, IsrSC 51(4) 1 (1997).

43. A main part of freedom of movement is **a person's right to leave his country:**

A person's right to leave his place of residence and to return thereto is a "natural right". It is one of the fundamental rights of the individual. Restricting this right severely violates his rights.

(HCI 4706/02 **Salah v. Minister of Interior**, IsrSC 56(5) 695, 704 (2002)).

44. The remarks of Honorable Justice Bach in Daher are also relevant for our case:

Restricting the freedom of movement of a citizen, in the sense that he is prevented from leaving the country and travel to other countries, is a severe violation of the rights of the individual, and the Israeli public in particular, for obvious and known reasons, should be sensitive to this issue.

Justice Silberg expressed this feeling by holding in HCI 111/53 **Kaufman v. Minister of Interior et al.**, IsrSC 7 534, on which my colleague, the vice president, also relied, as follows:

"A citizen's freedom of to travel from the country abroad, is a natural right, recognized as self-evident ..."

(HCI 448/85 **Daher v. Minister of Interior**, IsrSC 40(2) 701, 712 (1986)).

45. The right to leave the country of residence was also recognized as a fundamental right in a considerable number of conventions and international declarations. The Universal Declaration of Human Rights (1948) in Article 13 and the Covenant on Civil and Political Rights (1966) in Article 12(2) provide that any person has the right to leave his country:

Everyone shall be free to leave any country, including his own...

(ii) The right to family life

"Cast me not off in the time of old age; forsake me not when my strength faileth."
(Psalms 71 verse 9)

46. The petitioner, an 85-year-old woman in poor health, wishes to see, perhaps for the last time in her life, her son who was deported from his homeland and whom

she has not seen for about a year. She also wishes to see her son and daughter who live in Jordan with their families. This, after her husband 'Atef, passed away at the age of 86, while waiting for respondent's decision. There is no doubt that this concerns the basic realization of the essence of the right to family life.

47. The right to family life, which includes the right of parents and children to maintain their family relationships, is a well recognized right in Israeli law as in international law. This right imposes on the respondent an absolute and clear obligation to respect and safeguard the family unit.

48. Article 46 of the Hague Regulations, which constitute customary international law, provides:

Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

49. Customary international humanitarian law also stresses under rule 105 of the ICRC research:

Family life must be respected as far as possible.

(Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law. Vol I: Rules pp. 379-383 (ICRC 2005)).

And this honorable court has held time and again that:

Israel is obligated to protect the family unit by virtue of international conventions.

(HCJ 3648/97 **Stemka v. The Minister of Interior** IsrSC 53(2) 728, 787 (1999)).

See also on this issue:

Article 27 of the Fourth Geneva Convention 1949;

Article 10 of the Covenant on Economic Social and Cultural Rights 1966;

Articles 17 and 23 of the Covenant on Civil and Political Rights 1966;

Article 12 and Article 16(3) of the Universal Declaration of Human Rights 1948;

Article 12 of the European Convention on Human Rights 1950.

50. The Supreme Court reiterated time and again, the great importance of the right to realize spousal relations and family life, in many judgments and in particular in **Adalah** (HCJ 7052/03 **Adalah v. The Minister of Interior**, TakSC 2006(2) 1754).

Thus, for instance, President Barak (as then titled) writes in paragraph 25 of his judgment:

It is our main and basic duty to preserve, nurture and protect the most basic and ancient family unit in the history of mankind, which was, is and will be the element that preserves and ensures the existence of the human race, namely the natural family...

The family relationship ... lie[s] at the basis of Israeli law. The family has an essential and central purpose in the life of the individual and the life of society. Family relationships, which the law protects and which it seeks to develop, are some of the strongest and most significant in a person's life.

Conclusion

51. It seems that the importance and urgency of enabling the elderly sick widow to see her children and grandchildren who reside in Jordan – especially after the death of the head of the family, cannot be overstated. The respondents' refusal to allow her to exit the West Bank severely violates her right to family life.
52. In his outrageous conduct, the respondent, who failed to provide a timely response and who informed that the ban had been lifted but eventually, in fact, prevented petitioner from leaving her country, is denying the petitioner's exit in an absolute and sweeping manner. In so doing, the respondent has turned the petitioner, an 85-year-old unwell woman, into a prisoner in her country. The respondent's decision is not limited in time, putting the petitioner in a situation of complete uncertainty, as she does not know whether or not she will get to see her children and grandchildren before she dies. In so doing, the respondent severely infringes on petitioner's right to dignity and due process, and her right to argue for her innocence.

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.

This petition is supported by an affidavit which was signed before an attorney residing in West Bank and sent to the undersigned 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 under the above arrangements, taking into consideration the objective difficulties of a meeting between the petitioner and her legal counsels.

July 26, 2012

Talia Yehuda, Adv.
Counsel to the Petitioners

[File No. 72420]