At the Jerusalem District Court **AP 38446-11-12**
Sitting as the Court for Administrative Affairs

The Petitioners:
1. **Al-'Abayat**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – Registered Association**

represented by counsel, Advocate Daniel Shenhar et al.
4 Abu Obeida St., Jerusalem,
Tel: 02-6283555; Fax: 02-6276317

v.

The Respondent: **Military Commander in the West Bank**

represented by Jerusalem District Attorney's Office (Civil)
7 Mahal Street, P.O. Box 49333 Ma'alot Dafna, Jerusalem 97763
Tel: 02-5419555; Fax: 02-5419582

Response

According to the decision of this Honorable Court, the respondent hereby respectfully submits a response on his behalf.

Respondent's position is that the petition should be rejected in view of the position of the security personnel that the acceptance of petitioner 1's application (hereinafter: the petitioner) to receive a multiple entry permit into Israel, valid for one year, may risk state security.

A. General

1. The above referenced petition concerns petitioner's application to enable her to enter Israel to visit her son, the prisoner _____ al-'Abayat, by giving her a **multiple** entry permit to Israel, **valid for one year**, instead of the **single entry permit, given to the petitioner from time to time.**

2. It should already be pointed out, that the petitioner is issued from time to time entry permits into Israel for the purpose of visiting her son and brother who are incarcerated in Israel. The last permit which was issued to her was valid from November 10, 2012 until December 24, 2012.

3. Therefore, the respondent will argue that the petition should be rejected, due to the fact that petitioner's applications to receive entry permits into Israel for the purpose of visiting her family members who are incarcerated in Israel, are examined according to the procedures and until the

date hereof were approved in a manner which enabled the petitioner to visit her incarcerated son and brother.

4. In addition, the respondent will argue that the petition should be rejected, in view of the position of the security personnel that the acceptance of petitioner's application to receive a multiple entry permit into Israel, valid for one year, may risk state security.

5. The particulars of the security material will be presented to the Honorable Court, in as much as it so deems fit and with petitioners' consent, *ex-parte*, due to the fact that classified and sensitive intelligence data is concerned, the disclosure of the particulars and/or sources of which may harm state security and public safety.

6. Under these circumstances the respondent objects to give the petitioner a multiple entry permit into Israel, valid for one year, to visit her son as requested in the petition, all as specified below.

B. The Main Facts Relevant to this Matter

7. A search conducted in respondent's computerized system presented the following information:

   a. The petitioner, a resident of Bethlehem, is about 43 years old. She is married and has seven children.

   b. A security preclusion is fed against the petitioner as of January 21, 2004.

   c. The petitioner received in the past 28 entry permits into Israel for the purpose of visiting her son and brother (the prisoner _____ al-'Abayat, who is also incarcerated) between the years 2006 – 2012, the last of which was valid between November 10, 2012 – December 24, 2012.

   d. A new application which was submitted by the petitioner in the beginning of January 2013 is currently under process.

C. Respondent's Position

C.1 The legal framework

8. Upon IDF entry into the Judea and Samaria area, in June 1967, the Commander of IDF Forces replaced the Jordanian government, and started to act as a military administration pursuant to the provisions of international law. Among the authorities conferred upon him under customary international law, the Israeli military commander was given the power to establish the legal framework which would apply to the area held under belligerent occupation (HCJ 390/79 **Duweikat v. Government of Israel**, IsrSC 34(1), 1).

   This is the principal "hat" of the Commander of IDF Forces in the Area, and under this hat the Commander of IDF Forces in the Area manages the military administration organization, the "civilian" branch of which is the civil administration. The authority of the Commander of IDF Forces in the Area is premised on international law and his activity is designated to realize his duty to the Area according to international law, and particularly, according to regulation 43 of the Hague Regulations and the Fourth Geneva Convention.

9. The laws of the State of Israel were not applied to the Judea and Samaria Area and the basic legal principles which govern the Area and upon which the legal system applicable thereto is premised since June 1967, are conferred upon the Commander of IDF Forces in the Area and are derived

from the rules of international public law (HCJ 69/81 **Abu Aita v. Commander of Judea and Samaria Area**, IsrSC 37(2), 197).

10. The Area is held by Israel by way of a "belligerent occupation". A military administration was established in the Area, headed by the military commander. The powers and authorities of the military commander are premised on the rules of international public law concerning belligerent occupation. According to the provisions of these rules, all of the powers of the administration and governing authorities are held by the military commander (HCJ 393/82 **Jam'iat Iscan v. Commander of IDF Forces**, IsrSC 37(4), 785).

11. The Proclamation concerning Law and Administration (Judea and Samaria)(No. 2) which entered into effect on June 7, 1967, established the guiding legal principles according to which the Israeli military administration should act.

    According to the first principle, the law which was in effect in the Area immediately prior to the entry of the IDF Forces, on June 7, 1967, will continue to be in force, in as much as it does not contradict said proclamation or any order issued by the commander of IDF Forces in the Area, and subject to such changes, arising from the establishment of IDF's military administration in the Area (section 2 of the proclamation).

    According to the second principle, any governmental, legislative or administrative power concerning the Area or its inhabitants is conferred upon the commander of IDF Forces in the Area and will be exercised by him or anyone appointed by him or acting on his behalf for this purpose (**section 3(a) of the proclamation**).

12. Accordingly, under the rules of both international public law - customary and conventional – and the security legislation enacted pursuant thereto, the military commander is the sovereign in the Area, and acts *in lieu* of the Jordanian government, for all intents and purposes, from the beginning of June 1967.

13. Upon the entry of IDF Forces into Judea and Samaria, the Area was declared as a closed zone, the entry into and the exit from which require the permit of the Commander of IDF Forces in the Area, according to the Order on Closed Territories (West Bank Region) (No. 34), 5727-1967.

14. According to security legislation, the Judea and Samaria Area is a closed zone the entry into and the exit from which are prohibited unless a permit to that effect was issued by the Commander of IDF Forces in the Area or by anyone authorized by him for this purpose (see section 318 of the Order regarding Security Provisions [consolidated version] (Judea and Samaria) (No. 1651), 5770-2009).

15. The entry of Palestinian residents into Israel, by virtue of the permit issued by the commander of the Area is made pursuant to the Entry into Israel Order (Exemption to residents of Judea and Samaria, the Gaza Strip and Northern Sinai and Shlomo District and the Golan Heights) 5728-1968, in which the Minister of Interior determined, by virtue of his authority under section 17(b) of the Entry into Israel Law, 5712-1952, that an exit permit to Israel issued by the commander of the Area, to residents of the Area, for working or other purposes, exempts from the need to have a visa or permit under the Entry into Israel Law.

16. In 2003 the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter: the **Temporary Order Law**) was enacted. This law imposed, *inter alia*, limitations on the issuance of entry permits into Israel, and stipulated that, as a general rule, stay permits in Israel would not be granted to residents of the Area under the security legislation in the Area. Section 3B of the Temporary Order Law sets an exclusion to the rule by stating that the commander of the Area **is entitled** to grant a resident of the Area an entry permit into Israel in three exceptional cases:

3B. Notwithstanding the provisions of section 2, the commander of the Area may grant a permit to stay in Israel for the purposes enumerated below:

(1) Medical treatment;

(2) Work in Israel;

(3) For a temporary purpose, and provided that the permit to stay for the aforesaid purpose shall be granted for an accumulated period not exceeding six months.

Section 3D of the Temporary Order Law provides that such permit shall not be granted if, according to the opinion of authorized security personnel, the resident of the Area or his family member are liable to pose a security risk to the state of Israel.

C.2. Prison visits – Historic background

17. As of 1969, when the International Committee of the Red Cross (ICRC) assumed upon itself the handling of prison visits, Palestinians have been entering Israel to visit their incarcerated relatives, as a matter of course.

18. Since the general entry permit of Palestinians into Israel has been canceled, in 1991, Palestinians have been entering Israel to make prison visits by individual permits granted to them by the civil administration.

19. In September 2000, the Palestinians launched a fierce terror attack against Israel and Israelis, wherever they happened to be (hereinafter: the **recurring attacks**).

    Terror attacks take place both in the Area and in Israel. They are directed against citizens and soldiers, men and women, elderly and infants. Terror attacks are carried out everywhere, including, public transportation, shopping centers and markets, coffee shops and restaurants.

    Terror organizations use various and diverse measures, including gunfire attacks, suicide attacks which use guided human bombs, mortar fire, Katyusha rocket fire, and car bombs. They sew destruction and spill blood in the cities and towns and they are supported by part of the civilian population, in general, and by their families and relatives, in particular (HCJ 7015/02 **Ajuri v. Commander** of IDF Forces in the West Bank, IsrSC 56(6), 352 (2002); HCJ 2056/04 **Beit Sourik Village Council v. The Government of Israel**, IsrSC 58(5), 807 (2004)).

20. As a result of the recurring attacks the visits of the prisoners in Israeli prisons were stopped, due to the fierce fighting which took place in the Area, and due to the security condition within Israel at that time.

21. As of March 2003, following intense efforts of the IDF, ISA (Israel Security Agency), the civil administration, Israel Police, Israel Prison Service and the Ministry of Justice which were carried out following HCJ 11198/02 **Diriyah v. Commander of the Military Incarceration Facility Ofer**, it was decided to gradually allow prison visits, with the assistance of the International Committee of the Red Cross (ICRC). As of the end of 2003, prison visits were fully renewed.

C.3. Prison visits – Legal background

22. The international legal norm according to which the military commander of an occupied territory is obligated to allow prison visits is entrenched in Article 116 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War:

> **Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible**.

The language of the Article of the Convention indicates, that the right to prison visits is the right of the prisoner rather than of his family members.

23. The same rule was established in section 12 of the Order concerning the Management of an Incarceration Facility (Order No. 29), which was issued on June 23, 1967, and which provides as follows:

> **(a) An internee shall be allowed to receive visits of a family member on such dates and for such duration as will be determined by the commander or anyone on his behalf.**
>
> **(b) Notwithstanding the provisions of sub-section (a), the commander may prohibit visits of a specific internee based on security reasons**.

24. It should be mentioned in this context that **both international law and the local law in the Area grant the military commander discretion to limit the internee's right to receive visitors, based on security reasons**. Hence, under both international law and the local law security considerations are recognized as legitimate considerations, under relevant circumstances, to limit the right to prison visits.

C.4 Security considerations concerning the entry of Palestinians into Israel

25. The designation of the Area as a closed zone as well as the considerations concerning an exit from the Area are premised, *inter alia*, on security considerations, i.e, the concern that a security risk may be created as a result of the grant of an opportunity to freely enter and exit the Area. The opportunity to freely enter and exit the Area, particularly into the State of Israel, without a permit, may be exploited for activity against the safety of the residents of Israel and the residents of the Area.

26. In exercising his discretion as to whether or not a permit to enter and leave the Area should be granted, the military commander must weigh the extent of the security risk and/or the potential of the risk to public safety which may arise from the approval of the application, in whole or in part, in order to prevent an abuse of the freedom of movement in and out of the Area. He is also liable to weigh the essential governing interest of maintaining the security of the Area on the one hand, and the desire of the resident of the Area to leave it for this purpose of another, on the other.

27. Applications to receive entry permits for prison visits are firstly submitted to the ICRC, which delivers the applications in an orderly manner to the civil administration. The civil administration examines the applications based on criteria which were established for this purpose, including family relations and the applicant's age.

28. In addition, the civil administration examines whether a security preclusion has been fed into the data bases against the applicant, and transfers the applications to the ISA to perform an individual assessment concerning as to whether or not a security preclusion exists. If after the assessment the security personnel object to the applicant's entry into Israel based on specific security reasons, the application is denied. If no specific security objection is raised, an entry permit into Israel is granted to the applicant.

29. Over the years the High Court of Justice has discussed many petitions which concerned the authority of the military commander to prevent entry into and exit from the Area. In these judgments the court has confirmed, time and again, the diverse security considerations, including public safety, which the military commander of the Area must take into account while making a decision concerning the entry into and exit from the Area by residents of the Area for security reasons. This applies even more forcefully to an entry into Israel under the current security circumstances. See for instance HCJ 2875/06 **Kawazbeh v. Minister of Defence** (reported in Nevo, June 27, 2006):

> **A resident of the Area does not have a statutory right to work in Israel… as aforesaid, it became evident that entry permits have not been issued to the applicant in the past as he claimed, and that there was a security preclusion which prevented his stay in Israel. Hence, there is no cause in the above petition which justifies our intervention with the broad discretion afforded to the competent authorities in this matter. The petition is rejected**.

30. With respect to the considerations concerning the grant of an entry permit into Israel it has been explicitly held, that in its examination of an application to leave the Area or enter into the Area, the administrative authority may take into account the security risks involved in accepting the application. For this purpose **the existence of a reasonable suspicion is sufficient to serve as a basis to deny the grant of a permit**.

31. In this context, the words of the Supreme Court in HCJ 7277/94 **A. v. The Military Governor of the Gaza Strip** (published in Nevo, June 29, 1995) are relevant. In that case Gaza Strip residents filed a petition for the receipt of an entry permit into Israel, in which it was held as follows:

> **… the grant of a permit is always subject to the absence of security grounds which obligate a denial of the entry. The existence of such security grounds concerning a resident of the Area within the boundaries of the Palestinian Authority, is based – under the circumstances – on intelligence information. The examination and determination of the reliability of the intelligence sources is made by the security personnel**.

See and compare further: HCJ 11595/05 **Najar v. Commander of IDF Forces in the West Bank** (published in Nevo, December 17, 2006).

C.5. The improvement in the civil administration's performance

32. As is known, the issue of prison visits is a complex project in which different entities are involved, and which requires a large investment of resources. The respondent invests extensive efforts in the handling of the large number of applications submitted in connection with this issue, and takes

systemic efforts which include cooperation between the IDF, the civil administration, the ISA, the Israel Prison Service, the Israel Police and the ICRC. All relevant entities act in order to have the applications handled in an efficient and expeditious manner. When a security preclusion exists with respect to a prison visit application, the matter must be examined, which examination, by its nature, takes additional time.

33. In response to the allegations made in the petition concerning the visit arrangements for persons precluded from entering Israel and concerning the manner by which applications for family visits in prison are handled by the civil administration, the respondent will argue that the presentation of the above issues in the petition is not accurate. The improvement in the civil administration's performance has even been mentioned in the judgment rendered in AP 33219-04-10 **Handi v. Commander of IDF Forces in Judea and Samaria** (published in Nevo, March 26, 2010).

34. In this regard it should be noted that during the years 2005-2008 the number of permits which were issued by the civil administration was doubled (the issuance of 34,215 permits in 2005, as compared with the issuance of 68,983 permits in 2008). This drastic increase indicates that the handling of the applications became more efficient and is made on a shorter schedule, which complies with the undertaking of the civil administration in HCJ 10898/05 **Fatafta v. Commander of Military Forces in the West Bank**.

35. It should be emphasized that the number of permits which were issued by the civil administration is lower than the total number of permit applications which were denied due to failure to meet the criteria, such as applications which were submitted without details, or due to the existence of a security preclusion, after an individual assessment has been made by the security personnel.

36. The respondent estimates that dozens of thousands of prison visit applications are processed each year. Respondent's permit center processes, each week, about 1,000 prison visit applications and about 5,000 applications for all types of permits which the permit center is authorized to handle.

37. Furthermore, a significant increase occurred in the issuance of single entry permits to security precluded residents. Notwithstanding the existence of a security preclusion, it was decided to issue to such residents, after the balancing of all relevant considerations, a single entry permit (29,182 permits were issued in 2005, 50,917 single entry permits were issued in 2006, 45,141 single entry permits were issued in 2007, 73,079 single entry permits were issued in 2008, 57,815 single entry permits were issued in 2009).

38. The above data indicate that there was an improvement in the handling of prison visit applications by the competent authorities.

39. The respondent will further argue, that contrary to the allegations made in paragraph 14 of the petition, a visitor who is precluded from entering Israel can receive **at least** four entry permits for prison visits per annum, subject to security considerations.

40. A permit issued to a visitor against whom a security preclusion is fed, is a single entry permit, valid for 45 days. Immediately after the exercise of the permit, the visitor may submit a new application which will be examined on its merits. The precluded person does not have to wait until the expiration of the 45 day period, after the exercise of the permit. In view of the above, the number of times he can receive a permit to visit a specific prisoner, in the event that the processing of each application takes two and-a-half months, is five times over a period of 12.5 months. Obviously, when the applications submitted by the precluded person are processed on a schedule shorter than two and-a-half months, he can visit more frequently.

41. To complete the picture it should be noted that as a result of a human error at the civil administration's permits center, during the second half of 2012 a delay occurred in the issuance of permits or in the grant of a negative answer, in accordance with the position of the security personnel, with respect to the applications of about 3,000 residents. After said problem was discovered, a meeting was held, presided by the head of the operations division at the civil administration, in order to solve the problem, and it was resolved that the civil administration personnel would act to improve the processing procedures of prison visit applications, on two levels: the first, the improvement of the processing and supervisory procedures concerning the receipt of the applications, their transfer to the assessing personnel, making a decision and its delivery to the ICRC; the second, the processing of the applications with respect of which a delay occurred due to the above mentioned problem, until October 18, 2012.

C.6. The handling procedure of prison visit applications should not circumvented

42. The petitioners argue in their petition, that the respondent has breached his undertaking which was given in the past to handle permit applications within two and-a-half months, and mention in this regard the requests submitted by petitioner 2 to the respondent. However, contrary to this argument, it should be clarified that the above time period, which was mentioned in the state's notice in HCJ **Fatafta** and then in HCJ 7615/07 **Barghouti v. Commander of Military Forces in the West Bank** (published in Nevo, May 25, 2009), referred to the estimated processing time of applications for prison visit permits, submitted to the civil administration through the ICRC only, according to the acceptable work procedure in this matter. This estimate does not concern in any manner whatsoever the provision of answers to requests submitted to parties such as the legal advisor for the Area, the public liaison officer or the international organizations branch.

43. It should be emphasized that when a request is received by parties which are not authorized to approve and issue entry permits into Israel for the purpose of visiting a prisoner, such as the international organizations branch, the request is not processed in the "ordinary" course of applications for an entry permit into Israel for the purpose of visiting a prisoner which are processed by the civil administration after their receipt from the ICRC. The request is processed as a request which seeks to examine the conduct of the relevant party, and a permit is not necessarily issued in response thereto, but rather sometimes the answer only provides information or clarification concerning the procedure for submission of prison visit applications or concerning the relevant request.

44. It should be clarified that requests submitted by petitioner 2 or any other party to various parties such as: the legal advisor for the Area, the public liaison officer or the international organizations branch concerning prison visits, does not establish an additional administrative route for the issuance of prison visit permits. Moreover, such a request cannot "circumvent" or create an alternative for the proper submission of an application, through the ICRC to the civil administration. The processing of requests which are received by the various parties specified above is made for the purpose of handling problems or difficulties which arise from the procedure and a request to intervene when the regular procedure is not adhered to. Hence, the state's undertaking in the above mentioned petitions does not apply to the handling of such requests. Therefore, petitioner 2's "permit applications" do not constitute applications according to the acceptable procedure.

C.7. Respondent's position – from the general to the particular

45. As specified above, notwithstanding the recognition of a prisoner's right to be visited by his family members and the obligation of the military commander to facilitate such visits, this is not an absolute right. In exercising his discretion, the military commander must also take into account the security consideration and balance it against the prisoner's expectation to meet his family members.

46. Under these circumstances, an arrangement was established which enables residents against whom a security preclusion was fed to make prison visits, under which the specific risk posed by the applicant is examined. Based on this examination a decision is made whether or not a permit to visit a relative incarcerated in Israel should be granted. As the petitioners were notified in a letter dated July 13, 2010 (attached as Exhibit P/3 to the petition), in examining the application, the security personnel who recommend to the military commander on this issue, have three options: to deny the application, to approve the application and completely remove the security preclusion which was fed against the applicant, or approve the application while leaving the preclusion in force.

47. As specified above, in this case a security preclusion is fed **against the petitioner since January 21, 2004, based on negative security information which indicates that she poses a risk to the safety of the Area and to the safety of the State of Israel**. The petitioner submitted, from time to time, applications to visit her son and brother who are incarcerated in Israel, her applications were individually examined, and between the years 2006-2012, twenty eight prison visit permits were issued to her. However, when her applications were examined, it was found that **there was no room to remove the security preclusion which was fed against her**.

48. Therefore, the respondent objects to the issuance of a multiple-entry permit into Israel, valid for one year, instead of the single-entry permit, which is granted to the petitioner from time to time. A single-entry permit as aforesaid enables to examine petitioner's matter more frequently – an examination which is mandated by the security preclusion which is fed against the petitioner.

    The privileged security material which underlies the decision of the security personnel will be presented to the honorable court, subject to petitioners' consent, *ex parte* and *in camera*.

49. It is needless to mention basic principles, according to which the honorable court will not replace the discretion of the competent authority with its own discretion, and will not interfere with a decision made by the competent authority, unless the decision is materially defective.

50. Based on all of the above, the respondent is of the opinion that in view of the recommendation of the security personnel not to remove the security preclusion which is fed against the petitioner, and in view of the fact that petitioners' applications for single-entry permits to visit her incarcerated relatives in Israel are examined on an individual basis, petitioner's request to order the respondent to issue to her a multiple-entry permit valid for one year, should be rejected and that it should be held that respondent's request to continue to examine the risk posed by the petitioner at intervals shorter than a year, is a reasonable and acceptable request under the circumstances of the matter, which does not justify the intervention of this honorable court.

Therefore the honorable court is requested to reject the petition and order the petitioners to bear the costs of trial and legal fees.

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Inbal Moshe, Advocate

Jerusalem District Attorney's Office (Civil)