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At the Supreme Court
Sitting as the High Court of Justice

HCJ 579/13

- In the matter of:
1. _____ **Abu Belal, ID No.** _____
 2. _____ **Abu Belal, ID No.** _____
 3. _____ **Abu Belal, ID No.** _____
Minor, through his parents, petitioners 1-2
 4. _____ **Abu Belal, ID No.** _____
Minor, through his parents, petitioners 1-2
 5. _____ **Abu Belal, ID No.** _____
Minor, through his parents, petitioners 1-2
 6. _____ **Abu Belal, ID No.** _____
Minor, through her parents, petitioners 1-2
 7. _____ **Abu Belal, ID No.** _____
Minor, through his parents, petitioners 1-2
 8. _____ **Abu Belal, ID No.** _____
Minor, through her parents, petitioners 1-2
 9. _____ **Abu Belal, ID No.** _____
Minor, through his parents, petitioners 1-2
 10. **HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger - RA**

all represented by counsel, Adv. Tal Steiner (Lic. No. 62448) and/or Hava Matras-Irton (Lic. No. 35174) and/or Sigi Ben Ari (Lic. No. 37566) and/or Anat Gonen (Lic. No. 28359) 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) and/or Bilal Sbihat (Lic. No. 49838)

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.

GOC Southern Command
Represented by the State Attorney's Office, Ministry of Justice
29 Salah-a-din Street, Jerusalem
Tel: 02-6466590; Fax: 02-6467011

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 why he should not allow petitioner 1 to travel from Israel to the Gaza Strip, together with her husband and children, petitioners 2-9, to visit her seventy one years old sick mother, whom she has not seen for six years.

The requested permit is for one week at least, taking into consideration the long time involved in the entry into and exit from the Gaza Strip and the lengthy security check process at Erez Crossing, and in view of the medical condition of the sick mother.

Request to Schedule an Expedited Hearing

The honorable court is hereby requested to schedule an expedited hearing in the petition. Petitioner 1 wishes to see her sick mother who suffers from pulmonary fibrosis, shortness of breath (dyspnea) and mucus cough, and who has been recently treated in the European hospital in Gaza. The mother has a history of recurring hospitalizations due to pneumonia and respiratory distress and she needs the care and support of her family members and a close supervision over her condition.

On December 17, 2012 the respondent gave notice of his refusal to allow the petitioner and her family members to travel to Gaza.

The Factual Infrastructure

The parties

1. Petitioner 1 (hereinafter: the **petitioner**), is a 39 years old Israeli resident, who lives in Segev Shalom with her husband, petitioner 2, and her children, petitioners 3-9.
2. Mrs. _____ Tarabin, ID No. 951925320 (hereinafter: the **mother**) is petitioner's mother, a 74 years old widow, who lives in the Gaza Strip. The mother suffers from pulmonary fibrosis (a disease which involves an inflammatory process and the scarring of the lung tissue, which injure its functionality), shortness of breath (dyspnea) and mucus cough. The mother has a history of recurring hospitalizations due to pneumonia and respiratory distress and was recently hospitalized in the European hospital in the Gaza Strip from November 23, 2012 until November 29, 2012. The mother needs the care and support of her family members and a close supervision over her condition.

A copy of a medical record concerning the mother is attached and marked **P/1**.

3. Naturally, the petitioner wishes to travel from Israel to the Gaza Strip to visit her mother, together with her husband and children, to assist the mother and support her.
4. The petitioner, who was born and raised in the Gaza Strip, moved to Israel when she was married, in 1998. Due to respondent's policy, which restricts the entry into the Gaza Strip, a harsh severance was imposed on the family. Hence, the petitioner has not seen her family **for six years**. The last time the petitioner met her mother was in 2007, when the respondent himself approved her entry into the Strip to support her mother, whose medical condition was similar in nature to her current condition. Since then, the petitioner has submitted to the respondent a number of entry applications into the Gaza Strip to visit her mother, but her applications remained unanswered. Such severance is particularly difficult as her mother grows old and her medical condition deteriorates.
5. It should be further noted, that neither one of the petitioners has ever been detained or interrogated.

6. Petitioner 10 (hereinafter: **HaMoked**) is a not-for-profit association located in Jerusalem, which, *inter alia*, assists Israelis who wish to visit their families in the Gaza Strip.
7. The respondent, GOC Southern Command (hereinafter: the **respondent**) has the power to approve the entry of Israelis into the Gaza Strip areas on behalf of the State of Israel, which governs for over forty five years the Gaza Strip borders and the passages thereto.

In the past, this power was conferred upon him by virtue of his being the military official who acted, on behalf of the State of Israel, as the commander of IDF forces in the Gaza Strip and pursuant to a military order, under which the Gaza Strip was declared a closed military zone. Currently, he exerts the same power based on his interpretation of section 24 of the Implementation of the Disengagement Plan Law, 5765-2005.

Respondent's policy: permission to enter the Gaza Strip to visit a sick relative

8. The major principles of respondent's policy concerning the entry of Israelis into the Gaza Strip were described in respondents' response dated August 27, 2004 to a petition filed by HaMoked on this issue (HCJ 10043/03 **Abajian v. Commander of IDF Forces in the Gaza Strip** (not reported)).

In said petition, the respondents were requested, similar to this petition, to allow the entry of an Israeli resident into the Gaza Strip to visit a sick relative. Following the petition, the respondents permitted petitioner's entry into the Strip. The respondents declared then, among other things, that even in times of armed conflict, permission to enter the Gaza Strip was generally granted to Israelis who wish to visit a first-degree relative due to a serious illness, in the absence of a specific security preclusion.

9. These arrangements continued to exist after the execution of the disengagement plan, and continue to exist today. On July 18, 2008 the respondent published "Clarifications to Criteria for the entry of Israelis into the Strip", as those were presented in the above described HCJ. Within the description of the various criteria, he notified that:

The entry of Israelis to visit will be permitted for humanitarian reasons (wedding, engagement, serious illness, funeral etc.) only to a first-degree relative [...] **companion/spouse**: the entry of a companion will be permitted provided he is a first degree relative of the person who was granted a permit to enter the Strip – a spouse or one of the children under the age of 18.

A copy of the Gaza DCO notice dated July 18, 2008 concerning clarification of criteria for the entry of Israelis into Gaza, is attached and marked **P/2**.

10. The updated criteria, as of May 5, 2011, concerning travel between Israel and the Gaza Strip, were attached to the response of the Coordinator of Government Activities in the Territories to a petition filed under the Freedom of Information Act. The cases in which entry of Israelis into the Gaza Strip is permitted include, again, exit to visit a sick relative.

A copy of the notice of the Coordinator of Government Activities in the Territories concerning "Policy regarding transition of individuals from Israel to the Gaza Strip" of May 5, 2011, is attached and marked **P/3**.

Exhaustion of Remedies

11. On December 3, 2012 HaMoked applied urgently to the Israeli Desk at the Gaza DCO, and requested to permit the petitioner and her family members to visit her mother. In view of the circumstances of the case, the respondent was requested to issue to the petitioner an entry permit into the Gaza Strip as soon as possible.

A copy of HaMoked's letter to the respondent of December 3, 2012 is attached and marked **P/4**.

12. After about two weeks, and since no answer has been received, HaMoked wrote to the respondent again on December 16, 2012 and requested to receive an answer to its letter urgently, in view of the circumstances of the matter.

A copy of HaMoked's letter to the respondent of December 16, 2012 is attached and marked **P/5**.

13. On December 17, 2012 respondent's response was received by HaMoked, which stated that the application was denied "due to security objection". This, and nothing more.

A copy of respondent's response of December 17, 2012 is attached and marked **P/6**.

14. Under these circumstances, the petitioners have no alternative but to turn to this court.

The Legal Argument

It is a mitzvah incumbent on everyone to visit the sick - even the fortunate should visit the less fortunate. One should visit many times during the day; and the more visits the better - provided he does not become a burden. Whoever visits a sick person is deemed to have removed a portion of his sickness and relieves him; and whoever does not visit the sick is considered as if he shed blood.

(Rambam, Mishneh Torah, Hilchot Evel, Chapter 14, Halacha 6).

A. Petitioner's right to family life

15. The right to family life encompasses the safekeeping of the inherent character embedded in the unique nature of the family, which includes, among other things, support, moral encouragement and physical assistance, self realization, identity. This is usually so, and it is even more so in our case.
16. The petitioner wishes to exercise the essence of the right to family life: to see her sick mother whose medical condition deteriorates, after almost six years during which she has not seen her.
17. The Supreme Court reiterated time and again, in many judgments, the great importance of the right to family life, and in particular in the **Adalah** judgment. Thus, for instance, President Barak 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...

Indeed, 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.

(HCJ 7052/03 **Adalah v. The Minister of Interior**, TakSC 2006(2) 1754 (2006)).

And in another context it was stated 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).

18. Article 46 of the Hague Regulations, which constitutes customary international law, provides:

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

19. It should be emphasized that the right to family life constitutes a basic right in customary international humanitarian law:

Family life must be respected as far as possible.

(Henckaerts J.M. Doswald-Beck L. Customary International Humanitarian Law. Vol I: Rules. ICRC (2005). Pp. 379-383).

See also:

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.

20. According to international law a special duty exists to care for the elderly and sick and protect them. This customary principle was drafted as follows:

The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection.

(J. Henckaerts and L. Doswald-Beck L. Customary International Humanitarian Law (Vol. I, 2005) p. 489).

21. The importance of maintaining close relationships with family members and the support provided by the close family, when the elderly are concerned, is also expressed in UN resolutions:

Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.

(United Nations Principles for Older Persons, G.A. Res. 46/91, U.N. GAOR, 46th Sess., 74th plen. Mtg., Annex 1, U.N. Doc. A/RES/46/91 (1991), Article 10)

The General Assembly... urges the support of national initiatives on ageing in the context of national culture and conditions, so that... families are supported in providing care and all family members are encouraged to cooperate in caregiving.

(Proclamation on Ageing, G.A. res. 47/5, 47 U.N. GAOR Supp. (No. 49) at 13, U.N. Doc. A/47/49 (1992), Article 2.k).

22. The European committee has also emphasized the importance of the elderly in family life:

The social importance of the elderly in family life cannot be underestimated. The family is the basic structure in which the individual traditionally learns his or her social role, receiving a human heritage from his or her elders... Respect and care for the elderly are key elements in this quest.

(The council of Europe, Recommendation 1428 (1999): The future of senior citizens: protection, participation and promotion, Para. 5).

23. The right to family life, which includes the right of parents and their children to maintain family relations, is a recognized right under Israeli law and international law. From this right derives the obligation, which is imposed on the respondent, to respect the family relations between the petitioner and her mother, and not to impose difficulties on the petitioner who wishes to exercise her right and obligation to care for her mother and stand by her in her illness.

B. The right to freedom of movement

24. The right to freedom of movement constitutes the central expression of a person's autonomy, freedom of choice and realization of his rights and abilities. The right to freedom of movement constitutes one of the norms of customary international law and is well rooted in Israeli jurisprudence.

On this matter see:

Article 12 of the 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;

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

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

HCJ 3914/92 **Lev v. The Regional Rabbinical Court**, TakSC 94(1) 1139, 1147 (1994).

25. The respondent severely violates petitioner's freedom of movement by preventing her from entering the Gaza Strip and meeting her mother. The violation of the freedom of movement in our case causes a severe harm to petitioner's fabric of family life.
26. 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 the freedom of movement.

C. Respondent's obligation to specify the grounds for his decision as an inherent part of petitioner's right to have a hearing

27. The respondent did not specify the grounds for his refusal to allow petitioner's entry into the Strip, and satisfied himself by a very general and laconic statement for the prevention of her entry: "The exit of your client into the Strip will not be permitted due to security objection" – this and nothing more.
28. The petitioner, whose rights were restricted following respondent's decision, is entitled that the decision in her case be made in a proper administrative manner and that the grounds for the decision to restrict her said right be disclosed by the respondent, and the rationale is clear: if the reason for the refusal is not disclosed, the person who was injured by the decision will not be able to refute the allegations raised against him, and his protected rights may be restricted without any scrutiny or inspection.

Even when a standard decision is concerned, the authority does not fulfill its obligation by giving the reasons underlying its decision in a general and laconic manner, providing only the "caption" of its reasons with no specific and pertinent reference to the circumstances of the case at hand. This means that a notice stating "your application is denied for security reasons" – is not sufficient.

(Yoav Dotan, "The Duty to give Reasons in Administrative Law" 19 **Mechkarey Mishpat** 5, 37 (5762)).

29. The duty to give reasons does not apply only by virtue of this procedure or another, and this is not a formal matter: this is a duty which governs the basic principles of administrative law as an inherent part of the right to a fair hearing and of a person's right to know what are the claims of the authority and of the right to present his position before the authority.
30. Relevant to this matter are the comments of the honorable Justice (as then titled) Barak:

The case before us demonstrates the great importance that should be attributed to a strict adherence to the rules concerning the right to a fair hearing. Since the petitioner has not been given the opportunity to hear the complaints against him and to present his own position, he became convinced that the considerations of the authorities were inappropriate and discriminatory and his trust as a citizen in the government was undermined.

The rules concerning the right to a fair hearing are aimed at preventing this state of affairs, since the purpose thereof is not only to ensure that in practice justice is made with the injured individual, but also to ensure that the trust of the public in good governance is maintained...

This right is not only a formal procedure of summons and hearing. The right to be heard means the right to a fair hearing (HCJ 598/77, page 168). The meaning of this right is to give a proper opportunity to respond to information which was obtained and which may affect a decision which concerns petitioner's matter (see: HCJ 361/76).

Therefore, the right to be heard is not properly exercised, if the applicant is not advised of the information which was obtained in his matter and is not given the opportunity to properly respond thereto.

(HCJ 656/80 **Abu Romi v. Minister of Health**, IsrSC 35(3) 185, 190).

31. This basic right, which imposes clear duties, is also entrenched in international law (see Articles 1, 2 and 7 of the Universal Declaration on Human Rights; Articles 27 and 147 of the fourth Geneva Convention; Articles 2, 4 and 14 of the International Covenant on Civil and Political Rights; Article 2 of the International Covenant on Economic, Social and Cultural Rights; Articles 6 and 13 of the European Convention on Human Rights; etc).
32. In view of the above, the petitioners request to reserve the right to complete their arguments at a later stage, to the extent it may become necessary after respondent's arguments are presented.

Conclusion

33. The petitioner wishes to travel to the Strip to visit her elderly sick mother, who needs assistance and support.
34. In his refusal to grant her a permit to leave, the respondent severely violates petitioner's right to family life, a basic constitutional right of the petitioner.

In view of the above, the honorable court is hereby requested to issue an *order nisi* as requested in the beginning of this petition, and after receiving respondents' response, make the order absolute. In addition the court is requested to order the respondents to pay petitioners' costs and legal fees.

January 23, 2013

Tal Steiner, Advocate
Counsel to the petitioners