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In the Supreme Court
sitting as the High Court of Justice

HCJ 11198/02

The Petitioners:

1. ___ Diriya, ID No. ____, from Beit Fajar,
currently being detained in Ofer military detention facility until the end of legal proceedings
2. ___ Gheith, ID No. ____, from Deir Ghasaneh,
currently under administrative detention at the Ofer military detention facility___
3. Hamed, ID No. ____, from Silwad,
currently under administrative detention at the Ofer military detention facility
4. ___ Diriya, ID No. ____, from Beit Fajjar
5. HaMoked: Center for the Defence of the Individual

**all represented by Counsel Adv. Tamar Peleg-Sryck and/or Adv. Yossi Wolfson
of HaMoked: Center for the Defence of the Individual, 12 HaTanaim Street, Tel Aviv 69209
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- v e r s u s -

The Respondents:

1. Commander of the Ofer Military Detention Facility
2. Commander of IDF Forces in the Judea and Samaria Area

by the State Attorney's Office

Petition for Order Nisi

A petition is hereby filed for an Order Nisi, directed to the Respondents and ordering them to appear and show cause, as follows:

As regards Respondent 1: Why he should not allow Petitioners 1, 2, and 3 to receive regular family visits in the Ofer military detention facility, in which they are imprisoned.

As regards Respondent 2:

- A. Why he should not allow Petitioners 1, 2, and 3 to receive regular family visits in the Ofer military detention facility, in which they are imprisoned;
- B. Why he should not permit and establish the technical and procedural arrangements that will enable Petitioner 4 to travel from her home to the Ofer detention facility to regularly visit her son who is imprisoned in the facility.

Request for an expedited hearing

The Honorable Court is requested to order that the hearing on the petition be expedited because of the absolute infringement of the fundamental right of the Petitioners, and of other prisoners in the Ofer military detention facility, to receive family visits, from the time that the prison was opened nine months ago.

Nature of the petition

The petition deals with the complete and continuing denial of family visits to all detainees and prisoners in the Ofer detention facility since it was opened in late March 2002. The denial of family visits violates express provisions of laws and regulations that are binding on the Respondents. In addition, the refusal severely infringes on the fundamental right to family life, which is recognized and incorporated in our common law and in international law.

Exhaustion of remedies

1. Despite many requests made to the Respondents and despite undertakings given, no family visits have ever been made to the Ofer military detention facility, which, as mentioned, was opened in March 2002.

The first written request of Petitioners' counsel was sent on 1 July 2002. In the letter, which was addressed to the commander of the Ofer military detention facility, with copies to the legal advisor of the facility and to Captain Morris Hirsch, Assistant Legal Advisor for Judea and Samaria, Petitioners' counsel wrote, inter alia:

I again draw your attention to the severe violation of the right of prisoners in Ofer to receive family visits. My telephone calls to you in this matter, and, as far as I know, requests made by other persons, have been fruitless...

The infringement on the rights of prisoners and their families is arbitrary, extremely unreasonable, and unlawful, and becomes more grievous the longer the breach continues.

Therefore, I request that you arrange family visits at the Ofer military detention facility without further delay...

The letter is attached hereto as Appendix P/1.

- 6.1 When no response to the first letter was received, a second letter was sent. It was addressed to Lt. Col. Yair Lutstein, Deputy Legal Advisor for Judea and Samaria. This letter, too, remained unanswered.

The second letter is attached hereto as Appendix P/2.

- 6.2 The third letter is dated 18 September and is addressed to Ms. Osnat Mandel, Head of High Court of Justice Petitions Division, of the State Attorney's Office. The letter was sent, as stated therein, "as a result of the position taken by the Court and the Court's decision in HCJ 6834/02, of 10 September 2002, regarding family visits in the Ketziot detention facility." Based on that decision, Adv. Mandel was requested "to instruct the relevant individuals [to act as set forth in the said judgment. That is,] complete all the technical and administrative arrangements necessary for family visits, so as to enable family visits without delay [also in the Ofer detention facility]."

The third letter is attached hereto as Appendix P/3.

- 6.3 In response to Appendix P/3, Adv. Shai Nitzan, of the High Court of Justice Petitions Division, provided Petitioners' counsel with a copy of the letter of Captain Morris Hirsch, Assistant Legal Advisor for Judea and Samaria, which was addressed to Adv. A. Rosenthal.

The letter is attached hereto as Appendix P/4.

- 6.4 Petitioners' counsel requested Adv. Nitzan and Captain Hirsch to respond to her letter, using the wording offered by the state in HCJ 6834/02 as regards Ketziot, making a commitment that visits in Ofer would begin on a certain date. The request was not granted.

In a subsequent telephone conversation, Captain Hirsch told Counsel for the Petitioners that the IDF had fulfilled the undertaking it gave in P/4: "The construction work and technical arrangements necessary for family visits in the Ofer military detention facility by the end of October" had indeed been completed. Captain Hirsch stated that responsibility for whether visits took place

or not lay with the International Committee of the Red Cross (ICRC) and not with the IDF, as Petitioners' counsel contends.

- 6.5 The Petitioners sought to exhaust their remedies. In his affidavit, given on 17 December 2002, Petitioner 3, the representative of the detainees in the Ofer detention facility, states:

We approached the prison authorities on this matter [family visits], more than once. Just two hours ago, I sent another letter to the prison commander, requesting that he allow visits. The prison administration claims that the reason there are no visits lies with the ICRC, but I think it is the prison's responsibility. It is important that arrangements be made whereby the army allows and takes the necessary actions to enable people from far away to come for visits. But my father, for example, does not need [help with] transportation.

The facts: the Petitioners

2. Petitioners 1, 2, and 3 (hereafter: "the Petitioners") were arrested in March-June 2002. Since then, they have been held in the Ofer detention facility, and have not been visited by their families. The Petitioners gave affidavits supporting the petition.
- 2.1 Petitioner 4 is the mother of Petitioner 1. She has not seen her son since he was arrested. Petitioner 4, too, gave an affidavit in support of the petition. The Petition, which was signed before an attorney, and the power of attorney that she gave were forwarded by facsimile since it was not possible to meet with her.
- 2.2 Petitioner 5 is a registered non-profit organization that provides assistance to residents of the Occupied Territories and East Jerusalem whose rights have been violated by Israeli authorities.
- 2.3 Petitioner 1, 27 years old, from Beit Fajjar, was arrested on 20 May 2002. He is now being held until the end of the legal proceedings against him.

Petitioner 1 begins his affidavit with the following words: "I have been suffering from emotional problems that predate my arrest." He later states: I am emotionally drained. My mind is exhausted... Just like I keep quiet when speaking with you and barely answer questions – the same is true about my contacts with the other prisoners. I find it hard, it worries me, speaking with you". He adds: "Before I was brought here, I was being treated regularly for mental health problems...and also at the mental hospital in Bethlehem". He ends his statement with the following words: "I think about my family. I do not want to share my feelings [with you]".

“I want to visit my son in prison,” says Petitioner 4, the 60-year-old mother of Petitioner 1. “Is it necessary to explain why a mother wants to see her son, to be next to him, to hear his voice? In my case, though, it is not just the matter of a mother’s love. I worry about him very much. I am very frightened that his condition will deteriorate in prison. I want to know how he is coping with the prison conditions. I think that it would help him to see me and others from our family. I think it is not only a right, but an obligation to give my son support”.

According to Petitioner 4, her son, Petitioner 1, had been previously imprisoned, following which he suffered mental health problems. He withdraws into himself, fails to communicate with anyone. He received electric shock treatments and shots, as part of his treatment at the psychiatric hospital in Bethlehem.

The 60-year-old mother adds: “Since he was arrested, I have not seen my son. Nor has my husband or other members of our family, except for his sister. She saw him during a court hearing in Beit El about three months ago. She saw him from afar. He smiled, so he apparently recognized her, but he seems to be in another world”.

As stated in the neuro-psychiatric report of Dr. Banura, a resident of Bethlehem who treated Petitioner 1 along with Dr. Mujahed, Petitioner 1 suffers from schizophrenia.

The medical opinion is attached hereto as Appendix P/5.

- 2.4 Petitioner 2 was shot and then arrested on 6 March 2002. He was hospitalized for several months, most of the time in Israel Prison Service medical facility. In November 2002, he was transferred to the Ofer detention facility. He is an administrative detainee. The current order for his administrative detention expires on 4 March 2003. It is not known when he will be released.

In his affidavit, Petitioner 2 states:

I am 23 and married. I have a daughter, who is now three months old. She was born while I was in detention. I have never seen her. I couldn’t be in touch with my wife when she gave birth. I heard about the birth from my lawyer a court hearing. I am a new father, but have never experienced fatherhood. I have not seen my daughter.

I also have a father, mother, brothers, and sisters. I want to see them, too.

I live in Beituniya. I can see my home from the camp. When I see it, and know that my wife and daughter are there but that I can’t see them, I begin to cry. It would be better if I couldn’t see the house.

- 2.5 Petitioner 3 serves as the prisoners' representative detainees in dealings with the prison administration. He has been under administrative detention since the beginning of June. His detention was recently extended until June 19, 2003.

In his affidavit, he states, inter alia:

I am married and have three young children, a son who is seven years old, a daughter, who is five, and a 1 ½ year-old son. I also have a father, who is 65 years old.

Silwad, where I live, is only 12 kilometers away from here. From there, one can see Ofer. But more than six months have passed since I last saw my family.

I think it is a real crime to hold a person a ten minutes away from his family for so many months, without allowing him to communicate with them. I do not know what is happening in their lives, if somebody was wounded or injured, how they feel... I left when my son was nine months old. I want to see him, to hear him start talking, to see how he develops... I can't describe these feelings in words, but these are a father's feelings that everyone can understand.

The law

3. The Ofer detention facility is located in the Judea and Samaria Area. "The detention conditions in the region are primarily set forth in the Order Regarding Operation of Detention Facilities (West Bank Area) (No. 29), 5727 – 1967". This was held in the recent decision given with respect to holding conditions at Ofer in HCJ 3278/02, **HaMoked: Center for the Defence of the Individual et al. v. Commander of IDF Forces in the West Bank**(Par. 22). This is also the subject herein.
- 3.1 Section 12A of the Order Regarding Operation of Detention Facilities (West Bank Region) (No. 29), 5727 – 1967 (hereafter: "the Detention Facilities Order"), under the sub-heading "Visits," directs as follows:

A prisoner shall be allowed to receive family visits at the times and for the period of time as the commander, or a person on his behalf, shall determine."

Section 1 of the said order defines "commander" and "detention facility" as follows:

“commander” – any person appointed by a military commander to the position of commander of a detention facility.

“detention facility” – any place in the Area that is declared by me or by a military commander to serve as a place for the imprisonment and detention of prisoners.

The Detention Facilities Order is attached hereto as Appendix P/6.

- 3.2 Section 11(a) of the Administrative Detention Regulations (Conditions for Holding Persons in Administrative Detention, Judea and Samaria, 5742 – 1981 (hereafter: “Administrative Detention Regulations”), under the sub-heading “Visits to Detainee,” provides:

A detainee shall be allowed to receive visits, in a place that shall be determined by the commander, for thirty minutes, as set forth below:

- (1) One visit by one relative every two weeks. For the purpose of this section, “relative” means parent, grandparent, spouse, offspring, brother, or sister;
- (2) A visitor of a different family relationship or any other visitor who does not come within the provisions of Section 12 may visit with the special permission of the commander, at the commander’s discretion.

The regulations are attached hereto as Appendix P/7.

- 3.3 Section 17 of the Order Regarding Interpretation (West Bank Region) (No. 130), 5727 – 1967 (hereafter: “the Interpretation Order”), states:

(A) Where defense legislation mentions a military commander or another authority acting on behalf of the commander of IDF forces in the Area, the following provisions shall apply:

1. The IDF military commander in the Area may exercise any power or perform any function mentioned therein;
2. Any action that may be taken by the IDF military commander in the Area, while exercising his authority or discharging a duty as stated, is given preference over a prior act of a military commander or other authority as stated, even if it was not expressly revoked.

(B) The exercise of authority or performance of a function in accordance with Subsection (a), shall not be construed as generally denying the authority or the function of any person who held it, unless the commander of IDF forces in the Area so states explicitly.

3.4 Section 19(a) of the Interpretation Order states:

A person empowered by the defense legislation to carry perform an act or to compel the performance of an act, is also automatically given all the powers that are reasonably necessary to enable him to perform the act or compel the performance of the act.

The Order Regarding Interpretation is attached hereto as Appendix P/8.

3.5 As appears from the above provisions, the authority and duty to enable family visits in prison lie with Respondents 1 and 2. The area in which the prison commander exercises power and discharges duties is the prison in which he serves as commander. He must take every action, subject to the provisions of the Detention Facilities Order, required to allow families arriving at the prison gate to visit their relatives held inside.

3.5 [*sic*] The powers and obligations of the IDF military commander in the Area span the entire Area and every person and matter therein. The power and duty to permit and allow relatives of inmates to arrive from their homes to the prison and hold visits with their incarcerated loved ones is included within the scope of his powers and duties.

3.6 The comments of President Barak in H CJ 3278/08, cited above, in Paragraph 28, are appropriate to the present case *mutatis mutandis*: “The ICRC cannot be relied upon in this matter. It is the duty of the Respondent...”

4. The Supreme Court has more than once heard and ruled on the right of every person, including detainees and prisoners, to a family life.

4.1 All societies in cultures and at all times have considered family life a paramount value, second only to the value of life itself, as our case law has pointed out.

Civ. Reh. 2401/95, **Nahmani v. Nahmani**, Piskei Din 50 (4) 661; Civ. App. 5587/93, **Nahmani v. Nahmani**, Piskei Din 49 (1) 485, 500; Civ. App. 488/77, **A. et al. v. Attorney General**, Piskei Din 32 (3) 421, 434; Civ. App. 232/85, **A. v. Attorney General**, Piskei Din 40 (1) 1, 5; H CJ 114/86, **Weil v. State of Israel**, Piskei Din 41 (3) 477.

Preserving the integrity of the family is part of Israeli public policy. The family unit is the “primary unit” ... of human society... It is the institution recognized by society as one of the pillars of the life of society... The preservation of the

institution of the family is part of Israeli public policy.
H CJ 693/91, **Efrat v. Director, Population Administration
of the Ministry of the Interior**, Piskei Din 47 (1) 749, 783.

- 4.2 The right of a prisoner to family visits is a fundamental, constitutional right, which is derived from the right to family life. Imprisonment does not affect the fundamental right, which belongs to both the prisoner and his family, to maintain a family life in a format that detention conditions can allow.

Pris. Pet. **State of Israel v. Tamir**, Piskei Din 37 (3) 201, 206-208; H CJ 114/86, **Weil v. State of Israel**, Piskei Din 41 (3) 477, 489-490.

Imprisonment alone does not deny the prisoner or the detainee any of his rights, except as required and resulting from the denial of his freedom of movement, or when a specific law so states. Thus, when prison authorities seek to deny a detainee or a prisoner any human right, the authorities must prove that the denial is proper, well reasoned, and lawful.

The human rights of prisoners and detainees, the Supreme Court has ruled, includes all the rights and liberties given to all persons, except for freedom of movement.

Pris. Pet. 4463/94, Perm. Pris. App. 4409/94, **Golan v. Prisons Service**, Piskei Din 50 (4) 136, 153. H CJ 355, 370,373, 391/79, **Katlan et al. v. Prisons Service et al.**, Piskei Din 34 (3) 294, Misc. Crim. Appl. 3734/92, **State of Israel v. Azazma**, Piskei Din 46 (5) 72; H CJ 144/86, **Weil v. State of Israel**, Piskei Din 41 (3) 477, 492.

- 4.3 The right of the prisoner and his family to visits is given a special status. Special reasons, of substantial weight, must be provided when denying this right. There can be no lawful reason or justification for an absolute, ongoing, and sweeping denial of this right.

Pris. Pet. 4/82, cited above; H CJ 114/86, cited above.

The detention or imprisonment of a person is not intended to infringe on his rights, and “even persons suspected of the most heinous crimes are entitled to be detained in at least minimally human conditions, in which they are provided basic human needs. We would not be humane if we did not ensure a humane level [of treatment] to persons in our custody. This is the duty of the commander in the Area according to international law, and this is his duty under our administrative law. This is the duty of the Israeli administration based on its humane, Jewish, and democratic nature.

H CJ 3278/02, cited above, Paragraph 24.

5. The right to family life is recognized and protected by international law.

Article 46 of the Hague Regulations of 1907; Article 23(1) of the International Covenant on Civil and Political Rights, of 1966; Article 9 of the UN Convention on the Rights of the Child, of 1989; Article 27 of the Fourth Geneva Convention.

- 5.1 The Fourth Geneva Convention expressly relates to the right of an internee to visits, when it states, in Article 116:

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

- 5.2 The Standard Minimum Rules for the Treatment of Prisoners, of 1955, (SMR) state, in Article 17:

Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

- 5.3 In 1968, when the European Human Rights Commission examined the situation in prisons in Greece, it looked to the SMR and to the European Convention on Human Rights. On the question of the prisoner's contact with the outside world, in the chapter dealing with "temporary disappearance," the Commission reported on the refusal to allow visits by relatives "for considerable periods." As an example, the Commission referred to the case of a person who was not allowed to see his parents for fifteen days during which he was held in isolation.

Furthermore, the Commission held that Article 3, common to the Geneva Conventions, was breached by:

The extreme manner of separation of detainees from their families and in particular, the severe limitations, both practical and administrative, on the family visits...

The extreme manner of separation refers to the fact that it could take families three to four days to reach the island for visits that were permitted only once in three months. Practical limitations on such visits included the difficulty of travel and, for some families, the prohibitive expense of such travel.

The administrative limitations consisted of the restriction of the visit to two hour periods and the presence of the guard.

The Greek Case, 1969, p. 478, **12 Yearbook of the European Convention for Human Rights**.

Nigel S. Rodley, **The Treatment of Prisoners under International Law**, Second Edition (Clarendon Press, Oxford, 1999) 281-284.

6. Returning to domestic law: it is common law that technical or financial difficulties cannot justify the failure to respect a constitutional human right. A society in which human rights are given paramount value, the Supreme Court has held, must bear the financial cost entailed therein. Declaring the existence of a fundamental right is meaningless unless concrete action is taken to respect it.

H CJ 7081/93, **Botzer et al. v. Maccabim-Reut Local Council et al.**, Piskei Din 50 (1) 19, 27; H CJ 4541/94, **Miller v. Minister of Defense et al.**, Piskei Din 49 (4) 94, 113, 122.

Justice Dorner referred to this when she stated:

A fundamental right, by its very nature, entails a social cost. Where the exercise of an interest has no cost, it is meaningless to incorporate it in a right, and certainly not in a fundamental, constitutional right.

Crim. FH. **Ghaneimat v. State of Israel**, Piskei Din 49 (4) 589, 645.

In another matter, President Shamgar stated in the context of the right to dignity, that:

The constitutional message does not focus on the declaration of the existence of a fundamental right, but on its substance, its scope, and the fulfillment of the right in practice... Human dignity is not guaranteed by talking about it, but rather by expressing respect for it in a real and actual manner ...

Civ. App. 5942/92, **A. v. B.**, Piskei Din 48 (3) 837, 842.

In his treatise, Prof. Barak wrote:

The protection of human rights costs money, and a society that respects human rights must be willing to bear the financial cost.

Aharon Barak, **Interpretation in Law – Constitutional Interpretation**, Vol. 3 (Nevo, 1995) 528.

The exercise of fundamental rights is likely to cost money, but a society that holds fundamental rights in esteem must be prepared to pay the cost for exercising the rights.

7. So it is in times of peace and so it is in time of war and tension:

Also when the cannons speak and the Muses are silent, law exists and operates, determining what is permitted and what is forbidden, what is lawful and what unlawful. And where there

is law, there are also courts that determine what is permitted and what is forbidden, what is lawful and what unlawful.

[H CJ 7015, 7019/02, Kipah Ajuri et al. v. IDF Commander et al.](#) (not yet published).

Indeed, it is the court that puts a person behind bars, but now, when the walls close around him, the court is the father of the prisoners.

Pris. Pet. 7440/97 (Perm. Pris. App. 6172/97), **State of Israel v. Golan**, Piskei Din 52 (1) 1, 8-9.

Therefore, the Honorable Court is requested to issue the Order Nisi as requested in the beginning of this petition, and after receiving the Respondents' response, make it absolute.

The Honorable Court is also requested to order the Respondents to pay legal costs.

[signed] _____

Adv. Tamar Peleg-Sryck
Counsel for the Petitioners