At the Supreme Court **HCJ 4048/13**
Sitting as the High Court of Justice

In the matter of:

1. _____ **Arshid, ID No. _____,** Jenin
2. _____ **Handi, ID No. _____,** Qalqiliya
3. _____ **Salameh, ID No. _____,** Betlehem
4. _____ **Makhemar, ID No. _____,** Hebron
5. _____ **Dudin, ID No. _____,** Betlehem
6. _____ **Bani 'Odeh, ID No. _____,** Jenin
7. _____ **Habel, ID No. _____,** Nablus
8. _____ **Zalum, ID No. _____ ,** Nablus
9. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

all represented by counsel, Adv. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben Ari (Lic. No. 37566) and/or Hava Matras-Irron (Lic. No. 35174) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58008) and/or Bilal Sbihat (Lic. No. 49838) and/or Tal Steiner (Lic. No. 62448) and/or Anat Gonen (Lic. No. 28359)

Of HaMoked Center for the Defence of the Individual,
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The Petitioners

v.

Military Commander of the West Bank Area
represented by the State Attorney's Office, Ministry of Justice

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, as follows:

a. Why he should not cancel the limitation imposed on the number of entry permits into Israel which petitioners 1-8 (hereinafter: the **petitioners**) are allowed to receive for the purpose of visiting their loved ones, who are incarcerated in Israel;

b. Why he should not cancel the sweeping limitation imposed by him on the number of permits which the sons and brothers of Palestinian prisoners may receive for the purpose of entering Israel to visit them.

The grounds for the petition are as follows

> There is no dispute that the approval of applications of family members to visit the imprisoned is within the realm of an expectation which should be recognized by the competent authority in Israel, as part of the realization of the right to a family… **The duty of the commander of the Area, within the framework of his powers, is to ensure the safety and well being of the residents of the Area, including the realization of their family relations with their loved ones who are far away from them**, and provide proper protection to constitutional human rights (HCJ 7615/07 **Barghouti v. Military Commander of the West Bank**, TakSC 2009(2), 2993, paragraph 12 of the judgment of Justice Procaccia; all emphases in this petition were added – D.S.)

1. This petition concerns an anomalous situation which has been lingering for a number of years: Palestinian prisoners, who are imprisoned in Israel, may see their sons and brothers, between the ages of 16-35, twice a year only when sons are concerned, and once a year when brothers are concerned.

2. This severe violation of rights, of both the prisoners as their sons and brothers, is caused by respondent's policy concerning the issue of entry permits into Israel to family members of prisoners, residents of the West Bank. According to this policy, brothers of prisoners in the above ages are entitled to receive only one permit per year to enter Israel for the purpose of making a prison visit. Sons of prisoners in the above ages are entitled to receive no more than two permits per year.

Background

3. From the commencement of the second intifada, in October 2000 and until March 2003, Israel has completely prevented West Bank residents from visiting their family members imprisoned in incarceration facilities in Israel and in the Occupied Palestinian Territories (OPT). Following a petition which was filed by petitioner 9 (hereinafter: **HaMoked**) HCJ 11198/02 **Diriyah v. Commander of the Military Incarceration Facility Ofer** (not reported) the respondent commenced gradually allowing family members to visit their incarcerated relatives.

4. The respondent has also established narrow criteria defining who is eligible to visit: spouses, parents and grandparents, as well as brothers, sisters, sons and daughters under the age of 16 or over the age of 46 only. In July 2005, the respondent determined that sisters and daughters may visit their loved ones in prison without age limitation. In addition, **the respondent determined that sons between the ages of 16 - 35 would be entitled to visit their incarcerated father twice a year, and that brothers in the above ages would be entitled to visit once a year only**.

5. It should also be noted in this context that the respondent does not allow residents of the West Bank to arrive to visits on their own, and does not organize any visitation arrangements of his own. The visits are organized exclusively by the International Committee of the Red Cross (hereinafter: the **ICRC**). Visit applications are filed by the residents at the offices of the ICRC in their places of residence and the latter delivers them to the respondent. The respondent delivers his response to the ICRC, which informs the applicant thereof. The ICRC also organizes the actual transportation - at its own expense, in coordination with the respondent and along with strict security arrangements.

6. According to the regular procedure, when a prison visit application is approved, the applicant receives a one-year permit from the respondent. The permit is valid for ICRC prison visit shuttles only. The permit enables its recipient to visit prison without limitation, inasmuch as ICRC shuttles are available to them (usually, twice a month). Children under the age of 16 do not need a permit and may join the visits without limitations.

Brothers and sons of prisoners are classified from the outset as "precluded from entering Israel"

7. As mentioned above, the regular procedure, which applies to all West Bank residents who have incarcerated relatives in Israel, does not apply, from the outset, to brothers and sons between the ages of 16-35. The respondent classifies them, *a priori*, as "precluded from entering Israel", and accordingly a special procedure is applied to them – a procedure concerning family members who are classified by the respondent as "precluded from entering Israel".

8. By the end of 2003 and following petitions filed by HaMoked, the respondent determined, in principle, that persons precluded from entering Israel would also be able to participate in prison visits, organized by the ICRC, in the absence of a special preclusion preventing them from making prison visits (HCJ 8851/03 **Nahleh v. Commander of IDF Forces in Judea and Samaria** and HCJ 11193/03 **Nazal v. IDF Commander in the West Bank**; the judgments were not reported).

9. On October 26, 2004 the State Attorney's Office notified of a new arrangement which applied to individuals who were "precluded from entering Israel", with respect of whose participation in prison visits there was no security preclusion, via secured ICRC shuttles.

10. According to this arrangement, prison visit applications submitted by "precluded from entering Israel", are also transferred to the Israel Security Agency (ISA), for a specific review and examination. In the absence of any preclusion preventing the applicant from making prison visits, a single entry permit to Israel is granted to him for prison visit, which is valid for 45 days. After the visit, the permit expires. In order to make another visit, the applicant must submit another visit application, which is also specifically examined by the ISA and so on and so forth.

11. As aforesaid, brothers and sons of prisoners, between the ages of 16-35, are classified as "precluded from entering Israel", *a priori*, with no specific examination. Namely, despite the fact that there is an arrangement which enables Palestinian family members to visit their loved ones who are incarcerated in Israel several times per year, the mere fact that an individual happens to be a brother or a son of a prisoner, between the ages of 16-35, denies him, *a priori*, the ability to receive a multiple entry permit into Israel. Such an individual is labeled *dangerous* - "precluded from entering Israel" – with no specific preliminary examination whatsoever.

12. Furthermore, the permits, which enable a single entry into Israel during a 45 day period, may be obtained by the brother of the prisoner, once per year only, and by the son of the prisoner, twice a year only. Such a limitation is not imposed on other individuals who are "precluded from entering Israel", who theoretically, can receive a number of single entry permits per year.

13. As will be demonstrated in the factual part, sons who are entitled to two visits per year and brothers who are entitled to one visit per year, often cannot realize this minimal right due to respondent's conduct concerning the duration of the issuance of the permits.

Until when will the respondent continue to apply said policy?

14. In 2003, in which Palestinian prison visits were renewed, the state argued that the visit limitations derived from the complex security situation which existed at that time.

15. However, an offensive policy cannot last forever. It is clear that currently the security situation is completely different. The respondent himself, as described in paragraph 4 of the petition, has already removed some of the limitations which were imposed by him upon the renewal of the visits, about ten years ago.

16. Therefore, we must ask what is the underlying justification for the continued imposition of the limitation, which has been in force for whole ten years, of one or two visits per year, which violates the fundamental human right of the prisoners, their brothers and sons.

17. The respondent may argue that the duties imposed on him must be balanced against security needs, and that therefore, the severe limitation which is imposed on the realization of the right to visits and family relations, is justified. However, the term "security needs" is dynamic and changes with time. How can the respondent continue to implement a ten years old policy, which violates fundamental rights, without re-evaluating it? The respondent must update his policy which has been in force for many years, according to the current situation on scene, whilst upholding the duties imposed on him under applicable law.

18. To date, in view of the change of circumstances, there is no longer any justification for said limitation. The scales clearly tip in favor of the family members and the prisoners and the balancing point between "security needs" and the rights of the individual should change accordingly. It is impossible to continue to implement a policy which limits a fundamental human right, while on scene such extensive changes have taken place.

19. Moreover, in view of the changed circumstances, the fact that the respondent collectively harms such a large group of people, is unbearable, and must be stopped.

20. It will be both lawful and just for the honorable court to order the respondent to explain why he continues to insist on the implementation of a policy which is no longer relevant, and to eventually order him to change it, so that the fundamental rights of the Palestinian prisoners incarcerated in Israel, and of their brothers and young sons, are upheld.

The Parties

21. Petitioner 1, _____ Arshid, born in 1993, has never been detained or interrogated. His father, _____ Arshid ID No. _____), was arrested in 1993, sentenced to life in prison and is currently held in Shita prison. **Petitioner 1 was only twelve days old when his father was arrested**. Consequently, their acquaintance was made through the glass which separates between the prisoners and the visitors, when he visited his father with his mother or other family members once every few months. Ever since he turned sixteen years old, the son visited his father only twice, due to the limitation imposed on him by the respondent. He has last visited his father in September 2009. Since then, the respondent has not responded to his applications for additional permits.

22. Petitioner 2, _____ Handi, born in 1995, has never been detained or interrogated. His father, _____ Handi (ID No. _____), was arrested in September 2002, sentenced to twenty years in prison and is held in Nafha prison. **Petitioner 2 was only eight years old when his father was arrested**. He visited him once every few months, with other family members. Ever since he turned sixteen years old, he has been required by the respondent to receive permits. Therefore, he saw his father only three times during the last two years, in August 2011, in July 2012 and lately on March 17, 2013.

23. Petitioner 3, _____ Salameh, born in 1995, has never been detained or interrogated. His father, _____ Salameh (ID No. _____), was arrested in October 2006, sentenced to sixteen years in prison and is currently held in Nafha prison. Petitioner 3 visited his father on a regular basis when he was not required to obtain entry permits into Israel. Ever since he turned sixteen years old, two years ago, petitioner 3 saw his father only once, in August 2012. The respondent does not issue for him additional entry permits into Israel, despite his repeated applications. The limitation imposed by the respondent has almost completely severed the relations between the father and his son.

24. Petitioner 4, _____ Makhemar, born in 1994, has never been detained or interrogated. His father, the prisoner _____ Makhemar (ID No. _____), was arrested in June 2006, sentenced to 28 years in prison and is held in Ramon prison. Until he turned 16 years old, petitioner 4 visited his father on a regular basis, about once every two weeks. Since then, the respondent prevents him from seeing his father in a reasonable frequency, by failing to respond to his applications for entry permits into Israel. In July 2012, after a year and a half during which he has been waiting for respondent's response, petitioner 4 received a permit, and has eventually visited his father. Due to the limitation imposed on him by the respondent, he will be able to see his father again only in the spring of 2013, and only if the permit application is duly processed by the respondent.

25. Petitioner 5, _____ Dudin, born in 1991, has never been detained and was interrogated only once, for half an hour, about a year ago. His father, the detainee _____ Dudin (ID No. _____), was detained in August 2011 and has been held, ever since, under administrative detention, currently in Ketziot prison. Petitioner 5 is the prisoner's eldest son. However, he has hardly had the chance to know his father, who, ever since his son was born, has been held, most of the time, under arrest or administrative detention. Consequently, petitioner 5 bears the responsibility for the family's livelihood. To date he is a law student. However, in view of the fact that he is included in the category of "between the ages of 16-35", he is subject to the limitation imposed by the respondent. Thus, he visited his father only once since the father's detention, in November 2012. Another permit application awaits response, which is delayed.

26. Petitioner 6, _____ Bani 'Odeh, born in 1986, has never been detained or interrogated. His brother, the prisoner _____ Bani 'Odeh (ID No. _____), was arrested in November 2002, sentenced to 30 years in prison and is currently held in Gilboa prison. Ever since he turned 16 years old, petitioner 6 has been visiting his incarcerated brother approximately once every two years, only because of the limitation imposed on him by the respondent, as well as because of respondent's inadequate processing of petitioner 6's permit applications. The petitioner has last seen his brother in December 2012. Since then the respondent has been preventing him from submitting a new application due to the "one year" limitation, and consequently he does not know when he will be able to see his brother again.

27. Petitioner 7, _____ Habel, born in 1985, has never been detained or interrogated. His brother, the prisoner _____ Habel (ID No. _____), was arrested in January 2004, sentenced to 30 years in prison and is currently held in Megido prison. Ever since his brother's arrest, petitioner 7 visits him approximately once every two years – due to the limitation imposed by the respondent,

coupled by respondent's outrageous slow processing of the permit applications. Petitioner 7 saw his brother in December 2010, submitted a new permit application in December 2011 (the respondent did not enable him to submit an application earlier, due to the automatic limitation imposed by him), and received a permit only in July 2012. Should the respondent continue to apply the draconian limitation on prisoners' brothers, petitioner 7 will probably be able to see his brother again within a year and a half or two years, at best.

28. Petitioner 8, _____ Zalum, born in 1986, has never been detained or interrogated. His brother, the prisoner _____ Zalum (ID No. _____), was arrested in November 2002, sentenced to 30 years in prison and is currently held in Gilboa prison. Petitioner 8 has not seen his brother for about six months. The outrageous slow frequency in which he visits his incarcerated brother derives from the limitation imposed on him by the respondent, and from respondent's scandalous processing of permit applications. Furthermore, in view of the fact that his brother was arrested when he himself was 16 years old, he unfortunately "fell" into the arbitrary category adopted by the respondent. Thus, petitioner 8 saw his brother only twice, since the brother's arrest eleven years ago.

29. Petitioner 9, HaMoked, is a human rights organization, which assists, for many years, Palestininas, residents of the West Bank, to realize their right to visit their family members who are incarcerated in prisons in Israel.

30. The respondent is the military commander, in charge of the West Bank Area on behalf of the state of Israel which holds the West Bank under belligerent occupation for forty six years. Within the framework of his responsibilities, the respondent must ensure, *inter alia*, that the rights of the residents of the occupied territory under his command are realized, including their right to family visits in prisons, as part of the realization of their right to family life, according to international humanitarian law, international human rights law, Israeli constitutional and administrative law and the military legislation promulgated by him.

Exhaustion of remedies

31. On December 5, 2010 HaMoked wrote to Colonel Eli Bar-On, respondent's legal advisor, and demanded to revoke the limitation imposed on visits of brothers and sons of the Palestinian prisoners held in Israel.

    A copy of HaMoked's letter to respondent's legal advisor dated December 5, 2010 is attached and marked **P/1**.

32. On January 10, 2011 the response of respondent's legal advisor was received, according to which HaMoked's letter "is handled by the relevant officials. We shall notify you of the decision in the matter as soon as it is made."

    A copy of the response of respondent's legal advisor dated January 5, 2011 is attached and marked **P/2**.

33. On February 27, 2011 an additional letter was received from respondent's legal advisor, according to which HaMoked's letter was still handled by the 'relevant officials".

    A copy of the letter of respondent's legal advisor dated February 24, 2011 is attached and marked **P/3**.

34. A response to this letter was sent by HaMoked on March 7, 2011, which stated that said issue affected the life and well being of tens of thousands of family members and of thousands of

prisoners, and the respondent should therefore give said issue priority. HaMoked also requested to know who the handling officials were, in order to enable it to follow up on the progress made in the handling of the matter.

A copy of HaMoked's response dated March 7, 2011 is attached and marked **P/4**.

35. On April 6, 2011 an additional letter from respondent's legal advisor was received by HaMoked. Said letter stated that HaMoked's request was still "under review", as it concerned "an issue which requires a comprehensive and in depth examination."

A copy of the letter of respondent's legal advisor dated April 6, 2011 is attached and marked **P/5**.

36. Many months have passed and a pertinent response has not been received. Consequently, on July 19, 2011 HaMoked wrote again to respondent's legal advisor and demanded to receive an answer, after many months of "handling".

A copy of HaMoked's letter dated July 19, 2011 is attached and marked **P/6**.

37. An additional letter on this issue was sent to respondent's legal advisor on August 23, 2011. This letter described a case of a prisoner's brother who was the only visitor who could visit his brother, and due to respondent's policy could see him very rarely. Hence, the rights of both brothers were severely violated.

A copy of HaMoked's letter dated August 23, 2011 is attached and marked **P/7**.

38. In view of the fact that no response was received to HaMoked's said letter, and in view of the long time which passed since it has first turned to respondent's legal advisor, an additional letter was sent on November 8, 2011.

A copy of HaMoked's letter dated November 8, 2011 is attached and marked **P/8**.

39. Another reminder letter on this issue was sent to respondent's legal advisor on January 26, 2012.

A copy of the reminder letter dated January 26, 2012 is attached and marked **P/9**.

40. On that very same day a response was received from the legal advisor, through Major Rani 'Amar, head of the population registration unit. The response was surprising: "In view of the fact that the issue described in your letter derives primarily from the policy of the military commander which is based, *inter alia*, on security considerations, please send your request directly to the office of the director of the civil administration through the public liaison officer."

A copy of Major 'Amar's response dated January 26, 2012 is attached and marked **P/10**.

41. On February 15, 2012 HaMoked sent a response to Major 'Amar. In its letter HaMoked noted that its referral to another agency, over a year after respondent's legal advisor has advised that the matter was under review and examination, was outrageous and showed disrespect.

A copy of HaMoked's response to Major 'Amar dated February 15, 2012 is attached and marked **P/11**.

42. On that same day and in view of the above response, HaMoked wrote to the director of the civil administration. In its letter HaMoked reiterated and specified its position according to which the limitation which was imposed on the visits of brothers and sons should be revoked forthwith.

A copy of HaMoked's letter to the director of the civil administration dated February 15, 2012 is attached and marked **P/12**.

43. In view of the fact that no response has been received from the director of the civil administration, an additional letter on this issue was sent on May 2, 2012.

A copy of HaMoked's letter dated May 2, 2012 is attached and marked **P/13**.

44. On May 9, 2012 a response was received from the civil administration public liaison officer, Second Lieutenant Bar Akuka, according to which the matter was "under examination". Since then, no additional update or response have been received by HaMoked.

A copy of the civil administration's response dated May 8, 2012 is attached and marked **P/14**.

Hence, notwithstanding the numerous letters, the correspondence which spreads over a period exceeding a year and a half, and despite the great importance of the issue at hand, the respondent chose to disregard and not to give a pertinent answer. Under these circumstances, there was no other alternative, but to turn to this honorable court.

The Legal Argument

Holding Palestinian prisoners within the state of Israel

45. The policy of the state of Israel concerning the holding of Palestinian prisoners within the territory of Israel is entrenched in the Emergency Regulations (Judea and Samaria and the Gaza Strip – Adjudication of Offenses and Legal Aid) 5727-1967, which were promulgated immediately after the occupation of the OPT in 1967. Since then, the validity of the regulations was extended by primary legislation, and currently they are in force by virtue of section 1 of the Law for the Extension of Validity of the Emergency Regulations (Judea and Samaria and the Gaza Strip – Adjudication of Offenses and Legal Aid) 5767-2007. At the same time, an identical provision is set forth in sections 265(a) and 266(a) of the Order concerning Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009.

46. Said practice directly contradicts three clear provisions of the Geneva Convention IV relative to the Protection of Civilian Persons in Times of War, 1949 (hereinafter: the **Geneva Convention**). According to Article 76 of the Geneva Convention residents of an occupied territory, suspects of offenses should be detained within the limits of the occupied territory. Furthermore – if convicted, they will serve their sentence only within the limits of the occupied territory. The wording of the Article is unequivocally clear:

> **Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.**

The transfer of a detainee or a prisoner to the territory of the occupying power constitutes "deportation" or at least "forcible transfer". Deportation as well as forcible transfer of protected persons from the occupied territory is unequivocally prohibited, with no exception, by the Geneva Convention (first paragraph of Article 49):

> **Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power** or to that of any other country, occupied or not, **are prohibited, regardless of their motive.**

47. The violation of said Articles constitutes a severe violation of the provisions of the Geneva Convention, according to Article 147. The scholar Yuataka Arai-Takahashi writes in his book regarding the laws of occupation, as follows:

> The peremptory nature of the prohibition of deportation or forcible transfer can be confirmed by its incorporation into core crimes under international criminal law. **Both GCIV and API classify deportation or forcible transfer within the meaning of Article 49(1) GCIV as a grave breach** (Yuataka Arai-Takahashi, **The Law of Occupation**, Martinus Nijhoff Pub., 2009, p.476).

48. Respondent's policy of incarcerating Palestinian prisoners within the territory of Israel was discussed and approved by the Supreme Court in HCJ 2690/09 **Yesh Din v. Commander of IDF Forces in the West Bank** (not reported, judgment dated March 28, 2010). HaMoked was one of the petitioners. However, the honorable court found it necessary to note that the mere fact that the holding of Palestinian prisoners in Israel was lawful, did not derogate from the scope of respondent's obligations towards the protected population in general, and towards the population of the Palestinian prisoners, in particular; the court's assumption was that said policy complied with the rules of international law and Israeli law *because* the respondent met the standards established by international law. The following are the remarks of the Honorable President (as than titled) Beinisch, in paragraphs 6-8 of the judgment:

> The purposive interpretation which befits the provisions of the convention (Geneva Convention – D.S.) to the Israeli reality and the conditions of the Area **primarily requires the grant of substantial weight to the rights of the protected population, including the rights of the detainees**. This court has discussed many times the issue of securing adequate conditions to Palestinian detainees… according to the material standards established in international conventions… as aforesaid, **all of which are currently binding upon the prison authorities, which are obligated to respect the provisions of international law and the standards established by them concerning the conditions of detention and imprisonment in general, and the conditions of detainees who are protected residents according to international law, in particular**.

And specifically concerning respondent's obligation to enable the realization of the right to family relations, by the arrangement of prison visits (paragraph 9 of the judgment of President Beinisch):

> The travel arrangements for the purpose of making visits in Israel require, naturally, coordination and means of transportation, and said issue has been heard by us more than once, **in recognition of the importance of visits of family members, as part of the right for the realization of the family relation… seemingly, the issue of accessibility of family members for visits of their incarcerated relatives requires handling for the improvement and adaptation of adequate arrangements**.

49. Namely, the honorable court held that the holding of Palestinian prisoners in Israel was permitted, provided that respondent's duties under international law were upheld. However, as shown by us in the factual part above, by his policy, the respondent violates his duties under international law; the

respondent knowingly limits, by the implementation of an arbitrary bureaucratic measure, the number of visits which sons and brothers of prisoners can make.

50. It is a living example of the way by which the holding of Palestinian prisoners within the territory of the state of Israel easily inflicts a severe injury on protected rights. A single decision of the respondent suffices, who by a stroke of a pen violates the right to family life of thousands of prisoners and of tens of thousands of prisoners' sons and brothers. Such an offensive policy cannot be upheld.

The right to prison visits by relatives and respondent's obligation to arrange them

51. The right to family visits in incarceration facilities is a fundamental right, both of the prisoners and of their family members. It is a fundamental right premised on the perception of the individual as a social being, living within the framework of family and community.

52. The right to family visits is rooted in a number of Israeli and international legal sources. Among these sources, one may mention the Geneva Convention (which provides in Article 116 that "Every internee shall be allowed to receive visitors, especially immediate relatives - **at regular intervals and as frequently as possible**."), Section 47 of the Prisons Ordinance [New Version], 5732-1971 and the Prison Service Commission Order 04.42.00, entitled "Visit Arrangements of Prisoners" which provides in section 1 that:

> **The visit is one of the important means of communication between the prisoner and his family, friends and acquaintances**. The visit may help the prisoner while in prison and encourage him in times of crisis.

53. And it was so held in this regard in the judgment of Justice Procaccia in LHCJA 6956/09 **Maher Yunis et al. v. Israel Prison Service**, TakSC 2010(4), 189 (hereinafter: **Maher**)**,** in paragraph 8, there:

> Indeed, prison leaves and visits may also be regarded as part of the human rights to which they are entitled also while in prison, and which are not necessarily nullified merely due to the deprivation of liberty resulting from the incarceration, fruit of the penal sanction. **Leaves and family visits are some of the means of communication between a person-prisoner and the world and his close vicinity. He needs them by virtue of his nature. They are part of his self as a human being; they are part of his human dignity. They make an important contribution to his welfare and rehabilitation during his incarceration.**

54. The UN Minimum Standard for the Treatment of Prisoners, 1955 provides, in rule 37:

> 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.

55. A comprehensive study conducted by the ICRC regarding customary humanitarian international law, provides that the right of detainees and prisoners to receive visits is a recognized right under customary humanitarian international law:

> Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed

> to receive visitors, especially near relatives, **to the degree practicable.**
>
> (JM Henckaerts, L. Doswald-Beck, **Customary International Humanitarian Law** p. 448-449 (Volume I: Rules. 2005)).

56. Moreover. The right to visits is not that of the prisoner alone. It is also a recognized right under international law of the family members of the prisoner, whose relations with him were severed when he was put under arrest. One of the scholars summarizes the above as follows:

> People who are sent to prison lose the right to free movement but retain other rights as human beings. One of the most important of these is the right to contact with their families. **As well as being a right for the prisoner, it is equally a right for the family members who are not in prison.** They retain the right of contact with their father or mother, son or daughter, brother or sister who has been sent to prison. Prison administrations have a responsibility to ensure that these relationships can be maintained and developed. Provision for all levels of communication with immediate family members should be based on this principle. It follows that the loss or restriction of family visits should not be used as a punishment under any circumstances.
>
> (Coyle A. **A Human Rights Approach to Prison Management: a Handbook for Prison Staff** International Centre for Prison Studies (King's College, University of London and the UK Foreign and Commonwealth Office) 2002. p 95).

57. Is the respondent of the opinion that the issue of one or two permits per year, reasonably satisfies the standard required of him for the realization of the right of prisoners, their sons and brothers, to family relation? Can a son who sees his father twice a year, or a brother who sees his brother once a year, nurture and maintain the relation between them?

58. As we have seen in the factual part, brothers and sons of prisoners hardly see their incarcerated loved ones. Sometimes years pass until a single visit is realized. Under the current state of affairs, reasonable relations of a minimal level may not be maintained with a family member. By so doing, the respondent violates the obligation imposed upon him to protect the right of prisoners, their brothers and sons, to family relations.

The right to family life

59. The severe limitation imposed by the respondent on sons and brothers of prisoners which prevents them from visiting their incarcerated loved ones severely violates the fundamental right of the family members as well as of the prisoners to family life. The right to family life is and has always been regarded by society, at all times and in all cultures, as a superior value.

60. The Supreme Court has emphasized time and again the great importance of the right to family life in many judgments, and especially in **Adalah** (HCJ 7052/03 **Adalah v. Minister of Interior**, TakSC 2006(2), 1754).

Accordingly, for instance writes Honorable President (*emeritus*) Barak 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… lies at the basis of Israeli jurisprudence. The family has an essential and central role in the life of the individual and in 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.

And in **Dobrin**, Honorable Justice Procaccia writes (in paragraph 12 of her judgment):

> In the hierarchy of constitutional human rights**, after the protection of the right to life and bodily integrity, comes the constitutional protection of the right to parenthood and family.** The purpose of the right to bodily integrity is to protect life; the right to family gives life meaning and reason…
>
> **This right is therefore situated on a high level in the hierarchy of constitutional human rights. It takes precedence over the right to property, freedom of occupation and even the right to privacy. 'It embodies the essence of a person's being and the realization of his self'**.

61. Family rights are also recognized and protected by international public law. Article 46 of the Hague Regulations provides:

> **Family honor and rights**, a person's life, personal property as well as religious faiths and worship customs **must be respected**.

And in **Stamka** it was held that:

> Israel is obligated to protect the family unit under international treaties (HCJ 3648/97 **Stamka v. Minister of Interior**, IsrSC 53(2) 728, 787).

And see also: Articles 17 and 23 of the Convention 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; Article 27 of the Geneva Convention; Article 10(1) of the International Convention on Economic, Social and Cultural Rights of 1966; The preamble of the Convention on the Rights of the Child of 1989.

<u>The violation of the right of brothers and sons to family relations with their incarcerated loved ones is not proportionate</u>

62. According to the principle of proportionality, a protected human right may be violated only to the least extent required to achieve the objective, for which said right is being violated. The respondent must exercise his discretion "in a manner that will not, *inter alia*, violate the right other than to the least extent required, and in a manner that the relation between the damage caused as a

result of the violation of the right and the possible advantage which may arise from the achievement of the objective will be reasonable (HCJ 6226/01 **Indor v. Mayor of Jerusalem,** IsrSC 57(2) 157, 164).

63. This honorable court laid down the foundations, according to which the proportionality of the violation of a human right is examined. A violation of a right will be proportionate if it satisfies three cumulative subtests: the rational means test (which examines the correlation between the means used and the realization of the objective underlying respondent's objective); the least injurious means test (which examines whether the objective could have been achieved by another means, which violates the human right to a lesser extent); and the test of proportionality in the narrow sense (according to this test, even if the means used leads to the realization of the objective, and even if it is the least injurious means for the realization thereof, the damage caused to a protected human right by the means used must be of proper proportion to the gain brought about by that means)(see HCJ 5016/96 **Horev v. Minister of Transportation**, IsrSC 41(4)1, 53-54; **Stamka** above, page 777).

64. In view of the limitation clauses in the Basic Laws, the proportionality principle was adopted as a means for the examination of the lawfulness of laws, and hence, it is used as a condition for the lawfulness of any administrative act (HCJ 987/94 **Euronet Kavei Zahav (1992) v. Minister of Communications**, IsrSC 48(5) 412, 453). The proportionality of the violation of the rights of the Palestinian prisoners, their brothers and sons, will be examined taking into consideration the severity of the infringement, and in view of the superior status of the right to family life: "All three subtests… should be applied and implemented taking into consideration the nature of the violated right" (HCJ 1715/97 **Israel Investment Managers Association v. Minister of Finance,** IsrSC 51(4) 367, 420).

65. **The first subtest: the rational connection** – the first stage in the examination of the proportionality of respondent's policy concerns the question of whether a rational connection exists between the objective of safeguarding security and the means of the imposition of a sweeping limitation on the right of brothers and sons of prisoners to see their incarcerated loved ones.

66. In view of the severity of the violation inflicted by respondent's policy on the right of the petitioners, and many others like them, to see their incarcerated loved ones in reasonable frequency, a clear, significant and proved connection must exist between said policy and the realization of the objective of safeguarding security.

67. Case law provides that an administrative authority must lay down an appropriate factual infrastructure to substantiate its decisions. Said infrastructure must be based, *inter alia*, on the gathering of substantial data and evidence. Said ruling has an even greater effect and importance when the substantiation of measures, which violate a fundamental right, is concerned. In the absence of data and factual infrastructure there is no basis for the alleged connection between the means and the objective:

> When a denial of fundamental rights is concerned, it is not sufficient to present equivocal evidence … I am of the opinion that the evidence required to convince a statutory authority that there is justification for the denial of a fundamental right, must be clear, unequivocal and convincing… the greater the right the stronger the evidence which should serve as the basis for the decision concerning the reduction of the right (EA 2/84 **Neiman v. Chairman of Central Elections Committee**, IsrSC 39(2) 225, 249-250).

68. Namely, the respondent must show that his sweeping policy which denies the petitioners of their right to maintain family relations with their incarcerated loved ones is based on data and evidence, according to which it is indeed capable of preventing injury to security. In the absence of such factual infrastructure, respondent's policy will not satisfy the rational connection test.

69. **The second subtest: the least injurious means** - the least injurious means test concerns the question of whether the security objective may be realized in a different way, which will injure the fundamental rights of the petitioners, and others like them, to the minimum extent possible.

70. The severe limitation imposed on petitioners' right to prison visits does not satisfy this test. It is a sweeping arrangement, which puts an entire group of the population under suspicion, and exposes it to a "different treatment" solely due to a criterion which is based on age, gender and type of kinship.

71. This honorable court has held more than once, that sweeping arrangements, as opposed to arrangements which are based on a specific-individual examination, are disproportionate measures, which injure the individual beyond need (HCJ 3477/95 **Ben Atiya v. Minister of Education**, IsrSC 49(5)1, 15).

72. In **Saif** (HCJ 5627/02 **Saif v. Government Press Office**, IsrSC 58(5) 70, hereinafter: **Saif**) the honorable court examined the lawfulness of the decision of the Government Press Office, according to which the Office would stop issuing journalist certificates to Palestinian journalists, including those who were holding entry permits into Israel, and would not extend the validity of certificates which were issued in the past. The grounds given by the state to its sweeping refusal were its concern that government officials in Israel would be injured in press conferences or in government offices, in view of the fact that a journalist certificate facilitated the access to said places. According to the state, an individual security check cannot obliterate the risk posed by an OPT resident, since such risk derives from the mere residency.

73. The judgment, which rejected the state's arguments, provides that security considerations are not an absolute value and that "balancing is required between the interest of safeguarding security and other opposing protected rights and interests." (**Saif**, paragraph 6 of the judgment of Justice Dorner). It was further held that "the total refusal to issue journalist certificates to Palestinian residents of the Area – including those holding entry and work permits in Israel – indicates that no balancing whatsoever was made between the considerations of freedom of speech and information and security considerations, and in any event, the balancing which was made is not proper" (paragraph 7 of the judgment of Justice Dorner).

74. And it was so held on this issue by President Barak, in his judgment in **Adalah** (paragraph 69 of his judgment):

> The need to adopt the least harmful measure often prevents the use of a flat ban. The reason for this is that in many cases the use of an individual examination achieves the proper purpose by employing a measure that violates the human right to a lesser degree. This principle is acceptable in the case law of the Supreme Court**.**

75. As indicated above, the respondent must prove that the limitation imposed on the issue of entry permits into Israel to brothers and sons of prisoners, in the ages of 16-35, is based on solid grounds of evidence and data.

76. However, in view of the fact that the permits which are granted to the petitioners are issued in any event after an individual examination, there is a deep concern that the failure to conduct an individual examination more frequently is not based on security considerations. Thus, President Barak continues to state, in paragraph 69 of his judgment in **Adalah** as follows:

> There may be cases in which the individual consideration will not realize the proper purpose of the law, and a flat ban should be adopted. However, before reaching this conclusion, we must be persuaded, on the basis of proper data, that there is no alternative to the flat ban. Sometimes the choice of the flat ban results from a failure to determine the form of the individual consideration and not because such a consideration is ineffective. In **Stamka**, Justice M. Cheshin held — with regard to the policy of the Ministry of the Interior that required the foreign spouse who was staying in Israel to leave it for a period until his application for a status in Israel was examined — that: 'The clear impression is that the **weakness in the supervision of the Ministry of the Interior** was one of the main factors… for the creation of the new policy; and instead of strengthening the effectiveness of the supervision, the Ministry of the Interior took the easy path of demanding that the foreign spouse to leave Israel'

77. The implementation of the above in our case indicates that the respondent chose the "easy path": an arbitrary limitation on the number of permits per year which the petitioners may receive. The fact that the few permits which are granted, are issued following an individual examination, indicates that the respondent can conduct an individual examination of permit applications. The respondent chooses to impose a sweeping limitation on the possibility of carrying out an individual examination and making an individual decision concerning the applicant, according to his personal details, in a manner which stains the policy with disproportionality.

78. **The third subtest: proportion between the means and the objective** – the third proportionality test concerns the question of whether the scope of injury inflicted on the human right, as a result of respondent's policy, is proportionate to the objective the realization of which is sought.

79. According to the third subtest, if the gain brought about as a result of the policy is considerable, the violated right will be defeated by it. The nature of said subtest is different from that of its two predecessors, as it focuses on the violation of the human right which is caused as a result of the realization of the objective underlying the policy. It embodies the idea according to which "there is a moral barrier, which cannot be surmounted by democracy, even if the objective to be realized is proper" (President Barak HCJ 8276/05 **Adalah v. Minister of Defence,** TakSC 2006(4) 3675, 3689).

80. In the case at hand, said policy severely violates a very fundamental right, the right to family life. The justification for the violation of said right, if any, should serve a public interest of the first degree.

81. Nevertheless, the objective of safeguarding the security, if it is indeed the objective of the policy, as proper and important as it may be, is not an absolute value and it does not justify any violation of human rights. The security justification is not absolute, and it must be balanced against other needs. Thus, for instance, in **Saif** the court emphasized that a theoretical security risk posed by a journalist, who holds entry permits into Israel, does not justify an inevitable violation of protected rights and discrimination between foreign Palestinian journalists and all other foreign journalists. Security is never absolute and it may be defeated by other rights HCJ 5100/94 **The Public Committee against Torture in Israel v. The Government of Israel**, IsrSC 53(4) 817).

82. The heavy price paid by the petitioners, and others like them, as a result of the implementation of respondent's policy concerning the limitation of their prison visits, is exaggerated and excessive. The speculative security advantage which arises – if at all – of this policy, is not proportionate to the severity of the violation of petitioners' right to maintain family relations with their incarcerated loved ones.

Logistic difficulties cannot serve as an excuse for a violation of rights

83. Giving the brothers and sons of prisoners the same status for the purpose of receiving permits as all other family members, will lead, forthwith, to an increase in the number of permit applications. Respondent's conduct in this context, as shown above, raises the concern that this may be the main consideration for his refusal to allow brothers and sons to receive more permits. Namely, administrative convenience under the pretence of "security reasons", defeats in this case the protection of fundamental rights.

84. Furthermore, even if security reasons are concerned, the current situation is different from the situation which existed when the rules concerning prison visits of brothers and sons were established. Moreover, the reasonable option, as far as the respondent is concerned, is to examine each permit application on its merits, and in so doing to overcome the ostensible security concern.

85. Respondent's current conduct is unacceptable. When a fundamental right, such as the right to family life is concerned, logistic considerations or mere administrative difficulties cannot justify a violation of said right. The honorable court has emphasized this important principle more than once. In HCJ 6055/95 **Tzemach v. Minister of Defence**, IsrSC 53(5) 241, 281, Justice Zamir emphasized that:

> Protection of human rights quite often takes a toll. The society must be willing to pay a reasonable price for the protection of human rights.

An as commented by Justice Matza in HCJ 4541/94 **Miller v. Minister of Defence,** IsrSC 49(4) 94, 113:

> Anyway, when the case concerns a petition for the realization of a fundamental right – which is the case before us – **the relative weight of the budgetary considerations cannot be significant**, in view of the fact that : 'The rhetoric of human rights must be supported by a reality which gives these right top national priority. Protection of human rights costs money, and a society which respects human rights must be willing to bear the financial

burden' (Barak, in his book 'Constitutional Construction', volume C (Nevo, 5754, 528)).

86. In the **Marab** judgment – which concerned the issue of judicial review of a person's detention – President Barak emphasized that logistic considerations, such as shortage of judges or interrogators, cannot justify the extension of the period within which a detainee should be brought before a judge (HCJ 3239/02 Commander of Military Forces in the West Bank, IsrSC 57(2) 3349, 376; Also see HCJ 253/88 **Sejadia v. Minister of Defence**, IsrSC 42(3) 801, 820).

87. Accordingly, to the extent the issue of a reasonable amount of permits, with an individual examination of the permit applications in order to establish a suspicion of a security threat, if any, involves investment of resources and funds, the respondent must do it. Only in doing so, shall the respondent satisfy his duties under international law and Israeli law for the protection of the fundamental rights of the petitioners and tens of thousands of others like them.

Conclusion

88. As the petition indicates, there is no proper cause which can justify such a severe and disproportionate limitation on the fundamental rights of prisoners, their brothers and sons, to family relations.

89. This case concerns a right which is a fundamental right, under both international law and Israeli law. The respondent has the duty to protect it. His current policy violates the right of the petitioners, and of the other prisoners, their brothers and sons, without any reason or explanation.

Therefore, the honorable court is hereby requested to order the respondent as requested in the beginning of the petition and obligate him to pay trial costs and legal fees.

Jerusalem. June 6, 2013.

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Daniel Shenhar, Advocate
Counsel to the petitioners

(File No. 78048)