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At the Supreme Court

AAA 7212/12

HCJ 4047/13

Before:

Honorable Deputy President M. Naor
Honorable Justice E. Hayut
Honorable Justice Z. Zylbertal

The Appellants
In AAA 7212/12

1. _____ **Ahmed**
2. _____ **Ahemed**
3. _____ **Ahmed**
4. _____ **Ahmed**
5. _____ **Ahmed**
6. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger-RA**

The Petitioners in HCJ
4047/13:

1. _____ **Hadri**
2. _____ **Hadri**
3. _____ **Kahouji, ID No. _____**
4. _____ **Kahouji, ID No. _____**
5. _____ **Abu 'Adrah, ID No. _____**
6. _____ **Abu 'Adrah, ID No. _____**
7. _____ **Abu Marseh, ID No. _____**
8. _____ **Abu Marseh, ID No. _____**
9. _____ **Abu Qweidar, ID No. _____**
10. _____ **Abu Qweidar, ID No. _____**
11. _____ **Ustaz, ID No. _____**
12. _____ **Ustaz, ID No. _____**
13. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA**

v.

The Respondent in AAA 7212/12:

Minister of the Interior

The Respondents in HCJ 4047/13

1. **Prime Minister**
2. **Minister of the Interior**
3. **Attorney General**

Appeal against the judgment of the Jerusalem District Court sitting as a court for Administrative Affairs dated July 30, 2012 in AP 010144-11-11 given by the Honorable Judge N. Ben-Or

And a petition for an *Order Nisi*

Session date:	21 Iyar 5774 (May 21, 2014)
Secretary of the panel:	Ziv Schwartz
Typist:	Meital
Representing the Appellants in AAA 7212/12:	Adv. Adi Lustigman
Representing the Petitioners in HCJ 4047/14:	Adv. Noa Diamond
Representing the Respondents in AAA 7212/12:	Adv. Izhak Bart
Representing the Respondents in HCJ 4047/14:	Adv. Daniel Marks, Adv. Yochi Genesin

Protocol

Adv. Diamond: As we wrote in the response, the respondent made a logic leap. He took a situation which no one disputes to be complex and complicated, and from this factual situation the respondent jumps to the argument that the government resolution is based on the authorizing section, section 3D of the Temporary Order Law. There must be an authorization for that in the law. There is no such authorization. According to us it all stems from respondent's interpretation of section 3D of the Temporary Order Law, the security section, which authorizes to make a government resolution. The respondent argues that section 3D authorizes to determine that a security preclusion exists.

The Honorable Deputy President M. Naor: Is the petition a 'grasp all lose all'. I look at what is requested of us. Why the 2008 resolution should not be revoked etc. Before we go into the details, does Madam request to revoke the government resolution in its entirety? Or parts thereof? Let's understand exactly.

Adv. Diamond: We refer to the government resolution. As we discuss it here, we can refer to specific issues in the government resolution.

The Honorable Deputy President M. Naor: Isn't there room to focus your arguments on certain parts thereof.

Adv. Diamond: We do not say that the concept or that the government resolution itself is not legitimate. We say that the *de facto* outcome of the government resolution is not legitimate.

The Honorable Deputy President M. Naor: Does Madam wish to request specific things. What is the defined target?

Adv. Diamond: The issues may be divided, the extension issue, the geographic threat. I would divide it into three parts the revocation of which is requested. A request to revoke the blanket prohibition because we argue that there is no authorization in section 3D.

The Honorable Deputy President M. Naor: How? This sweeping manner of argument does not take us very far. I asked my questions and now Madam shall do what she understands.

Adv. Diamond: Our argument is that the mere resolution or treatment of the Gaza Strip as a unique area, a different area, is not legitimate. We do not argue that the government does not have the authority to obtain an opinion and declare of Gaza as such. The requested *order nisi* concerns other issues. Therefore if we divide the requested *order nisi* we can say three things. To revoke the blanket prohibition established by the government resolution and to conduct an individual examination to residents from the Gaza Strip. We request that the opinion of the security agencies will be an additional layer in the hurdle that should be surmounted by the individuals who undergo an individual examination. The argument should be that there is a presumption of heightened risk but not a sweeping presumption of denial of family unification applications. The second issue is, in fact, a request to revoke the sweeping manner by which the resolution established the discretion of the Minister of the Interior. The government resolution is sweeping and limits the discretion of the Minister of the Interior. The Minister of the Interior has explicitly referred to this issue and interpreted section 3D as a section which grants him the discretion. The last issue is the geographic threat. Section 3D refers to the geographic location. This expansion from a place of primary risk, to anyone who is registered in the Gaza Strip even he has not been there many years, is a very broad expansion of the authorizing section. It is an expansion which is made without authority. We have a very clear authorizing law. It is not a law which was enacted hastily at the darkness of night. Section 3D is very clear with respect to the respondent. The government resolution makes 'improvements' when it adds the registration risk which is not mentioned in the law. Furthermore, it is a resolution which violates fundamental rights beyond the Temporary Order Law itself, without any authority. In this case it establishes an arrangement in a matter which is under the authority of the Knesset rather than of the government. There is a clear authorizing section which was broadly construed by the court in the **Dakah** judgment. The individual security risk, the individual indirect risk caused by a family member. An unconstitutional normative situation was created. The government resolution should be revoked, and as far as we are concerned it may be divided into the three issues which I specified.

Adv. Lustigman: As we wrote, we are the same petitioner and I refer to the words of my colleague, but our appeal concerns the interpretation of the government resolution. We refer to its interpretation.

The Honorable Deputy President M. Naor: Ostensibly, according to what is written, an approval should have been given in the past.

The Honorable Justice E. Hayut: You refer to an initial application which was submitted in 2006. Is there any indication in the documents to what happened in that period.

Adv. Lustigman: The petitioner applied without representation and therefore she does not have a copy of the form. We attached the documents to the petition and to the appeal. Her spouse was deported and his counsel noted that there was a family unification application. Even if the application is from a later date, of which there is no dispute, and we argued that the document which was presented was the approval.

The Honorable Justice E. Hayut: It is an application without an approval. According to the language of the law it should be an approved application.

The Honorable Deputy President M. Naor: After the government resolution it was denied on criminal grounds. There is a problem here. We are in this proceeding many years after the denial. The original denial was on criminal grounds and it followed a previous denial based on criminal reasons. Had it been heard and decided. The **Dufash** case. Before the government resolution in many of these cases, here the denial was made for criminal reasons. After the government resolution it was attached.

Adv. Lustigman: The appellate committee also ruled that had it been for criminal reasons the appeal would have had no basis. The decision was given without reasoning and without a hearing. The family could not apply because of the limitations which were imposed by the Temporary Order Law. There was a government resolution in 2002. There was a law and the petitioner was not at the right age and the matter was postponed. It is a very old denial. Refers to the judgment.

The Honorable Justice Z. Zylbertal: Perhaps in paragraph 17 and I quote.

Adv. Lustigman: Yes, this is what I meant. Furthermore, the appeal and the petition did not concern the approval of the application. We believe that in this case an individual examination was made.

The Honorable Deputy President M. Naor: In the context of an administrative proceeding, you must take the government resolution as is. The government resolution says 'approved' and your application was not approved. Therefore, ostensibly, the transitional provision does not apply thereto.

Adv. Lustigman: I want to refer to the government resolution. It is hereby clarified that the section will apply from now onwards. The government resolution does not refer only to individuals whose applications were approved. It is in force from now onwards. Therefore we argue that even according to the language of the government resolution itself, the issue of the application was added.

The Honorable Deputy President M. Naor: It can be assumed that anyone who was in the pipe line was approved.

Adv. Lustigman: I think that the first part of the government resolution, it cannot be said that it was written with no reason. A person whose initial application was approved.

The Honorable Justice E. Hayut: Reliance is when someone received an initial approval and now it is about to be taken away from him.

Adv. Lustigman: We referred to the Temporary Order Law. The law does not apply to a person whose application. It does not apply in the sense that his case will be examined. Before the limitations were imposed by the law according to the government resolution.

The Honorable Deputy President M. Naor: Such provisions may be pointed at but it seems to me that the exception to the rule was the **Dufash** ruling.

Adv. Lustigman: Dufash is relevant to this issue. A beneficent interpretation could have been implemented. It was agreed on this issue that the interpretation would be beneficent.

The Honorable Deputy President M. Naor: This is the Dufash ruling.

Adv. Lustigman: This was the consent of the state after a few hearings. In **Dufash**, which concerns section 4.1 of the law, the status is not upgraded. There was no room for the law because a person could not be upgraded before the effective date in 2002. We do not raise this argument in our arguments. It is only an example.

The Honorable Justice E. Hayut: If there was a delay it was on your part because the application could have been submitted earlier.

Adv. Lustigman: I return to the point of the preliminary application. It was actually approved in our case. It is an application which stemmed from the Temporary Order Law. To submit a sort of a preliminary application together with certain documents.

The Honorable Deputy President M. Naor: But it is not an approval.

Adv. Lustigman: Only after said examination and its approval a date will be scheduled for the submission of all documents. It all takes time and not necessarily because of the applicants. In this case it was not argued that the delay occurred because of the applicants.

The Honorable Justice E. Hayut: You were told to submit in January and you submitted in March.

Adv. Lustigman: Because the petitioner was not represented. She says that she was told to come in March and she came in March. These facts are not in our knowledge and they are not significant in this case. She submitted the application before the effective date. Another aspect which concerns the Temporary Order Law is the application of the law to [...] applications which were submitted prior to the limitations and thus, for instance, if a young 18 years old woman...

The Honorable Deputy President M. Naor: These limitations were established, one gate was opened following our comments.

Adv. Genesin: After the hearing an *order nisi* was issued. In August 2005. The second amendment was in March 2007 following the court's comments. It is 3A1 and the last part of 3D. These were made together.

Adv. Lustigman: A young woman who married at the age of 18 and submitted the application, her application could have been processed according to the applicable version. The effective date is the application submission date. The same also applies with respect to children. In **AAA 5718/09 Srur** the question was also what happened with a boy who submitted the application when he was thirteen and a half years old and turned fourteen years old by the time it was approved, and according to the law his status could not be upgraded. It was held that the effective date was the application submission date rather than the original application approval date.

The Honorable Justice E. Hayut: The government resolution provides that the date is the initial application approval date.

The Honorable Deputy President M. Naor: According to your interpretation the approval is only an example.

Adv. Lustigman: With respect to the initial application we cannot one hundred percent prove it. The single cases which were discussed by the courts were not refuted and different permits were not granted, in those cases in which an agreement was reached. We are of the opinion that according to said decisions too it was held that an individual examination should be conducted and individual permits were granted.

The Honorable Deputy President M. Naor: In how many cases was an application submitted before the government resolution was made?

Adv. Lustigman: I don't have data beyond the cases which were decided. I am familiar with the judgment which was given by your honorable Justice in **Azat**, which pertains to criminal matters concerning students and foreigners.

The Honorable Deputy President M. Naor: It applies to many things. When I read the file, I wanted to ask the state what was the scope of the matter. I say once again that along my intention to ask the state I could not help thinking that even if individual arrangement were made you would come and say

Adv. Lustigman: In this case unlike **Azat**, it was held by the court that they were neither humanitarian nor lawful. The state of Israel must protect their best interests when they are separated from their father for a long period of time.

The Honorable Deputy President M. Naor: You must take the government resolution as is.

Adv. Lustigman: With respect to **Dufash**, in **Dufash** there were dozens of petitions in the district court concerning change of status. The **Dufash** case reached the Supreme Court. The indication for a situation of delays. Firstly the **Dufash** judgment was given. There were dozens of judgments. We don't have data and it is an issue which the state should attend to. There are indications that there is no significant surge in family unification application. The indications that we have are that out of hundreds of files, there are only a few cases of family unification applications between Israeli residents and Gaza Strip residents, as opposed to many cases which concern the West Bank. There is a huge gap between these two situations. I searched for cases of this sort, out of which three cases were not heard and some three other cases did not materialize in part in the sense of this narrow aspect of the group that submitted applications. If the interpretation concerning their matter is correct it is beneficent and limits a sweeping decision.

The Honorable Deputy President M. Naor: In the context of your proceeding, which is an Administrative Affairs Appeal, you cannot argue with the government resolution.

Adv. Lustigman: I say it from the aspect of the government resolution. We are of the opinion that it is a mistake in the judgment. The examination is made as we have noted and there are data in the civil administration website.

The Honorable Justice E. Hayut: If the determination made by the government resolution is a collective one, it does not enable an individual examination. You should challenge it within the framework of the High Court of Justice. You cannot challenge, the court of administrative affairs is not authorized to review its lawfulness. The narrow crack which is available for Madam is the interpretation issue. In this sense it makes no difference whether the application is in process or whether it was approved. These people were excluded. Obviously, this is subject to an individual examination.

Adv. Lustigman: These judgments concern applications, it is agreed to individually examine applications which were submitted before.

The Honorable Deputy President M. Naor: The category is, those individuals who were in the pipeline. Firstly, how many are they... were in the pipeline in the sense that people were anxiously waiting to reach the age 25-35. Ostensibly, upon reaching said age they could receive a family unification application. The government resolution, as I see it at least, it is the same dispute, and I speak only for myself, there were various differences of opinion which were resolved. Currently there is a group, and I think that the government resolution and its transitional provisions ostensibly draw a distinction between those who were approved and can stay, and those who were in the pipeline and who will not be individually examined. Individuals who submitted applications which have not yet been resolved.

Adv. Genesin: They will not be individually examined by they can apply within the framework of section 3A1.

The Honorable Deputy President M. Naor: Disregarding the humanitarian exception, the situation is that a person who was in the pipeline immediately prior to the government resolution, namely, could have

received, for instance, by virtue of age, the government resolution blocked him. He was in the pipeline and was not approved.

Adv. Genesin: It is not the government resolution which blocked him.

The Honorable Deputy President M. Naor: I refer to 35 years old individuals.

Adv. Genesin: This is the law and this is our main argument. Even if the court makes the order absolute and revokes the government resolution it is not required according to section 3D. In this context it is important to note that between the first and second amendments two things happened. The disengagement in 2005, when the first amendment was made, and the second thing, we are in a situation in which after the January 2006 elections, the Hamas wins, a government is established and then the Hamas takes control. Less violent. We have the resolutions of the cabinet which formulates a special policy concerning Gaza. The cabinet resolutions refer to a host of issues. Section 3D provides that the Minister can determine, based on a professional opinion, a professional opinion which was submitted to him by security agencies, that in a certain area activity takes place, that it is a heightened risk area. It is not the Judea and Samaria area. It is either Iran or Gaza. He can authorize the competent authority to resolve otherwise. 2 says no to everything. 3 says in the 2005 amendment which is an amendment which was made before the disengagement, it says yes in certain areas. In 2007, which is after the first judgment and also after the disengagement and the changes which took place in the political and security situation, we have the additional amendment to section 3D.

The Honorable Deputy President M. Naor: I can understand the government resolution itself. Right now I limit my question to the transitional provisions either of the Minister of Interior or the government. A person who was in the pipeline, submitted an application. Shouldn't he be excluded?

The Honorable Justice E. Hayut: The HCJ challenges the government resolution. According to Madam, if the last part of section 3D is the only thing which counts then, ostensibly, there is no room for the transitional provisions, Transitional provisions were prescribed. Let's leave the interpretation. Leave it alone for a moment. It has nothing to do with the appeal. It can come in by way of interpretation. From the point of view which wishes not to injure where injury is not necessary, wouldn't it be appropriate to explicitly provide that the transitional provision which was set forth in the government resolution, would also apply to pending applications. The question is based on the assumption that the pending applications may not be included by way of interpretation. The question is shouldn't a transitional provision be submitted.

The Honorable Deputy President M. Naor: A request was filed within the context of the HCJ and we requested her to pin-point the issues.

Adv. Genesin: The concept prior to the incidents which took place in Gaza. My colleague said it. Madam asked and my colleague answered. How can we know if it was submitted in March or January or something like that. It is not like **Dufash** or something like that. There were always arguments. He arrived and he could not make it through the line.

The Honorable Deputy President M. Naor: You don't dispute it that they were in the pipeline or were they just hanging in the air.

The Honorable Justice E. Hayut: Applications which have a reference.

Adv. Genesin: If your honors look closely, there is a difference between 4.1 and 4.2. The rationale is that in view of the rise of Hamas, under such circumstances we cannot examine an application which was submitted. An application which was approved is an application which was examined. If an approval was granted it means that an examination was carried out in his regard prior to the government resolution and

prior to the change which occurred in the security situation. A person who submitted an application did not undergo a security check. We are talking about someone who, as I said the disengagement takes place in 2005, someone who may have submitted an application in 2006.

The Honorable Deputy President M. Naor: He may have submitted prior to the government resolution. I am particularly concerned with individuals who were physically in Israel.

Adv. Genesin: Which poses a very very big difficulty. It is only done in Israel.

The Honorable Deputy President M. Naor: But the difficulty also stems from the fact that you wanted them to prove a center of life. How can they prove a center of life without actually being here. It is a vicious circle.

The Honorable Justice E. Hayut: Moreover. There are individuals who resided in the West Bank. We are talking about a person who, in fact, has not been in Gaza since 2000. He is here, in the West Bank. There was an HCJ which was resolved by us on this issue. There is case law which provides that the definition of a 'resident of the region' is made according to the registration and should be interpreted according to actual residency. This concerns the definition of a resident. When they speak of the opinion under section 3D the definition of resident according to registration does not apply. It stems from the difficulty to check people particularly after Hamas took over. If there is a person whose examination is not problematic in view of the fact that, in practice, he resides in the West Bank, then said reasoning is not applicable to section 3D. If he passed the age of 35 why shouldn't he be included.

Adv. Genesin: It cannot be regarded only this way. When we amended the law, already in 2005, security agencies came and said that we, despite the fact that the risk profiles were so and so, they were more than 25-35, we took a risk and reduced the ages for men and women. 25 for a woman and 35 for a man. Then a new situation was created with respect to Gaza.

The Honorable Justice E. Hayut: We offered a cut-off point which is subsequent to the disengagement. The question is why shouldn't there be harmony in said decision, why should there be a different treatment as compared to any other West Bank resident.

Adv. Genesin: What happens in Gaza and still does not happen in the West Bank is only the result of inability to travel from Gaza to Israel and to the Judea and Samaria area. According to the opinion, as indicated by the intelligence material, what happens in Gaza is not unique to it. The transit and transfer of infrastructure and measures and human resources from Gaza to the Judea and Samaria area creates a much more dangerous security environment. What your honors say is that a person from Gaza who has unlawfully moved to the Judea and Samaria area, and settled down there, maintains a strong bond with the terrorists over there, with the individuals who went with him to school and with whom he worked.

The Honorable Justice E. Hayut: If he has a bond he will fail in the individual examination.

Adv. Genesin: Your honors assume that a Palestinian who moved from Gaza to the Judea and Samaria area is now fully committed to Judea and Samaria.

The Honorable Justice E. Hayut: These are settlement petitions. We are concerned with individuals who have been residing in the West Bank since 2000 or 1999.

Adv. Genesin: We have prepared a procedure which concerns settlement in Judea and Samaria as a result of unlawful residence, to transfer a person whose established and strong bond is with Gaza, from a place in which terror activity takes place even as we speak, only because he unlawfully moved and entered Israel between 2000 to 2005. What is the solution for such a person, it may be the gap. The solution for such a person, if he thinks that there is a special humanitarian reason he should submit an application

according to section 3A1. What my colleague requests in the HCJ is that all Gaza resident undergo individual examinations like Judea and Samaria residents.

The Honorable Justice E. Hayut: It may be said that he should be treated in the same manner as a West Bank person. There are persons who were recognized after many years of residency and who became West Bank persons.

Adv. Genesis: Not in these ages.

The Honorable Justice E. Hayut: If he does not meet the age requirements of the law, assuming it is not relevant. If he/she is over 35 or 25 and falls within the narrow allowed exception, why shouldn't they be treated for family unification purposes in the same manner as West Bank persons.

Adv. Genesis: The reason that the government resolution provides what it provides and refers to what was approved, is that if it was approved I take a certain risk but not such a big risk.

The Honorable Deputy President M. Naor: Is it possible to consider, neither the entire picture nor the government resolution. As far as I am concerned the government resolution is perfectly fine.

Adv. Genesis: What Justice Hayut asks, is whether an individual who according to the settlement HCJ, did not only submit an application but who received from us a permit to permanently reside, can be excluded. Is this is the right question. The question of the Honorable Justice Naor is whether the individuals who applied between 2005 and 2007 when the second amendment entered into effect, and between these dates their applications were neither approved nor denied, but they were in the pipeline, can these individuals be included in the transitional provision of the government resolution.

The Honorable Deputy President M. Naor: The question is whether Madam is willing to consider and we shall retire to deliberate on whether or not orders should be issued in this matter.

The Honorable Justice E. Hayut: Perhaps you consider and submit to us responses on this issue.

Adv. Genesis: What Madam refers to are only applications, what Madam refers to, that someone submitted and there is a signature confirming that it was submitted.

The Honorable Deputy President M. Naor: Correct, and he has not yet received a response. This is a serious issue and we do not know what may be the implications thereof, how many people are concerned.

The Honorable Justice E. Hayut: This should also be examined.

The Honorable Deputy President M. Naor: As far as I am concerned the HCJ requires answers which are not included in the exhibits. How much time?

Adv. Genesis: I request 45 days. I want to check the figures.

Adv. Diamond: I request to respond to the response.

Adv. Lustigman: It was held that when there was a security opinion after the government resolution, the government resolution was made and thereafter a specific opinion was given, in that case it cannot be ignored. Until this day I have not received a response whether the application which was denied in this case, was denied a year and a half later. They said that on the same day that the complete application was submitted in March 2008 they transferred

The Honorable Deputy President M. Naor: Sometimes there is an individual solution.

Adv. Bart: The transitional provision is based on the reliance interest. The government takes into consideration the reliance interest. A person who submitted an application and was rejected after two months has a lessened interest.

A decision was given.

Typist: Meital