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**At the Supreme Court**  
**Sitting as the High Court of Justice**

**HCJ 348/15**

- In the Matter of:
1.                     **Firani, ID**                      
Resident of the Palestinian Authority
  2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA No. 580163515**

All represented by counsel, Nasser Odeh (Lic. No. 68398) and/or Bilal Sbihat (Lic. No. 49838) and/or Hava Matras-Iron (Lic. No. 35174) and/or Sigi Ben Ari (Lic. No. 37566) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Abeer Jubran-Daqwar (Lic. No. 44346)

Of HaMoked: Center for the Defence of the Individual, founded by  
Dr. Lotte Salzberger  
4 Abu Obeida St., Jerusalem, 97200  
Tel: 02-6283555; Fax: 02-6276317

**The Petitioners**

v.

1. **The Military Commander of the West Bank**
2. **The Coordinator of Government Activities in the Territories**

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

**The Respondents**

**Petition for Order Nisi**

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause:

- A. Why they do not reply to the Petitioners' applications promptly as appropriate to the urgency of the matter;

- B. Why they do not allow Petitioner 1 to travel from the Gaza Strip to the West Bank in order to visit her ailing mother in the West Bank and to return to the Gaza Strip after the visit ends.

### **Request to Schedule an Urgent Hearing**

The Honorable Court is requested to set a date for an urgent hearing of the petition. The ailing mother of Petitioner 1 resides in the West Bank and suffers from myocardial infarction, severe damage to the systolic function, and dilated cardiomyopathy. The mother was hospitalized three times in the past month, most recently on December 30, 2014 at the Palestinian Medical Complex hospital due to dizziness, shortness of breath, pain and vomiting. The mother was released to her home on January 4, 2015 in need of further cardiac treatment and monitoring. The Petitioners urgently appealed to the Respondent requesting to allow the entrance of Petitioner 1 into the West Bank. However, despite the urgency of the matter, the Respondent has not yet allowed her entry.

In light of the aforesaid, the Honorable Court is requested to schedule a date for an urgent hearing of the petition and at the least, to order the Respondent to submit his preliminary response to the petition at the earliest possible time as it may obviate the hearing of this petition.

### **The Factual Infrastructure**

#### **The Parties**

1. Petitioner 1 (hereinafter: **the Petitioner**) is a Palestinian woman, born in 1993, and residing in the Gaza Strip.
2. Mrs. \_\_\_\_\_ Firani, I.D. \_\_\_\_\_ (hereinafter: **the mother**), the Petitioner's mother, was born in 1961 and resides in Ramallah in the West Bank. The mother was hospitalized on December 8, 2014 at the Palestinian Medical Complex in Ramallah due to pressure in the chest, abdominal pain, vomiting, shortness of breath, and dizziness. She was diagnosed with a myocardial infarction and released to her home after her condition stabilized. She was hospitalized for the second time on December 22, 2014 at the Arab Heart Center in Nablus due to shortness of breath on exertion. It must be noted that an echocardiogram found that she suffers from severe damage to the systolic function and dilated cardiomyopathy. The mother was hospitalized for the third time on December 30, 2014 at the Palestinian Medical Complex suffering from dizziness, shortness of breath, pain and vomiting. The mother is in need of further cardiac treatment and monitoring.

Copies of medical documents are attached hereto and marked **P/1 A-C**.

3. The Petitioner, naturally, wishes to travel from the Gaza Strip to the West Bank to visit her ailing mother, attend to her, support her, and nurse her. In view of the mother's grave condition, the Petitioner fears that this will be the last time she and her mother meet.
4. Petitioner 2 (hereinafter: **HaMoked: Center for the Defence of the Individual or HaMoked**) is an association that works for the advancement of human rights in the Occupied Palestinian Territories (OPT).
5. Respondent 1 is the Military Commander of the West Bank on behalf of the State of Israel which has held the West Bank under military occupation for more than forty seven years. The Respondent is authorized to permit travel by Palestinians into and out of the West Bank.
6. Respondent 2, the Coordinator of Government Activities in the Territories, is responsible for implementing Israeli policy in the West Bank and the Gaza Strip, and is in charge, *inter alia*, of the Gaza District Coordination and Liaison Administration.

### **Exhaustion of Remedies**

7. On December 23, 2014, the Petitioner submitted an application to the Respondents, through the Palestinian Civil Affairs Committee, requesting to travel to the West Bank through Israel in order to visit, nurse and support her ailing mother.
8. On December 29, 2014, HaMoked: Center for the Defence of the Individual wrote to the Gaza DCO humanitarian hotline, stressing the mother's grave condition and requesting that a transit permit be granted to the Petitioners urgently.

A copy of HaMoked's appeal of December 29, 2014 is attached hereto and marked **P/2**.

9. A week went by without a reply. Therefore, on January 4, 2015, HaMoked contacted the Gaza DCO humanitarian hotline for the second time, again noting the mother's grave condition, noting that she had recently been hospitalized at the Arab Heart Center and that an echocardiogram revealed that she suffers from severe damage to the systolic function and dilated cardiomyopathy, and requested that the transit permit be urgently granted to the Petitioner.

A copy of HaMoked's appeal to the Respondents of January 4, 2015 is attached hereto and marked **P/3**.

10. As no reply was received for two weeks, on January 7, 2015, HaMoked contacted the Gaza DCO humanitarian hotline for the third time, requesting that a permit be urgently issued to the petitioner to visit the ailing mother, at the latest by January 12, 2015 as otherwise an appeal to the courts will be considered.

A copy of HaMoked's letter of January 7, 2015 to the Respondents is attached hereto and marked **P/4**.

11. Despite the urgency of the matter, no reply has been received to date. As such, the petitioners had no option but to appeal to the Court.

## **The Legal Argument**

### **A. The Respondents' Obligation Respond to Requests Promptly**

12. The Respondents, like any administrative authority, are obliged by law to respond to a communication promptly. It is a known rule that “the obligation to act with due haste is one of the basic tenets of good governance” (Y. Zamir, **The Administrative Authority** (Vol. 2, Nevo, 5756 - 1996), 717).

Regarding this matter, See:

H CJ 6300/93 **Institute for the Training of Women Rabbinical Advocates v. Minister of Religious Affairs**, IsrSC 48(4) 441, 451 (1994);

H CJ 7198/93 **Mitral LTD. v. Minister of Industry and Commerce**, IsrSC 48(2) 844, 853, (1994);

H CJ 5931/04 **Mazursky v. the State of Israel – Ministry of Education**, IsrSC 59(3) 769, 782 (2004);

H CJ 4212/06 **Avocats sans Frontieres v. GOC Southern Command**, TakSC 2006(2) 4751(2006).

13. It has already been ruled that when it comes to human rights the concept of a “reasonable timeframe” has special meaning (H CJ 1999/07 **Galon v. The Governmental Commission for the Inquiry of the Events of the Lebanon Campaign 2006**, TakSC 2007(2) 551, 569 (2007));

And that in matters pertaining to human rights –

There is room to expect a speedier resolution of the matter [...] A protracted infringement on human rights often exacerbates the extent of the infringement and its result could be an erosion of the right as well as severe and ongoing harm to the individual.

(H CJ 8060/03 **Q'adan v. Israel Land Administration**, TakSC 2006(2) 775, 780 (2006).

See also: H CJ 10428/05 **'Aliwa v. the Commander of IDF Forces in the West Bank**, TakSC 2006(3) 1743, 1744 (2006); H CJ 4634/04 **Physicians for Human Rights v. the Minister of Internal Security**, TakSC2007(1) 1999, 2009 (2007).

14. The present case concerns a matter that demands special urgency – the Petitioner's request to visit her ailing mother, yet the Respondents continue to linger and fail to provide their reply despite the urgency of the matter and the mother's grave condition.

## **B. Violation of the Respondents' Rights**

### **(i) The Right to a Family Life**

15. The Petitioner seeks to visit her ailing mother, to assist her, support her, attend to her and nurse her. This is a clear expression of the close relationship between a person and his immediate family. This special relationship between members of the same family unit has earned the recognition and protection of the law under the title of the right to family life.
16. The right to family life is a recognized right in Israeli and international law. In view of this right, it is the duty of the Respondent to respect the family unit.
17. Article 46 of the Hague Regulations that constitute customary international law stipulates:

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

18. In customary international humanitarian law, under Rule 105 of the International Committee of the Red Cross study it is emphasized that:

Family life must be respected as far as possible.  
(Henckaerts J.M. Doswald-Beck L. *Customary International Humanitarian Law*. Vol. I: Rules. ICRC (2005), pp. 379-383).

The Honorable Court has repeatedly ruled that:

Israel is obligated to protect the family unit under international conventions.  
(HCJ 3648/97 **Stamka v. Minister of the Interior**, IsrSC 53(2) 728, 787 (1999)).

See also:

Article 27 of the Fourth Geneva Convention, 1949;  
Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966;  
Articles 17 and 23 of the International Covenant on Civil and Political Rights 1966;  
Article 12 and article 16(3) of the Universal Declaration of Human Rights, 1948;  
Article 12 of the European Convention on Human Rights 1950.

19. Numerous Supreme Court rulings have reiterated and emphasized the vast importance of the right to family life, and especially the judgment that was delivered in the **Adalah** case. (HCJ 7052/03 **Adalah et. al v. Minister of the Interior** TakSC, 2006(2), 1754 (2006)).

Thus, for example, President Barak writes in paragraph 25 of his judgment:

It is our main and basic duty to preserve, nurture and protect the most basic and ancient family unit in the history of mankind, which was, is and will be the element that preserves and ensures the existence of the human race, namely the natural family [...]

[T]he family relationship ... lie[s] at the basis of Israeli law. The family has an essential and central purpose in the life of the individual and the life of society. Family relationships, which the law protects and which it seeks to develop, are some of the strongest and most significant in a person's life.

20. Every person is entitled to the right to move freely within his own country. The right to freedom of movement is the prime expression of a person's autonomy, his freedom of choice and the realization of his abilities and his rights. The right to freedom of movement is one of the norms of customary international law.

See:

HCJ 6358/05 **Vanunu v. OC of the Home Front Command**, TakSC 2006(1) 320, paragraph 10 (2006);

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

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

21. The right to freedom of movement is the engine that drives the array of human rights, the engine that enables a person to realize his autonomy and choices. When right to movement is restricted, this "engine" is harmed and as a result thereof some of a person's possibilities and rights cease to exist. His dignity as a person is violated. Hence the great importance attributed to the right of freedom of movement.
22. When restrictions are imposed on a person's freedom of movement within the area of the state or the entity in which he resides, his social life, cultural life, human rights and freedom of choice are violated. This person is restricted in the most fundamental spheres of his life: where he will live, with whom he will share his life, where his children will study, where he will receive medical care, who his friends will be, where he will work, what will his occupation be, and where he will pray.
23. The right to freedom of movement is also entrenched in international humanitarian law. The Fourth Geneva Convention reinforces the right to freedom of movement as a basic right of protected persons, whether they are in occupied territory or in the territory of a hostile state. Article 27 of the Convention determines that protected persons shall be entitled in all circumstances to humane treatment and to respect of their dignity.

24. It is important to also note articles 41-43 (which apply to the territory of a state that is involved in conflict) and 78 (which applies to occupied territory). These articles concern restrictions on freedom through detention or assigned residence. These means are specific and their employment is likewise specific. This demonstrates that the freedom of movement of protected persons in all other circumstances was very important to the high contracting parties. It is necessary to establish explicit and specific rules for restricting freedom of movement only where there is, as a general rule, an obligation to respect this right:

Art. 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person whose residence is being assigned and also a source for the possibility of restricting this right. This can be seen, inter alia, in the provisions of art. 78 of the Fourth Geneva Convention that determines that the measures stipulated therein are the measures that the occupying power (i.e., the military commander) may “at most” carry out.  
(HCJ 7015/02 '**Ajuri v. IDF Commander in West Bank**, TakSC 2002(3), 1021, 1027).

25. International human rights law is also a binding source which anchors the freedom of movement as a basic human right. Thus, article 12(A) of the International Covenant on Civil and Political Rights, which Israel signed and ratified establishes:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

26. The aforementioned Article 12 is a mandatory source. For additional sources of interpretation see: Article 13 of the Universal Declaration of Human Rights and Article 2 of the Fourth Protocol (1963) to the European Convention on Human Rights.

### **C. Passage from the Gaza Strip to the West Bank**

27. The Gaza Strip and the West Bank constitute one legal unit. This is entrenched in military legislation: The Military Proclamation regarding the Application of the Interim Agreement (Judea and Samaria), (no. 7) 5756- 1995 anchored the interim agreement between Israel and the PLO (“the Oslo Accord”), which determined – as a fundamental principle – that the West Bank and the Gaza Strip constitute two parts of one territorial unit. This was also recognized by this Honorable Court (HCJ 7015/02 '**Ajuri v. IDF Commander in the West Bank**; IsrSC 56 (6) 352.

Changes that have taken place in the scope of Israeli control of the Gaza Strip due to the implementation of the “Disengagement Plan” did not affect this recognition. Indeed, this is a matter of two questions - the question of the scope of the Respondents’ obligations

towards the civilian population, and the question of the two geographical units constituting one political entity (History recognizes other examples of states whose territory was divided among various occupiers, yet they undoubtedly remained one state).

28. It is because of the scope of Israeli control over the Gaza Strip and the West Bank that the Petitioners must receive the Respondents' approval. Hence, the Respondents have concrete obligations towards the Petitioners. These were recognized in the rulings of this Court, which determined that Israel has special obligations towards residents of the Gaza Strip. This Court ruled as follows:

In the prevailing circumstances, the main obligations of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; **these obligations also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip**, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory due to which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.

HCI 9132/07 **al Basyouni et al. v. The Prime Minister et al.**,  
January 30, 2008, paragraph 12 of the judgment. (Emphasis added,  
B.S.).

29. As stated, the Respondents' control over the possibilities of passage between the Gaza Strip and the West Bank carries obligations towards the Petitioners. This was recognized in the rulings of this Court. Passage from the West Bank to the Gaza Strip through Israel is the only option available to the Petitioners to realize their right to family life and freedom of movement.
30. It must be noted that the Petitioner does not seek to remain in Israel, only to pass through it due to the circumstances that were imposed upon her by the Respondents.
31. It should be noted that **the right of transfer/transit** is recognized in international law and is significantly different from the right of entry.
32. The principle whereby persons are entitled to legitimately demand a country to allow them to pass through it was first mentioned in the bible:

Let us pass through your country. We will not turn aside into any field or vineyard, or drink water from any well. We will travel along the King's Highway until we have passed through your territory.  
(Numbers 21:22)

Refusal of the demand was considered arbitrary behavior that could justify war.

33. **International Law recognizes the existence of a right of passage (right of transfer) which constitutes a restriction of the principle of sovereignty.** A state is obligated to permit travel through its territory to foreign nationals wishing to reach another country. The right of transfer exists where transfer is necessary (even if alternatives exist), and where it poses no harm to the state being traversed. The transfer may be undertaken under conditions meant to protect the legitimate interests of the state being traversed.

34. The scholar Uprety notes in his book that:

Jurists over the past six decades have definitely favored the view that States whose economic life and development depend on transit can legitimately claim it.

(K. Uprety, *The Transit Regime for Landlocked States: International Law and Development Perspectives* (The World Bank, 2006), p. 29).

35. In relation to an enclave, the right of transfer is has customary status and naturally stems from the very existence of the enclave. The scholar Farran bases this, *inter alia*, on the legal principle whereby whoever grants a thing must also grant that without which the grant is of no use (*cuicumque aliquis auid concedit concedere videtur et id sine quo res ipsa non potuit*).

In Farran's words:

The law would not recognize the right of state A to a detached piece of its territory enclaved in state B's unless it was possible for state A to use that right. The existence of a right implies its exercise: without a right of free communication the rights of a state to its exclaves would be incapable of exercise and therefore nugatory. Hence there is no need for an express treaty between the two states concerned to give such a right: it is implicit in the very existence of the enclave. If a treaty is made, it may well regulate the exercise of this international way of necessity: but in its absence the right of way will still exist, for the necessity is still in being.

(d'Olivier Farran, C., *International Enclaves and the Question of State Servitudes, The International and Comparative Law Quarterly*, Vol.4, No. 2. (Apr. 1955) 294, pp. 304).

36. The right of transfer also exists where there are no proximate relations. The classic cases which led to the development of the principle of the right of transfer, are those of landlocked states (such as Switzerland or countries in the Caucasus), enclaves surrounded

by a different state (such as West Berlin prior to the unification of Germany and the Mount Scopus enclave between 1948 and 1967) as well as countries which are geographically divided (such as the OPT).

37. In his comprehensive article, the scholar Lauterpacht describes the right of transfer in the following manner:

On that view, there exists in customary international law a right to free or innocent passage for purposes of trade, travel and commerce over the territory of all States – a right which derives from the fact of the existence of international community and which is a direct consequence of the interdependence of States.

(E. Lauterpacht, *Freedom of Transit in International Law, Transactions of the Grotius Society*, Vol. 44 (1958), pp. 313-356, p. 320).

Lauterpacht bases the customary nature of the right of transfer on the writings of scholars from Grotius to the present day, as well as on state practice. He proves that the basic principle of freedom of transfer is uniformly repeated in countless two- party and multi- party treaties (the earliest treaties he mentions are from the eleventh century). These treaties regulated the concrete application of this right in different contexts: transfer through rivers and waterways or transfer on land within the territory of different states. He exhibits how the same logic is implemented in relation to the seas.

Amongst the modern treaties which are broader in terms of the number of parties thereto, one may mention the Convention on the High Seas (1958) (Article 3, dealing with landlocked states' right of access to the sea) ; The Convention on the Territorial Sea and the Contiguous Zone (1958) (Articles 14 - 24 dealing with innocent passage in territorial waters); The United Nations Convention on the Law of the Sea (1982) (Article 125 relating to the right of access to the sea and the right of transfer) and the GATT agreement (Article V relating to the right of transfer).

38. As stated above, the right of transfer can be exercised on condition no harm is done to the traversed state. For this purpose, the right may be subject to payment of expenses related to the transit itself, demands such as quarantine for the prevention of disease and so on. In regards to security considerations, Lauterpacht states that:

In terms of the problem of transit, there is room for the view that States are not entitled arbitrarily to determine that the enjoyment of a right of transit is excluded by considerations of security. What they may do is, by reference to the factor of security, to indicate one route of transit in preference to another or, possibly, to allow the use of the route subject only to certain conditions. But it must be doubted whether the discretion of the State stretches beyond this.

(supra, p. 340)

39. This approach is evident in treaties which anchored the general principle of the right of transfer in concrete circumstances. The right of transfer does not cease to exist in times of emergency, nor does it cease to exist in times of war, but it may be restricted according to the circumstances. The restriction must be as minimal as possible –in terms of both scope and duration.
40. One can see that the scope of the right of transit is broader than the scope of the right of entry for the purpose of remaining in a country, and that therefore any violation thereof requires more substantial grounds.

### **Conclusion**

41. The Petitioner request to travel from the Gaza Strip to the West Bank in order to visit her ailing mother, assist her, support her, attend to her, and nurse her.
42. The present case concerns an urgent matter that requires an urgent reply. The Petitioner seeks to realize her basic right to family life; however, the Respondents continue to linger and fail to provide their reply, despite the urgency of the matter and the grave medical condition of the mother who was hospitalized three times in the past month.
43. By delaying their response to the Petitioners' requests, the Respondents are not only derelict in their duty to provide a response within a reasonable period of time, but are also violating the right of the Petitioner to freedom of movement within her own country and the rights derived from it, primarily the right to family life.

This petition is supported by an affidavit signed before an attorney in the Gaza Strip and sent by fax to the undersigned as agreed by phone. The Honorable Court is requested to accept this affidavit and the powers of attorney which were also sent by fax in consideration of the objective difficulties involved in holding a meeting between the Petitioner and her representatives.

In light of the aforesaid, the Court is requested to issue an *order nisi* as sought and after hearing the Respondent, render it absolute. The Court is also requested to rule that the Respondent bear the Petitioners' expenses and legal fees.

January 15, 2015

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