January 3, 2019

District Court of Jerusalem sitting as the Court for Administrative Affairs

AAA 11930-07-18 State of Israel v. Khatib et al.

External file 1806/16

Before Honorable Justice Oded Shaham

Appellants State of Israel
Represented by M. Wilinger, Adv., and T. Erel from Jerusalem District Attorney (Civilian)

V.

Respondents
1. Khatib
2. Khatib
3. Khatib
4. Khatib

Represented by B.Agsteribbe, Adv. and D. Shenhar, Adv.

Judgment

Before me is an administrative appeal.

1. The appeal was filed by the State of Israel - Ministry of Interior - Population and Immigration Authority (hereinafter: the Appellant). It is directed against the decision of the Appellate Tribunal under the Entry into Israel Law - 1952 (hereinafter: the Tribunal and the Entry into Israel Law respectively) in Appeal (Jerusalem) 1806-16 dated May 23, 2018) Honorable Adjudicator A. Ezer). The Tribunal accepted the Respondents' appeal against the decision made by the Ministry of Interior to revoke the residency permit of Respondent 2 (hereinafter: the Respondent) pursuant to the graduated family unification procedure and end said procedure. The decision was based on a stabbing terror attack carried out by the Respondent's son.

2. Having considered parties' arguments and given the material before me, I have reached the conclusion that the appeal must be denied. I shall list the grounds for this conclusion.

3. The Respondent was born in 1976. In 1996, she married Respondent 1, a resident of Israel born in 1969. Respondent 1 filed a family unification application on December 12, 1999. The application was approved on January 23, 2001. Pursuant to the application, the Respondent received a DCO permit was renewed yearly until 2016. On October 12, 2015, the couple's son (born on March 28, 1998) perpetrated a stabbing terrorist attack in which a Border Police officer was lightly injured. The son was

killed during the attack. Thereafter, on December 23, 2015, the Respondent [*sic*] issued notice that he was considering denying the family unification application due to the aforesaid attack. A hearing was held (January 10, 2016), following which a decision was made (March 15, 2016) to revoke the Respondent's DCO permit due to the terror attack. The aforesaid appeal was filed against this decision and accepted.

4. To complete the picture, it is noted that subsequent to the filing of the appeal, the Respondent [*sic*] made an additional decision (November 3, 2016 - hereinafter: the supplementary decision), listing additional grounds for the original decision, including the Respondent's being the terrorist's natural guardian, and as such, responsible for his actions pursuant to her duty to monitor and supervise her minor children; the inability to disengage the son's actions from the family environment in which he was reared; the absence of a sense of responsibility for the act on the Respondent's part, based on what she said at the hearing in her case; the fact that the attack was carried out as part of a wave of lone-wolf terrorist attacks, motivation for which, according to security officials, is partly connected to family relations. The decision concluded with the following remark: "We cannot take lightly the issuance of Israeli stay permits for a person under whose parental supervision and responsibility a hateful act of terrorism was perpetrated against the State of Israel."

5. I shall add further that during the hearing before the Tribunal, security officials provided an extended brief summary, noting that second generation Israeli residents are consistently overrepresented in terrorism compared to their share of the population, which is indicative of the level of threat posed by this demographic; and that, inter alia, during the recent security escalation (beginning in October 2015), Israeli Arabs perpetrated several significant terrorist attacks, about half of which were perpetrated by second generation Israeli residents.

6. Section 2 of the Citizenship and Entry into Israel Law (Temporary Order) - 2003 (hereinafter: the Temporary Order) provides that while the Temporary Order is valid, and notwithstanding any other statutory provision, the Minister of Interior will not grant a permit to reside in Israel under the Entry into Israel Law to a resident of the Area. Section 3 of the Temporary Order qualifies the aforesaid Section 2, providing that the Minister of Interior has discretion to approve an application for a stay permit in Israel filed by a resident of the Area in specific cases listed in the section. This section applies to the matter at hand. Section 3d of the Law provides that a resident of the Area would not be granted an Israeli stay or residency permit if the Ministry of Interior has, "based on the opinion of the competent security officials [...], determined that the resident of the Area or a member of his family is liable to constitute a security threat to the State of Israel".

7. There is validity to the Appellant's argument that the Minister of Interior has wide latitude when exercising his power to grant status to a foreign national who is married to an Israeli resident or citizen (HCJ 758/88 **Kendal v. Minister of Interior**, IsrSC (41) 4 505 (1992); HCJ 3373/96 **Za'atara v. Minister of Interior** (October 16, 1996)). Nevertheless, the decision is not impervious to judicial review. It must be proportionate, i.e., it must serve a purpose and must not unnecessarily violate fundamental rights (in the case at hand, it is the fundamental right to family life). The decision must be based on pertinent considerations ascribed their proper weight.

8. As the Tribunal noted in its decision, the security risk is assessed by the Ministry of Interior on an individual basis (see HCJ 2028/05 **Amara v. Ministry of Interior** (July 10, 2006)). The procedure set forth in the Temporary Order reflects the understanding that this security risk may not necessarily be direct, but also indirect, emanating from the permit applicant's close relatives (See HCJ 7444/03 **Daka v. Minister of Interior** (February 22, 2010); see also HCJ 1740/04 **'Ayat v. Minister of Interior**

(July 31, 2006)). This also applies to "concern that the applicant residing in Israel could consciously or unconsciously provide assistance to a first-degree relative who is plotting to carry out hostile or subversive acts against the state" (remarks of my colleague, Honorable Justice Y. Noam in AP (Administrative Jerusalem) 677/06 **Daya v. Minister of Interior** (November 3, 2006)). As noted in the aforesaid matter of Daka, "the security concern is given particularly considerable weight" as part of the balance struck under the Temporary Order. In the same matter, the Court also remarked, "The authority must assess the weight of the impingement on the right to family life, with attention to all the relevant information, against the direct or indirect security preclusion. The greater the impingement on the right to family, the greater the weight of the risk posed by the permit applicant, whether direct or indirect, must be.

9. With respect to reliance on classified information and security officials' assessments, the Court ruled in the aforesaid matter of Amara, that,

> Individual assessments often rely on intelligence information in the possession of security officials. Like in many other cases involving security risks, the level of the security risk is assessed based on classified intelligence information... The practice of considering family unification applications based on classified information that is inadmissible in court and is not presented to the person whose right is impinged upon is an unavoidable necessity. When concrete information regarding a security risk is received, whatever the source may be, the Respondent has cause to consider denying the requested status.

10. The Appellant does not dispute the Tribunal's finding that no security preclusion, direct or indirect, is held against the Respondent. In this context, the Tribunal ruled, having considered the report presented to it regarding the general threat posed by Israeli residents or citizens who are second generation to family unification, that said argument does not substantiate any of the grounds listed in the Temporary Order for revoking the status of a resident of the Area.

11. I have reviewed the aforesaid report (September 10, 2017). A review of the report reveals that the finding the Tribunal made on this issue is founded. Indeed, the concept reflected in the Temporary Order is one of concrete risk, direct or indirect, emanating from a specific individual. The law does not set forth a cause grounded in considerations of general deterrence. The report does not indicate such a concrete threat emanating from the Respondent. Moreover, the assessment report does not indicate that rejecting the Respondent's application offers any added security value, not even as a general deterrent. Consequently, the report does not substantively support the decision made by the Ministry of Interior. The same holds true for the statements made by the security officials during the ex parte court hearing, which have been provided to me, and all the more so given that the decision of the Ministry of Interior was never based on deterrence, either specific or general.[1]

12. With respect to the arguments in the supplementary decision: The Appellant argues that the decision can be supported by the fact that the Respondent has a basic obligation to see to it that no one under her responsibility harms national security. The Tribunal accepted that such an obligation does,

[1] In its decision, the Tribunal referred to an additional report, mentioned in the judgement in AP (Administrative H) 57857-05-16, **Minister of Interior v. Zayud** (August 6, 2017). The aforesaid report addressed the deterring effect of revoking the citizenship of second generation family unification individuals involved in terrorism would have on other second generation individuals. This report is irrelevant to the case at hand, as it does not concern a decision regarding the status of a person involved in terrorism.

generally, exist. However, this does not suffice. A general obligation such as this does not and cannot give rise to any type of absolute responsibility on the Respondent's part for everything her son has done. It is important to recall that this is not a young child, but a minor nearing the age of majority. This obviously affects how much and what type of supervision can be reasonably expected from his parents. I add that in a similar context, the Supreme Court ruled years ago that, "As is known, our law does not provide for vicarious liability on the part of parents, as such, for their children's negligence. However, parents do have a direct duty of care to supervise the actions of their children to prevent them from causing harm according to the ordinary level of care by a reasonable parent" (CA 290/68 Arieli v. Tzink 22(2) 645 (1968), p. 649 of the judgment). In the case at hand, there is no argument or basis for an argument that the Respondent was privy to her son's intentions. There is no argument or basis for an argument that she willfully ignored these intentions; nor is there an argument or basis for an argument that she exhibited negligence with respect to his actions. In these circumstances, I cannot lend much weight to the aforesaid argument.

13. As for the argument presented by the Ministry of Interior referring to the Respondent not taking responsibility for the act committed by her son, and even denied his carrying out a terrorist attack during her interview, noting that, "They (Security forces, O.S.) shot him". The position expressed by the Respondent, as it emerges from her interview, does not indicate support for terrorism, much less incitement for terrorism on her part. Moreover, the Respondent's statement to the police, attached as an annex to the argument brief submitted by the Respondents, in fact, indicates the opposite. When the Respondent was asked whether her son belonged to any Palestinian organization she replied in the negative, adding, "I always make sure the children do not get into these things...." (Statement, October 12, 2015, p. 2).

14. The Appellant's general approach, namely that an act of terrorism, whatever it may be, is serious and reprehensible, is correct. This certainly pertains to the circumstances of the case at hand, which I have addressed. However, given the unique nature of the relationship between parents and their children, it is difficult to ascribe a great deal of weight to the aforesaid position expressed by the Respondent in the interview, which can be reasonably interpreted as a natural response of denial. The Respondent's mental state around this issue is reflected in other things she said during the interview in relation to the attack her son perpetrated and in the course of which he was killed, whereby, "We... Don't know if this is reality or a dream. We still haven't gotten used to it". It is also doubtful whether the position of the Ministry of Interior, which ascribed significant weight to this matter, is congruent with the fundamental value of freedom of thought and opinion. Given the picture that emerges from the entirety of the material, it is difficult to avoid the impression that the decisions in the Respondent's matter contained a punitive element related to actions she did not carry out and for which she was not responsible.

15. In light of the above, I cannot accept the far reaching argument raised by the Appellant, whereby any other decision from the Ministry of Interior would have contradicted "fundamental tenets regarding state sovereignty, Israel being a Jewish, democratic state and [...] other important state interests". Indeed, in a similar ruling, the Supreme Court interpreted a statutory provision related to release on bail of illegal aliens in state custody in a manner that permits considering public interests, despite the fact that such considerations were not explicitly listed in the relevant statutory provision (Section 13.6(b) of the Entry into Israel Law; see, LAA 173/03 **State of Israel - Ministry of Interior v. Salameh** (May 9, 2005), paragraph 9 of the judgment). Nevertheless, even if I suppose that within the wide latitude the authority has over decisions of the type discussed herein it may consider public policy, such as, "The state shall not aid those who would destroy it" (HCJ 562/86 **al Khatib v.**

Ministry of Interior Jerusalem District Director, IsrDC (3) 657 (1986), p. 661), in this case, the force of the alleged consideration, as it emerges from the discussion above, fails to substantiate the decisions made in the Respondent's matter.

16. The aforesaid is further supported in light of the considerations against the decision of the Ministry of Interior, which it should have taken into account. The decision portends a veritable violation of the fundamental right to family life afforded to the Respondent, who has three children. The decision means the revocation of a permit the Respondent has had for many years. In this context, the decision gave no weight to the far reaching implications of uprooting the family from the place that has been the center of its life for more than a decade, as stated by the Respondent in her interview on January 10, 2016. As the Respondent said, "How are his parents and siblings at fault? We have nowhere to go, no way to live somewhere else... We've been in Jerusalem our whole lives...."

17. In the overall circumstances, it appears that even taking into account the public policy considerations argued by the Ministry of Interior, the decision it has reached in the Respondent's matter is clearly disproportionate. As such, there is no cause to intervene in the decision issued by the Tribunal ordering the revocation of the decision. This is all the more forceful given the restraint this Court generally employs with respect to intervention in decisions made by the Tribunal given the expertise the Tribunal has in matters brought before it.

18. Given all the above, the appeal is hereby denied. The Appellant shall pay Respondents' costs to the sum of 10,000 ILS. No VAT shall be added to this amount, which reflects the scope of the work required in this proceeding and the findings made herein. The sum shall be paid by February 10, 2019. The classified material presented to me for review (the ISA report provided to the Tribunal, the transcripts of the ex parte hearing held by the Tribunal) will be returned to the ISA and the Tribunal.

Delivered today, January 3, 2019, in parties' absence.

Oded Shaham, Justice