At the Supreme Court **HCJ 3592/08**
Sitting as the High Court of Justice

In the matter of:

1. _____ **Hamidat, Identity No.**_____, resident of the Palestinian Authority
2. _____ **Ahmad Abu Zer, Identity No.**_____, resident of the Palestinian Authority
3. _____ **Abu Zer, Identity No.**_____, resident of the Palestinian Authority
4. _____ **Hamidat, Identity No.**_____, resident of the Palestinian Authority

5. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Saltzberger – R.A.**

represented by Adv. Sigi Ben-Ari (Lic. No. 37566) and/or Yossi Wolfson (Lic. No. 26174) and/or Abeer Jubran (Lic. No. 44346) and/or Ido Blum (Lic. No. 44538) and/or Yotam Ben-Hillel (Lic. No. 35418) and/or Hava Matras-Irron (Lic. No. 35174) and/or Yadin Elam (Lic. No. 39475) and/or Alon Margalit (Lic. No. 35932)

of HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Saltzberger
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The Petitioners

- Versus -

1. **Commander of the Army Forces in the West Bank**
2. **The Brigadier General of the Southern Command**
3. **The Minister of the Interior**
4. **The State of Israel**

The Respondents

A Petition for *Order Nisi*

A petition is hereby filed for an *Order Nisi* directed to the Respondents and ordering them to give reasons for:

1. Why would not they allow Petitioner 1 to pass from Gaza Strip to the West Bank, where her spouse, Petitioner 4, lives and where their marriage ceremony shall take place, by issuing a permit to enter Israel.

2. Why would not they allow Petitioners 2-3, the Petitioner 1's parents, to pass from Gaza Strip to the West Bank and back to Gaza Strip, in order for them to be able to participate in their daughter's marriage ceremony which will take place in the West Bank village of Zurif by issuing a permit to enter Israel.

A Motion for an Urgent Hearing

The Court is moved to schedule an urgent hearing of the petition in view of the **approaching date of the marriage ceremony that was set for May 15, 2008.**

Petitioners 1 and 4 signed a marriage agreement **five months ago**, in November 2007. Since then, Petitioner 1 is trying in vain to get a permit to enter Israel for the purpose of her passage from Gaza Strip to the West Bank, where her spouse lives and where their marriage ceremony shall be held, after which the couple can begin their mutual life and maintain complete marriage life.

The Factual Foundation

The Parties

1. Petitioner 1, born in 1986, is a resident of the Palestinian Authority, who presently lives in her parents' house in Han Yunes refugee camp which is in Gaza Strip.

2. Petitioner 4, born in 1978, is a resident of the Palestinian Authority, who lives in Zurif in Hebron District which is in the West Bank.

3. Petitioners 2 and 3 are Petitioner 1's parents, and are also residents of the Palestinian Authority who live in Gaza Strip.

4. Petitioner 5 (Hereinafter: **HaMoked for the Defence of the Individual** or **HaMoked**) is a human rights organization located in Jerusalem.

5. Respondent 4 occupies the territories of the West bank and Gaza Strip under a belligerent occupation. Respondent 1 is the military commander, who is responsible for the West Bank territory on behalf thereof.

6. Respondents 2 and 3 are responsible for issuing permits to enter Israel for the purpose of passing from Gaza Strip to the West Bank. Respondent 3 has the power, which he delegated to Respondent 2.

The Facts and the Exhaustion of Administrative Remedies

7. In April 2007 Petitioners 1 and 4 became acquainted with one another through the telephone and internet, by mutual acquaintances and decided to get married. In November 2007 the couple signed a marriage agreement in Gaza. Due to the security situation prevailing then in the Gaza Strip, Petitioner 4 could not attend the agreement signing and he empowered his brother in law who resides in Gaza to sign the agreement instead of him.

   A copy of the marriage agreement is attached hereto and marked **p/1**.

8. A month later, in December 2007, Petitioner 3, Petitioner 1's father, approached the Palestinian Civilian Committee in Gaza with a request to coordinate with the Israeli party the Petitioner 1's passage to the West Bank in order to for her to be able to unite with her spouse and realize her marriage. Since then, he again approached the committee and was answered that his application is still being handled. In January, Petitioner 1 was told that her application was not forwarded to the Israeli party at all, since **as from January 16, 2008 Israel is not willing to accept and handle any application which is forwarded by the Palestinian Civilian Committee, other than in cases of demise.**

   A copy of a confirmation from the Palestinian Civilian Committee regarding Israel's refusal to handle the applications forwarded thereby, is attached hereto as Exhibit **p/2**.

9. The couple decided to wait a little with the hoping for stabilization of the situation and set the date for the marriage ceremony to May 15, 2008.

   A copy of the wedding invitation is attached hereto and marked **p/3**.

10. On April 3, 2008 the Petitioners approached, through HaMoked for the Defence of the Individual to the humanitarian centre in the District Corrdination Office of Gaza Strip (Hereinafter: **DCO Gaza**), with a request to allow the entrance of Petitioners 1-3 to Israel, for their passage from Gaza Strip to the West Bank. It was indicated in the application that Petitioner 1 has approached the Palestinian Civilian Committee in the past and that "**an answer that conditions the handling of our client's request on the forwarding of an application through the Civilian Committee would be pointless**".

    A copy of the application of HaMoked for the Defence of the Individual of April 3, 2008 is attached hereto and marked **p/4**.

11. Despite the aforesaid, on April 6, 2008 a response was received from DCO Gaza, whereby it was necessary to first approach the Palestinian Civilian Committee. Obviously that in view of the committees' notification on the Israeli party's refusal to accept applications, this demand leaves the petitioners at an impasse.

    A copy of the DCO Gaza response that was received on April 6, 2008 is attached hereto as Exhibit **p/5**.

12. Thus, by refusing to examine the application, the respondents prevent the petitioners to union and begin mutual marital and family life under one roof.

The Legal Argument

The Respondents' Duty to Exercise Their Power and Examine the Petitioner's Application

13. The respondents cannot renounce their power and abstain from examining the petitioners' application. "**A power is granted to an administrative authority in order for the authority to exercise the same…this is the duty to act**" (Yitzhak Zamir, *The Administrative Power* (Nevo 1996), 691).

> **The citizen who approaches the authority is entitled that the authority shall exercise its power, and should the authority refuse to do so, the court shall interfere and charges with exercising the power** (Ra'anan Har Zahav, *The Israeli Administrative Law* (Shenhav 1996), 104).

14. The court ruled in many cases that the authority is not obligated to accept the application but it must consider the application and decide thereon (HCJ 35/48 **Breslev v. The Minister of Trade and Industry**, *Piskei Din* 2 (33), 334; HCJ 297/82 **Berger v. The Minister of the Interior,** *Piskei Din* 37(3) 29, 35).

> **In any case of a power, the authority is obligated to consider the issue, and cannot avoid acting without due consideration** (according to Justice Barak in HCJ 297/82 **Berger v. The Minister of the Interior**, *Piskei Din* 37(3) 29, paragraph 6 of his judgment)

15. **"The duty to act arises in two situations. In one situation, the authority is requested by an external party to exercise its power. Thus, for example, when a person requests to receive from the authority a business license or a driving license…in this situation the duty to act arises when the application is submitted to the authority"** (Zamir, 693).

16. The petitioners approached with an application to the holders of the power, the respondents, and thus arose their duty to act. The respondents refuse to examine the application and decide thereon and thus they renounce their duty to act.

17. Furthermore, the respondents' sweeping refusal to discuss any application, excluding in cases of demise, is arbitrary and unproportionate. The principle which obliges examining the concrete circumstances and disqualifies sweeping prohibitions repeats time after time in the Supreme Court case law:

> **The Broadcasting Authority's decision in this matter cannot be sweeping and general, but it must be anchored in the circumstances of each and every case.**

(HCJ 399/85 **Kahane et al v. the Management Committee of the Broadcasting Authority et al**, *Piskei Din* 41(3) 255, 303).

18. The court disqualified more than once a collective refusal which was not based on an individual examination due to non-proportionality. Thus, for example, a sweeping refusal to grant journalist certificates to residents of the territories was disqualified (HCJ 5627/02 **Sayef v. The Government Press Bureau** *Piskei Din* 58(5) 40).

And see also: HCJ 243/82 **Zichroni v. the Management Committee of the Broadcasting Authority et al** (*Piskei Din* 37(1) 757, 781); A.H.H.C.J. 4191/97 **Rekanat Ephraim v. National Labor Court**, *Takdin Elyon* 2000(4) 587, 594; HCJ 6741/99 **Yekutieli v. The Minister of the Interior**, *Piskei Din* 55(3) 673, 713-714.

The Respondents Duty to Ensure the Human Rights and the Normal Life of the Petitioners

19. The many changes that occurred in the recent years in the occupied territories – whether in Gaza Strip or in the West Bank, whether following signing agreements or following terror and violence – cannot constitute an excuse for breaching the human rights of the residents who live there. As was ruled by Chief Justice (his former title) Barak:

> **There is no possibility of making a clear distinction between the status of human rights in times of war and their status in times of peace. The dividing line between terror and calm is a fine one. This is the case everywhere. It is certainly the case in Israel. There is no possibility of maintaining it over time. We must treat human rights seriously both in times of war and in times of calm. We must free ourselves from the naive belief that when terror ends we will be able to put the clock back.**
>
> (HCJ 7052/03, **Adalah – the Legal Centre for Arab Minority Rights in Israel et al v. The Minister of the Interior**, *Takdin Elyon* 2006(2) (Hereinafter: the **Adalah Case**), 1754, paragraph 21 of his judgment).

20. The respondents cannot ignore the fact that life goes on also in time of conflict. Also in time of conflict the residents of the conflict area are entitled to realize their right to a family life – to fall in love, get married, live with the spouse under one roof, have children and raise them together. The respondents cannot expect that the residents of the territories should freeze their family life due to the conflict. They cannot force separation on the young petitioner couple and prevent them from living life together until peace prevails in our region.

> **The life of a population, same as the life of an individual, is not static but rather in a permanent motion with development, growth and change. A military government cannot ignore all that. It is not entitled to freeze life.**
>
> (As ruled by Justice (his former title) Barak in HCJ 393/82, **Jamy'at Askan v. Commander of the IDF Forces in Judaea and Samaria**, *Piskei Din* 37(4) 785, 805).

21. Regulation 43 of the Hague Regulations states that:

> **The power of the legitimate authority having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order...**

22. The duty to ensure the normal order and life and act for the needs of the society applies on all scopes of the civilian life:

> **The beginning of Regulation 43 of the Hague Regulations grants the military administration a power and a duty to restore and ensure the public order and life…..the regulation does not limit itself to a unique aspect of the public order and life. It extends to the public order and life with all their aspects. Therefore, such power applies – aside issues of safety and military – also on diverse "civilian" circumstances, such as economic, social, educational, sociological, sanitation, health, transport, and similar issues that human life in a modern society is related thereto.**
>
> (Article 18 of the judgment of Justice Barak in HCJ 393/82 **Jamy'at Askan** above).

23. In ensuring the normal life there is a great significance for the passing time and its influence on the population:

> **It is not necessarily a one-time action, but an ongoing duty, and anyway it is not to be maintained other than by consideration of the circumstances that change from time to time, and with due regard to the needs occasioned by the passage of time, and that will continue to change with the passage of time. The circumstances referred to are not necessarily those of security, but also of economy, sanitation, transport etc.**
>
> **[…]**

> **The length of time…may affect the nature of the needs, and the necessity in making adjustments and reorganization may increase as more time elapses… In the framework of the legal interpretation of Article 43, the relationship between the time element and the form be taken by fulfilling the provisions of Article 43 was therefore stressed more than once.**
>
> (HCJ 69/81, **Abu Aita v. The Regional Commander of Judea and Samaria**, *Piskei Din* 37(2) 197, 310-311).

24. The respondents are not entitled to freeze the petitioners' right to a family life or separate the couple from each other. This injury is in contrast with their duty to protect the petitioners' human rights and to ensure the continuation of their normal life.

The Military Commander's Power: Security Needs and the Population Welfare

25. The respondents' discretion, certainly the Respondent 1's discretion, is limited. They should consider the security needs on one hand, and the needs and rights of the local population on the other hand and to balance between them:

> **The Hague Convention empowers the regional commander to act in two major fields: one – ensuring the legitimate security interest of the occupier of the area, and the second – ensuring the needs of the local population in the area under belligerent occupation… The one need is military, and the other is a civilian-humanitarian need. The first focuses on the concern for the security of the military force that occupies the place, and the second - on the responsibility for maintaining the residents' welfare. In the latter context, the regional commander is responsible not only for maintaining the order and the security of the residents, but also for protecting their rights, and especially the constitutional human rights bestowed to them. The concern for human rights lies at the heart of the humanitarian considerations that the commander is obliged to consider. According to Regulation 43 of the Hague Convention, the force which controls an occupied territory bears the responsibility to use all measures available thereto to restore and ensure, then, as much as possible, public order and security in the region, while honoring the law which is valid in the region as much as possible. In performing his role in maintaining the order and security, the regional commander must therefore ensure the necessary security interests on one hand, and protect**

the interests of the civilian population in the region on the other hand.

(HCJ 10356/02 **Hass v. The Brigadier General of the Central Command**, *Piskei Din* 58(3) 443, 455-456).

26. The military commander is not entitled to consider national, political and other considerations, and is limited to considerations of security in their narrow sense. Any other consideration to be considered by the military commander shall constitute an extrinsic consideration:

> **The military commander's considerations are by securing his security interests in the region on one hand, and securing the interests of the civilian population in the region on the other hand. Both are targeted towards the region. The military commander is not entitled to consider the national, economic, social interests of his own state, insomuch as they have no ramification on his security interest in the region or on the interest of the local population. Even the army's needs are its military needs and not the national security needs in its broad sense.**
>
> (HCJ 393/82 **Jamy'at Askan Elma'almoon v. Commander of the IDF Forces**, *Piskei Din* 37(4) 785, 793-794).

27. In our matter, the decision not to handle at all the applications of the petitioners and others in their situation is in contrast with the duties of the military commander to secure the population needs and welfare. Moreover, the respondents did not assert a security argument which concerns the petitioners and which prevents the consideration and exercising discretion in respect of their application.

<u>The Petitioners' Right to Choose a Spouse and Exercise Family Life</u>

28. The right to a family life is a recognized and protected right in the humanitarian international law and the international human rights law.

Article 16 of the Universal Declaration of Human Rights, 1948, states that:

> **Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.**
>
> **[…]**
>
> **The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.**

See also:

Article 46 of the Hague Regulations;

Article 27 of the Fourth Geneva Convention;

Article 10 of the Covenant on Economic, Social and Cultural Rights, 1966;

Articles 17 and 23 of the 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 Covenant of Human Rights;

HCJ 3648/97 **Stamka et al v. The Minister of the Interior**, *Piskei Din* 53(2) 728, 787.

These provisions are part of the customary international law, being also established also in general practice, which is acknowledged as law and arises from general principles of the law recognized by civilized nations. Therefore, the state's duty to ensure a maximal degree of the familial existence, possible under the circumstances, is a duty by law.

29. The right to a family life was recognized in this Honorable Court's case law as a central and fundamental right (see for example: HCJ 2245/06 **Dobrin v. The Israeli Prison Service,** *Takdin Elyon* 2006(2) 3564, 3569). Moreover, the majority of the judges of the panel in HCJ 7052/03 in the **Adalah Case** believed that the right to a family life is a constituntional right derived from the right to human dignity.

> **The person's family ties are, to a large extent, the centre of his life (see Roberts v. United States Jaycees, 469 U.S. 609, 618-619 (1984)). Few are the decisions that shape and affect the person's life as much as the decision as to the person with whom to join his destiny and with whom to establish a family.**
>
> **(**The **Adalah Case**, Section 32 of the judgment of Chief Justice (his former title) Barak).

30. It is impossible to expand on the seriousness and the significance of the conjugal relation in the life of every human being:

> **It is man's nature, in fact the nature of his very creation, to seek out a partner, with whom to live his life and with whom to establish his family. This has been the case throughout the ages and this is the case nowadays, notwithstanding many changes that have occurred to the human customs and family. Both in the past and today it is said that 'It is not good that the man should be alone' (Genesis 2, 18), and we shall recognize man's strong desire to find a**

'helpmate', with whom his destiny shall be joined together.

So much has been written of man's search for his 'helpmate', of the meaning of the relation between him and the object of his love, that it may seem that most of human creativity is devoted to the study of this relation. It seems that ancient dramatist Aristophanes' speech concerning this relation, quoted by Plato, are apposite:

"For if we become friends of God and his and allies, we will each attain the beloved who is the flesh of his flesh, which few in our generation do… [I am referring] in general, to all men and women and say that the human race would be happy if we were to bring our love to a consummate end, and if everyone is to attain that beloved who is the flesh of his flesh, and returns to his ancient nature. And if this is the best, then now, at present, that which is closest to it shall be the best; namely - that a man attains the beloved to his liking."(Plato, "The Symposium" in *The Writings of Plato* (Translated to Hebrew by Y.G. Libes, 1999, Vol. B) 116).

In searching for a spouse, in living together with him, in creating their family, a person fulfils himself, shapes his identity, and builds a haven and a shield against the world. It seems that especially in our turbulent and complex world, few are the choices in which a person fulfils his free will, as much as the person's choice with whom to share his life.

It seems that nowadays few are the choices in which a person fulfils his free will, as much as the person's choice with whom to share his life, with whom to establish his family, with whom to raise his children. In choosing a spouse, in entering into the marriage relation with him, the person expresses his personality and realizes one of the central elements of his personal autonomy.

(The **Adalah Case**, Sections 1-3 of the judgment of Justice Joubran).

31. The essence and nature of the conjugal relationship is living together under one roof:

Living together under one roof lies in the heart of the constitutional right to family life and marriage. In extensive and consistent case law, not only that

> **this court regarded living together as the central element of family life and marriage, but it even went so far as to equate living together with having a conjugal relationship...**
>
> **Thus, living together is not merely a characteristic that lies on the periphery of the right to a family life, but one of the most fundamental elements of this right, if not the most fundamental. Consequently, violating person's ability to have mutual life with his spouse is in fact violating the essence of his family life... To emphasize: it is not merely a violation of one of the meanings of the constitutional right to have a family life, but an entire prevention of this right, and it should be considered as such** (*ibid*, Sections 9-10 of the judgment of Justice Joubran).

32. Realizing the person's right to choose his spouse and to have conjugal and mutual life together under one roof depends on him realizing an additional right thereof: his right to establish his home in his country, which is also a basic right that relates to the person's essence. As was ruled by Justice Hayot:

> **The right of a person to choose the spouse with whom he wishes to found a family and also his right to have his home in the country where he lives, are in my opinion human rights of great importance. They incorporate the essence of man's existence and dignity as a human being and his freedom as an individual in the deepest sense.**
>
> (The **Adalah Case**, Section 4 of the judgment of Justice Hayot).

33. Justice Levi emphasized in his judgment that the right to a family life means also the right to choose the location of the family unit:

> **The basic right of a person to marry whomever he chooses, as he sees fit and in accordance with his outlook on life, and his right that he and the members of his family be able to lead their live together also from the perspective of the geographic location of the family unit, which they have chosen for themselves.**
>
> (The **Adalah Case**, Section 7 of the judgment of Justice Levi).

34. And if thus was ruled in the Adalah Case with respect to a citizen who wishes to found a family unit with a foreign citizen – then all the more when speaking of two residents of the same entity, who wish to establish a family together, and in our matter – two Palestinians residents of the Palestinian Authority.

35. The respondents violate the petitioner's right to a family life and in fact **prevent it completely**, by denying the couple to have a conjugal life and prevent them from establishing their home in the place chosen by them. In order to so badly violate the right to a family life, the respondents should at least present significant considerations of security that might justify the deprivation of this important and basic right. But the respondents, not only that they do not present significant considerations of security – **they do not present considerations of security at all, and do not even bother to examine the application and to exercise their discretion.**

The Petitioners' Right to Freedom of Movement and Choosing their Residence in their Country

36. The right to freedom of movement is the main expression of the person's autonomy, his free will and the realization of his abilities and rights. The right to freedom of movement is considered amongst the norms of the customary international law.

> **The person's right to movement, as a material characteristic of his personal liberty, was recognized from time immemorial as a meta-right, with a special strength and position among the individual's basic rights and liberties** (HCJ 111/53 **Kaufman v. The Minister of the Interior**, *Piskei Din* 7 534; HCJ 190/57 **Asiag v. The Minister of Defence**, *Piskei Din* 12(1) 52, 55). **The freedom of movement is derived from the person being a freeman, and from the state's nature as a democratic state, and from us being part of the international community, which in its framework the freedom of movement is recognized as a customary human right.**
>
> **In the hierarchy of human's basic rights, the individual's right to movement has a great constitutional power… it stands at the utmost importance of the hierarchy of human rights in Israel… the individual's freedom of spirit and physical freedom derive their power from each other, and by combining one another they unite together the elements of the human's personal liberty.**
>
> (HCJ 6358/05 **Vanunu v. The General of the Home Front Command**, *Takdin Elyon* 2006(1) 320, 324).

And see also:

HCJ 1890/03 **Bethlehem Municipality v. The State of Israel**, *Piskei Din* 59(4) 736, 754;

HCJ 3914/92 **Lev v. The Regional Rabbinical Court**, *Piskei Din* 48(2) 491, 506.

37. The right to freedom of movement is the force that drives the fabric of human rights. The force that enables a person to realize his autonomy, his choices. When limiting the freedom of movement, this "engine" is damaged and as a result thereof some of the person's options and rights cease to exist. His dignity as a man is violated. This is the reason for the great significance related to the right to freedom of movement.

> **…every person has a basic right to autonomy. This right was defined as the right of every individual to make decisions regarding his actions and desires in accordance with his choices, and to act in accordance with these choices… This right of a person to shape his life and his destiny encompasses all of the central aspects of his life - where he will live; what work he will do; with whom he will live; what he will believe. It is central to the existence of each and every individual in society. It includes an expression for recognition of the value of each and every individual as a world in himself. It is essential to the self-determination of each individual, in the sense that the entirety of the choices of each individual defines the personality and life of the individual.**
>
> (C.A. 2781/93 **Da'aka v. "Carmel" Hospital**, *Takdin Elyon* 99(3) 574, 595).

38. When limiting a person from moving within the territory of the state or entity wherein he resides, his social life are being violated, his cultural life and human rights are being violated, and his freedom of choice is being violated. Such person is limited in the most material questions of his life: where he will reside, with whom he will share his life, where will his children study, where he will receive medical care, who will be his friends, where he will work, what work he will do and where he will pray.

39. The right to freedom of movement and choosing the place of residence is anchored also in the International humanitarian Law.

40. The Fourth Geneva Convention determines the freedom of movement as a basic right of protected persons, whether in an occupied territory or in the territory of an enemy state. Article 27 of the convention determines that protected persons shall be entitled, in all circumstances, to respect for their honor.

41. The Universal Declaration of Human Rights, 1948, determines in Article 13 that:

> **Everyone has the right to freedom of movement and residence within the borders of each State.**

Accordingly, also the American Declaration of the Rights and Duties of Man, 1948, determines in Article 8 that:

> **Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory and not to leave it except by his own will.**

42. The Covenant on Civil and Political Rights, 1966, determines in Article 12 that:

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

43. The residences of the Territories has the right to change their place of residence as they see fit within the Territories, including between Gaza Strip and the West Bank, which constitute a single territorial unit. This is their material and basic right.

In the matter of the State of Israel's recognition in the Gaza Strip and the West Bank as a single territorial unit, see:

Article 5 of the "Declaration of Principles" of September 13, 1993, that was signed by Israel and the PLO.

Article 23(6) of the Agreement on the Gaza Strip and the Jericho Area, "Cairo Agreement", that was signed by Israel on May 4, 1994;

Article 11(1) of the Interim Agreement that was signed by Israel in the White House on September 28, 1995;

Article 1(2) of Annex I of the Interim Agreement, Security Arrangements;

The proclamation relating to the implementation of the Interim Agreement (Proclamation No. 7);

The Agreement on Movement and Access between Israel and the Palestinian Authority of November 15, 2005;

HCJ 7015/02 **Ajuri v. Commander of the IDF Forces in the West Bank**, *Takdin Elyon* 2002(3) 1021;

HCJ 7052/03 **Adalah – the Legal Centre for Arab Minority Rights in Israel the Petitioners et al v. The Minister of the Interior**, *Takdin Elyon* 2006(2) 1754.

44. Indeed, the right to freedom of movement, as much as any right, may be limited. The various conventions determine that considerations of security constitute a reason for limiting such right. However, it was ruled in the case law that in order to limit such right there is a need to meet at least the test of a "frank and earnest fear" for a violation of security, if not the more severe test of "actual danger to the state security" (HCJ 448/85 **Daher, Advocate v. The**

Minister of the Interior, *Piskei Din* 40(2) 701; HCJ 4706/02 **Sheikh Salah et al v. The Minister of the Interior**, *Piskei Din* 56(5) 695).

45. In this connection, it is important to mention Articles 41-43 (that apply in a territory of a state involved in a conflict) and 78 (that applies in an occupied territory) of Geneva Convention. These articles address the limitation of liberty by internment or by delimitation of the residence. The measures are narrow and the use thereof is narrow, thus leading us to understand that the freedom of movement of the protected persons in all other circumstances was very important to the member states. Only in place wherein in general, there is a duty to respect the freedom of movement, there is a need to determine explicit and narrow rules for the limitation thereof:

> **Article 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person who is being assigned and also a source for the possibility of violating this right. This is being expressed, *inter alia*, in the provisions of Article 78 of the Fourth Geneva Convention itself, which determines that the measures determined thereby are the measures that the Occupying Power (namely, the military commander) is entitled "at most" to take.**
>
> HCJ 7015/02 **Ajuri v. Commander of the IDF Forces in the West Bank**, *Piskei Din* 56(6) 352, 367;

The violation of the rights of Petitioners 1 and 4 is extremely severe. The petitioners cannot live together as husband and wife under one roof although being married. They cannot establish a home together. They cannot maintain a mutual household. They cannot shape their life and mutual destiny.

The Right to Pass in a State Compared to Entering the Territory of a State for the Purposes of Work or Settlement

46. There is a need to distinguish between passage in a state, for a limited and short time, as required in the case of the petitioners, and entering a state for the purpose of work or settlement.

47. Approach whereby people are entitled to appeal to a state with the legitimate demand for passage through it, may be found already in the Old Testament:

> **Let me pass through thy land, we will not turn into the fields, or into the vineyards, we will not drink of the waters of the well, but we will go along by the king's high way, until we be past thy borders** (Numbers, 21 ,22).

The refusal to this demand was perceived there as arbitrariness and as justifying war.

48. **The international law recognizes the existence of the right of transfer that includes a limitation of the principle of sovereignty**. A state is obliged to enable a passage through its territories for foreign citizens who wish to reach other state. The right of transfer exists when the passage is necessary (even if alternatives exist), and when it does not harm the states passed through. The passage may be in conditions intended to protect the legitimate interests of the state passed through.

49. The right of passage derives naturally from the very existence of an enclave. As described by the scholar d'Olivier Farran:

> **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 in still in being.**
>
> (d'Olivier Farran, C. (1955) "International Enclaves and the Question of State Servitudes", *International and Comparative Law Quarterly*, 4(April) 297, 304).

The right of passage exists also where there is no proximity. Classic cases, against which background the principle of the right of passage developed, are the cases of **landlocked states** (such as Switzerland or the Caucasus states), **enclaves** surrounded by other state (such as West Berlin prior to the Germany reunification and the Mount Scopus enclave during 1948-1967) and **geographically-separated states** (such as the Palestinian territories).

50. And this is how Lauterpacht describes the right of passage:

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

Lauterpacht establishes the customary nature of the right of passage on scholar works since Grotius and until these times, as well as on the states' practice. He

proves that the basic principle of the freedom of passage is repeated uniformly in innumerable bilateral and multi-lateral conventions (the earliest conventions that he mentions are from the 11th century), that regularized the concrete application thereof in various contexts: in passage in rivers and waterways or in terrestrial passage through the territories of various states. He shows how such logic was implemented in respect of seaways.

Among the more modern and comprehensive conventions in respect of the amount of parties thereof, we can mention the Convention on the Open Sea (1958) (Article 3 on the right of landlocked states to access to the sea); the Convention on the Territorial Sea and the Contiguous Zone (1958) (Articles 14-24 on innocent passage in the territorial water), the United Nations Convention on the Law of the Sea (1982) (Article 125 on Right of access to and from the sea and freedom of transit) and the GATT Agreement (Article V on the right of passage).

51. The right of passage is conditioned, as aforesaid, on the absence of harm to the state passed through. For this purpose, the right may be conditioned by payments for expenses involved in the very passage; in demands such as closure to prevent distributing diseases, and so forth. With respect to considerations of security, Lauterpacht writes:

> **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.** (*ibid*, 340)

This approach is reflected in the conventions that anchored in concrete circumstances the general principle of the right of passage. The right of passage does no cease to exist in case of emergency, and neither in time of war, but it can be limited in accordance with the circumstances. The limitation should be as small as possible – both from the perspectives of the scope and length thereof.

Relevant provisions are found in the New York Convention on Transit Trade of Land-Locked States (1965) (the complete version of the convention is found in

http://www.austlii.edu.au/au/other/dfat/treaties/1972/4.html

> **Article 12 - Exceptions in case of emergency**
>
> **The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency endangering its political existence**

or its safety may, in exceptional cases and for as short a period as possible, involve a deviation from the provisions of this Convention on the understanding that the principle of freedom of transit shall be observed to the utmost possible extent during such a period.

Article 13 - Application of the Convention in time of war

This Convention does not prescribe the rights and duties of belligerents and neutrals in time of war. The Convention shall, however, continue in force in time of war so far as such rights and duties permit.

The Humanitarian Consideration

52. Above all, it is a humanitarian matter wherein the humanitarian considerations are significant considerations. It is a married couple who wish to unite and build the life thereof.

53. The humanitarian reasons are not *ex gratia*:

The humanitarian reasons are part of the law, and there is a duty to take them into account.

(HCJ 5504/03 **Kahlot et al v. Commander of the IDF Forces in the West Bank et al**, the decision of the Honorable Registrar Shaham of June 24, 2004).

The State of Israel is a law-abiding state; the State of Israel is a democracy which respects human rights, and seriously considers humanitarian considerations.

(HCJ 794/98 **Ubeid et al v. The Minister of Defence**, *Piskei Din* 55(5) 769. 774).

Conclusion: The Respondents' Decision is Unreasonable and Disproportionate

54. The violation of the rights of the petitioners and of others in their situation, for no purpose and based on a sweeping policy, is in contrast with basic principles of the legal system, according to which violation of protected human rights should be made only for worthy purpose and to an extent no greater than necessary.

55. The respondents' power is to grant permit to pass in Israel for the purpose of passage to the West Bank. The considerations that should be taken are mere considerations of security. The single concern of these considerations is preventing future risk (see: HCJ 7015/02 **Ajuri v. Commander of the IDF**

Forces, *Piskei Din* 56(6) 352, 370). The refusal to handle the petitioners' application is not based on considerations of security and cannot be based on considerations of security because the matter of the petitioners was not examined individually.

56. The step taken by the respondents that does not derive from considerations of security is a collective punishment. Thus, the respondents violate the basic rights of the couple, Petitioners 1 and 4, without legitimate argument, and even with deviation from the guidelines that the respondents undertook thereto in the past, namely, allowing the passage in humanitarian cases.

57. The only permit required for Petitioner 1 is a permit that enables passage in Israel. This is a passage from Gaza Strip to the West Bank, a passage that takes only one hour. Such a permit is sometimes given even to a person who poses a security concern since the risk potential of the short passage is low and can relatively easily be reduced by various measures. As aforesaid, the difference between a permit to enter Israel for the purpose of staying for work or for any other reason, and a permit to pass in Israel, is critical and also therefrom derives the absence of reasonability and proportionateness in the respondents' decision.

58. The respondents should have examined the petitioners' application and balance between the relevant considerations and seriously refer to the difficult separation forced upon the couple and the critical violation of their right to establish together a family unit and their right to an autonomy.

59. As aforesaid, the respondents cannot freeze the petitioners' family life. The life of man and family life, by nature, continues. Also in times of conflict, couples continue to get married, found families and have children. Not only that the respondents cannot ignore that, but it is their duty to do everything in their power to enable the continuance of normal life.

This petition is supported by an affidavit signed before a lawyer in the Gaza Strip and sent to the undersigned by fax, arranged by phone. The Honorable Court is moved to accept this affidavit and the POA's that were also given by fax and arranged by phone, considering the objective difficulties concerning a meeting between the petitioners and their representatives.

In view of all the above, the Honorable Court is moved to issue an *Order Nisi* as requested and after having heard the respondents' respond, make it absolute. Furthermore, the Court is moved to order the respondents to pay petitioners' costs and attorney fees.

April 17, 2008

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Sigi Ben-Ari, Adv.
Counsel for the Petitioner

(T.S. 55223)