At the Supreme Court
Sitting as the High Court of Justice

HCJ 8155/06
Before a panel presided by
President D. Beinisch

Petitioners:
1. **The Association for Civil Rights in Israel**
2. **HaMoked: Center for the Defence of the Individual**
3. **Physicians for Human Rights**

by counsel, Att. Limor Yehuda and/or Dan Yakir, and/or Dana Alexander and/or Avner Pinchuk and/or Michal Pinchuk and/or 'Auni Bana and/or Laila Margalit and/or Oded Feller and/or Tali Nir and/or Nasrat Daqwar and/or Gil Gan-Mor and/or Nisreen 'Alyan
of the **Association for Civil Rights in Israel**
P.O. Box 34510, Jerusalem 91000
Tel: 02-6521218; Fax: 02-6521219

v.

Respondents:
1. **Commander of IDF Forces in Judea and Samaria**
2. **Head of the Civil Administration**
3. **Head of the Israel Security Agency**
4. **Legal Advisor for the Judea and Samaria Area**

by the State Attorney's Office
29 Salah al-Din St. Jerusalem

Response on behalf of the Petitioners to Updating Notice on behalf of the Respondent dated 10 March 2009

In accordance with the decision of the Honorable President D. Beinisch dated 29 March 2009, the Petitioners hereby respectfully submit a response on their behalf to the updating notice on behalf of the Respondents dated 10 March 2009.

The last updating notice filed by the Respondents contains no new information regarding developments in the procedure or in its application and it generally repeats statements already made in the Respondents' previous notices. In this notice, as in its predecessors, and despite comments and suggestions made by the Court in previous hearings as to the possibility of providing prior notice, the Respondents have not addressed this central issue.

The new procedure adopted by the Respondents following submission of this petition entrenches in writing an unlawful state of affairs which contravenes the fundamental principles of Israeli administrative law as developed in the rulings of this Court. Moreover, in this situation, the Petitioners encountered a unique phenomenon – a deterioration of a situation following the adoption of a new procedure.

This state of affairs requires the intervention of this Court.

The subject matter of the petition

1. The subject matter of this petition (as delimited in the Court's decision of 1 August 2007) is the administrative process for imposing prohibitions on travel abroad by Palestinian residents of the West Bank.

2. The Petitioners' demand in this petition is simple and basic – where the proper authority considers infringing upon a person's fundamental right, in our matter prohibiting his travel abroad, it is obligated to provide the person with prior notice of the same, give him a right to plead his case before it ahead of the decision being made, and after hearing him, arrive at an informed decision and list the grounds thereto.

3. **From the legal aspect** – the Petitioners' arguments in this petition present no innovation. They are entirely based on the fundamental principles of administrative law as entrenched in the long history of rulings by this Court and in accordance thereto, on the obligations incumbent on an administrative authority while seeking to infringe upon a person's fundamental right – prior notice, the right to plead one's case, arriving at an informed, grounded decision (see pp. 42-50 of the petition). They are based on this Court's extensive ruling, which determined, time and again, that the military commander must act in accordance with the principles of Israeli administrative law (see for example HCJ 393/82 Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area, *Piskey Din* 37(4) 785; HCJ 2056/04 Beit Suriq Village Council v. Government of Israel *Piskey Din Piskey* 55(5) 807; HCJ 7957/04 Zaharan Yunis Muhammad Mar'abeh v. Prime Minister of Israel, *Piskey Din* 60(2) 477; HCJ 4764/04 Physicians for Human Rights v. Commander of IDF Forces in Gaza, *Piskey Din* 55(5) 385, 394).

4. **From the factual aspect** – In their petition and in other court documents, the Petitioners presented an extensive and well anchored factual infrastructure regarding the violation of protected human rights for which the Respondents are responsible. The Petitioners also presented the vast scope of the violations, which could have been prevented had the Respondents acted in accordance with their legal duties – the reversal of some 60%-70% of the decisions (see on this issue sections 70-74 of the petition, sections 36-38 of the Petitioners' response of 20 February 2008) and the statistics attached as Exhibit P/57).

5. **The Petitioners did not address these claims**. Since the petition was filed and despite the fact that the Respondents filed a number of written arguments, they have not presented an argument, or even a shred of an argument clarifying how their actions, against which the petition was filed, are consistent with the legal obligations incumbent upon any administrative authority.

   As stated, despite questions and comments made by the Court in the previous hearing, we have found no response to this issue in the updating notice.

6. **This is an unlawful procedure which contravenes the rules of administrative law by which any public authority is bound**. In the context of this petition, the Respondents are turning the tables and

seeking to create a new rule which undermines fundamental principles: rather than imposing the onus to notify on the public authority which is considering infringing upon a civilian's fundamental right, the procedure imposes the onus on the civilian to inquire whether the authority happened to deny him his right.

7. Moreover, the data reveals that **the procedure adopted by the Respondents has made the situation in effect prior to submission of the petition worse** (see Petitioners' response of 20 February 2008, updating notice of 21 September 2008 and the request for reconsideration of the request for temporary injunction filed in conjunction with this response).

8. In these circumstances, **not only has the Respondents' conduct since the petition was filed not reduced the need for legal intervention but rather increased it.** Therefore, the Honorable Court is requested to issue an **order nisi** as detailed in the conclusion of the Petitioners' response of 20 February 2008 (the version of the order detailed in the petition modified to the Court's decision of 1 August 2007).

The Respondents' obligation to provide prior notice of their intent to deny a fundamental right

9. The Respondents' legal obligation is – to provide a potential victim with prior notice and an opportunity to plead his case in order to try and avert the harmful decision. This obligation constitutes one of the building blocks of Israeli administrative law and has been entrenched in a number of rulings handed down by this Court:

> It is needless to overstate the importance of the right to plead one's case and the right to a hearing – which is one of the principles of natural justice – particularly when a procedure which violates fundamental rights is at issue. It has been said on this matter:
>
> > "A person's fundamental right in Israel is that a public authority which harms a person's status shall not do so before it grants the same the opportunity to make his opinion heard" (the statement of Justice Barak in HCJ 654/78 Ginguld v. National Labor Court, p. 654; see also HCJ 3/58 Berman v. Minister of the Interior, pp. 1505-1508; HCJ 358/88 The Association for Civil Rights in Israel v. GOC Central Command, p. 540; Y. Zamir Administrative Power (Vol. B) p. 793 and thereafter. Compare to my statements in CivA 530/78 Mifromal Jerusalem LTD v. Director of the Customs and Excise Department)."
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> HCJ 4706/02 Salah v. Minister of the Interior, *Piskey Din* 56(5) 695, 706

10. And it was further ruled:

> "It is a fundamental rule that an administrative authority shall not harm an individual unless he is given the opportunity to plead his case before it beforehand. It is the authority's duty to give whosoever may be harmed by its decision a fair and reasonable chance to state his claims, and the latter has a fundamental right to make them heard."

HCJ 3379/03 Moustaki et al. v. The State Attorney's Office, *Piskey Din* 58(3) 865, 889

(See also HCJ 361/76 "HaMegader – Barzelit" LTD. v. Coordinator of Audits and Accounts at the Customs and Excise Collector Division, *Piskey Din* 31(3)281, 290-292; HCJ 656/80 Abu Romi v. Minister of Health, *Piskey Din* 35(3) 185, 189).

11. Where [the authority] has not done so, even if it offered to hold a retrospective hearing, it is still a violation of the duty to hold a hearing (HCJ 2911/94 Baki v. Ministry of the Interior Executive Director, *Piskey Din* 48(5) 291, 305).

12. Regarding the actions of Respondent 1 too, this Court has ruled:

> "This Court considers that the existence of fair hearing rules in a matter involving a person, is expressed, inter alia, in that one who anticipates severe harm to his person or property shall be given advance notice and be granted an opportunity to raise his objections in the matter."
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> HCJ 358/88 The Association for Civil Rights in Israel v. GOC Central Command, *Piskey Din* 43(2) 529, 540.

13. Indeed, in similar cases, the Respondents see to it that they act in accordance with this fundamental rule. The procedure for prohibiting the exit of East Jerusalem residents to Jordan establishes as follows:

> "…once the director of the population registry receives a decision not to allow a certain person to exit to Jordan, three letters are sent: the first – to the person applying for an exit permit notifying him that he may make reference in writing; the second – to the director of the relevant population registry bureau in order for him to update the applicant's travel document and the third – to the Israel Police Force border control.
>
> … [A]fter information is collected by security officials which, in their opinion, necessitates preventing a certain person's exit to Jordan, the director of the population registry is contacted. He reviews the relevant material and where convinced that there are reasons relating to national security which necessitate the same, he reaches a decision that the general permit to exit to Jordan shall not apply to said person. As stated above, in the letter sent to said person, he has a right to plead his case and object to the decision. The letter sent to the applicant states that the preclusion is for a term of six months."

From a letter by the official in charge of freedom of information at the Ministry of the Interior to HaMoked: Center for the Defence of the Individual dated 5 December 2005.

The response in AdmPet 750/05 HaMoked: Center for the Defence of the Individual v. Ministry of the Interior and the response letter are attached and marked **Exhibit P/71**.

14. In the responses to the petition, the Petitioners chose not to address this argument and did not explain why and for what reason they should not be compelled by the Court to do the following: provide notice and a fair chance at a hearing.

15. The procedure created by the Respondents regarding Palestinian residents of the Territories officially entrenches the Respondents' disavowal of these duties. Rather than rectifying the substantive flaw, the procedure establishes that if a Palestinian from the West Bank wishes to know whether his right to

travel abroad has been denied, the onus is on him to contact the DCO at least three months prior to his planned trip in order to inquire. It should be emphasized, the onus is on him and not on the Respondents. The fact that only some 1% of the residents of the Territories are recorded as prohibited from travel abroad is irrelevant as an individual person does not know whether or not he is precluded. The significance of this is that every resident who is planning to travel abroad and wishes to know whether the Respondents will allow him to do so, must arrive at the DCOs and hand in an application. Ostensibly, according to the Respondents' data (sections 22-23 to their notice of 10 March 2009), in one month, 20,000 to 100,000 civilians were to have gone to the DCOs with such inquiry applications. In 2008 a total of 722,393 applications were to have been filed …

16. In this context, there is perhaps room to distinguish between unusual and extraordinary cases (whose nature should be duly examined) regarding which the claim that security reasons prevented the provision of prior notice may be made and the vast majority of the cases, regarding which no such impediment exists.

17. However, **not in one of the court documents filed by the Respondents in the context of this petition, did they respond to this argument. Thus far, the Respondents have not presented any explanation why they should not be compelled to provide notice, as is the norm, to individuals whose travel abroad had been prevented and provide them with a fair opportunity to present their arguments**. The only shred of explanation was provided during the previous hearing in the petition:

> "In the context of exit, I will demonstrate the response. Suppose a person is not precluded from travel and last night he received an order to perpetrate an attack or bring money from Jordan for the benefit of Islamic Jihad, so you let him know whether he [is or is not] precluded from traveling?..."

Statement made by Att. Shirman, p.1 of the hearing protocol dated 28 October 2008.

With all due respect, this argument cannot stand.

18. First, it is important to clarify that this argument was made only in the oral arguments without being included in any of the written arguments submitted by the Respondents thus far. The presentation of a hypothetical argument by counsel for the Respondents in the course of a hearing as a sole explanation, without providing any factual support thereto is inappropriate, to understate. Even under the normal procedure at the HCJ, the Petitioners' ability to confront factual arguments presented by the Respondents is extremely limited (see Ra'anan Har Zahav, Legal Procedures at the High Court of Justice (1991), pp. 151-153, 163-169). Accepting a hypothetical argument such as this as a factual argument (much less one serving as a justification to disavow rooted fundamental principles of administrative law) further harms the Petitioners' already inferior procedural status and impedes the Court's ability to formulate its conclusions on the basis of a credible factual infrastructure.

19. Second, the example might illustrate a rare case, but certainly not the general rule. As stated, the issue at hand is registries which include thousands of residents. A reasonable assumption is that the cases in which information leading to a decision to prohibit travel abroad was received 'last night' are the rare exceptions, and clearly do not reflect the general rule.

20. Third, it seems that there is no limit to the possibility of presenting arguments and dubbing them "security" reasons. If there is truth to this claim raised by counsel for the Respondents, one wonders how the Respondents are able to provide prior notice to Israeli citizens and residents, including Israelis living in the Territories and Palestinian residents of East Jerusalem, that their travel abroad

had been prohibited for security reasons, but are unable to do so when it comes to Palestinian residents of the West Bank.

21. Fourth, accepting this argument means revoking the obligation to notify and hold a hearing in cases where decisions are based on security considerations.

22. This is not hairsplitting. This issue concerns one of the fundamental guarantees of administrative law which was designed to prevent arbitrary violation of a person's fundamental right. As the Petitioners have proven, had the Respondents acted in accordance with their legal duties and provided prior notice to the victim, the breach of the right may have been prevented in the vast majority of the cases (see, on this issue, sections 70-74 of the petition; sections 36-38 of the Petitioners' response dated 20 February 2008 and the statistics attached as Exhibit P/57). This is so as inquiry regarding the preclusion may have been carried out before the breach and not once a person has already been turned away while en route abroad.

The information presented by the Respondents

23. According to the figures provided by the Respondents, 69 individuals were able to submit an application in accordance with the procedure. The Respondents do not provide information as to the period of time to which this figure refers. The data indicates that 67 of the applicants were persons who had been prohibited from travel and whose fundamental right to freedom of movement had already been denied and continued to be denied during the Respondents' processing of the application. **Thus, the information provided by the Respondents themselves indicates that as the Petitioners and the Court had expected – the new procedure was not used for "prior inquiry" at all**. Everyone who applied 'according to the procedure' knew they were precluded, presumably after they had been turned away while en route abroad.

24. The basis for the Respondents' declaration that these figures are a success is also unclear. The Respondents did not specify how many hours it took these individuals to submit the applications, how much trouble was involved, or how many times they had to report to one DCO or another. Moreover, the Respondents did not specify how many weeks went by until the prohibition on travel was removed (a period during which the applicants were prevented from traveling abroad), and how many weeks the applicants who have not received a final response have been waiting. Since these are merely figures and the human stories behind them are not recounted, there is no telling what private disasters afflicted each of these individuals who waited and who are still waiting for a decision.

25. Moreover, the Respondents omit relevant information from their response. In order to correctly evaluate the scope of the phenomenon and the number of people harmed by it, the Respondents should have divulged the number of people who appear as precluded from traveling abroad and the number of residents who have been turned away at the Bridge (namely, whose travel abroad was precluded while en route abroad) over the past year. Instead, the Respondents chose to present general and selective data which does not present to the Court with the true picture.

26. The Respondents are aware that this data is relevant to the hearing in the petition. On 2 October 2008, counsel for the Petitioners requested counsel for the Respondents provide these figures. This request went unanswered, including in the updating notice.

    A copy of the Petitioners' letter to the Respondents is attached and marked **Exhibit P/72**

27. In order to argue improvement, the Respondents should have drawn a comparison to the situation which was in effect before the procedure was adopted. As indicated by the Respondents' own data –

the procedure was not used for "prior inquiry". As for residents of the Territories who have already been turned away at the Bridge – their situation is worse today than it was before the adoption of the procedure (see Petitioners' request for reconsideration of the request for a temporary injunction filed in conjunction with this response).

Conclusion: the procedure was not useful and was not used for the purpose of "prior inquiry". As for those who have already been turned away at the Bridge – their situation has only been made worse.

Processing times under the procedure – disproportionate infringement on human rights

28. According to the procedure, a resident regarding whom a "security preclusion" has been entered is required to wait six weeks to receive a preliminary response whether the security preclusion may be removed. In cases where the response is negative, he must wait another six weeks in order to receive a response to his objection.

29. Thus, **under the new procedure, the timeframe for inquiring whether there is a decision and completing the hearing process is three full months**, a time during which, the individual is denied a fundamental right.

30. It appears that this protracted timeframe stems from the fact that the Respondents do not hold reviews and examinations of the justification for continuing to prohibit persons appearing in the database as "precluded for security reasons".

31. The procedure includes no exception relating to urgent travel abroad or trips planned less than three months ahead of time. As indicated by the Respondents' notice – failure to submit the application six or seven weeks[1] prior to the planned date of exit leads to the application's rejection out of hand (see section 17 of the updating notice).

32. Additionally, according to a new rule adopted by the Respondents, which was only recently brought to the attention of the Petitioners, they will review their decision to prohibit a person from traveling abroad only once a year. This is carried out in a sweeping manner and without considering the circumstances of the case. Moreover, even this reevaluation will be carried out only in response to a special application by the person who has been prohibited from traveling, and not on the initiative of the Respondents. The outcome is that, as far as the Respondents are concerned, the decision has no time limit, and, again, the onus is on the resident to initiate an inquiry process which may lead to the removal of the preclusion. The Respondents' unacceptable premise is, therefore, the continued denial of the right rather than it being upheld and respected.

In recent responses sent by the Civil Administration and the office of the Legal Advisor for the Judea and Samaria Area, the Respondents refused to reconsider their decisions to prohibit the applicants from traveling abroad on the claim that it has not been a year since the previous application was reviewed. The responses clarify that a new application for examination of the preclusion may be submitted only at the end of a one-year period and that an application submitted before that time will not be reviewed.

A copy of the correspondence regarding Mr. Abu Sara and Mr. Abu 'Aisha is attached and marked

[1] While the published procedure (Exhibit RN/1 indicates the resident must file the application **six weeks** prior to planned travel, the internal working protocol (Exhibit RN/2) indicates that the resident must file the application **seven weeks** prior to planned travel.

Exhibit P/73.

33. This is a disproportionate infringement of a fundamental right.

34. The Respondents' duty is to hold the inquiry in the shortest possible time, while considering the individual's needs. Thus, for example, if an individual was on his way abroad and only upon his exit was notified that he is prohibited from traveling – the authority is obligated to act with utmost urgency to examine his case in order to minimize the harm already caused to this person. Clearly, the level of urgency may also derive from the individual's personal circumstances: must he hasten to reach a specific event which cannot be postponed? Is he on his way to receive urgent medical treatment? Etc.

35. The Respondents are able to hold the inquiry in a much shorter timeframe than specified in the procedure, as indicated by the timeframe established for examining requests by Palestinian residents of the Territories to enter Israel. According to the procedure regulating this issue, the Respondents pledged to provide a final response within no more than nine business days. This procedure establishes that the applicant must file the application 14 days in advance.

    A copy of the "procedure for responding to the entry of Palestinian residents from the Judea and Samaria Area and the Gaza Strip to Israel – provision of prior notice regarding approval/denial of the application", is attached and marked **Exhibit P/74**.

36. In addition, the Respondents are obligated to consider every case on its merits and in accordance with the concrete factual infrastructure relating to the person and establish a limited period which, in any case shall not exceed six months, during which his freedom of movement is proscribed.

37. The procedure would have been unacceptable and disproportionate even if related to only a few dozen people. However, as indicated by the Respondents' statements, some one percent of the residents of the West Bank are recorded as "precluded from travel abroad", meaning that what is at issue is an unreasonable and disproportionate infringement of the human rights of thousands of individuals.

Conclusion

38. We have seen that the Respondents' updating notice contains no new information. As for the procedure – it is still afflicted by the same basic flaws which the Petitioners addressed in their previous responses. One can gauge the ailments of the new bureaucracy created by the Respondents, which is a clear example of the "bureaucracy of occupation" in all its glory, from the recent examples presented by the Petitioners in their request for reconsideration of the request for a temporary injunction.

39. The Petitioners request that this Honorable Court review the fundamental legal argument on which this petition is based – according to which the Respondents must provide a person with prior notice and an opportunity to plead his case before a decision to deny his right to freedom of movement is made.

40. The authority has a duty to consider, uphold the right to plead one's case and arrive at an informed, grounded decision before deciding to deny a person a fundamental right. Every beginner law student knows as much. The extensive rulings of this Court determined as much. These are the procedures adopted by the proper authority regarding Israeli residents who wish to travel abroad. These are also the procedures declared by the proper authority regarding the exit of residents wishing to travel to Jordan (see sections 11-12 in the response in AdmPet 750/50, HaMoked: Center for the Defence of

the Individual v Minister of the Interior, and the letter and the response of the official in charge of freedom of information at the Ministry of the Interior, Exhibit P/71.

41. The "new procedure" adopted by the Respondents in our case, contravenes these obligations which are entrenched in common law. It is based on a fundamentally flawed principle – a disavowal by an authority of its obligation to provide prior notice of its intention to deny a person's fundamental right and its obligation to provide a right to plead one's case before arriving at a decision in his matter. How? By transferring the onus to inquire onto the individual. The procedure which has been adopted is an exception in the landscape of procedures applicable in similar situations. The Respondents presented no grounds for this breach of the basic obligations incumbent upon them or for the deviation from the norm in all other cases.

42. Accepting the (groundless) position presented by the Respondents in this petition and sanctioning the procedure has grave and dangerous implications. It may undermine deeply rooted fundamental principles of Israeli administrative law and revoke, for all intents and purposes, the most fundamental duty of an administrative authority – to provide prior notice and a right to plead one's case prior to infringing upon a basic right.

43. The Honorable Court is request to reject, outright, the Respondents' attempt to disavow their legal duties and stand guard lest the common law developed over the decades of the extensive rulings by this Court be turned around.

44. Therefore, in light of the aforesaid, and in light of the statements made in the Petitioners' response of 20 February 2008 and the updating notice on behalf of the Petitioners of 21 September 2008, the Honorable Court is requested to issue **an order nisi as requested in the petition** (after adjusting it to the decision of the Court dated 1 August 2007) as detailed in the conclusion of the Petitioners' response of 20 February 2008.

Today, 12 May 2009

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Limor Yehuda, Att.
Counsel for the Petitioners