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At the Supreme Court **HCJ 6409/08**
Sitting as the High Court of Justice

In the matter of: **1. _________ Azbeh**, **Identity No.________**, Israeli citizen

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

Represented by Adv. Sigi Ben-Ari (Lic. No. 37566) Abir Jobran (Lic. No. 44346) and/or Yossi Wolfson (Lic. No. 26174) and/or Ido Blum (Lic. No. 44538) and/or Yotam Ben-Hillel (Lic. No. 35418) and/or Hava Matras-Irron (Lic. No. 35174)
of HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
4 Abu Obeidah St., Jerusalem 97200
Tel: 02-6283555; fax: 02-6276317

The Petitioners

- Versus -

1. **GOC Southern Command**
2. **The Minister of Defense**
3. **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 as follows:

a. Why they will not allow the Petitioner's departure from Israel to the Gaza Strip in order to visit her husband, who she has not seen for over eighteen months.

b. Why they will not specify the security reasons due to which the Petitioner's application to leave Israel for the purpose of visiting her husband in the Gaza Strip was denied, and allow her to respond to his claims.

Motion for an Urgent Hearing

The Court is moved to schedule an urgent hearing to hear the petition in view of the lasting forced separation between the couple.

The Petitioner, an Israeli citizen married to a Palestinian who resides in the Gaza Strip, used to visit him by virtue of renewable residence permits, in accordance with a special procedure termed by the Respondents as the "divided families procedure".

The Petitioner left the Gaza Strip on December 29, 2006 and has since then been unable to see her husband.

The Factual Infrastructure

The Parties

1. Petitioner 1, an Israeli citizen, born in 1959, a resident of the village of Qalansawe, is married to Mr. _______ 'Adli (I.D. _____), a resident of the Palestinian Authority who resides in the Gaza Strip.

2. Petitioner 2 (hereinafter: "**HaMoked**" or "**HaMoked: Center for Defence of the Individual**") is a registered association which resides in Jerusalem whose aim is to protect the rights of the Palestinians in the occupied territories.

3. Respondent 1 (hereinafter: the "**Respondent**"), GOC Southern Command, is authorized to approve the entry of Israelis into Gaza Strip areas, subject to the security instructions of Respondent 2. In the past, he held this authority due to his being the military person who had command over the Gaza Strip on behalf of Israel, and in accordance with a military order which determined that the areas of the Palestinian Authority in the Gaza Strip are a closed military zone. He currently holds such authority in accordance with his interpretation of Section 24 of the Implementation of the Disengagement Plan Law**,** 5765-2005.

4. Respondent 2, the Minister of Defense, is the person authorized to determine the security instructions, subject to the Israeli administrative and constitutional law and in balance with the human rights law.

Freezing of Family Reunification Proceedings and the "Divided Families" Procedure

1. Israeli spouses who are married to Palestinians who reside in Gaza are unable to initiate a family reunification proceeding in Israel with their spouse due to the Citizenship and Entry into Israel Law (temporary provision) 5763-2003 and decision no. 3598 of the government of June 15, 2008.

2. The only option remaining for such couples is that the Israeli spouse divides his life between Israel and the Gaza Strip, since the Palestinian spouse residing in Gaza is not permitted to enter Israel. It should be stated that the existence of this possibility underlay the State's claim before the Court in the framework of the petition on the matter of the legality of the Citizenship and Entry into Israel Law. According to the State, the said law is proportionate and legal

since it does not absolutely "preclude" the right to a family life but only restricts it, as shall be specified below.

3. Israeli citizens and residents who are married to spouses from the Gaza Strip are subject to a procedure which is customarily termed the "divided families" procedure. This procedure was formulated in the mid-nineties, and according thereto, spouses from divided families may reside in the Gaza Strip, subject to receipt of renewable entry permits.

4. The rationale behind the existence of the longstanding procedure may be inferred from the letter of the Gaza legal advisor to HaMoked: Center for Defence of the Individual dated November 9, 2004:

> **The IDF authorities in the region are attentive to the desire to protect the family unit and the welfare of children and to maintain family life as normally as possible. One of the spouses being a resident of Israel, whilst the other spouse is a resident of the Palestinian Authority certainly does not facilitate the maintaining of a proper family life, *a fortiori* when children are involved in this reality**.
>
> **In view of the awareness of the foregoing difficulty, work procedures were formulated concerning divided families**.

A copy of the letter dated November 9, 2004 is attached and marked **p/1**.

5. The Respondent undertook, in the framework of HCJ 10043/03 **Avigiyan v. The Commander of IDF Forces in the Gaza Strip**, that:

> **In view of the desire to consider, to the extent possible, the needs of the residents of the Palestinian Authority, as well as the desire of the citizens and residents of Israel to visit their relatives who reside in the Gaza district, the respondent allows, also during the period of the armed conflict, and in the absence of any specific security impediment, the entry into the Gaza district of close relatives who wish to visit the Gaza district due to the existence of an exceptional humanitarian need (a wedding, engagement, serious illness, funeral etc.)**.
>
> **In addition, in the absence of a specific impediment, entry into the Gaza district by Israelis who are married to a person who resides in the Gaza district is also permitted**.

A copy of the Respondent's response in HCJ 10043/03 dated August 27, 2004 is attached and marked **p/2**.

6. These arrangements continued to exist also after the performance of the "disengagement" plan, when the Respondent is authorized to permit the entry of Israelis into the Gaza Strip, in accordance with the interpretation of Section 24 of the Implementation of the Disengagement Plan Law**,** 5765-2005.

7. Following the events that occurred in the Gaza Strip in June 2006, the Respondents almost completely closed the crossings to the Gaza Strip, including the Erez checkpoint, which is used for the entry of Israelis to the Gaza Strip.

   An expression of the difficult situation and the policy of closing the crossings during the month of June may be found, for example, in the judgment that was issued on June 28, 2007 in HCJ 5429/07 **Physicians for Human Rights v. The Minister of Defense** (not published).

8. With the passage of time, the Respondents reopened the Erez checkpoint for passage. Although initially, as a rule, passage was possible in a very limited manner (medical cases, foreigners trapped in the Gaza Strip etc.), **already from the first moment the Respondents allowed the passage of spouses from divided families**, including the entry and departure of spouses from divided families and the renewal of their permits for residence in the Strip.

9. According to the experience of HaMoked: Center for Defence of the Individual, the security refusal derives, in most cases, from an indirect security impediment, which does not directly pertain to one of the spouses. Prevention of the departure from Israel to Gaza does not involve a hearing proceeding or another administrative proceeding, it is not limited in time and the significance thereof is an absolute violation of the right to a family life and to dignity.

<u>The Petitioner's Visits to the Gaza Strip and Exhaustion of Proceedings</u>

5. The Petitioner married her husband, a Palestinian who resides in the Gaza Strip, in 1999. The couple lived together in Qalansawe until 2004.

6. Since 2004, the Petitioner has visited her husband in Gaza frequently, through permits which were issued for her through the "divided families procedure".

7. The Petitioner's last visit to the Gaza Strip was in December 2006.

8. Due to treatment of medical problems (a herniated disc in her back) the Petitioner did not apply to enter the Strip for six months.

9. Once it had eased, in June 2007, she approached the Israelis' bureau at the Gaza DCO in an application to allow her to visit her husband in the Gaza Strip. Despite repeated applications, she received no response to her request.

10. On February 17, 2008, the Petitioner, through HaMoked: Center for Defence of the Individual, approached the Israelis' bureau at the Gaza DCO and requested that her entry into the Gaza Strip be coordinated.

    A copy of the letter is attached and marked **p/3**.

11. On June 11, 2008, after approximately four months of no response, a response was received from the Gaza DCO, whereby it had been decided that "departure from Israel will not be permitted due to a security impediment".

    A copy of the letter dated June 11, 2008 is attached and marked **p/4**.

The Legal Argumentation

The Right to Freedom of Movement

12. The right to freedom of movement is the central expression of a person's autonomy, free choice, and the exercise of his abilities and rights. The right to freedom of movement is one of the norms of customary international law.

    See:

    Section 6(a) of Basic Law: Human Dignity and Liberty;

    HCJ 6358/05 **Vanunu v. GOC Homefront Command**, Takdin-Supreme Court 2006(1) 320, Paragraph 10;

    HCJ 1890/03 **The City of Bethlehem et al. v. The State of Israel**, Takdin-Supreme Court 2005(1) 1114, Paragraph 15;

    HCJ 3914/92 **Lev v. The District Rabbinical Court**, Takdin-Supreme Court 94(1) 1139, 1147;

13. The right to freedom of movement is the motor which drives the fabric of a person's rights, the motor which allows a person to exercise his autonomy, his choices. When freedom of movement is restricted, the said "motor" is damaged and consequently a part of a person's possibilities and rights cease to exist. Human dignity is violated. Hence the great importance ascribed to the right to freedom of movement.

14. The Respondents are seriously violating the Petitioner's freedom of movement by preventing her from entering the Gaza Strip and meeting her husband. The significance of the violation of the freedom of movement in the present case is the critical harm to the Petitioner's family life.

15. The Supreme Court's case law has emphasized that when there is a **security impediment against a specific person, and the intention is to a personal impediment which is connected to him specifically and not to his relatives**, the competent authority is still required to maintain the balancing formula between the prejudice to the rights of the individual and the security considerations, and the fear needs to be a "sincere and serious fear" of harm to security as a preliminary and basic condition to justification of the prejudice to the rights of the individual, including all of the repercussions deriving from such prejudice:

    > **An examination of the degree of legitimacy in the violation of a constitutional right concerns the proportionality of the violation and the issue of**

> **whether the violation is not excessive. Under circumstances of a conflict between the right to movement of the individual and the security of the public, the first dimension of the examination concerns the issue of whether, from the outset, it is a security risk of a nature which justifies restriction of any freedom; since not every security fear, whatever it may be, will justify harm to a constitutional right of the individual. On this matter, a balancing formula has taken root, which relies on the existence of a "sincere and serious fear" of harm to security as a precondition to the legitimacy of prejudice to the right of the individual.**
>
> **…**
>
> **Upon examination of the proportionality of the prejudice to the right of the individual, it is necessary to ascribe weight, first and foremost, to the relative strength of the competing values, and to the relative weight of one against the other. The balancing formula and the manner of realization thereof is influenced by the nature of the competing values (The cases Dayan, *ibid*, p. 475; Dahar, p.708; The City of Bethlehem, *ibid*, paragraph 16)**. (HCJ 6358/05 **Mordechai Vanunu v. GOC Homefront Command Yair Neveh et al**, Takdin-Supreme Court 2006(1), 320, 326).

16. The Respondents probably did not weigh, in the correct manner, all of the relevant considerations, particularly in view of the Israeli legislation on the matter of family reunification, which leaves no other alternatives or possibilities for the purpose of softening the violation of the right of the Petitioner and her husband to a family life and to dignity.

Absolute Violation of the Right to a Family Life; Prevention of the Meeting between the Petitioner and her Husband in view of the Israeli Legislation

17. The right to a family life is a right which is recognized by Israeli law and international law. Against this right, the Respondent is subject to the duty to honor the family unit.

18. Section 46 of the Hague regulations, which constitute customary international law, provides:

> **The dignity and rights of the family, human life, personal property as well as religious beliefs and rituals must be honored**.

And it has already been ruled that:

> **Israel is obligated to protect the family unit by virtue of international conventions**. (HCJ 3648/97 **Stamka et al v. The Minister of the Interior**, PDI 53(2) 728, 787).

See further: Section 10 of the International Covenant on Economic, Social and Cultural Rights, 1966; Sections 17 and 23 of the International Covenant on Civil and Political Rights, 1966; Section 12 and Section 16(3) of the Universal Declaration of Human Rights, 1948; Section 12 of the European Convention on Human Rights; Section 27 of the Fourth Geneva Convention.

19. The Supreme Court has reemphasized the great importance of the right to a family life in many judgments, and particularly in the judgment which was issued in the **Adalah** case (HCJ 7052/03 **Adalah et al v. The Minister of the Interior**, Takdin-Supreme Court 2006(2), 1754).

Thus, for example, the Chief Justice Barak writes, in Section 25 of his judgment:

> **It is our primary and basic duty to preserve, nurture and protect the most basic and ancient social 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.**
>
> **…**
>
> **The family relationship… lies at the basis of Israeli law. The family plays a vital and central role 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.**

And with respect to the tie between spouses it was written as follows:

> **It is the nature of man, literally the nature of his creation, to seek for himself a partner with whom he will live his life and with whom he will establish his family. This has been the case throughout the ages and this is the case today, notwithstanding many changes that have occurred to human customs and the family. Both in the past and today it is said that 'it is not good for man to be alone' (Genesis 2:18), and we recognize the strong desire of man to find a 'help mate', so that their fate may be joined.**
>
> **In searching for a spouse, in living together with him, in creating a family, a person realizes himself, shapes his identity, builds a haven and a shield against the world. It would appear that especially in**

> **our turbulent and complex world, there are few choices in which a person realizes his free will as much as the choice of the person with whom he will share his life** (*ibid*, Sections 1-3 of the judgment of Justice Joubran).

20. **In view of government decision 1813 and the legislation of the Entry into Israel Law (Temporary Provision), 5763-2003, a new policy has been determined whereby the right of Israeli spouses married to Palestinians who reside in the territories to family reunification in Israel has been denied**.

21. However, as was clarified by Chief Justice Barak (Ret.), the Citizenship Law does not violate the freedom of choice of the Israeli spouse to marry a Palestinian who resides in the territories, and that there is still a possibility that the Israeli spouse will be able to meet with his spouse in the territories. According to his statements:

> **Human dignity as a constitutional right extends to the right of an Israeli to establish a family unit and exercise the same in Israel. Does the Citizenship and Entry into Israel Law violate this right? Certainly the Citizenship and Entry into Israel Law does not prevent the Israeli spouse from marrying his spouse from the region. The freedom to marry is preserved. Moreover, usually the Israeli spouse is not prevented from relocating to the region ("Every person is free to leave Israel": Section 6(a) of Basic Law: Human Dignity and Liberty). Thus he is entitled, of course, to exercise his right to have the family unit outside Israel. I assume — without all of the details having been forwarded to us in this regard — that in most cases the Israeli spouse will receive a permit from the military commander to enter the region. With regard to the Palestinian authorities, we have not been told that they make difficulties in this regard. It follows that the main issue before us is the issue of realization of the life of the family unit in Israel** (*ibid*, Takdin-Supreme Court 2006(2), 1754 p. 1778).

22. According to the statements of the Honorable Justice Barak, the right of the Israeli spouse to visit or to live together with the Palestinian spouse in the territories derives from Section 6(a) of Basic Law: Human Dignity and Liberty, i.e. from his right to leave Israel. Therefore, restriction of this right must be on the basis of direct information against the Israeli spouse.

23. Therefore, presently, the only way for spouses, one of whom holds an Israeli I.D. card and the other is a resident of the Palestinian Authority who lives in the Gaza Strip, is to see the spouse in the Gaza Strip. Prevention of the Petitioner's entry into the Gaza Strip **is the last nail in the coffin of the right to a family life between the Petitioner and her husband**. The Petitioner and

her husband currently have no way to exercise their right to a family life – the husband is unable to enter Israel whilst the Petitioner is barred from entering the Gaza Strip. Thus, the damage to the family unit is absolute.

24. It appears that the Respondents did not examine, in their decision, the profundity of the violation of the right of the Petitioner and her husband to a family life, which violation is disproportionate and indefinite.

Violation of the Principles of Administrative Law: The Duty to Give Reasons and the Right to a Hearing

25. The exercise of the authority of the military commander in the region must also fulfill the principles of Israeli administrative law, which concern the exercise of the governmental authority of a civil servant, and in this context, the duty to give reasons (HCJ 2056/04 **Kfar Beit Surik Council et al v. The Israeli Government et al**, Takdin-Supreme Court 2004(2) 3035, p. 3044, from Paragraph 23 onward; HCJ 3278/02 **HaMoked: Center for the Defence of the Individual v. The IDF Forces Commander in the West Bank**, PDI 56(1) 386, Paragraph 23; HCJ 392/82 **Jamat Askan Almalmon Altaonia v. The IDF Forces Commander in the Judea and Samaria Region**, PDI 37(4) 785, p.792-793; I. Zamir, *Administrative Authority*, Nevo Publishing, Jerusalem, 1996, Vol. B, 897-898).

26. Giving reasons for a decision improves the quality of the decision, allows examination of the decision by a review body, ensures uniformity and prevents arbitrariness and is part of a proper relationship that needs to exist between the Respondent and the residents of the territories. Due to its importance, the duty to give reasons for an administrative decision was established in the Law for the Amendment of Administrative Procedures (Decisions and Reasons), 5719-1959 (hereinafter: the "**Reasons Law**"). However, even in a case to which the Reasons Law does not apply, the duty to give reasons applies to the authority as a case law principle and as part of the rules of natural justice. When no reasons are given for a decision, the defect imposes upon the authority the burden to explain the decision and to prove that the decision is proper. (MCrM 3810/00 **Grossman v. The State of Israel**, Takdin-Supreme Court 2000(2) 1478, Paragraphs 4-5; I. Zamir, *Administrative Authority*, Nevo Publishing, Jerusalem, 1996, Vol. B, 897-898, 905).

27. According to the Respondent's response to the Petitioner, the refusal to permit her to leave Israel and to visit her husband who lives in the Gaza Strip is "due to a security impediment". In this response, there is nothing to meet the rationales that underlie the administrative duty to give reasons, and in this context the ability of a person who is prejudiced by an administrative decision to weigh whether the decision meets the test of the law and whether there are grounds and reasons to subject it to judicial review (I. Zamir, *ibid*).

28. In this state of affairs, there is prejudice to the Petitioner's ability to understand, review and confront the Respondent's decision, which appears, on the face of it, to be arbitrary and unreasonable.

29. In addition, the Petitioner was not granted any right to voice her claims and to address such security impediment, in violation of the right of argumentation or hearing which is available to any person who may be harmed as a result of a decision of an administrative authority.

> **A basic right of a person in Israel is that a public authority which prejudices the status of a person will not do so before granting such person the opportunity to voice his opinion. With regards to this basic right, it is irrelevant whether the public authority is acting by virtue of legislation or by virtue of an internal directive or by virtue of an agreement. The issue of whether the authority exercised is judicial, quasi-judicial or administrative, and whether the discretion granted to such authority is broad or narrow is also of no importance. In any event in which a public authority seeks to change a person's status, it is required to treat him fairly, and this duty imposes upon the authority the obligation to grant such person the opportunity to voice his opinion.** (HCJ 654/78, **Riva Gingold v. The National Labor Court et al**, PDI 35(2) 649, p. 654-655).

30. Thus, the Petitioner has no shred of information with regards to the reason for the security impediment, she is unable to make reference thereto and she does not know when she will be able, if at all, to see her husband and what will happen to her marriage.

31. **In summary**, the Respondents are critically violating the Petitioner's basic rights. They do not meet the proportionality test, particularly in view of Israeli legislation with respect to family reunification. They are taking a most injurious measure, for an indefinite period of time, without giving reasons and without granting a right of hearing.

In view of the aforesaid, the Court is moved to issue an *Order Nisi* as sought, and after hearing the Respondents, to render it absolute. In addition, the Court is moved to adjudicate expenses and legal fees in favor of the Petitioners.

July 17, 2008
[TS 54197]

____
Adv. Sigi Ben-Ari
Counsel for the Petitioners