**At the Supreme Court** **HCJ 6409/08**
**Sitting as the High Court of Justice** Scheduled for October 29, 2008

In the matter of: _____ **'Azbeh et al.**

Represented by Adv. Nirit Heim and others

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**The Petitioners**

- Versus -

**GOC Southern Command et al.**

**The Respondents**

# Response on Behalf of the Petitioners

1. The Petitioners respectfully file a response on their behalf to the Respondents' response in the title petition, subject to the decision of the agreed motion for the filing of a response on behalf of the Petitioners, which is filed together with this response.

2. The petition concerns the request of Petitioner 1, an Israeli citizen, that the Respondent permit her entry into the Gaza Strip, in order that she be able to be with her husband, Mr. 'Adli, who resides in the Gaza Strip, who she has not seen since December 2006.

3. In the response dated July 30, 2008 the Respondents presented their position, whereby they object to Petitioner 1 entering the Gaza Strip to visit her husband who resides there due to a "security impediment… in view of this family's involvement in terrorist activity".

4. According to the Petitioners, the decision to totally prevent visitations - which will cause a complete separation between the couple and in fact tear apart the family unit – due to security reasons which, even according to the

Respondents, have nothing to do with the Petitioner herself, is radical, unreasonable and disproportionate.

5. The result of accepting the Respondents' position is to create a situation in which the Respondents rely on distant and indirect ties as legitimate grounds for a serious violation of rights, whilst creating broad and enormous circles of people whose rights are violated, even though they themselves are innocent and are not involved in any "terror activity", nor have any direct tie to anyone who is involved in such activity.

**The use of preventive measures which violate the dignity and liberty of a person who does not himself pose a risk to national security**

6. The basic assumption in Israeli law is that it is permissible to use preventive tools and measures which violate the liberty and dignity of a person, only when that person himself poses a risk to national security, since a person must not be harmed for the sins of another. The results of the balance between the liberties and rights restricted by the Respondents, and the security impediment, would be different in different cases, according to the extent and scope of the harm of such preventive measure; the restricted liberty; and the magnitude of the risk posed. However, the basic balancing formula remains the same, and the basic principle remains the same. In the words of the Honorable Justice Dorner:

> The military commander has broad discretion and he can choose, from among the preventive measures available to him, the most effective measure for the prevention of the risk to national security. Moreover, for the purpose of choosing this measure, the commander may also weigh considerations of general deterrence, **provided that the person himself poses a risk to national security**.
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> (HCJ 9534/03 **Edriss v. IDF Forces Commander in the West Bank**, Takdin-Elyon 2003(3) 82; the emphasis has been added).

7. The scholar Kenneth Mann phrased this principle as follows, in his article on taking measures against terror:

> Under the Court's jurisprudence, the essence of a preventive sanction is that it is addressed to a **proven source of danger** – an individual against whom evidence of dangerousness has been presented and a determination of actual dangerousness made… **It must be shown that the particular person presents a risk, a risk that his or her own actions** will endanger the security of the area in the future.
>
> (K. Mann, *Judicial Review Of Israeli Administrative Actions Against Terrorism: Temporary Deportation Of Palestinians From The West Bank To Gaza*, Middle

> East Review of International Affairs, Vol. 8, No. 1 (March, 2004), p. 31).

8. According to this principle, the violation of the liberty of a person who does not himself pose a risk to national security, is necessarily disproportionate, irrespective of the magnitude of the security risk, namely, this is not an issue of "quantitative" balancing.

According to the opinion of the Honorable Chief Justice Barak on the matter of violation of human liberty and dignity, through administrative detention:

> Indeed, the transition from the administrative detention of a person from whom a danger is posed to national security to the administrative detention of a person from whom no danger is posed to national security is not a "**quantitative**" transition but a "**qualitative**" transition…
>
> The harm to liberty and dignity is so substantive and deep, that it is not to be tolerated in a liberty and dignity seeking state, even if the rationales of national security lead to undertaking such a step… **One is not to detain in administrative detention any other than one that himself poses a risk, with his own actions, to national security.** This was the situation prior to the legislation of the Basic Law: Human Dignity and Liberty. This is certainly the case after this basic law was passed, and raised human dignity and liberty to a constitutional-supra-statutory level.
>
> (CrimFH 7048/97 **John Does v. The Minister of Defense**, PDI 54(1) 721, p. 743-744).

9. And on a similar issue the court recently ruled that:

> The requirement of an individual threat for the purposes of placing someone in administrative detention **is an essential part of the protection of the constitutional right to dignity and personal liberty**.…
>
> It should be noted that the individual threat to the security of the state represented by the detainee is also required by the principles of international humanitarian law. Thus, for example, in his interpretation of articles 42 and 78 of the Fourth Geneva Convention, Pictet emphasizes … the supreme principle that **the threat is determined in accordance with the individual activity of that person**.
>
> (CrimA 6659/06 **John Doe v. The State of Israel** (not published, June 11, 2008), Paragraphs 18-19 of the

> Honorable Chief Justice Beinesh's judgment. The emphasis has been added).

10. The Court ruled that the same balancing formula also applies to a violation of human liberty through the imposition of restrictions on a person's freedom of movement and right to leave Israel.

In the words of the Honorable Justice A. Procaccia:

> **In special and exceptional circumstances, the State takes preventive measures which are intended to protect its existence, by placing barriers which will make it difficult for the person to carry out his planned crime**. These barriers are often expressed in the restriction of the person's liberty to such or other extent. Restriction of personal liberty is a weighty violation of the basic right of the individual. It is only tolerated when its necessity is proven to achieve an essential and weighty public interest.
>
> The need for a similar balance arises in our system in the context of administrative detentions… this balance assumes… that it is possible to allow – in a democratic, security and freedom-seeking state – the administrative detention of a person who poses a risk to national security… there are two reasons for this position: First, the harm of administrative detention to the liberty and dignity of **a person who himself poses a threat to national security is** severe… since it violates a person's liberty – which liberty is protected in Israel at the constitutional-supra-statutory level – without a trial and without a judgment.
>
> (HCJ 6358/05 **Vanunu v. GOC Home Front Command**, Takdin-Elyon 2006(1) 320, p. 330. Emphasis added).

11. Thus, for example, it was ruled with respect to an order for police supervision of the movements and place of residence of a person, which also restricts his right to leave Israel:

> At this point it should be emphasized, for the avoidance of any doubt, that the authority, whose limits were outlined in Section 110, cannot be exercised in order to punish a person for his actions in the past or in order to serve as a substitute for criminal proceedings. The authority is preventive, i.e. forward-looking, and must not be used unless the same is required in order to prevent an anticipated risk…

> The authority pursuant to Section 110 could not have been exercised **unless the totality of the evidence that was brought before the military commander indicated an expected future risk from the petitioner**, if no steps would be taken to restrict his actions and prevent a considerable part of the damage expected from him…
>
> (HCJ 554/81 **Baransa v. The General of the Central Command**, PDI 36(4) 247, p. 249-250. Emphases added)

The same is also true with respect to the delimitation of a person's place of residence:

> In other words, the exercise of the discretion regarding the delimitation of residence is based on the consideration which is intended to prevent risk from the person whose residence is sought to be delimited. **The place of residence of an innocent person who himself poses no risk must not be delimited**… also, the place of residence of a person who is not innocent and has committed acts that harm security, must not be delimited when, under the circumstances of the case, he no longer poses any risk. Therefore, if a person has committed acts of terror, and delimitation of his residence would reduce the risk that he poses, his place of residence may be delimited. The place of residence of an innocent family member who did not cooperate with the person, or of a non-innocent family member who poses no risk to the area, must not be delimited.
>
> […]
>
> **Our character as a democratic and freedom and liberty seeking state calls for the conclusion that a person's place of residence is not delimited unless such person himself, through his own actions, poses a risk to national security…** to emphasize: the purpose of the delimitation is not punishment. Its purpose is preventive. It is not intended to punish the person whose place of residence is delimited. It is intended to prevent him from continuing to constitute a security risk.
>
> (HCJ 7015/02 **Ajuri v. IDF Forces Commander**, Takdin-Elyon 2002(3) 1021, p. 1030).

12. The European Court of Human Rights also ruled that the imposition of restrictions on a person's freedom of movement must be made on the basis of evidence against such person and only due to a risk deriving from him

personally – and that restrictions and impediments cannot be imposed on a person merely due to his family ties:

> The Court fails to see how **the mere fact that the applicant's wife was the sister of a Mafia boss**, since deceased, **could justify such severe measures being taken against him** in the absence of any other concrete evidence to show that there was a real risk that he would offend…
>
> In conclusion, and without underestimating the threat posed by the Mafia, **the Court concludes that the restrictions on the applicant's freedom of movement cannot be regarded as having been 'necessary in a democratic society.**
>
> (*Labita v. Italy* (Application No. 26772/95), judgment of 6 April 2000, para. 196-7).

13. The scholar Cole emphasized that the taking of various measures against a person, not on the basis of his own actions but rather on the basis of his connections and a speculative future concern (what he calls the "preventive paradigm") causes severe and basic harm to the principle of the rule of law and its foundations:

> Whether in the context of material support, interrogation, detention or war-making, the preventive paradigm puts tremendous pressure on the values we associate with the rule of law. Designed to place enforceable constraints on state power, the rule of law generally reserves detention, punishment and military force **for those who have been shown, on the basis of sound evidence and fair procedures**, **to have committed some wrongful act in the past that warrants the government's response**. The… 'preventive paradigm', by contrast, justifies coercive action… on the basis of speculation about future contingencies, without either the evidence or the fair processes that have generally been considered necessary before the state imposes coercive measures on human beings.
>
> When the state begins to direct highly coercive measures at individuals… based on necessarily speculative predictions about future behaviour, it inevitably leads to substantial compromises on the values associated with the rule of law – such as equality, transparency, individual culpability, fair procedures and checks and balances.
>
> David Cole*, Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror',*

> *in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 233, 249 (Bianchi & Keller eds., 2008)).

14. In fact, the only case in which it has been ruled that it is possible to consider a security risk which derives not only from the person himself but also from a member of his immediate family, is with respect to the considerations of the Minister of the Interior on the issue of granting status and citizenship in Israel, since this does not constitute the use of preventive measures which restrict human liberty, but rather the granting of special status with many and far-reaching implications.

With respect to the special status of the right to citizenship, see for example:

HCJ 3648/97 **Stamka v. The Minister of the Interior**, PDI 53(2) 728, 790;
HCJ 2597/99 **Rodriguez-Tushbayim v. The Minister of the Interior**, 59(6) 721, 756-757;
HCJ 8093/03 **Artmibe v. The Ministry of the Interior**, PDI 59(4) 577, 584.

15. The court indicated the distinction in this context, between the use of preventive measures and the granting of status in Israel, in the Amara affair:

> "It should be kept in mind that we are concerned with the granting of legal status in Israel. **This is not the use of sanctions or preventive measures against residents of the area**, such as administrative detentions and delimitation of a place of residence… in view of their special nature, we have ruled more than once that they may be used only against a person who himself poses a security risk… not so in the case of non-granting of legal status in Israel to a resident of the area.
>
> (HCJ 2028/05 **Amara v. The Minister of the Interior**, Takdin-Elyon 2006(3) 154, 159).

It should be emphasized that in this field too, the same is done by virtue of primary and explicit legislation (Section 3d of the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003), and that this legislation has received no little criticism (see, for example: Guy Davidov, Yonatan Yuval, Ilan Saban and Amnon Reichman "State or Family? The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003", ***Mishpat Umimshal*** H 644, 686 (5765)).

16. The Respondent is therefore not entitled to impose restrictions and impediments which violate the Petitioner's liberty and dignity, other than due to a risk which derives from her personally.

The statements of the Honorable Justice (his former title) Menachem Elon are true for the present case:

> Come and see how cautious we are, **and how fearful we are, not to violate, heaven forbid, any one of the**

> **various liberties**… either in whole or in part, and we are strict with any person who wishes to violate the same, whether a certain or likely violation, and we thoroughly consider the balance of interests between these liberties-values and basic values of security, public peace and so forth. Human personal liberty is the father and procreator of all of these liberties. The great rule in our legal system and in the world of Judaism is that every person is innocent until duly convicted and that every person is presumed proper…
>
> A person's right to personal liberty is one of the cornerstones of Hebrew law, **and a great rule thereof is that every person is presumed proper until the contrary shall be proven and the presumption rebutted**.
>
> (Motion 15/86 **The State of Israel v. Tzur**, PDI 40(1), 706, 713 (1986).

17. As is recalled, in the present case, the Respondent raised no security claim against the Petitioner. In his decision to prevent her entry into Gaza, the Respondent acted irrespective of the basic legal principles described above. In view of the aforesaid, the Respondent's decision in the Petitioner's case is disproportionate and extremely unreasonable, and therefore contrary to principles of proper administration.

In the words of the Honorable Justice Rubinstein:

> Also with respect to discretionary power, it is not without a normative framework. **Any exercise of administrative discretion is subject to the accepted rules regarding reasonableness, fairness, good faith, absence of arbitrariness and discrimination and other such criteria…**
>
> Even if the authority refuses to exercise discretionary power, its avoidance of action may be reviewed according to the criteria accepted at the time of review of statutory powers, i.e., it may be reviewed whether the non-exercise of the power resulted from reasonable considerations, or whether the circumstances on the whole mandated the exercise of the power.
>
> (HCJ 4540/00 **Abu-Afash v. The Minister of Health**, Takdin-Elyon 2006(2) 2017, p. 2023; and see also HCJ 297/82, **Berger v. The Minister of the Interior**, PDI 37(3), 29).

**<u>The Right to a Family Life</u>**

18. The Respondent has no security claim against the Petitioner, and is seeking to absolutely deny her right to unite with her husband, who lives in the Gaza Strip; her right to a family life.

19. The court reemphasized the great importance of the right to a family life, in particular in the judgment that was issued in the **Adala** case (HCJ 7052/03 **Adala v. The Minister of the Interior**, Takdin-Elyon 2006(2), 1754 (2006). In view of the Respondents' answer, it appears that it is necessary to recall, in greater detail, the clear and unequivocal rulings of the court in that case.

20. Insofar as there were disputes between the judges in the Adala judgment, the starting point of all of them was identical: The right to a family life, in the basic nuclear sense of preservation of the mere existence of the family unit, is a superior, natural and primary basic right which underlies the existence of society.

21. This, for example, is how the Honorable Chief Justice Barak describes it in his judgment:

> The right to family life, in the broad sense, is recognized in Israeli law. It is derived from many statutes, which provide arrangements whose purpose is to preserve, encourage and nurture the family unit... 'Human society cannot exist unless we protect with our lives its basic unit, which is the family unit' (Justice M. Silberg in C.A. 337/62 Riezenfeld v. Jacobson, PDI 17, 1009, 1021). It is "an institution that is recognized by society as one of the foundations of social life" (Chief Justice Y. Olshan, *ibid*, p. 1030).
>
> (Section 25 of Chief Justice Barak's judgment).

22. And the Honorable Deputy Chief Justice (Ret.) Heshin adds:

> We all agree — how could we do otherwise? — that a person, any person, has a right to marry and to have a family life. The covenant between a man and a woman, family life, was created before the state existed and before rights and obligations came into the world. First came the creation of man, and man means both men and women. 'And G-d created man in His image, in the image of G-d He created him: male and female He created them' (Genesis 1, 27). Thus Adam and Eve were created. A man needs a woman and a woman needs a man: 'Wherefore a man shall leave his father and his mother and cling to his wife, and they shall be one flesh' (Genesis 2, 24). Thus a covenant is made between a man and a woman, and when children are born, the extended family comes into existence. In the course of all of this, love was created. Thus, insofar as the family is concerned, the state found it readymade

> and extended its protection to what nature had dictated to us. Society and the state sanctified the covenant of the man and the woman in marriage, and thus the right to marriage and to have a family life came into existence. Philosophers and thinkers may say what they wish; in the final analysis — or to be precise, in the initial analysis — the existence of the family comes from G-d above, from nature, from man's genetic makeup, from the very existence of life. Such is the relationship between a man and a woman and such is the relationship between parents and their children. And as we have said elsewhere (CFH 7015/94 The Attorney General v. John Doe, PDI 50(1) 48, 102):
>
> It is the law of nature that a mother and father naturally have custody of their child, raise him, love him and provide for his needs until he grows up and becomes a man. This is the instinct for existence and survival inside us… "the blood ties," the primeval yearning of a mother for her child — and it is shared by man, beast and fowl. … This tie is stronger than any other, and it goes beyond society, religion and state…
>
> The right to marry and to have a family life, including the right of a minor to be with his parents, is the basis for the existence of society. The family unit is the basic unit of human society, and society and the state are built thereon. It is not surprising, therefore, that the right to a family life has been recognized by the international community as a basic right... Even though this right, the right to marry and to have a family life, has not been explicitly included among the basic rights that were expressly recognized in the Basic Laws, we shall all agree — agree and declare — that it derives from the highest right of all, from human dignity. The right to marry and to have a family life is automatically derived therefrom.
>
> (Sections 46-47 of the judgment of the Deputy Chief Justice (Ret.) Heshin).

23. And the Honorable Justice (her former title) Beinisch:

> It seems to me that there is no real disagreement as to the actual existence of the right to have a family life in the nuclear and limited sense of the basic right of a person to choose his partner in life and to realize the existence of the family unit…
>
> The right to realize the autonomy of free will by establishing a family unit in accordance with individual

> choice and realizing it by living together is derived from human dignity…
>
> The basic human right to choose a spouse and to establish a family unit with him in his country is a part of his dignity and the essence of human personality…
>
> (Sections 6-7 of the judgment of the Honorable Justice Beinisch).

24. And the Honorable Justice Hayut:

> The right of a person to choose the spouse with whom he wishes to establish a family and also his right to build his home in the country where he lives are in my opinion human rights of the first order. They incorporate the essence of human existence and dignity as a human being and his freedom as an individual in the deepest sense.
>
> (Section 4 of the Honorable Justice Hayut's judgment).

25. And the opinion of the Honorable Justice Procaccia is also pertinent:

> The human right to family is one of the fundamentals of human existence. It is hard to describe human rights that are equal thereto in their importance and strength. It combines within it the right to parenthood and the right of a child to grow up with his natural parents. Together they create the right to the autonomy of the family…
>
> Alongside the human right to the protection of life and the sanctity of life, constitutional protection is granted to the human right to realize the meaning of life and its *raison d'être*. The right to family is a *raison d'être* without which the ability of man to achieve self-fulfillment and self-realization is impaired. Without protection of the right to family, human dignity is violated, the right to personal autonomy is diminished and a person is prevented from sharing his fate with his spouse and children and conducting a life together with them. Among human rights, the human right to family stands on the highest level. It takes precedence over the right to property, to freedom of occupation and even to privacy and intimacy. It reflects the essence of the human experience and the embodiment of the realization of one's self.
>
> (In Section 6 of the Honorable Justice Procaccia's judgment).

26. And the Honorable Justice Naor emphasizes that:

> The right to a family life is a constitutional right derived from the constitutional right to human dignity.
>
> (In Section 4 of the Honorable Justice Naor's judgment).

27. And the Honorable Justice Rivlin (his former title):

> The right to realize family life is a basic right. Denying it violates human dignity. Denying it infringes on the autonomy of the individual to marry whomever he wants and to establish a family; it certainly infringes on liberty. This violation of liberty is no less serious than the violation of human dignity... It deals a mortal blow to a person's fundamental ability to dictate his life story.
>
> (In Section 8 of the Honorable Justice Rivlin's judgment).

28. Indeed, these things are clear and known and the opinions of the honorable judges merely declare what is known and laud what is virtually self-evident. It should be emphasized that in fact with respect to the right to a family life in itself, the Adala judgment states nothing new, since also in the many years prior thereto, the court reemphasized time and again the huge importance of the right to a family life, in its nuclear sense (i.e., the relationship between spouses and between parents and their children) as a basic, fundamental and primary human right.

29. The Petitioners nevertheless deemed it fit to recall and cite at length from the opinions of the honorable judges, since it appears that that which is obvious, that natural right, that "basis for the existence of society", has absolutely escaped the Respondent, who by refusing to permit the Petitioner's entry into the Gaza Strip to unite with her husband, put an end to the Petitioner's married life, as well as the exercise of her basic rights in the framework of the nuclear family unit.

**Conclusion**

30. The Petitioner wishes to enter the Gaza Strip in order to be with her husband, who resides there.

31. In the answer to the petition, the Respondent raised no security claim against the Petitioner.

32. Such conduct seriously harms the Petitioner, through no fault of her own, in an arbitrary and sweeping manner.

33. Such conduct contradicts the duties imposed upon the Respondent to respect family life.

34. In view of the aforesaid, the Honorable Court is moved to issue an *Order Nisi* as sought in the petition.

October 27, 2008

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Counsel for the Petitioners

[T.S. 54197]