At the Supreme Court **HCJ 268/08**

Sitting as the High Court of Justice

Re: 1. **_____ Abu Kweider, from Nevatim.**
2. **_____ Salim, resident of the Palestinian Authority**
3. **HaMoked: Center for the Defence of the Individual founded by Dr. Lute Salzberger - registered non profit organization**

Represented by attorneys Abeer Jubran (lic. no. 44346) and/or Ido Blum (lic. No. 44538) and/or Yotam Ben Hillel (lic. no. 35418) and/or Hava Matras-Iron (lic. no 35174) and/or Sigi Ben-Ari (lic. no. 37566) 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. Lute Salzberger
4 Abu Ovadiah Street, Jerusalem, 97200
Tel: 02-6283555 : Fax: 02-6276317

The Petitioners

v.

1. **GOC Southern Command.**
2. **Minister of Defence.**
3. **The State of Israel.**

The Respondents

Petition for an Order Nisi

A petition is hereby filed for an Order Nisi which is directed at the Respondents and ordering them to appear and show cause:

A. Why they will not allow petitioner 1's departure from Israel to the Gaza Strip in order to visit her spouse, petitioner 2, who resides there.

B. And in the alternative; why they will not arrange a hearing for petitioner 1 with regard to the blocking of her departure from Israel to the Gaza Strip; and why they will not set time limits to the blocking period of her departure from Israel to the Strip.

Request for an Urgent Hearing

The court is requested to schedule an urgent hearing of the petition, **in light of the forced separation imposed upon the spouses, petitioners 1 and 2, for over a year.**

The Factual Basis

The parties

1. Petitioner 1, born in 1978, is a female Israeli citizen, who is a resident of Nevatim, which is near Beersheva.

2. Petitioner 2, born in 1980, is a male Palestinian citizen who is a resident of the Palestinian Authority, who resides in Khan Yunis, which is in the Gaza Strip.

3. On 20 September, 2002 a marriage certificate was signed between petitioners 1 and 2.

   A copy of the marriage certificate is attached and marked p/1.

4. Petitioner 3 (hereinafter: **HaMoked: Center for the Defence of the Individual or HaMoked)** is a human rights organization, which is situated in Jerusalem, and which deals, among other things, with the concerns of Israelis who wish to visit their relatives in the Gaza Strip territories.

5. Respondent 1, the general of the southern command (hereinafter: **the respondent)** is authorized to approve the entry of Israelis into Gaza Strip territories subject to the guidelines set by respondent 2. In the past he held this authority by dint of his being the military factor who on behalf of Israel commanded the army forces in the Gaza Strip pursuant to a military order, which determined that the P.A. territories in the Gaza Strip was a closed military area. Nowadays he exercises the same authority pursuant to his interpretation of section 24 of the Disengagement Plan Implementation Law, 5765 – 2005.

6. Respondent 2, the Minister of Defence, is the person authorized to set security guidelines subject to Israeli constitutional and administrative law and balanced by human rights law.

"Split family practice" and the freeze on the family unification practice in Israel

7. Israeli spouses married to Palestinian residents of the territories cannot enter a family unification process in Israel, because of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003.

8. The only option available to those couples is to live in the occupied territories or for the Israeli spouse to divide his life between Israel and the territories. It should be noted that the existence of this possibility was a core element of the State's claim before the court, within the framework of a petition in the matter of the legality of the Citizenship and Entry to Israel law, that the aforesaid Law was proportional and constitutional, since it does not "negate" the right to a family life in an absolute manner, but only partially restricts it. This shall be elaborated upon below.

9. For Israeli citizens and residents married to a spouse from the Gaza Strip, a practice that has been customarily called "a split family practice" applies to them. This practice, which crystallized in the mid- nineties, meant that spouses from split families could stay in the Gaza Strip subject to receiving renewable entry permits.

10. The rationale behind the existence of this years old practice may be discovered from the Gaza legal advisor's letter to HaMoked: Center for the Defence of the Individual dated 9 November, 2004:

> **The desire to protect the family unit and the welfare of the children and to sustain an orderly family life as much as is possible is in full view of the IDF authorities in the region. The fact that one of the spouses is an Israeli resident, while the other spouse is a resident of the Palestinian Authority certainly does not ease the preservation of a standard family life, a fortiori when kids are involved in this situation.**
>
> **In light of the awareness of the aforesaid difficulty, work practices have been formulated to deal with split families.**

A copy of the letter dated 9 November, 2004 is attached and marked **p/2.**

11. The respondent committed himself within the framework of HCJ 10043/03 **Abigian v. Commander of the IDF Forces in the Gaza Strip**, to the following:

> **In light of the desire to consider, where possible, the needs of the Palestinian Authority residents, as well as the desires of Israeli citizens and residents to visit their relatives who live in the Gaza Strip region, the respondent allows, even during a period of armed hostilities, and in the absence of a particular security impediment, the entry into the Gaza Strip region of first degree family relatives who wish to visit the Gaza Strip region on account of there being an exceptional humanitarian need (wedding, engagement, serious illness, funeral, and the like).**

Therefore, in the absence of a particular impediment entry into the Gaza Strip region is permitted to those Israelis who are marred to a person who resides in the Gaza Strip region.

A copy of the respondent's response in HCJ 10043/03 dated 27 August, 2004 is attached and marked p/3.

12. These arrangements have continued to operate even after the implementation of the "disengagement" plan, since the respondent holds the authority to permit the entry of Israelis into the Gaza Strip pursuant to his interpretation of section 24 of the Implementation of the Disengagement Plan Law 5765-2005.

13. Lately HaMoked: Center for the Defence of the Individual has begun to receive more and more refusals of applications by spouses of split families who wish to unite with their Palestinian spouses who reside in the Gaza Strip.

So for example on 3 December, 2007 a petition was filed that deals with the same matter (HCJ 10292/07) an Israeli citizen, from a split family, was refused entry to the Gaza Strip on account of a security impediment, but without arranging for a hearing, and without explaining to her the security impediment is.

14. The refusal is for the main part because of a security impediment, which is not necessarily directly related to one of the spouses. Preventing a meeting between the spouses is done without a [court] order and without any time limit, something which turns the prevention of a meeting between the spouses into an absolute violation of the rights to a family life, and their rights to parenthood and to dignity.

15. **As things presently stand there is no mechanism for a hearing process or administrative process in the matter of preventing a meeting between the spouses, even though it is an absolute and severe violation of the right to a family life.**

The possibility of entering the Gaza Strip in light of the latest incidents

16. As a result of the outbreak of incidents in the Gaza Strip during the month of June, 2006, the respondents almost completely closed off the passageways to the Gaza Strip, including the Erez check-post, through which Israelis enter the Strip.

An expression of this harsh situation and of the policy of closing off passageways over the course of the month of June may be found, for example, in the judgment that was given on 28 June, 2007, in HCJ 5429/07 **Physicians for Human Rights v. The Minister of Defence** (unreported).

17. Over the passage of time the respondents have reopened the Erez checkpoint to traffic. Even though during the first phase passage for the most part was severely restricted (medical cases, foreigners who were trapped in the Strip, etc.) **the respondents, already from the very first moment, allowed the passageway of spouses from split families,** including the entry and exit of spouses from split families and the renewal of residential permits in the Strip.

Previous visits of petitioner 1 to the Strip

18. In 2002 the spouses, petitioners 1 and 2 married each other. As a result of the freezing of the family unification procedure – pursuant to the Entry into Israel Law (temporary order), 5763-2003 – the only option available to petitioners 1 and 2 in order to realize their right to a family life was the visits of petitioner 1 to the Strip pursuant to the split family practice. Since then petitioner 1 has divided her life between her spouse in the Strip and her family in Israel.

19. Petitioner 1 would regularly visit the Strip and reside there through renewable residential permits, and all this pursuant to the "split families" procedure.

20. It is incumbent upon the applicant for a renewal of his residential permit to send a fax to the Israelis Office and then to wait for a reply. From the daily experience of HaMoked: Center for the Defence of the Individual, the Israelis Office does not always have a reply or even information for the date of renewing the permit upon the expiry of the current permit, and that being the case many women from split families have been forced to wait a number of weeks in the Strip without a valid permit.

21. During the month of November, 2006 the permit held by petitioner 1 expired. However, a few days before the permit's expiry, petitioner 1 sent as she usually did an application by fax to the Israelis Office for its renewal.

22. Petitioner 1 would scrupulously follow up on her application and would telephone the Israelis Office in order to receive an update of her situation, and the soldiers working at the Israelis office would usually reply that her application was still being handled. In the month of January 2007 a soldier at the Israeli Office informed petitioner 1 that a new guideline had been laid down by the District Coordination Office (hereinafter "DCO") in terms of which anyone applying to renew their residential permit to enter Gaza must present a valid Israeli travel document or passport, and therefore petitioner 1 had to present a valid passport for the purposes of continuing the handling of her application.

23. Since this involved a new guideline, and since petitioner 1 was not in possession of a valid passport at that time, during the month of January, 2007 she went to the Erez

checkpoint in order to enter Israel and to receive a passport. A policeman at the checkpoint interrogated her about the period in which she resided [in Gaza] without a valid permit. Petitioner 1 explained to the policeman that she filed an application for a renewal of her residential permit for Gaza, and she was constantly informed that her matter was being handled, and only when she was apprised of the new stipulation in terms of which the presentation of a passport was a pre-condition for renewing the permit, she applied to leave Gaza to receive an Israeli passport. The policeman at the Erez checkpoint released her and permitted her to enter Israel, and informed her that if she does not present her Israeli passport she will not be able to re-enter Gaza.

24. Petitioner 1 left for Beersheva where she was issued with an Israeli passport. Petitioner 1 as she usually did sent a fax to the Israeli Office and requested that they co-ordinate her entry to Gaza. The Israeli Office replied to her that she was prevented from entering Gaza for security reasons. Petitioner 1 received no details with regard to the security impediment.

25. It should be noted that after correspondence passed between HaMoked: Center for the Defence of the Individual and the head of the Gaza DCO, the Ministry of the Interior, the GOC Southern Command and the Coordinator of the Activities in the Territories, the guideline mandating the presentation of Israeli passports or a travel document for the purpose of entering Gaza and residing there has been rescinded.

    A copy of the letter from HaMoked dated 1 February, 2007 to the spokeswoman of the Ministry of the Interior is attached and marked p/4;

    A copy of the letter from HaMoked dated 1 February, 2007 to the head of the Gaza DCO is attached and marked p/5;

    A copy of the letter from HaMoked dated 11 February, 2007 to the operations liaison in the territories is attached and marked p/6;

    A copy of the letter from the southern command headquarters dated 19 February, 2007 in the matter of the rescinding of the guideline is attached and marked p/7.

26. Petitioner 1 continued to send applications to the Israeli Office and always received a refusal based on security considerations. Petitioner 1 applied to Adv. Nawaf Kweider and sent through his offices a number of applications, but the answer always remained the same based on the claim of a security impediment.

27. On 28 November, 2007 HaMoked applied to the Israeli Office, and requested that it issue petitioner 1 with a residential permit for Gaza in order that she be able to return to her normal life and visit her husband who resides there.

A copy of the letter from HaMoked dated 28 November, 2007 is attached and marked p/8.

28. On 5 December, 2007 the HaMoked office received a letter from the Israeli Office - the Coordination Liaison Administration at the Erez check post, in terms of which "[petitioner 1's] departure from Israel to reside in Israel will not be approved for the following reasons: **security opposition".**

    A copy of the letter dated 5 December, 2007 is attached and marked p/9.

29. On 2 January, 2008 the undersigned sent a letter to the border police and requested to know whether there was a stay of exit from Israel order against the petitioner 1. In a telephone enquiry vis-à-vis the border police it was orally informed that there was no stay of exit order against the petitioner 1.

    A copy of the letter dated 2 January, 2008 to the Border Police is attached and marked p/10.

The legal argumentation

The violation of the petitioners' rights

The right to freedom of movement

30. The right to freedom of movement is the prime expression of a person's autonomy, his freedom of choice and the realization of his abilities and his rights. The right to freedom of movement is counted as one of the norms of customary international law.

    And see:

    Section 6(a) to the Basic Law: Human Dignity and his Freedom;

    HCJ 6358/05 **Vanunu v. The General of the Home Front Command**, *Takdin-Elyon* 2006(1) 320, paragraph 10 (2006);

    HCJ 1890/03 **Bethlehem Municipality et al v. The State of Israel**, *Takdin-Elyon* 2005(1) 1114, paragraph 15 (2005);

    HCJ 3914/92 **Lev v. Regional Ecclesiastical Court,** *Takdin-Elyon* 94(1) 1139, 1147 (1994).

31. The right to freedom of movement is the motor that sets the web of human rights in motion, the motor that enables a person to realize his autonomy, his choices. When one restricts the right to movement that "motor" is harmed and as a result thereof a portion of a person's possibilities and rights cease to exist. His dignity as a person is violated. Thus we see the high level of importance attributed to the right of freedom of movement.

32. The respondents are severely harming petitioner 1's freedom of movement in that they are preventing her from entering the Gaza Strip in order to meet with her husband. The harm to the freedom of movement means in our case the severest harm to the petitioner's fabric of family life.

33. The Supreme Court's judgment stressed that even where there is a **security impediment against a <u>particular person</u>, and the intention is to a personal impediment that is specifically related to him and not to his relatives,** it is still incumbent upon the authorized body to balance the harm to individual rights against security considerations, and the suspicion must be a "sincere and serious suspicion" of harm to the security as a basic pre-condition to legitimate a violation of the individual right, with all the ramifications that flow from these violations :

> The test as to the measure of legitimacy required to violate a constitutional right is based upon the proportionality of the violation, and upon the question whether the violation does not go beyond that which is necessary. Under circumstances, where there is a clash between the right to movement of the individual and public security, the first dimension of the test is based on the question whether from the outset it involves a security risk of a nature that justifies any type of restriction on freedom; since not all security suspicions, whatever they may be, will justify the violation of the individual's constitutional right. In this matter the balancing test has become entrenched which relies on the existence of a "sincere and serious suspicion" of harm to the security as pre-condition to the legitimacy of harm to an individual's right.
>
> ….
>
> In the proportionality test the violation of the individual's rights must first and foremost be assigned a weight as to the relative strengths of the competitive values when their relative weights are balanced against each other. The wording of this balance and the way of realizing it is influenced by the type of competitive values (the Dayan episodes, *Ibid.* p. 475, Dahar p. 708, **Bethlehem Municipality**, *Ibid,* judgment 16). (HCJ 6358/05 **Mordekhai Vanunu v. Home Front Command General Yair Naveh et al**) *Takdin Elyon* 2006 (1), 320, 326 (2006)

34. The respondent apparently incorrectly weighed up all the relevant considerations, especially in light of Israeli legislation in the matter of family unification, that does not provide any alternative or other option to soften the harm done to petitioner 1's and her husband's right to a family life and to dignity.

Absolute harm to the right to a family life, indefinitely preventing a meeting between petitioner 1 and her husband in light of Israeli legislation

35. The right to a family life, which includes the right of parents and children, grandparents and grandchildren and siblings to maintain their family ties, is a recognized right in Israeli law and in international law. This right thus imposes a duty on the respondent to honor the family unit.

36. Article 46 of the Hague Convention, which constitutes customary international law, declares :

> **Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected**.

And it already has been decided:

> Israel is obligated to protect the family unit by virtue of International Conventions **(**HCJ 3648/97 **Stemka et al v. The Minister of the Interior** *Piskei Din* 53(2) 728, 787 (1999)).

See also: Article 10 of the International Covenant on Economic, Social and Cultural Rights, 1966; articles 17 and 23 of the International 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 Convention on Human Rights; article 27 of the Fourth Geneva Convention.

37. The Supreme Court has repeatedly emphasized the grave importance of the right to a family life in its many rulings, and especially in a judgment that was handed down in the **Adalah** case (HCJ 7052/03 **Adalah et al v. The Minister of the Interior** *Takdin Elyon* 2006(2), 754 (2006))

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

> The primary and most basic duty that should be fulfilled is the nurturing and maintenance of the basic and earliest social unit in the history of man, which was, is, and shall always be the core element for guarding and ensuring the existence of human society –which is none other than the natural family.

…..

> The family link …rests at the basis of Israeli law. The family has an essential and central role in the life of the individual and in the life of the society. The family ties, which are protected by law and which the latter seeks to develop, are one of the strongest and most meaningful in man's life.

38. The right to preserve the fabric of family life also (and especially) exits when one of the parents lives in a separate venue.

39. **In light of Government Decision 1813 and the enactment of the Entry to Israel Law (temporary order), 5763-2003, new policy has been determined, in terms of which the right of Israeli spouses married to Palestinian residents of the territories to family unification has been denied.**

40. Nonetheless, and as has been clarified by Chief Justice (ret.) Barak, the underlying assumption was that there is nothing in the citizenship law to suggest a violation of the Israeli spouse's freedom of choice to marry a Palestinian resident of the territories and to live together with him in the territories or to visit him there. And in his own words:

> Human dignity as a constitutional right infuses the right of an Israeli to establish a family unit and to realize it within Israel. Does the Citizenship and Entry to Israel law harm this right? **Certainly the Citizenship and Entry to Israel Law does not prevent an Israeli spouse to marry his spouse from the region. The freedom to marry has been preserved.** Furthermore: For the most part we do not prevent an Israeli spouse from moving to the Region ("All persons are free to leave Israel": article 6(a) of the Basic Law: Human Dignity and his Freedom). He is thus permitted, obviously, to realize his right to maintain the family unit outside of Israel (HCJ 7052/03 **Adalah – The Legal Center for Arab Minority Rights in Israel et al v. The Ministry of the Interior et al** *Takdin Elyon* 2006(2), 1754 1778 (2006)). (Emphasis mine A. G).

41. **Lately** the court has become the venue for more and more petitions that deal with the prevention of a meeting between Israelis and their Palestinian spouses who live in the territories and who pursuant to the Citizenship and Entry to Israel Law have been denied the possibility of receiving family unification in Israel.

As a result of this prevention these spouses have been absolutely denied their rights to a family life, to dignity, to freedom of movement and to parenthood.

The decision to prevent a meeting in this case, like in other cases, was carried out without a hearing, and generally with the claim that there is confidential security material that prevents a meeting taking place.

The security material on many occasions does not directly relate to one of the spouses, but to family relatives or acquaintances who know people who are connected to certain activists.

Of even graver concern, the prevention of a meeting between the spouses and the freeze of the right to a family life <u>has no time limit</u> and can continue indefinitely. This means the disintegration and even destruction of the family unit.

42. **It should be noted and per the honorable Judge Barak's dicta, the right of an Israeli spouse to visit or to live together with their Palestinian spouse in the territories, flows from article 6(a) of the Basic Law: Human Dignity and Liberty which is derived from the right to leave Israel. A limitation on this right must be based on direct information against the Israeli spouse (see paragraph 35 above).**

43. **From the aforesaid one may state unequivocally that the only option open to spouses, one of whom holds an Israeli identity document and the other is a Palestinian resident who lives in Gaza, is to live together – or at the very least to meet each other – in Gaza.**

44. The prevention of the entry of petitioner 1 to Gaza **is the last nail in the coffin of the right to a family life between petitioner 1 and her husband.** Nowadays there is no way for petitioner 1 and her husband to exercise their right to a family life – the husband cannot enter Israel whereas petitioner 1 is prevented from entering Gaza. The harm here to the family unit is fundamental and absolute.

45. The respondents, when making their decision, apparently did not discern the depth of the harm to the right of petitioner 1 and her husband to a family life, harm that was not proportional or limited by time. And gravest of all, petitioner 1 was never told the nature of the security impediment in her case.

46. The respondents severely harmed the rights of the petitioners to a family life in that they cut off the family members and spouses from each other.

<u>The right to a hearing</u>

47. The right of argumentation or of a hearing is available to anyone whose status is liable to be harmed as the result of a decision by an administrative authority.

Petitioners 1-2 were not given the right to make their views heard, they were not summoned to any type of investigation, and there was not even a retraining order issued against petitioner 1 disallowing her departure from Israel.

48. The respondents are severely and harshly harming petitioners 1-2's rights to a family life, while totally ignoring their right to make their views heard with regard to the security impediment.

49. The right to be heard is an important right in the decision making process by the administrative authority, especially for those whose rights are liable to be harmed or will in fact be harmed as a result of that administrative decision:

> The basic right of a person in Israel is that the public authority which harms a person's status will not be able to do so, before granting that person the opportunity to voice his opinion. For the purposes of this basic right, there is no difference if the public authority operates by virtue of legislation, by virtue of an internal guideline, or by virtue of an agreement. There is also no relevance to the question whether the authority being exercised is judicial, quasi judicial or administrative or whether the discretion that has been granted to that authority is broad or narrow. In any event when a public authority requests a change to a person's status it must act towards him with fairness and this obligation imposes upon the authority the obligation to grant that person the opportunity to make his opinion heard, (**Gingold Jam v. The National Labor Court et al**, *Piskei Din* 35(2) 649, 654-655 (1979)).

50. Until this very day the petitioners have no shred of information as to the reason for the security impediment, and as a result of the threat of continued forced separation, the family members are in a situation of severe uncertainty and fears.

Non compliance with the proportionality test

51. The respondent's decision is an absolute violation of the rights of the petitioners to a family life. And the question is asked, whether the respondents' decisions, including that of respondent 1, passes the proportionality test.

52. In the **Bet Sorik case** it has been established that:

> The principle of proportionality determines that the decision of an administrative authority is lawful only if the governmental measures that were adopted for the realization of the governmental goal are appropriate. The principle of proportionality is focused therefore on the relationship between the goal that one seeks to realize and the means adopted for their realization … three secondary tests have been

> determined that provides concrete substance to the proportionality principle… the first secondary test determines that there must be a compatible link between the goals and the means. The means that the administrative authority adopts needs to be derived for achieving the goal which the administrative authority seeks to attain. The means adopted by the administration needs to rationally lead to the realization of the goal. This is the fitting means or rational means test. The second secondary test determines that the means that the administrative authority adopts must do minimal harm to the individual. From among the range of means that may be adopted for the realization of the goal one must adopt that one which causes the least harm. This is the least harm means test. The third secondary test determines that the damage caused to the individual from the means that the administrative authority adopts to realize its goals needs to in fitting proportion to the benefit that these means bring. This is the proportional means test (or proportionality in the "narrow sense")… only if all three of these secondary tests are present may one say that the means adopted by the governmental authority in realizing its goals was proportional. (HCJ 2056/04 **The Bet Sorik Village Council v. The Government of Israel** *Piskei Din* 58(5) 807, 839-840 (2004)).

53. The respondents do not pass the proportionality test. It is not clear what danger there is in admitting petitioner 1 to Gaza, especially in light of the fact that at the Erez checkpoint, an x-ray device and advanced means of checking passersby have been installed. Furthermore the respondents have adopted the severest of measures, for the purposes of preventing a meeting between petitioners 1 and 2, for an unlimited period of time.

In conclusion

54. It appears that in this petition there is no need for further elaboration in order to express the right of petitioner 1 to visit her spouse and to be close to him, as well as the right of petitioner 2 to be close to his spouse. After all this case typically falls within the criteria set by the respondents to allow Israelis to enter the Gaza Strip.

The honorable court is requested to the power of attorney of petitioner 2 [sic] that was given via fax, considering the objective difficulties with regard to a meeting between petitioner 2 and his counsel.

In light of the above, the court is requested to issue an order nisi as requested, and after listening to the respondents to make it absolute. Likewise the court is requested to rule in favor of the petitioners and to order the respondent to pay the petitioners' costs and attorney fees.

7 January, 2008

_____

Adv. Abeer Jubran
Counsel for the plaintiff

T.S. 53044