

Disclaimer: The following is a non-binding translation of the original Hebrew document. It is provided by **HaMoked: Center for the Defence of the Individual** for information purposes only. The original Hebrew prevails in any case of discrepancy. While every effort has been made to ensure its accuracy, **HaMoked** is not liable for the proper and complete translation nor does it accept any liability for the use of, reliance on, or for any errors or misunderstandings that may derive from the English translation. **For queries about the translation please contact site@hamoked.org.il**

At the Central District Court in Petah-Tikva

PP 57476-11-11

In the matter of: 1. _____ Semhan

ID No. _____

Held in Hadarim Prison

Represented by Counsel, Adv. Daniel Shenhar (Lic. No. 41065) and/or Sigi Ben Ari (Lic. No. 37566) and/or Hava Matras-Irron (Lic. No. 35174) and/or Ido Blum (Lic. No. 44538) and/or Elad Cahana (Lic. No. 49009) and/or Noa Diamond (Lic. No. 54665) and/or Nimrod Avigal (Lic. No. 51583) and/or Benjamin Agsteribbe (Lic. No. 58088)

Of HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger

4 Abu Obeida St., Jerusalem 97200

Tel: 02-6283555; Fax: 02-6276317

The Petitioner

v.

Israel Prison Service

Represented by the Central District Attorney

The Respondent

Prisoner's Petition

A prisoner's petition is hereby filed, in accordance with article 62A of the Prison Ordinance [New Version], 5732-1971, which is directed at the respondent ordering it to allow petitioner's sister to enter the incarceration facilities under its responsibility and visit him.

The grounds for the petition are as follows:

Isolating the prisoner from society in order to realize the purposes of the sentence also results in a separation from his spouse, children and wider family circle. **But even though this restriction is inherent to the imprisonment, the existence of a human right to family and parenthood requires that the scope of the violation is reduced as much as possible, to its essential limits only, such as by way of giving controlled permission for family visits to prisoners,** granting furloughs when defined conditions are satisfied, providing facilities that allow conjugal visits between spouses, etc.. **This preserves the proportionality of the violation of the human right, which is inherently required by the loss of liberty resulting from imprisonment.**

(HCJ 2245/06 **Dobrin v. Israel Prison Service**, TakSC 2006(2), 4564, paragraph 15 of the judgment rendered by Justice Procaccia, hereinafter: **Dobrin**. All emphases were added – D.S.).

Background

1. From the commencement of the second intifada, in October 2000 and until March 2003, Israel prevented West Bank residents from visiting their family members in Israeli prisons. Following HCJ 11198/02 **Diriyah v. Commander of the Military Incarceration Facility Ofer**, TakSC 2003(3), 2099, The commander of the military forces in the West Bank (hereinafter: the **military commander**), commenced gradually allowing family members to visit their incarcerated relatives.
2. The visits in prison are organized exclusively by the International Committee of the Red Cross (hereinafter: the **ICRC**). According to the regular procedure, when a prison visit application is approved, the applicant receives a one-year permit from the military commander. According to a special procedure applicable to a resident of the Area who is classified as "precluded from entering Israel", if there is no preclusion preventing him from making prison visits, he receives a single entry permit to Israel for the purpose of making a prison visit, which is valid for 45 days. This permit which is also forwarded by the ICRC, enables its recipient to make one prison visit during said 45 day period. At the end of the visit, the permit is stamped at the prison and thus expires. In order to make another prison visit, the applicant must submit a new application through the same procedure.
3. In fact, the issuance of an entry permit to Israel for the purpose of making a prison visit under the special procedure applicable to persons who are classified as "precluded from entering Israel", takes at least four months.

The Parties and Exhaustion of Remedies

4. The petitioner, born in 1969, was arrested in July 2003 and sentenced to life imprisonment. He is currently being held in Hadarim prison, which is under respondent's responsibility.
5. Petitioner's sister, Ms. _____ Wahsh (ID No. _____), born in 1963, from Bethlehem, a mother of one child. She was arrested in 1979 and sentenced to two years in prison. Ever since her release, about 30 years ago, she has never been arrested or interrogated again. **Ms. Wahsh has not seen her brother since his arrest, more than eight years ago.**
6. The petitioner hardly gets any family visits. His mother is too old to visit him. The military does not issue his brothers permits to enter Israel for such prison visits due to a "security preclusion". His only visitor is his 55-year-old sister, who has cancer, and therefore cannot visit him more than once every other month, on average. In view of the above, the petitioner is almost totally disconnected from the outer world and his family members, which makes it extremely difficult on him.
7. Ms. Wahsh has not seen her brother, as aforesaid, since his arrest, more than eight years ago, in all. Ever since, the respondent has refused to allow her entry to the incarceration facilities in which the petitioner has been held, due to the fact that she is classified by it as a "former inmate" and as such she must obtain its permission to make a prison visit. It should be noted here that Ms. Wahsh obtained a permit to enter Israel to visit her brother from the commander of the military forces in the West Bank. The permit is valid for one year, until July 2012, which attests to the fact that even the military commander does not consider her entry to Israel to visit her brother as posing any kind of threat.
8. In her distress, especially due to the fact that she had an entry permit to Israel which she could not use, Ms. Wahsh requested the assistance of HaMoked: Center for the Defence of the Individual (hereinafter: **HaMoked**).
9. On August 1, 2011, HaMoked wrote on behalf of Ms. Wahsh to Nafha prison, where the petitioner was held at that time, and requested the prison commander to allow the sister's entry to prison, for visitation purposes.

A copy of the request is attached and marked **P/1**.

10. On August 18, 2011 the prisoners' officer of the facility replied. In the response, HaMoked was informed that the prison authorities did not approve Ms. Wahsh's entry to the prison. The sole explanation given for the decision was "security reasons".

A copy of the response of Nafha prison is attached and marked **P/2**.

11. Following said refusal, HaMoked appealed to respondent's southern district commander against the decision of the Nafha prison. In the appeal HaMoked complained of the unsubstantiated refusal, especially in view of the difficult humanitarian circumstances of the case.

A copy of the appeal dated September 1, 2011 is attached and marked **P/3**.

12. On September 18, 2011, HaMoked received the response of the southern district commander, which stated that the district commander had refused to allow Ms. Wahsh to visit her brother. No reason or explanation was provided for said refusal. Furthermore, it was not stated whether the denial had a time limit.

A copy of the response of the southern district commander is attached and marked **P/4**.

13. On October 23, 2011, the undersigned visited the petitioner in Hadarim prison, where the petitioner confirmed to him that the respondent persisted in refusing to allow his sister to visit him in prison.

Therefore, the petitioner, who has not seen his sister since his arrest, and who is visited by his sick sister only once every other month, has no alternative but to petition to this honorable court.

The Legal Aspect

The constitutional concept that gives human rights a supreme normative status also has ramifications for the human rights of a prisoner, and his ability to realize these rights when he is in prison. The constitutional system in Israel is based on the presumption that a person's basic rights should not be denied or restricted unless there is a recognized conflicting interest, whether private or public, that is of sufficient weight to justify this. The same presumption also applies to sentenced offenders. This means that **the protection of human rights is also extended to prisoners after they are sentenced, and a violation of their rights may be allowed only where a conflicting**

public interest of great significance justifies it. (Dobrin, page 3570).

Denial of Prison Visits – The Normative Framework

14. Regulation 30(c) of the Prison Regulations 5738-1978 provides that:

The commissioner may order that a prisoner be denied visits for a period not exceeding three months, if he has reasonable grounds to suspect that the prisoner may take advantage of the visits for activity intended to put state security or public safety at risk.

Regulation 30(d) provides that:

If the commissioner is convinced that a cause to deny visits as specified in sub-regulation (c) still exists, he may re-order to deny visits for additional periods as aforesaid.

15. Section 17(d) of the Prison Service Commission Order 03.02.00, entitled "Rules concerning Security Prisoners" (hereinafter: the **security prisoners order**) reiterates the commissioner's authority to deprive a prisoner of visits for security reasons.

16. As specified below, an administrative power which, in this case, is held by the prisons' commissioner, should be exercised in accordance with the standards of reasonableness and proportionality, especially if as a result of the exercise of such power a person's constitutional right is violated. We shall show below how central and important the petitioner's rights that are being violated by the exercise of respondent's power are, and we shall question the reasonableness and proportionality of respondent's decisions in this matter.

The Right to Prison Visits by Relatives and the Respondent's Obligation to Arrange them

17. The right to family visits in incarceration facilities is a fundamental right, both of the prisoners and of their family members. This is a fundamental right premised on the perception of the individual as a social being, living within the framework of family and community. The right to family visits is rooted in a number of Israeli and international legal sources. Among these sources, one may mention the Fourth Geneva Convention (which provides in article 116 that "Every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible."), Section 47 of the Prisons Ordinance [New

Version], 5732-1971 and the Prison Service Commission Order 04.42.00, entitled "Prisoner Visitation Arrangements", providing in section 1 that:

The visit is one of the important means of communication between the prisoner and his family, friends and acquaintances. The visit may help the prisoner while in prison and encourage him in times of crisis.

18. And it was so held in this regard in the judgment of Justice Procaccia in LHCJA 6956/09 **Maher Yunis et al. v. Israel Prison Service**, TakSC 2010(4), 189 (hereinafter: **Maher**), in paragraph 8, there:

Indeed, prison leaves and visits may also be regarded as part of the human rights to which they are entitled also while in prison, and which are not necessarily nullified merely due to the deprivation of liberty resulting from the incarceration, fruit of the penal sanction. **Leaves and family visits are some of the means of communication between a person-prisoner and the world and his close vicinity. He needs them by virtue of his nature. They are part of his self as a human being; They are part of his human dignity. They make an important contribution to his welfare and rehabilitation during his incarceration.**

19. The UN Minimum Standard for the Treatment of Prisoners, 1955 provides, in rule 37:

Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

A Prisoner's Human Rights Remain Intact during his Incarceration

20. The right to family visits in incarceration facilities is also derived from the governing concept, both in international law and Israeli law, that mere arrest or imprisonment do not nullify the fundamental rights of the prisoner. Prison walls limit the prisoner's freedom of movement, with all ensuing consequences, but they do not nullify his other fundamental rights, excluding those denied him in accordance with an explicit provision of the law:

It is a major rule with us that he is entitled to any and all human rights as a human being, even when he is detained or imprisoned, and the imprisonment alone cannot deprive him of any right whatsoever,

unless this is mandated by and arises from the deprivation of his right to free movement, or when there is an explicit provision of the law to that effect... This rule has been rooted in Jewish heritage for ages: As stated in Deuteronomy 25, 3: 'then thy brother should seem vile unto thee', the sages established a major rule in Hebraic penal doctrine: 'when beaten – he is like your brother' (Mishna, Makot, 3, 15). **And this major rule is relevant not only after he has completed his sentence but also while serving a sentence, because he is your brother and friend, and he retains and is entitled to his rights and dignity as a human being.**

(HCJ 337/84 **Hokma v. Minister of Interior**, IsrSC 38(2) 826, 832; and see also: **Dobrin**, paragraph 14 of the judgment rendered by Justice Procaccia; PPA 4463/94 **Golan v. IPS**; PPA 4/82 **State of Israel v. Tamir**, IsrSC 37(3) 201, 207; HCJ 114/86 **Weil v. State of Israel**, IsrSC 41(3) 477, 490).

21. And it was recently so held in the comprehensive judgment of Justice Danziger in **Maher**, in paragraph 36, there:

The approach of Israeli jurisprudence concerning the purpose of a person's incarceration is that it is exhausted by the deprivation of the individual's personal liberty, by way of limiting his right to free movement. According to this approach, even when a person is incarcerated, he continues to retain any human rights afforded to him. Indeed, "when admitted into prison a person loses his liberty but he does not lose his dignity."

22. Article 10(1) of the Covenant on Civil and Political Rights provides that:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

This Article was interpreted by the human rights committee, the body responsible for the implementation of the covenant, in CCPR General Comment No. 21 dated April 10, 1992, in a very broad manner:

[R]espect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. **Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.**

23. The principle under which prisoners are entitled to all human rights other than those nullified by the mere fact of the incarceration, was also established in articles 1 and 5 of the Basic Principles for the Treatment of Prisoners, adopted by the General Assembly of the UN (in resolution 45/111 dated December 14, 1990). Article 1 provides that:

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.

And according to article 5:

Except for those limitations that are demonstrably necessitated by the fact of incarceration, **all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights**, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

24. The various provisions concerning the right to prison visits enable the imposition of limitations on this right, including, *inter alia*, for security reasons. However, as with any limitation on a fundamental right, such limitations must be imposed within the framework of the principles of reasonableness and proportionality, giving weight to the importance of the fundamental right being violated.

The Right to Family Life

25. Preventing family members from visiting their incarcerated loved ones, severely violates the fundamental right of the family members as well as the prisoners to family life. The right to family life is and has always been regarded by society, at all times and in all cultures, as a supreme value.
26. The Supreme Court has emphasized time and again the great importance of the right to family life in many judgments, and especially in **Adalah** (HCJ 7052/03 **Adalah v. Minister of Interior**, TakSC 2006(2), 1754).

Accordingly, for instance writes Honorable President (*emeritus*) Barak in paragraph 25 of his judgment:

It is our main and basic duty to preserve, nurture and protect **the most basic and ancient family 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...

And in **Dobrin**, Honorable Justice Procaccia writes (in paragraph 12 of her judgment):

Among human rights, **after the protection of the right to life and bodily integrity, comes the constitutional protection of the right to parenthood and family.** The purpose of the right to bodily integrity is to protect life; the right to family gives life meaning and reason...

This right is therefore situated on a high level in the hierarchy of constitutional human rights. It takes precedence over the right to property, freedom of occupation and even the right to privacy. 'It embodies the essence of a person's being and the realization of his self'.

27. Family rights are also recognized and protected by international public law. Article 46 of the Hague Regulations provides:

Family honor and rights, a person's life, personal property as well as religious faiths and worship customs **must be respected.**

And in **Stamka** it was held that:

Israel is obligated to protect the family unit under international treaties (HCJ 3648/97 **Stamka v. Minister of Interior**, IsrSC 53(2) 728, 787).

And see also: Articles 17 and 23 of the Convention 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; Article 10(1) of the International Convention on Economic, Social and Cultural Rights of 1966; The preamble of the Convention on the Rights of the Child of 1989.

Limiting a Fundamental Right – Principles of Reasonableness and Proportionality

28. Under the various provisions concerning the right to prison visits limitations may be imposed on the right for security reasons. Thus, regulation 30(c) of the Prison Regulations authorizes the commissioner or his deputy to deny visits of a prisoner with respect of whom reasonable grounds exist to suspect that he may take

advantage of the visits for activity intended to harm state security, as specified above. This period may be extended for an additional period of three months at a time.

29. However, like any limitation imposed on a fundamental right, such limitations must comply with the principles of reasonableness and proportionality and proper weight should be given to the importance of the violated right. A violation of a person's right, and in our case the violation of petitioner's right to prison visits, is lawful only if it meets the competence test and the test of proper balancing between such right and other interests for which the administrative authority is responsible. The more important and central the violated right, the greater the weight that should be attributed to it in the act of balancing it against opposing interests of the administrative authority (PPA 4463/94, LHCJA 4409/94 **Golan v. Israel Prison Service**, IsrSC 50(4) 136, 156).
30. The weight attributed to the evidence underlying the administrative decision depends on the nature of the decision. The weight of the evidence must reflect the importance of the right or interest being violated by the decision and the extent of the violation. The fact that respondent's decision violates petitioner's fundamental rights, obligates the respondent to base its decision on weighty estimates and data (see EA 2/84 **Neiman v. Chairman of Central Elections Committee**, IsrSC 39(2) 225, 249-250).
31. Even if the respondent is of the opinion that after more than eight years of denial, the mere fact that the petitioner sees his sister poses any kind of security threat, then, upon denying such visitation right, the respondent should have complied with the proportionality principle. This principle focuses on the relation between the objective the achievement of which is being sought, and the means used to achieve it. One of the subtests of the proportionality principle is the least injurious measure test. This means that in the spectrum of measures which can be used to achieve the objective, the measure used must violate the constitutional right to the least extent possible (HCJ 2056/04 **Beit Sourik Village Council v. The Government of Israel**, IsrSC 58(5) 807, 839-840).
32. This imposes upon the respondent the obligation to examine the evidence before it carefully and on an individual basis; it must thoroughly examine whether the strict security arrangements used in the shuttles and incarceration facilities are sufficient to neutralize risks, if any, including the prevention of direct contact between the prisoner and his visitors other than through a glass partition, watched by wardens to neutralize any security risk which may concern it. Needless to specify additional security measures that the respondent may use, as it is evidently respondent's expertise. In addition, it should have balanced the risk, its

extent and likelihood against the clear and severe harm to the petitioner and his sister.

Violation of Rules of Good Governance

33. Respondent's exercise of power must comply with the principles of Israeli administrative law concerning the use of governmental authority by a civil servant. Among these basic principles upon which Israeli jurisprudence is premised the duty to give reason should be noted (AAA 10845/06 **Keshet Broadcasting Ltd. v. The Second Authority for Television and Radio**, TakSC 2008(4), 1709; AAA 9135/03 **Council for Higher Education v. Haaretz Newspaper**, not reported yet, page 6 of the judgment; Itzhak Zamir **The Administrative Authority**, Vol. B, 897-898 (1996)).
34. 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 those who require its services. 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 where 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 flaw imposes upon the authority the burden of explaining the decision and proving that the decision is proper. (JRCr 3810/00 **Grossman v. The State of Israel**, TakSC 2000(2) 1478, Paragraphs 4-5; Itzhak Zamir, **The Administrative Authority**, Vol. B, 905 (1996)).
35. In respondent's response no reasons were given for the decision to prevent petitioner's sister from visiting him in prison. In view of the above, this response does not comply with the rationales underlying the administrative duty to give reasons, including the ability of the person who is prejudiced by the administrative decision to examine whether the decision meets the test of the law and whether there are grounds and reasons to subject it to judicial scrutiny (Itzhak Zamir, *Ibid*).

Conclusion

36. In conclusion, the petitioner has proved that the respondent is obligated to allow family visits in prison and that the right to family life is a fundamental

constitutional right, situated on a high level in the hierarchy of constitutional human rights.

37. The petitioner has also proved that under the law, the respondent is obligated to act reasonably and proportionately while making a decision denying a visitor's entry, a duty which was doubtfully upheld in this case.

In view of all of the above, the honorable court is hereby requested to order the respondent to act as specified in the beginning of this petition.

Jerusalem, November 29, 2011

Daniel Shenhar, Adv.
Counsel to the Petitioner

(File No. 69786)