At the Jerusalem District Court Sitting as a Court for Administrative Affairs
Before the Honorable Judge Dr. Yigal Marzel

AP 57730-02-13 Hamidat et al. v. Ministry of Interior et al.

The Petitioners:

1. **_____ Hamidat**
2. **_____ Hamidat**
3. **_____ Hamidat**
4. **_____ Hamidat**
5. **_____ Hamidat**
6. **_____ Hamidat**
7. **_____ Hamidat**
8. **_____ Hamidat**
9. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

Represented by counsel Adv. Noa Diamond et al.,
Of HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger

v.

The Respondent:

1. **Chair of the Appellate Committee for Foreigners (Jerusalem District)**
2. **Legal Advisor to the Population, Immigration and Border Authority**
3. **Head of the Population, Immigration and Border Authority**
4. **Minister of Interior**

All represented by Jerusalem District Attorney's Office (Civil)

Judgment

1. The above captioned petition – concerns respondents' refusal to accept petitioner 1's application, to grant her husband, petitioner 2, a DCO permit. Petitioners' application was denied on the grounds that petitioner 2's position with the Palestinian Authority created a "conflict of interests".

Relevant Background

2. Petitioner 1, Mrs. _____ Issa Muhammad Hamidat, is a permanent resident who resides in Jerusalem. Petitioner 2, Mr. _____ Hamidat, resident of Bani Na'im in the Area, married petitioner 1 in 1990. According to the petition, at least from the end of 1999 the family has been continuously residing in the Silwan neighborhood, Jerusalem. The spouses have six children. The petitioners submitted an application for a stay permit for petitioner 2 back in 2008. After various correspondences and proceedings which are not relevant to the case at hand, respondent 2's final decision in the petition was received (only on December 5, 2011). According to the decision, the application was denied due to "a concern of a conflict of interests". The decision stated that petitioner 2 was employed by the Palestinian Authority, where he held the cultural and political training portfolio. In the framework of said position he is in charge of the provision of training and consultation to the police officers of the Palestinian Authority. In 1992-1994 he worked at the Orient House. Between 1990-1991 he was held under two administrative detentions. According to the denial letter, Petitioner 2 himself noted in the hearing that he was "in charge of the political training" and "acted as a lecturer". The denial letter noted further that according to the pay slips provided by petitioner 2 to the administrative authority, his salary was paid by the Palestinian Authority and he holds the rank of "Akid" (lieutenant colonel).

3. The petitioners filed an appeal against said decision with the Appellate Committee for Foreigners. In a decision dated January 17, 2013, the appeal was denied. The decision stated that respondent's discretion should reviewed according to section 3D of the Entry into Israel Law (Temporary Order), 5763-2003. The appellate committee mentioned the discretion of the administrative authority in connection with the grant of status in Israel, along the fundamental constitutional right to family life. It was further stated that against said backdrop it was justified to deny an application "due to a threat posed by the sponsored party on the security or criminal level." It was also stated that "conflict of interests" could also be a relevant consideration.

4. On its merits, it was held that the appeal should be denied in view of the senior position held by petitioner 2 with the Palestinian Authority. The decision stated that the denial of the application was a proportionate decision despite the fact that the only thing which was requested at that time was a DCO permit, since the final objective was to obtain a permanent residency status in Israel. It was further stated that the status applicant himself – namely, petitioner 2 – was in a conflict of interests situation. Accordingly, the case did not concern a denial of an application of a family member who was not himself in a "conflict of interests" situation. The senior position of petitioner 2 with the Palestinian Authority and his high rank, as well as the issues with which he was engaged (political training) pointed at a high level of loyalty which justified the denial of the application. The appellate committee also noted that it did not take lightly and even gave weight to the fact that petitioner 2 acted "for the promotion of peace between the nations". It was stated that said activity which was described in the documents presented to the appellate committee – "should be promoted and encouraged". However, in view of the nature of the application being a family unification application the final objective of which was, as aforesaid, a permanent residency status, the appellate committee did not find cause for intervention in respondent's position. With respect to the proportionality of the decision – it was noted that if petitioner 2 held a low ranking position, the grant of temporary status for renewable periods "outside the graduated procedure" could have been considered. However, in view of the senior position held by him as aforesaid, it was held that the decision was reasonable and proportionate with no cause for intervention. Hence the petition to this court.

The Petition

5. The petitioners argue that the decisions made in petitioner 2's matter were unreasonable and disproportionate and should be interfered with and that the remedy of renewable DCO permits should be granted to petitioner 2 who should be permitted to stay with his family in Israel. The

petitioners clarified that the only thing that petitioner 2 requested was to lawfully stay in Israel. He did not ask for and could not receive a permanent residency status in Israel (due to the Citizenship and Entry into Israel Law). The concern of a "conflict of interests" underlying respondents' decision was vague and non-specific. The threat embedded in petitioner 2's activity is unclear. The extent of its probability is unclear. Although there are judgments according to which conflict of interests may be a relevant consideration, said judgments preceded the Citizenship and Entry into Israel Law, namely, they were given before the current legal situation according to which, in any event, permanent residency status cannot be obtained in a family unification procedure. The petitioners also argued that respondents' decisions did not give weight to the constitutional right to family life, in general, and particularly in the absence of any specific security or criminal threat assigned to petitioner 2 as aforesaid. The decision is neither balanced nor proportionate, particularly in view of the requested temporary (DCO) stay permit. The petitioners noted further, with respect to petitioner 2's personal data, that he was an academic. His position is civilian-educational in nature. He gives academic courses to the Palestinian Police. These courses concern protection of human rights and international law. Petitioner 2 does not wear police uniform and does not engage in police or military activity. His activity in the Orient House took place about twenty years ago in social matters. The administrative detentions were also twenty years ago and are not relevant, and anyway, the respondents did not base their decisions on them. The petitioners also attached to their petition a letter of the "Parents Circle - Bereaved Families Forum" in support of their arguments concerning petitioner 2's work and personality.

The Response

6. In their response, the respondents requested that the petition would be denied. They argue that the decisions made in petitioner 2's matter are lawful – reasonable – and proportionate. They argue that in the framework of the processing of petitioners' application, a query was transferred to security agencies. The position of the security agencies was that "there is a concern of conflict of interests" (paragraph 23 of the response). The respondents emphasized the broad discretion vested in the Minister of Interior in applications of this sort. Among other things, the Minister of Interior is entitled to and is even obligated to take into account considerations which pertain to the protection of state security and sovereignty as well as "other important interests" of the state. The right to family life does not necessarily dictate the grant of a stay permit in Israel, and in any event this consideration may be balanced – as it was lawfully done in the case at hand – against the concern from petitioner 2. This concern derives mainly from the fact that petitioner 2 is employed by the Palestinian Authority, namely, petitioner 2 "has an obligation of loyalty to the Authority and is committed to its interests. It is therefore clear that petitioner 2 is in a conflict of interests situation and under such circumstances, the grant of status in Israel to petitioner 2 may prejudice important and vital interests of the state" (paragraph 50 of the response). The respondents referred again to judgments of the Supreme Court which held that "conflict of interests" was a relevant and sufficient cause for a denial of a family unification application. They emphasized petitioner 2's senior position with the Palestinian Authority and his rank. With respect to petitioner 2's peace promotion activity, the respondents are of the opinion that it does not abrogate the concern of conflict of interests which arises from petitioner 2's main engagement. As to the probability aspect, the respondents are of the opinion that there is no need to prove that this conflict of interests situation will, in fact, cause petitioner 2 to take actions motivated by "extraneous considerations". And with respect to the proportionality of the decision it was noted that in view of the senior position held by petitioner 2 with the Palestinian Authority, there was no room to take the least injurious measure, namely, the grant of temporary stay permits, in view of the concern which arose, according to the respondents, from petitioner 2's

presence in Israel and the concern that security and other interests of the state of Israel would be prejudiced. For these reasons it was requested to deny the petition.

The Hearing

7. Before entering the gates of the decision, it should be noted that in a hearing which was held on May 7, 2013, and following the court's comments, the parties agreed to conduct additional communications concerning factual controversies they had in connection with the content of petitioner 2's position with the Palestinian Authority. Documents were exchanged between the parties in that regard. Following said correspondence, an additional decision was made by the Minister of Interior in this matter – and in fact it is the last decision currently pending before the court (P/57 dated May 14, 2014). The decision, as quoted in respondents' response, states as follows: "According to the decision of the Minister, petitioner 2's application for status in Israel by virtue of family unification procedure is denied, in view of a conflict of interests which exists between the senior position held by him with the Palestinian Authority – a rank of Akid – a rank parallel to the rank of a colonel, with the Palestinian Authority, for which he receives salary on an ongoing basis from the Authority, and the requested status in Israel." Said notice and decision, was followed by supplementary arguments on behalf of the parties. Petitioners' position was that the last decision of Minister of Interior could not be upheld in view of the fact that petitioner 2 did not request status in Israel but rather, DCO permits only. This matter, however, was neither referred to nor given any weight in the decision. In addition, the petitioners argued that the last decision of the Minister of Interior did not take into consideration the factual data and study materials transferred by the petitioners to the respondents after the hearing. The above study material clearly shows that petitioner 2's position is merely civilian-academic. It was further argued that the last decision which was made did not explain what was the protected interest; what was the concern; and was a least injurious measure considered. The respondents, on the other hand, argued in their response that the (last) decision of the Minister of Interior should be upheld. A summary of the materials which were transferred by the petitioners was presented before the Minister of Interior. The Minister of Interior concluded that the material which was presented to him did not carry any weight when balanced against the conflict of interests which existed between petitioner 2's senior position with the Palestinian Authority and the requested status in Israel. With respect to the type of the requested status, the conflict of interests arises from the mere grant of the stay permit in Israel to petitioner 2, regardless of the limitation imposed by the Citizenship and Entry into Israel Law on status upgrades. With respect to the material which was transferred for respondents' review, it was argued that such material clearly indicated that petitioner 2 was engaged in detailed training regarding the work of the Palestinian Police and that it only reinforced respondents' conclusion concerning the problematic nature of petitioner 2's conflict of interests and the decision to deny his application.

Discussion and Decision

8. Having reviewed the entire material before me and having heard the arguments of the parties' legal counsels (including the above mentioned supplementary arguments), my conclusion is that the decision of the Minister of Interior should be revoked – as well as respondents' decisions which preceded it; and respondents 2 – 4 should make a new decision in petitioner 2's application, according to the data and guidelines which will be specified in detail below. All of the above, in view of the fact that the decision which was made – either in the beginning or by the end of the day – does not sufficiently take into account the relevant considerations under the circumstances and thus, does not reflect the balance between them, giving rise to sufficient cause for the court's intervention with the broad discretion vested in the administrative authority in such matters.

9. Indeed, there is no dispute that the Minister of Interior, in the framework of his authority under the law, has broad discretion in connection with the grant of stay permits in Israel. The petitioners did not dispute this broad discretion which is entrenched in the law and case law since long ago. In addition, it was not argued that the decisions in petitioner 2's matter were made without authority. The arguments therefore pertain to the manner by which the discretion was exercised and the decisions were made in petitioner 2's matter – arguments which should be accepted under the circumstances. Consequently, the matter should be remanded to the administrative authority for the purpose of making a new and reasoned decision. We shall therefore specify the flaws of the decision being the subject matter of this petition which justify the above conclusion.

10. Firstly, as noted by the Appellate Committee for Foreigners, and as was also reiterated by respondents' counsel in the hearing held before me (page 2 line 7), the denial of petitioner 2's application is based on the authority and discretion pursuant to section 3D of the Citizenship and Entry into Israel Law. According to this section "an opinion of the competent security agencies, that a resident of the Area or the other applicant or their family member may pose a security threat to the state of Israel" is required. It is questionable whether the decision making process in petitioner 2's matter satisfied, *ab initio*, the condition which requires the receipt of an opinion of the competent security agencies, stipulated in the above section. As specified above, the response stated that the position of the security agencies was indeed transferred, but the only thing which was noted in that respect was that "there is a concern that a conflict of interests exists". It was not argued that the opinion which was received indicated that petitioner 2's presence in Israel would pose a security threat. In fact, in the hearing held before me, respondents' counsel noted that the denial was not based on security or criminal reasons but rather on the grounds of "conflict of interests as such" (page 1 lines 13-14). The argument clarified that the security position was not based on privileged information, but rather on the mere position and seniority thereof. It was also argued that said conflict of interests was not "completely" disconnected from the security aspect.

11. Indeed, in view of the individual aspect of section 3D of the Citizenship and Entry into Israel Law, which requires an opinion of security agencies that pertains to the specific circumstances, it is questionable whether the information received and the alleged threat - if any - are sufficient. Hence, even if we assume that the respondent has in his possession an opinion of the competent security authorities in petitioner 2's matter under the circumstances of the matter, it is a general opinion which does not point at any specific risk, and also in the hearing held before me and in the response no detailed explanation was given - beyond a general and non specific position – concerning said "conflict of interests". In that regard it should be added, beyond need, that *ab initio*, the issue of such dual loyalties and conflict of interests is not a simple issue – and see Liav Orgad, "The Enigma of Loyalty: Who owes What to Whom and Why?", Law and Man – Gvurot to Amnon Rubinstein (***Mishpat VeAsakim*** 14) 723 (2012)). In view of the above, even if is a relevant consideration, its relative weight under the circumstances is questionable and this fact should have been reflected in the decision concerning petitioner 2's matter.

12. It should be added, on the specific threat level, that not only have I not been presented with any explanation and details concerning the alleged conflict of interests argument, but rather, in fact, the Appellate Committee for Foreigners issued, on January 17, 2010, an interim order which prevented the removal of petitioner 2 from Israel until otherwise resolved. After the filing of the petition with this court, an interim injunction was issued, *ex parte*, at the request of the petitioners, which prevents the removal of petitioner 2 from Israel. The respondents were given the opportunity to apply for the revocation of said injunction at any time (decision dated February 28, 2013). Such application has never been submitted. This means that petitioner 2 stays in Israel for several years during which no allegation has been raised by the respondents regarding any specific threat posed by his activity, and during which a change of the current situation has not

been requested. This fact also reflects on the strength of the arguments concerning the specific security threat which arises from the alleged conflict of interests raised against petitioner 2.

13. Secondly, it is true that diverse authority exists, including judgments of the Supreme Court, according to which conflict of interests may justify a denial of a family unification application (see HCJ 3373/96 **Siham Za'atra v. Minister of Interior** (October 16, 1996); HCJ 2898/97 **Rabiha Atiya v. Minister of Interior** (May 3, 1998); HCJ 1447/07 **Rashed v. Ministry of Inteior** (May 15, 2008)). However, it was rightfully argued by petitioners' counsel that a certain difference existed between the circumstances of the case at hand and the above referenced cases. It is firstly so, in view of the fact that in said cases an application for permanent residency status was denied, whereas in the case at hand the application is for a DCO permit. In addition, at least in some of the cases, an additional detail existed beyond the general allegation of conflict of interests, such as, for instance, the existence of specific intelligence information which created a substantial security threat (see AP (Jerusalem) 251/07 **Dima Hamed v. Minister of Interior** (December 5, 2007); AP (Jerusalem) **Ivtasem Muhammad al-Razem v. Minister of Interior** (January 20, 2005)). It does not mean that the conflict of interests cause is no longer relevant – since it is clear that it has been recognized by case law – but rather that the strength of the cause should be examined in view of additional data as well. Such additional data, including, for instance, a specific concern or the provision of false information etc., - were neither presented, nor proved and argued. The above should have therefore been taken into consideration in the exercise of the discretion.

14. Thirdly, the petitioners provided detailed explanations concerning the scope and specific position of petitioner 2 with the Palestinian Authority, as a position of a civilian-academic nature. It was noted that said information was brought to the attention of the Minister of Interior before his last decision was made. However, the decision as drafted does not indicate that any weight was attributed to this information – neither generally nor *vis-à-vis* the initial conflict of interests argument based on which the application was denied. The decision pertains only to petitioner 2's rank and salary and makes no reference to all other details which were presented. It should be pointed out that despite the fact that the parties reserved all their arguments, consent was expressed in the hearing before me of a willingness to examine said data (at least).

15. Fourthly, against these deficiencies in the reasoning of respondents' decisions, stands petitioners' right to family life. Said right and the weight which should be assigned to it were even mentioned in the decision of appellate committee being the subject matter of this petition. This case concerns a family unit which has been living in Israel for nearly fourteen years (to date). Petitioner 1 has permanent residency status in Israel. The spouses have six children. As mentioned above, petitioner 2 has been residing in Israel for the entire duration of said period – while, at least from the commencement of the proceedings before the appellate committee - his presence is lawful and by virtue of judicial orders. No argument was raised concerning any specific threat posed by petitioner 2 throughout said period. In this sense, the decisions made do not assign sufficient weight to petitioners' right to family life and to the balancing between said right and all other considerations which were taken into account.

16. Finally, as pointed out by the appellate committee in its decision, which matter is not in dispute (see HCJ 7444/03 **Dakah v. Minister of Interior** (February 22, 2010)), the administrative decision in such matters should also comply with the requirement of proportionality. It should therefore be demonstrated that the right to family life cannot be violated, *inter alia*, by a measure of a lesser injurious effect; and that a proper relation exists between the violation of the right, of the first part, and the benefit to public interest, on the other part (or that an alternative measure of a lesser injurious effect will not realize the public interest to the same extent but will reflect a more appropriate balance between the damage and the benefit). The decisions made in petitioner

2's matter do not comply with this requirement of proportionality in the sense that petitioner 2 reiterates that he does not request permanent residency status in Israel. Thus, and not only due to the inability to receive a status upgrade, his request was limited to one thing only: staying lawfully with his family members in Israel. The above was explicitly clarified in the hearing which was held before me, in the declarations made to the protocol by petitioner 2's counsel. It was declared, *inter alia*, that not only that a permanent residency status was not requested and that such an argument would not be made, but to the extent that a DCO permit would be granted "we shall not regard it as a family unification application in the procedural sense" (page 3 lines 1-2). It was also explicitly declared that to the extent petitioner 2 was granted the requested permit "we shall not argue that the grant of the permit should be regarded as the commencement of a procedure for the receipt of a permanent residency status or as the commencement of a graduated procedure" (page 3, lines 5-6). The last decision made in petitioner 2's matter does not express the above limitation of the requested permit – not in terms of the considerations which were taken into account and not in terms of the proportionality of the final decision – the meaning of which for the petitioners at this time is the dissolution of the family unit (and compare, HCJ 5702/07 **Sabag v. Minister of Interior** (May 4, 2010)).

17. Hence, in view of all of the above flaws, the conclusion is that the decisions made in petitioner 2's matter were deficient, and that the accumulation of all such deficiencies provides sufficient basis for the revocation of the decisions and for remanding the matter to the administrative authority which should make a new decision in petitioner 2's application, taking into consideration all relevant circumstances, according to the host of reasons specified above. It should be added that the administrative authority has ostensibly received an opportunity to reconsider the above during the hearing held in this court. However, said new decision was made before the deficiencies of the decisions were specified and in any event, the new decision did not refer to them. Moreover, in view of the concise reasoning of the last decision, and in view of all of the above reasons and the discretion of the administrative authority to begin with, the proper relief under these circumstances is to remand the matter to the administrative authority for the purpose of making a new decision by assigning proper weight to all relevant considerations (see and compare, AAA 6937/11 **Local Planning and Building Committee Drom HaSharon v. Shitrit** (February 19, 2013)).

The result

18. The result is that respondents' decisions in petitioners' application – are revoked. The matter will be remanded to the administrative authority for the purpose of making a new decision within 60 days from today. The order issued in this proceeding which prevents the removal of petitioner 2 from Israel will remain in force until the new decision is made. Under the circumstances no order for costs in given.

The Secretariat will send this judgment to the legal counsels of the parties.
Given today, Elul 23, 5774, September 18, 2014, in the absence of the parties.

(signed)

Yigal Marzel, Judge