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At the Nazareth District Court
Sitting as a court for administrative affairs

PP 24334-02-13

In the matter of: 1. _____ Qassem
ID No. _____
Held in Gilboa 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 Noa Diamond (Lic. No. 54665) and/or Nimrod Avigal (Lic. No. 51583) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Bilal Sbihat (Lic. No. 49838) and/or Tal Steiner (Lic. No. 62448) and/or Anat Gonen (Lic. No. 28359)

Of HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA
4 Abu Obeida St., Jerusalem
Tel: 02-6283555; Fax: 02-6276317

The Petitioner

v.

Israel Prison Service

Represented by the Northern 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 brother to enter the incarceration facilities under its responsibility and visit him, and arrange an open visit for his mother in view of her severe medical condition.

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.

The Parties and Exhaustion of Remedies

2. The petitioner, born in 1971, was arrested in August 2002 and sentenced to 35 life imprisonments plus 50 years in prison. He is currently being held in Gilboa prison, which is under respondent's responsibility.
3. Petitioner's mother, Mrs. _____ Qassem (ID No. _____), born in 1947, from Jerusalem, has never been detained nor interrogated. She suffers from diabetes and had an open heart surgery in recent years. In addition, on February 28, 2012, Mrs. Qassem had a stroke which severely infirmed her and consequently she is confined to a wheel chair. Moreover. As a result of said event the mother suffers a hearing loss and has speaking difficulties.

Medical documents attesting to the mother's condition are attached and marked **P/1**.

4. Petitioner's brother, Mr. _____ Qassem (ID No. _____), born in 1971, is from Jerusalem. Mr. Qassem served three months in prison in Israel in 1988. Since his release from prison, he has neither been detained nor interrogated again.
5. This is the place to note that in view of her condition, Mrs. Qassem cannot visit her son in the regular manner in which a wall and a partition divide between him and her and communication is made through telephone receivers. Consequently, the mother and son have not met even once ever since the mother had a stroke in February 2012. Despite the fact that Mrs. Qassem has never been detained or interrogated and despite her severe medical condition the respondent does not enable her to visit her son in an open visit and thus, it is the only agency which prevents the connection between the son and his sick mother.
6. In view of her protracted distress, the mother turned to HaMoked: Center for the Defence of the Individual (hereinafter: **HaMoked**) and requested its assistance. On September 24, 2012, HaMoked wrote to Junior Commissioner (*Gundar Mishne*) Nazia Lahyani, commander of Shata Prison where the prisoner was held, and requested to approve an open visit for the mother, according to section 17J(2)(a) of the Prison Service Commission Order 03.02.00, according to which an "open visit" may be allowed when the family member is sick; in said letter the medical condition of Mrs. Qassem was clarified, and the relevant medical documents were attached.

A copy of HaMoked's letter is attached and marked **P/2**.

7. On November 11, 2012, HaMoked was informed by phone, in response to its letter concerning Mrs. Qassem's matter, that the request for the arrangement of an open visit of the sick mother with her incarcerated son was denied. The respondent did not even deign to specify the grounds for its response and satisfied itself by the vague argument that "negative information" exists.
8. Despite the fact that Mr. Qassem, petitioner's brother, was detained for a short period 15 years ago, the respondent has not allowed him to see his brother for over two years, and prevents his entry into the incarceration facilities in its responsibility being a "former inmate".
9. Said difficulty caused Mr. Qassem to request HaMoked's assistance, which wrote twice on his behalf to the prisons where the petitioner was held, on September 5, 2012, and on January 16, 2013. In said letters HaMoked demanded that Mr. Qassem would be given a permit to enter prison and visit his brother, in view of the long time which passed since they have last met.

Copies of HaMoked's letters are attached and marked **P/3** and **P/4**.

10. The response of the commander of Shata Prison was received on November 11, 2012 by phone, according to which the respondent persisted in refusing to allow Mr. Qassem to visit his brother. No reason or explanation was given to said decision. The letter to the commander of Gilboa Prison has never been answered.
11. In view of the dead end which was reached in the attempt to assist to connect between the prisoner and his family members, the undersigned visited the petitioner in Gilboa prison on January 21, 2013, where the petitioner confirmed to him that the respondent refused to allow his brother to visit him in prison, and in addition, refused to arrange an open visit for his mother.

Therefore, the petitioner, who has not seen his brother for over two years and who has not seen his mother for almost a year, 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

12. 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.

13. 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.
14. 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

15. 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.

16. 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.

17. 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

18. 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).

19. 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."

20. 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.

21. 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.

22. 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

23. 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.
24. 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...**

The family relations... underlie Israeli law. The family has an essential and central role in the life of the individual and in the life of society. Family relationships, which the law protects and which it seeks to develop, are some of the strongest and most significant in a person's life.

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

In the hierarchy of constitutional 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....

25. 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

26. 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.
27. 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).
28. 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).
29. Even if the respondent is of the opinion that the mere fact that the petitioner will see his brother and mother 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).

30. 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 family members.

Violation of Rules of Good Governance

31. 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)).
32. 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)).
33. In respondent's response no reasons were given for the decision to prevent petitioner's brother from visiting him in prison and to prevent the arrangement of an open visit for his mother who wishes to visit him in prison. Said responses do 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

34. 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.

35. 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, February 12, 2013

Daniel Shenhar, Adv.
Counsel to the Petitioner

(File No. 74466)