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At the Supreme Court

HCJ 5263/08

Sitting as the High Court of Justice

_____ Al-Harimi et al.
by counsel, Att. Ido Bloom et al.
Of 4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

- Versus -

Commander of IDF Forces in the West Bank
by the State Attorney's Office
Ministry of Justice Jerusalem
Tel: 02-6466513; Fax: 02-6467011

The Respondent

Response on behalf of the Respondent

In accordance with the decision of Honorable Justice Arbel dated 12 June 2008, which was presented to the State Attorney's Office on 16 June 2008, the Respondent hereby respectfully submits his response to the petition as follows.

1. The petition concerns the request of the Petitioners, residents of the Judea and Samaria Area, to allow their entry into Israel for the purpose of passage to the Gaza Strip, in order to visit _____ Al-Harimi and _____ Al-Harimi, their close relatives, whose transfer to the Gaza Strip was agreed upon in 2002, following the Church of Nativity affair.
2. The Respondent shall claim that the petition must be denied by reason of lack of cause to intervene in his decision not to accede the Petitioners' request.
3. The Petitioners claim that the Respondent is under a "special obligation" to allow this visit, this, *inter alia*, pursuant to the State's pledge in HCJ 10677/04 **Al-'Abayat v. Commander of IDF Forces in the West Bank** (unpublished, judgment dated 27 December 2004, hereinafter – the **Al-'Abayat case**).
4. Security agencies have stated that in April 2002, during operation "Defensive Shield", the IDF fought Palestinian terrorists in Bethlehem. Dozens of them fled to the Church of Nativity and barricaded themselves therein until the conclusion of the affair by international agreement. With the end of the barricading affair, an agreement was reached to remove the persons who had barricaded themselves, including _____ Al-Harimi and _____ Al-Harimi, to the Gaza Strip.
5. In late 2004, the petition in the **Al-'Abayat case** was filed, in which the Court was requested to instruct the Respondent to allow visits by relatives of the persons who had barricaded themselves [in the Church of Nativity] whose removal to the Gaza Strip was arranged. On 26 December, the parties to the petition filed a joint application to have the petition deleted. The application was accepted and the Honorable court ruled in the judgment:

We have taken note of the Respondent's notices as follows:

All residents of the Judea and Samaria Area whose immediate relatives were removed to the Gaza Strip in the framework of understandings reached under international sponsorship following the siege on the Church of Nativity in April 2002, will be able to file individual applications to visit the Gaza Strip. These

applications shall be approved, subject to individual examination by the ISA [Israel Security Agency], security clearance and the absence of a general closure in Judea and Samaria or the Gaza Strip which prevents the exit/entry of persons holding a valid permit. Such applications will be handled promptly, as are all applications by residents of the Area wishing to exit from Israel. [the final phrase was corrected in the decision dated 10 January 2005 to “to Israel”, H.G]

Pursuant to the statements in the abovementioned notice, we decide to delete the petition.

[emphases added]

It shall be emphasized that this pledge was given beyond the requirement of the law, since, as known, residents of the Judea and Samaria Area have no vested right to enter Israel, not even for the purpose of passage to the Gaza Strip. On this matter see for example H CJ 7277/94 **John Doe v. The Military Governor for the Gaza Strip**, *Takdin Elyon*, Vol. 95(2) 889; H CJ 7475/05 **Sa'id Q'aabneh et al. v. Commander of IDF Forces in the West Bank**, *Takdin Elyon* 2005(3) 2662; H CJ 739/06 **Zakriya Ta'amra v. Commander of IDF Forces in the West Bank**, *Takdin Elyon* 2006(3), 790; H CJ 6662/00 **Haddad v. Ministry of Defense**, *Takdin Elyon* 2001(2) 3 and most recently H CJ 9657/08 **Jarbo'a et al. v. Commander of IDF Forces in the West Bank et al.** (yet unpublished, handed down on 24 July 2008).

6. The Petitioners claim that [they] last visited the removed persons in the Gaza Strip in September 2006 and that ever since, the Respondent is not allowing the visits due to a security preclusion; and that in so doing, the Respondent is ignoring his explicit undertaking in the **Al-'Abayat case**. The Petitioners claim that the Respondent is “cutting off members of the family from one another and tearing the family asunder”.
7. The Respondent shall claim that due to the substantive change of circumstances that occurred after the judgment in the **Al-'Abayat case** was handed down in 2004, it is doubtful that the Respondent's aforementioned notice in that matter is still relevant. Today, almost four years

after the aforementioned judgment, **transformations** which cannot be described as anything other than dramatic **have occurred**.

In 2004, when the aforementioned judgment in the **Al-'Abayat case** was handed down, the Gaza Strip was being held by IDF forces under belligerent occupation. In late 2005, Israel implemented the disengagement plan and the State of Israel removed all its settlements, civilians and military forces from the Gaza Strip.

On 25 March 2006, a Hamas government was sworn in pursuant to elections held in the Palestinian Authority on 25 January 2006. From that day and thereafter, control of the Gaza Strip has been transferred to the hands of a terrorist organization which set the destruction of the State of Israel as its goal.

In March 2007 a “national unity” government was established in the Gaza Strip, which included representatives from most Palestinian movements. However, internal conflict between the Hamas and Fatah movements reignited in May 2007 and peaked in June 2007, when Hamas seized control of the entire Gaza Strip by force. **Currently [Hamas] effectively rules both the territory of the Gaza Strip and the crossings between Israel and the Gaza Strip, on their Palestinian side.**

Following the violent takeover of the Gaza Strip by Hamas, the Ministerial Committee for National Security (hereinafter: **the Cabinet**) convened on 5 September 2007 and again on 19 September 2007 and decided, among other things, that in view of Hamas' seizure of the Gaza Strip, Gaza has become “hostile territory” **identical in almost every relevant manner to an enemy state with which there is a state of war**. Consequently, the Cabinet decided to impose restrictions on the passage of goods to Gaza, to reduce fuel supply and services to Gaza and to **restrict movement to and from the Gaza Strip**.

A copy of the announcement of the Government Secretariat Office regarding the Cabinet's decision dated 19 September 2007 is attached and marked **R/1**.

8. Under these circumstances, passage from the Gaza Strip to Israel through the Erez Crossing, **as well as movement in the opposite direction**, is currently routinely restricted, as a rule, **to humanitarian cases**, among them mainly urgent medical cases, life saving, passage of international organizations' employees etc. and all of these too, subject to the discretion of the State of Israel which is under no obligation in this matter.

As such, and in light of the takeover of the Gaza Strip by the Hamas terrorist organization, the Respondent's policy regarding movements from Judea and Samaria to Gaza is that these shall be limited to cases of a humanitarian nature only.

9. It would not be superfluous to note that the Honorable Court, to which this policy of the Respondent had been presented, found no cause to intervene. On this matter please see HCJ 5429/07 **Physicians for Human Rights v. Minister of Defense**, *Takdin Elyon* 2007(2) 5055; HCJ 6339/07 **Ghazawi v. GOC Southern Command**, *Takdin Elyon* 2007(3) 2330 (2007) and the matter of **Jarbo'a** above (with the necessary changes):

Petitioner 1, who resides in the Gaza Strip, has applied for entry to the Judea and Samaria Area via passage through Israeli territory, in order to visit three of her children who reside in the Judea and Samaria Area. The children in question are aged 17, 19 and 23. The competent authority has decided that under current circumstances, the foresaid passage shall only be permitted in exceptional circumstances, and the case of Petitioner 1 does not fall under this category. Taking into account the present security circumstances, particularly in the Gaza Strip, we have not found fault in the decision not to accede the request of Petitioner 1. The present case is substantively different from other cases where exceptional medical circumstances exist etc. One must bear in mind that Petitioner 1 has no vested right to enter Israel for any purpose, including passage to the Judea and Samaria Area.

10. In these special circumstances, it seems that the demand that the Respondent **specifically** permit visits by relatives of persons who moved from the Judea and Samaria Area to Gaza in

the context of an international agreement, due actions they have taken against IDF soldiers and after they used force against the Church of Nativity and barricaded themselves therein, when similar family based requests are denied due to the special circumstances, cannot stand.

Summary

11. The Respondent shall argue this he is currently under no obligation to allow the Petitioners' visits to Gaza, despite the Respondent's notice in the **Al-'Abayat** case.

This is due to the substantive change of circumstances which has taken place in the Gaza Strip since that petition was heard and due to the general policy in effect today regarding passage to and from the Gaza Strip, a policy in which the Honorable Court did not find cause to intervene, and according to which visits are permitted only in exceptional humanitarian cases. It shall be emphasized that **in general**, family visits do not fall under the category of exceptional humanitarian cases.

12. Thus, and due to all the aforesaid, the Respondent shall argue that the Petition must be denied.

Today 28 Av 5768

28 August 2008

[signed]

Hila Gorney, Att.
Senior Deputy State
Attorney