At the Jerusalem District Court sitting as the Court for Administrative Affairs

AP 17012-04-11 Abu Dahim et al. v. Minister of Interior et al.

Before:	**Honorable Justice Nava Ben Or**
The Petitioners:	1. **_____ Abu Dheim** 2. **_____ Abu Dheim** 3. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger** Represented by counsel, Adv. Adi Lustigman
	v.
The Respondent:	**Ministry of Interior** Represented by Jerusalem District Attorney, Adv. Amitsur Eitam

Judgment

1. Petitioner 1 is a resident of Israel. She is married to Petitioner 2, originally a resident of Jordan, who is registered in the population registry of the Palestinian Authority. The couple has three children. They were married in 2005 and have lived in Jerusalem ever since. On May 24, 2006, Petitioner 1 filed an application for family unification with Petitioner 2. Two years later, on March 18, 2008, the application was denied on the grounds that the brother of Petitioner 1 had perpetrated the terrorist attack on Merkaz Harav Yeshiva in Jerusalem on March 6, 2008. The Petitioners appealed the decision and after much time had elapsed with no response, they petitioned this court (AP 8851/08). In response to the petition, the Respondent stated that the security preclusion did not pertain only to Petitioner 1's kinship to the terrorist who had perpetrated the aforesaid attack but also to Petitioner 2's "connection to terrorists and to a person who is involved in terror supporting activities". In view of this response, the parties consented to withdraw the petition in order to have the Petitioners' matter reconsidered.

2. A few weeks after the agreed withdrawal, on March 10, 2009, the Respondent notified the Petitioners that the refusal remained. In this instance, the grounds cited were that Petitioner 2 is the nephew of ____ Ghabis, "who has been flagged by security officials as a person who intends to commit a suicide attack". On May 11, 2009, the Petitioners appealed this decision. The Petitioners requested to be provided with a summary of the security information. On July 28, 2009, the Respondent's Central Desk Chief told the Petitioners that the appeal had been transferred to her and that the security information that formed the basis for the denial issued on March 10, 2009 could not be disclosed beyond what had already been stated.

   The Petitioners claim that they took this letter as meaning that this was an interim response and that the appeal had not yet been reviewed on its merits.

3. Two weeks after the aforementioned letter, on August 11, 2009, the Supreme Court delivered its judgment in AAA 1038/08 **State of Israel v. Ghabis**. The court ruled that when the Respondent considers denying an application for family unification for reasons of security or criminality, he must hold a hearing prior to making the decision. As such, on November 10, 2009, the Petitioners requested the Respondent reexamine their application for family unification, after they are given a hearing. This request received no pertinent response.

   Counsel for the Petitioners sent additional letters on January 9, 2011, January 24, 2011 and March 6, 2011, inquiring about the status of the November 10 application. According to the Petitioners, one of the office clerks told Petitioners' counsel over the telephone that she would check the status of the application and provide an answer.

4. On March 24, 2011, during a patrol carried out by the Israel Police in order to locate illegal aliens, Petitioner 2 was found in a supermarket in his neighborhood where he was employed. He was detained. As he had no valid stay permit and his contention that he should not be deported so long as his application was pending fell on deaf ears, he was taken to a police station where he remained for several hours and was then removed to the Palestinian Authority.

   Hence the petition.

5. According to the Petitioners, Petitioner 2 was removed to the Territories[i] in breach of Respondent's internal protocol. According to the "General protocol for receipt of any application and appeals against decisions" (protocol 5.1.0001), no enforcement action should be taken against an applicant as long as a decision in his application, appeal or objection is pending. Since at the time Petitioner 2 was removed to the Territories both his appeal against the denial issued on March 2010 and his application for a hearing of November 2010 were pending, indeed, according to the protocol, he should not have been removed. This is all the more so considering the fact that Petitioner 2 explicitly told the police officer who questioned him about his illegal presence that his family unification application was pending before the Respondent. However, the police did not allow Petitioner 2 to present relevant documents and since he was unable to make contact with his counsel, the questioning continued and he was ultimately removed to the Territories, as stated.

   The Petitioners further claim that the removal was not only a breach of the Respondent's internal protocols, but also a breach of the law as the removal of a resident of the Area[ii] can be done on the decision of a police officer holding the rank of at least chief inspector who has been authorized by the police commissioner for this purpose. The decision must be made in writing and the officer must prepare a written report listing the claims presented by the resident and the grounds for the decision after the resident was granted the right to make his case (Sec. 13.10 of the Entry into Israel Law 5712-1952). However, in the matter of Petitioner 2, the police officer who questioned him and

ordered his removal held the rank of staff sergeant major; there was no written order and no written report listing the Petitioner's arguments or the grounds for the decision to remove him from Israel.

6. In response to the petition, the Respondent argued that the Petitioner's application for status in Israel had been rejected and as a result he had no vested right to be present in Israel. The submission of an application for reconsideration does not give rise to such a right under the protocol. If this were not the case, there would be no end. Any time an application is rejected, the applicant would submit another application which would suffice, according to the interpretation suggested in the petition, to justify the continued illegal presence. According to the Respondent, the letter dated July 28, 2009 constitutes a decision to reject the appeal. In this context, the Respondent refers to exhibit P/8 to the petition (the letter of counsel to the Petitioners dated August 24, 2009) which indicates that the Petitioners clearly understood that the July letter constituted a rejection of the appeal on its merits as they stated therein that they intended to challenge the rejection and even requested an extension in order to file such challenge. However, no challenge was filed and as such the Petitioner should be deemed to have exhausted his remedies and accepted the Respondent's decision. He is illegally present in Israel and cannot obtain the remedy sought in the petition.

   The Respondent further notes that on March 27, 2011, namely three days after Petitioner 2 was removed from Israel, counsel for the Petitioners was notified that the application for reconsideration was denied and that no further arguments may be presented after they had been reviewed at length in the past. It is noted that counsel for the Petitioners clarified in the hearing that this letter was brought to her attention only upon submission of the Respondent's statement of response to the petition.

   According to the Respondent, in these circumstances, even if it is ruled that "some technical flaw or another occurred in the removal", indeed, Petitioner 2 has no vested right to be present in Israel and at the time the petition was submitted, the Petitioners were in possession of the decision rejecting their appeal and a decision rejecting their application for reconsideration. As such, there is no foundation for the petition, given that no procedures are pending before the Respondent.

7. During the hearing, counsel for the Petitioners further argued that the question whether the July 2009 letter was taken by the Petitioners to mean denial of the appeal or not was irrelevant, as the contents of the letter clearly indicated that the Respondent never addressed the arguments made in the appeal and no detailed decision had ever been made. It is, therefore, objectively clear that no decision on the merits of the appeal has been made to date. Counsel further explained that the application for an extension to challenge the denial was a "safety measure", but when the July 2009 letter was closely reviewed, counsel for the Petitioners reached the conclusion that no decision on the appeal had ever been made and therefore no challenge was filed.

   Counsel for the Respondent claimed that Petitioner 2 must not be allowed to reenter Israel when he is under a security preclusion, even if there were procedural flaws in his removal process, considering there is no pending procedure in his matter.

8. Just a few days after the hearing, counsel for the Respondent filed a clarification notice. The notice stated that inasmuch as he was recorded as saying that Petitioner 2 was under a security preclusion at the present time, this was not in fact the case. Counsel for the Respondent further clarified that security officials had no involvement in the decision to remove the Petitioner and that there was no security objection to revoking the removal. However, this position did not express consent to grant Petitioner 2 status in Israel, a matter to which security officials have objected in the past and was not at issue in this petition. Despite the aforesaid, the Respondent maintained his position that

Petitioner 2 must not be allowed to enter Israel as he had no right to do so given the fact that he refrained from challenging the decision given in the appeal he had filed.

9. The petition must be accepted.

10. Sec. 13.10 of the Entry into Israel Law stipulates a particular arrangement with respect to removing residents of the Palestinian Authority, or the Area who are illegally present in Israel or present in the country in breach of the terms of the permit they were granted. This is an arrangement stipulated in statute, not in directives or regulations. According to this arrangement, only a police officer holding the rank of chief inspector who has been authorized by the police commissioner for this purpose, or a border control official may order the removal of such person from Israel. The order must be given in writing and the issuer must hold a hearing and record the statements of the resident and the grounds for the decision. In effect, the Respondent does not dispute that not one of these provisions was followed. The police officer who detained Petitioner 2 and ordered him to leave the country held the rank of staff sergeant major. The order was not issued in writing and, it follows, the grounds for it were not specified. Indeed, the Respondent [*sic*] was given an opportunity to present his arguments during his questioning by the same police officer with respect to his illegal presence in the country, but no hearing was held before the competent official as required by law.

    I do not see eye to eye with the Respondent that these are "procedural" or "technical flaws", as he puts it. These statutory provisions were designed to ensure that the discretion to remove a resident of the area of the Palestinian Authority is exercised by an official who was specifically authorized to do so and who holds a rank that is senior enough. The obligation to hold a hearing and provide a decision stating the grounds thereto in writing also ensures discretion is exercised in an appropriate manner. The flaws in the procedure used in the case of Petitioner 2 were material and related to the fundamental characteristics of the procedure. In fact, no procedure took place, but rather simply the collection of a statement with respect to suspected illegal presence and a removal from the country without any review of the Petitioner's arguments. It is not unreasonable to assume that the competent official would have held the position that any removal from the country should be postponed until these claims were clarified. My conclusion is that the police staff sergeant major made the decision *ultra vires* and in breach of statutory provisions and that it is therefore void.

    This conclusion is reinforced in view of Respondent's notice that there is no security impediment to revoking the Petitioner's removal and that such considerations never formed the basis for the removal.

11. It appears that the law is with the Petitioner also with respect to his claim that no pertinent decision was made in his appeal. On reading the July 2009 letter, it is clear beyond any doubt that no one considered the arguments Petitioner made in the appeal, as all the letter states is that the appeal had been transferred to the person who signed the letter and that the security information on which the refusal was based could not be divulged. The Respondent has sent no letter making any relevant reference to the arguments made in the appeal. Therefore, even if counsel for the Petitioner initially thought that the letter was a denial of the appeal, indeed, its content clearly indicates that it is not and as such, the appeal remains pending before the competent official at the Ministry of Interior to this day. Moreover, shortly after the July letter, the Supreme Court delivered its decision in **Ghabis**. Since this judgment recognizes that individuals whose family unification applications are refused for security reasons, as is the Petitioner's case, are entitled to a hearing, it is not unreasonable for the Petitioner to decide to postpone filing a challenge to the appeal and instead request a hearing pursuant to the **Ghabis** rule. Indeed, the Petitioner might assume that if he prevailed in this route, the challenge would become moot. The Petitioner did not receive a response to his request for a

hearing until after he was removed from Israel. Since the nature of this response is not at issue in this petition, I shall not address it. Indeed, on the face of it, the Respondent is correct in claiming that the application for reconsideration does not, in and of itself, justify postponing removal from the country. Indeed, if this were not the case, a person could remain in Israel indefinitely contrary to a decision by the competent authority to deny his application for status. However, this is not the case in the circumstances under review. Once the door was opened to a hearing pursuant to the judgment of the Supreme Court, and the Petitioner sought to apply it to his matter, his request cannot be considered a "new application", particularly considering that his appeal was pending. Rather, this constitutes the exhaustion of the right to a hearing in connection with the original decision, as it had only just been discovered that the authorities must allow a hearing before issuing a refusal based on security grounds.

12. As this is the case, indeed, at the time the Petitioner was ordered to leave the country, his appeal was pending before the Respondent, as was his request to apply the **Ghabis** rule to him so that the family unification application is not refused for security reasons before the right to a hearing is exhausted. And if this is so, then according to said protocol, the Petitioner should not have been removed from Israel before a decision was given either in the appeal or in the request for a hearing.

13. The petition is thus accepted inasmuch as the Respondent must allow the Petitioner to enter Israel pending a decision in the appeal he submitted, which, as stated, has yet to be given. This statement is not to be construed as a position on the desired decision.

The Respondent will pay Petitioners' legal fees and costs to a total sum of ILS 5,000.

The secretariat will provide a copy of the judgment to parties' counsel.

Given today, 4 Sivan 5771, June 6, 2011 in the absence of the parties.

[signed]
Nava Ben Or, Judge

[i] "Territories" is a term commonly used in Israel to refer to the Occupied Palestinian Territories, translator.

[ii] "Area" is a term used in Israel to refer to the West Bank, translator.