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At the Supreme Court
Sitting as the High Court of Justice

H CJ 7832/12

In the matter of:

1. S _____ T _____, ID No. _____
Resident of the Occupied Territories
2. **HaMoked: Center for the Defence of the Individual,
founded by Dr. Lotte Salzberger**

all represented by counsel, Advocate Tal Steiner (Lic. No. 62448) and/or Hava Matras-Irron (Lic. No. 35174) and/ or Sigi Ben Ari (Lic. No. 37566) and/or Daniel Shenhar (Lic. No. 41065) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Nimrod Avigal (Lic. No. 51583) and/or Bilal Sbihat (Lic. No. 49838)

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 Petitioners

v.

1. **Military Commander of the West Bank**
2. **Coordinator of Government Activities in the Territories**

The Respondents

Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause:

1. Why they should not allow petitioner 1 to travel from the West Bank to the Gaza Strip, so that she would be able to take care of her sick daughter, who underwent a Hysterectomy, and to return to the West Bank as soon as the visit ends.
2. Why they should not respond to the applications submitted to them expeditiously, as required under the law and in view of the nature of the applications submitted to them.

Request for Urgent Hearing

The honorable court is requested to schedule an urgent hearing in the petition. The daughter of petitioner 1 was hospitalized due to a heavy bleeding, and had recently undergone a Hysterectomy. It should be noted that the petitioner submitted her application to visit her daughter more than a month ago, when her daughter was hospitalized and an operation was scheduled for her. Due to respondents' procrastination, the petitioner could not be beside her daughter when she was operated on, and presently she wishes to go to Gaza as soon as possible, to take care of her daughter and assist her in her recovery.

The Factual Infrastructure

The Parties

1. Petitioner 1 (hereinafter: the **petitioner**), born in 1955, is a resident of the Occupied Territories who lives in Bethlehem.
2. Petitioner's daughter, Mrs. A _____ T _____, ID No. _____ (hereinafter: the **daughter**), was born in Bethlehem, the West Bank in 1980. In 1999 the daughter married and moved to the Gaza Strip where she had five children.
3. In the beginning of September the daughter started to suffer from a heavy vaginal bleeding. On September 11, 2012 she was hospitalized in Shuhada al-Aqsa hospital in the Gaza Strip. Two weeks later she was discharged from the hospital and sent back home.

A copy of the medical record dated September 11, 2012 is attached and marked **P/1**.

4. Due to the fact that the bleeding did not stop, the daughter was hospitalized again on October 10, 2012, and on October 16, 2012 had a Hysterectomy. After hospitalization and supervision, she was discharged and sent back home on October 24, 2012.

A copy of the medical record dated October 13, 2012 is attached and marked **P/2**.

5. Naturally, the petitioner wishes to take care of her daughter who is recovering from surgery, to assist her in her recovery and help her to take care of her house and children during the recovery period. The daughter, on her part, desperately needs her mother's assistance at this time, until she recovers from the difficult operation she underwent.
6. It should be noted, that as a result of respondents' policy, which creates a separation between the Gaza Strip and the West Bank, **the petitioner did not see her daughter for thirteen years** – in fact, ever since the daughter married and moved to the Gaza Strip, and has never met her grandchildren who reside in the Gaza Strip, the eldest of whom is already eleven years old.
7. Petitioner 2 (hereinafter: **HaMoked**) is a not-for-profit association which acts to promote human rights in the Occupied Territories.
8. Respondent 1 is the military commander of the West Bank Area, on behalf of the State of Israel, which holds the West Bank under belligerent occupation for forty five years.
9. Respondent 2, the coordinator of government activities in the territories, is responsible for the implementation of the policy of Israel in the West Bank and the Gaza Strip, and is in charge, *inter alia*, of the Gaza District Coordination and Liaison Office.

Exhaustion of remedies

10. On September 12, 2012, one day after her daughter was hospitalized, the petitioner submitted to the respondents, through the Palestinian liaison office in Bethlehem, an application to travel to the Gaza Strip via Israel to visit her hospitalized daughter, and then to return to the West Bank. The above referenced medical record, marked P/1 was attached to the application.
11. On September 20, 2012, after petitioner's application remained unanswered, HaMoked wrote to the respondents, through the civil administration public liaison officer, and requested that the requested permit be issued to the petitioner without delay.

A copy of HaMoked's letter dated September 20, 2012 is attached and marked **P/3**.

12. On October 10, 2012 HaMoked received the response of the public liaison officer which stated that petitioner's application was handled by the civil administration personnel, and that she should send an updated medical record concerning her daughter's condition.

A copy of the public liaison officer's letter dated October 10, 2012 is attached and marked **P/4**.

13. On October 14, 2012, after the daughter was hospitalized for the second time, HaMoked sent an additional letter to the public liaison officer together with an updated medical record which was attached thereto concerning the daughter's condition, which stated that she was about to undergo an operation on October 16, 2012 (the above mentioned medical record P/2). The application noted that in view of the daughter's difficult medical circumstances, the respondents were requested to immediately allow the mother's passage to the Gaza Strip.

A copy of HaMoked's letter dated October 14, 2012 is attached and marked **P/5**.

14. Meanwhile the daughter underwent the Hysterectomy. The petitioner missed the opportunity to be beside her daughter when she was taken into surgery. The petitioner was very upset and she became even more eager to see her daughter as soon as possible.
15. On October 17, 2012 HaMoked's representative spoke with the public liaison officer over the phone, who told her that he could not accept the updated medical record which was attached to the application, and that the petitioner should go again to the Palestinian liaison office and submit the record in person.
16. On the following day, October 18, 2012, the petitioner went again to the Palestinian liaison office and submitted the updated medical record.

17. The days passed, and petitioner's application remained unanswered. Therefore, on October 24, 2012 HaMoked wrote again to the public liaison officer, reminded that petitioner's application was still pending and requested, for the third time, that the petitioner be issued the necessary permit that would enable her to travel to the Gaza Strip to take care of her sick daughter, who was recovering from the difficult operation she underwent.

A copy of HaMoked's letter dated October 24, 2012 is attached and marked **P/6**.

18. Almost two months passed from petitioner's first application, but despite the clear urgency of the matter, no response has yet been received.
19. Under these circumstances the petitioners have no alternative but to turn to the court.

The Legal Argument

It is a mitzvah incumbent on everyone to visit the sick - even the fortunate should visit the less fortunate. One should visit many times during the day; and the more visits the better - provided he does not become a burden. Whoever visits a sick person is deemed to have removed a portion of his sickness and relieves him; and whoever does not visit the sick is considered as if he shed blood.

(Rambam, Mishneh Torah, Hilchot Evel, Chapter 14, Halacha 6).

A. Respondents' obligation to respond to applications submitted to them expeditiously

20. The respondents, like any other administrative authority, are obligated to respond to an application expeditiously as required by law. It is a well known rule that the "obligation to act expeditiously is one of the basic principles of good governance." (I. Zamir, **The Administrative Authority** (Volume B, Nevo, 5756), 717).

And on this issue see:

H CJ 6300/93 **Institute for the Training of Women Rabbinical Advocates v. Minister of Religious Affairs**-, IsrSC 48(4) 441, 451 (1994);

H CJ 7198/93 **Mitrel Ltd. v. Minister of Industry and Commerce**, IsrSc 48(2) 844, 853 (1994);

H CJ 5931/04 **Mazurski v. The State of Israel – Ministry of Education**, IsrSc 59(3) 769, 782 (2004);

H CJ 4212/06 **Avocats Sans Frontiers v. GOC Southern Commend**, TakSC 2006(2) 4751 (2006).

21. It has already been ruled that when human rights were concerned, the concept of a "reasonable time frame" obtained a special meaning (H CJ 1999/07 **Galon v. The Governmental Commission for the Enquiry of the Events of the Lebanon Campaign 2006**, TaSC 2007(2) 551, 569 (2007));

And that in matters concerning human rights -

A more expeditious regularization of the matter is expected [...] a continued violation of human rights quite often broadens the scope of the injury and may result in the erosion of the right as well as in a severe and continued injury to the individual.

(H CJ 8060/03 **Q'adan v. Israel Land Administration**, TakSC 2006(2) 775, 780 (2006)).

And see also:

H CJ 10428/05 '**Aliwa v. Commander of IDF Forces in the West Bank**, TakSC 2006(3) 1743, 1744 (2006); H CJ 4634/04 **Physicians for Human Rights v. Minister of Public Security**, TakSC 2007(1) 1999, 2009 (2007).

22. Our case concerns a matter which requires, in particular, an expeditious response: the petitioner wishes to take care of her daughter, who underwent a difficult operation and needs her assistance and support. Initially the petitioner wanted to be beside her daughter during her first hospitalization and when she was taken into surgery, but due to respondents' foot dragging in the processing of her application – she was unable to be there.
23. The court stressed in the past, unequivocally, how gravely it regarded a conduct of procrastinations and failure to give a pertinent response by the authority:

The respondent is not entitled to treat the petitioners - similar to any other applicant - the way it does; the respondent is not entitled to leave their case pending without a pertinent response ... the respondent is not entitled to exhaust the petitioners to no avail, to cause them unnecessary costs and expenses and by so doing, to postpone the examination of their matter on its merits. And if the respondent forgot the nature of the duties entrusted upon it, then it is the court's obligation to remind it of same.

H CJ 10399/04 **Ben Abedkol v. The Ministry of the Interior**, TakSC 2005(3) 1608, 1609 (2005)).

B. The right to family life

24. The right to family life incorporates the preservation of various elements of which the family texture is composed, which include, *inter alia*, mental support and physical assistance, self realization and identity. This is generally so, and in our case, all the more so: petitioner's daughter has just underwent a difficult operation and she is expected to be discharged from the hospital and sent to her home, where she will need her mother's assistance during the recovery period. The petitioner, on her part, wishes to be beside her daughter in this time of need, to support her and take care of her, after thirteen years during which they have not seen each other.
25. The Supreme Court has emphasized time and again the great importance of the right to family life in many judgments, and especially in **Adalah**. Thus, for instance, writes the honorable President 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...

Family relations... underlie Israeli jurisprudence. The family has an essential and central role in the life of the individual and in the life of the society. Family relations, which are protected by the law and which the law seeks to develop, are of the strongest and most meaningful in a person's life.

(HCJ 7052/03 **Adalah v. Minister of Interior**, TakSC 2006(2), 1754).

And in another context 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).

26. Regulation 46 of the Hague Regulations, which constitutes international customary law, provides:

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

27. It should be emphasized that the right to family life also constitutes a fundamental right under customary international humanitarian law:

Family life must be respected as far as possible

(Henckaerts J.M. Doswald-Beck L. Customary International Humanitarian Law. Vol I: Rules. ICRC (2005). Pp. 379-383).

And see also:

Article 27 of the Fourth Geneva Convention 1949;

Article 10(1) of the International Convention on Economic, Social and Cultural Rights 1966;

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 1950.

28. The right to family life, which includes the right of parents and their children to maintain their family relations, is a recognized right under Israeli law and international law. From this right derives the obligation, which is imposed on the respondent, to respect the family relations between the petitioner and her daughter.

C. Respondents' obligation to ensure petitioners' public order and safety

29. The respondents are obligated to actively protect the rights of the residents, to ensure their public order and safety and to maintain their rights. Regulation 43 of the Hague Regulations, provides:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter **shall take all the measures in his power** to restore, and ensure, as far as possible, public order and safety... (emphasis added).

30. The obligation to ensure public order and safety and act for the needs of the population applies to all areas of civilian life:

The first clause of Regulation 43 of the Hague Regulations vests in the military administration the power and imposes upon it the duty

to restore and ensure public order and safety... The Regulation does not limit itself to a certain aspect of public order and safety. It covers all aspects of public order and safety. **Therefore, this authority – alongside security and military matters – applies also to a variety of “civilian” issues** such as, the economy, society, education, welfare, hygiene, health, transportation and other such matters to which human life in modern society is connected.

(HCJ 393/82 **Jam'iat Iscan v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 37(4) 785, 797 (1983); emphasis added).

D. Freedom of movement

31. Every person has the right to move freely in his own country. The right to free movement is the main expression of a person's autonomy, the freedom to make his own choices and the realization of his rights and capabilities. The right to free movement constitutes one of the norms of customary international law.

On this matter see:

HCJ 6358/05 **Vaanunu v. GOC Home Front Command**, TakSC 2006(1) 320, paragraph 10 (2006);

HCJ 1890/03 **Bethlehem Municipality v. State of Israel**, TakSC 2005(1) 1114, paragraph 15 (2005);

HCJ 3914/92 **Lev v. Regional Rabbinical Court**, TakSC 94(1) 1139, 1147.

32. The right to freedom of movement is the engine which drives the entire body of a person's rights, the engine which enables a person to realize his autonomy, his choices. When the freedom of movement is limited, that “engine” is damaged, as a result of which certain opportunities and rights a person has cease to exist. His human dignity is infringed. Hence, the great importance attributed to the freedom of movement.
33. When a person's right to move in the area of the state or authority in which he lives is limited, his social life is injured, his cultural life and human rights are violated, his freedom of choice is impinged. Such a person is limited in the most material aspects of his life: where he shall reside, with whom will he share his life, where will his children study, where he will receive medical treatment, who will be his friends, where he will work, what will be his profession and where will he pray.
34. The right to free movement is also entrenched in the international humanitarian law. The fourth Geneva Convention establishes the freedom of movement as a fundamental right of protected persons, either in the occupied territory or in the territory of the occupying state. Article 27 of the Convention provides that protected persons are entitled, in all circumstances, to respect for their persons and their honor.
35. It is also important to take note of Articles 41-43 (which apply to the territory of the state which is involved in the conflict) and Article 78 (which applies to the occupied territory). These Articles concern limitation of freedom, by detention or assigned residence. These are strict measures and they must be used strictly. To teach you, that the right of protected persons to free movement under all other circumstances was of the utmost importance to the member states.

Only where there is, in general, an obligation to respect the freedom of movement, it is necessary to establish explicit and strict rules for its restriction:

Article 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person whose residence is being assigned and also a source for the possibility of restricting this right. This can be seen, *inter alia*, in the provisions of Article 78 of the Fourth Geneva Convention itself which determines that the measures stipulated therein are the measures that the occupying power (i.e., the military commander) may take "at most".

HCJ 7015/02 Ajuri v. Commander of IDF Forces in the West Bank, TakSC 2002(3), 1021, page 1027).

36. International human rights law also constitutes a binding source which enshrines the freedom of movement as a basic human right. Article 12(a) of the International Covenant on Civil and Political Rights, which was signed and ratified by Israel provides as follows:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

37. The above Article 12 is a binding source. For interpretation purposes see also Article 13 of the Universal Declaration of Human Rights and Article 2 of the fourth Protocol from 1963 of the European Convention on Human Rights.

E. The passage from the West Bank to the Gaza Strip

38. The Gaza Strip and the West Bank constitute a single legal unit. This is established in military legislation: the Proclamation on the Implementation of the Interim Agreement (Judea and Samaria), (No. 7), 5756-1995, entrenched the Interim Agreement between Israel and the PLO (the "**Oslo Accords**"), which provides – as a basic principle – that the West Bank and the Gaza Strip constitute two parts of a single territorial unit. This was also established in the judgment rendered by this honorable court (HCJ 7015/02 **Ajuri v. Commander of IDF Forces**, IsrSC 56(6) 352).
39. It should be noted that even the changes which took place in the scope of Israel's control in the Gaza Strip, did not have any bearing on the fact that these two parts constitute a single territorial unit. And indeed, there are many examples, throughout history, of states which were partly occupied, and regardless of the scope of the occupation, remained undoubtedly one single state.
40. The scope of Israel's control over the Gaza Strip and the West Bank obligates the petitioner to obtain respondents' permit. Hence, the respondents bear substantial obligations towards her. These obligations were acknowledged by this court in its judgments, and it was stipulated that Israel had special obligations applicable to the residents of the Gaza Strip. As this court ruled:

In the prevailing circumstances, the main obligations imposed on the State of Israel towards the residents of the Gaza Strip derive from the state of belligerency that exists between Israel and the Hamas organization which controls the Gaza Strip; **these obligations also derive from the scope of control exercised by the State of Israel over the border crossings between Israel and the Gaza Strip**, as well as from the situation which was created between Israel and the territory of the Gaza Strip after the years of Israeli

military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.

(HCJ 9132/07 **Al-Bassiouni v. The Prime Minister**, paragraph 12 of the judgment (not reported, January 30, 2008). Emphases added)

41. And to be precise: the petitioner does not wish to stay in Israel, but only to pass through it to visit her sick daughter due to the urgency of the circumstances imposed on her.
42. **International law recognizes the Right of Transfer/Transit which to a certain extent limits the principle of sovereignty.** A state is obligated to enable the passage of foreign residents who wish to go to another state. The right of transit exists when the passage is required (even if alternatives exist), and when it does not harm the state through which the passage is made. The passage can be made under conditions the purpose of which is to protect the legitimate interests of the state through which the passage is made.
43. The scholar Uprety points out in his book that:

Jurists over the past six decades have definitely favored the view that States whose economic life and development depend on transit can legitimately claim it.

(K. Uprety, *The Transit Regime for Landlocked States: International Law and Development Perspectives* (The World Bank, 2006), p. 29).
44. When an enclave is concerned, the right of transit has a customary force and it naturally stems from the mere existence of the enclave. The scholar Farran, bases the above, *inter alia*, on the legal principle according to which whoever grants a thing is presumed also to grant that without which the grant of the thing itself would be worthless.

(cuicumque aliquis auid concedit concedere videtur et id sine quo res ipsa non potuit)

As stated by Farran:

The law would not recognize the right of state A to a detached piece of its territory enclaved in state B's unless it was possible for state A to use that right. The existence of a right implies its exercise: without a right of free communication the rights of a state to its exclaves would be incapable of exercise and therefore nugatory. Hence there is no need for an express treaty between the two states concerned to give such a right: it is implicit in the very existence of the enclave. If a treaty is made, it may well regulate the exercise of this international way of necessity: but in its absence the right of way will still exist, for the necessity is still in being.

(d'Olivier Farran, C., *International Enclaves and the Question of State Servitudes, The International and Comparative Law Quarterly*, Vol.4, No. 2. (Apr. 1955) 294, pp. 304).

45. In his comprehensive article concerning the freedom of transit, the scholar Lauterpacht describes it as follows:

On that view, there exists in customary international law a right to free or innocent passage for purposes of trade, travel and commerce over the territory of all States – a right which derives from the fact of the existence of international community and which is a direct consequence of the interdependence of States.

(E. Lauterpacht, *Freedom of Transit in International Law, Transactions of the Grotius Society*, Vol. 44 (1958), pp. 313-356, p. 320).

46. The right of transit is conditioned, as aforesaid, on that no harm is caused to the state through which passage is made. For this end the right may be conditioned on payments of the costs involved in the mere passage; on requirements such as quarantine to prevent the spread of diseases, etc.

With respect to security considerations, Lauterpacht writes:

In terms of the problem of transit, there is room for the view that States are not entitled arbitrarily to determine that the enjoyment of a right of transit is excluded by considerations of security. What they may do is, by reference to the factor of security, to indicate one route of transit in preference to another or, possibly, to allow the use of the route subject only to certain conditions. But it must be doubted whether the discretion of the State stretches beyond this.

(*Ibid*, page 340).

47. This attitude is reflected in treaties which have established, under specific circumstances, the general principle of the right of transit. The right of transit does not cease to exist in a state of emergency or in a state of war, but it may be restricted according to the circumstances. The restriction must be as minimal as possible – both in terms of its scope and duration.
48. The above indicates that the scope of the right of transit is broader than the scope of the right of entry for stay purposes, and therefore weightier reasons are required to justify a violation thereof.

Conclusion

49. The petitioner wishes to visit her daughter, whom she has not seen for thirteen years, after the latter underwent a difficult operation. This concerns a basic realization of the right to family life.
50. Respondents' failure to give a pertinent response to petitioner's application, and the fact that the petitioner was put off repeatedly by the respondents for a long period of time, prevents petitioner's passage and violates her right to freedom of movement in her own country and the rights the exercise of which is dependent thereon, and first and foremost the right to family life.

This petition is supported by an affidavit which was signed before an attorney in the West Bank and was sent to the undersigned by fax, subject to coordination by phone. The honorable court is requested to accept this affidavit and the power of attorney which was also sent by fax, taking into consideration the objective difficulties involved in a meeting between the petitioner and her legal counsels.

In view of the above, the honorable court is hereby requested to issue an *order nisi* as requested and after hearing respondents' response, make the order absolute. In addition the court is requested to order the respondents to pay petitioners' costs and legal fees.

October 30, 2012

Tal Steiner, Advocate
Counsel to the petitioners

[File No. 74632]