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At the Supreme Court
Sitting as the High Court of Justice

HCI 6475/07

1. _____ Abu a-Laban
2. **HaMoked: Center for the Defence of the Individual,**
founded by Dr. Lotte Salzberger
represented by counsel, Adv. Abeer Jubran et al.
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **OC Southern Command**
2. **Minister of Interior**
3. **Minister of Defense**
4. **Coordinator of Government Activities in the Territories**
5. **Government of Israel**
6. **State of Israel**
represented by the State Attorney's Office
Ministry of Justice, Jerusalem
Tel: 02-6466157; Fax: 02-6467011

The Respondents

Response on behalf of the Respondents

1. In accordance with the decision of Honorable Justice Vogelman dated July 25, 2007, the Respondents hereby respectfully submit their response to the petition as follows:
2. The petition concerns the request of the Petitioner, a resident of the Gaza Strip, to travel to Egypt in order to take an exam and continue her studies.
3. In the petition it was noted that in view of the closure of the Rafah crossing, the Respondents must allow the Petitioner to travel through Israel to Allenby Bridge.
4. With respect to Rafah Crossing, it should be noted that shortly after Hamas took over the Gaza Strip, the European monitoring mission, EUBAM, which had operated at the crossing pursuant to the Agreement on Movement and Access, announced the cessation of its operation and it appears that this operation will not resume in the near future. Israel currently has no control, effective or otherwise, over Rafah Crossing, whether it is open or closed. Moreover, Egypt opposes the opening of Rafah Crossing. In this state of affairs, Israel has announced that it too opposed the opening of

Rafah in a manner that would allow unmonitored access into and out of the Gaza Strip, contrary to agreements formulated with the Palestinians after the IDF left the area in September 2005.

5. On the other hand, the solution the Respondents offer the Petitioner - and many others in her predicament, whether inside the Gaza Strip or outside it - is the Kerem Shalom crossing, located at the triple border shared by Israel, the Gaza Strip and Egypt. However, the Palestinian Authority has thus far opposed the opening of the crossing, and, at the same time, Hamas threatens to use force to stop any attempt to utilize Kerem Shalom for travel by individuals (mortar shells have been launched at the crossing over the past two weeks for this purpose).
6. Finally, with respect to the possibility of the Petitioner traveling via Israel to Allenby Bridge, the matter would require opening the Erez crossing. However, the Palestinian side of the Erez crossing is currently effectively under the control of Hamas operatives and any opening thereof puts the lives of soldiers and civilians at risk. Due to the aforesaid, the Respondents' current policy is to open Erez Crossing only in the most obvious humanitarian cases, as detailed below.
7. Moreover, inasmuch as Gaza residents have grievances with respect to their inability to travel to Egypt, the address for same is not the State of Israel, but rather Hamas, which has control of the Gaza Strip and refuses to allow its residents to leave it other than through the Rafah crossing.
8. It should be noted, at this early stage, that over the last few days, Israel, Egypt and Palestinian Authority officials have formulated an interim solution whereby some Gaza residents who have been stranded in Egypt would be permitted to enter via the Nitzana crossing and thereafter through Erez. The purpose of this solution is to relieve the pressure on the Egyptian side of the Gaza-Egypt border, where some 6,000 people seeking to return home to Gaza from Egypt are presently located. It is stressed that this remedy is temporary and not meant as a solution for all the people who are "stranded" on the Egyptian side. It is to be used only for individuals whose names have been provided to Israel by Egypt with the consent of the Palestinian Authority. It is not superfluous to note that Hamas has already announced that it would object to any attempt to have Palestinians return to the Gaza Strip in this way, including by using force.
9. The Respondents' position is that the petition must be dismissed. This position is detailed below.

The Normative Foundation

10. The premise in our matter is that the Petitioner - a Palestinian resident of the Gaza Strip - has no legal right to enter Israel and that no Palestinian resident of the Gaza Strip has a right to leave the Gaza Strip via the territory of the State of Israel.
11. The Court has ruled more than once that the State has a sovereign right to determine who may enter its gates and that the scope of the discretion the authorities have on this matter is extremely broad. This position, adopted by the Court, permeates its rulings both in the distant and more recent past (see, for example, on this issue: H CJ 482/71 **Clark v. Minister of Defense**, IsrSC 27(1) 113; H CJ 9723/01 **Levy v. Employment Service**, IsrSC 57(2), 87).

On this matter, we should like to clarify that the position of the Honorable Court is consistent with international law, as well as state practice internationally, a practice whereby every country reserves the absolute right to decide which foreign nationals will enter it and, as a rule, a country need not explain to a foreign national why it denies him entry into its territory.

As is known, the power vested in the Minister of Interior to grant permits under the Entry into Israel Law has been interpreted by this Court as involving extremely broad discretion. So the Court stated in H CJ 431/89 **Kendel Richard et al. v. Minister of Interior**, IsrSC 46(4) 505, p. 520:

According to Section 1(b) of the Entry into Israel Law "a person who is not an Israeli citizen, or does not have an *oleh*ⁱ permit or an *oleh* certificate, shall remain in Israel pursuant to a permit given under this law". The power to grant such a permit and the discretion related thereto are vested in the Minister of Interior, the Respondent. The law, and the regulations enacted pursuant thereto... do not define the criteria for granting such a permit. The Respondent has broad discretion in this matter and he has no obligation to provide the grounds for his decision." [emphasis added].

On the issue of restricting the entry of foreign nationals to Israel, the following was stated in HCJ 1031/93 **Elianne (Hava) Passero (Goldstein)**, IsrSC 49(4) 661, p. 705:

This public significance has led to the situation wherein every country places restrictions on the entry of foreign nationals into its territory and places further restrictions on those wishing to become residents or citizens. These restrictions are meant to preserve the unique culture of the residents of the country; their identity; the things they have in common and that unite them and make unique; their economic interests and public order and morality. These restrictions are of two kinds - restrictions on entry into Israel and restrictions on naturalization and settlement therein. With respect to the restrictions on entering the country, every country reserves the absolute power to control the entry of foreigners into its territory." [emphasis added]

See also the judgment given in HCJ 7277/94 **A. v. Military Governor of the Gaza Strip**, TakSC, Vol 95(2) 889, in which residents of the Gaza Strip petitioned for a permit to travel to Israel, and in which the Court ruled:

None of the Petitioners has a vested right to enter Israel in order to work therein. The decision whether or not to permit their entry into Israel for the purpose of work or for any other purpose is at the discretion of the Respondent... [emphasis added]

12. It follows that the Petitioner herein **has no right to enter Israel**, and, the Respondents will argue, the petition must be dismissed solely on this ground.
13. Moreover, it is difficult to accommodate entry by subjects of a territory ruled by an enemy from that territory into Israel, certainly when active hostilities are taking place and certainly for the purpose of academic studies.

Dismissal of the petition on the grounds that this is a diplomatic issue

14. We begin with the fact that the entry of Palestinian residents of the Gaza Strip into the territory of the State of Israel, for any reason whatsoever, and certainly for the purpose of travel abroad, is clearly a diplomatic issue.

It was so before Hamas took over the Gaza Strip about six weeks ago and it is all the more so at present.

This suffices for dismissing the petition in its entirety.

15. Note, Israel is not responsible for the fact that Hamas, which is currently in control of the Gaza Strip, does not allow Palestinians to enter and leave the Gaza Strip other than through the Rafah crossing; nor does this fact impose any obligation on Israel to allow Gaza residents to travel abroad by another route. It is superfluous to note that in these circumstances, the State of Israel is not obligated to allow Gaza resident to travel to Jordan and Egypt through Israel and the Judea and Samaria Area. Therefore, inasmuch as the Petitioners have grievances, they must address them to the entities currently in control of Gaza, including Hamas, rather than the State of Israel.

The security situation in recent weeks

16. Beyond necessity, the petition must be dismissed also on its merits, as detailed below:
17. In recent weeks, after Hamas militants took over the Erez crossing access road, the security risk at this crossing has increased significantly. Erez Crossing and the District Coordination Office (DCO) located in its vicinity have been under repeated terror attacks in recent weeks, beginning some two weeks before the Hamas military coup in the Gaza Strip.
18. From May 26, 2007 until now, some 50 mortar shells have been fired at the Erez crossing and the DCO. One of these shells hit and wounded an officer and six soldiers. Other shells have fortunately only caused property damage. About 20 of the 50 shells were fired at the area of the crossing and the DCO in five separate incidents, in the time that has passed since Hamas took control of the Gaza Strip on June 12, 2007.
19. Additionally, on June 18, 2007, armed militants entered the "sleeve" (through the access point from the Palestinian side of the crossing to the Israeli side). They fired and threw grenades at the Palestinians who were crowding together on the Palestinian side of Erez and on the IDF soldiers on its Israeli side.
20. In addition, security officials have received alerts about intentions on the part of terrorists to attack the crossing via tunnel bomb.
21. It would not be superfluous to note that the Palestinian side of the Erez crossing is currently under the effective control of a murderous terrorist organization that would not hesitate to use any opening of the crossing to try to harm or kidnap soldiers and other individuals present at the crossing.
22. Moreover, since the Palestinian police officers who staffed the Palestinian side of the crossing have abandoned it, there is now no one on the Palestinian side to monitor the Palestinians arriving at the crossing and make sure that those who do arrive are individuals who have received a permit rather than terrorists planning to perpetrate an attack on the crossing.
23. In addition, the fact that Palestinian officers have abandoned the crossing has led to a situation whereby there is no one to perform crowd control at the Palestinian side of the crossing and ensure there is no crowding that could provide cover for a terrorist.
24. With respect to the risk associated with every opening of the Erez crossing at this time, see remarks made recently in HCI 5429/07 Physicians for Human Rights v. Minister of Defense, TakSC 2007(2) 5055 (2007), as follows:

... [A]ccording to the respondents it should be recalled that - as aforesaid - each opening of the Erez Crossing entails a risk to the lives of the Israeli civilians and soldiers and recently an event occurred - for example - in which pregnant Palestinian women who were supposed to cross on a

humanitarian basis, were in fact suicide terrorists. Therefore the opening of the gate should be narrowed down to the barely essential to avoid a situation in which a certain sick person takes "let me die with..." action.

...

However, conversely, it is neither we nor the petitioners - who stand at the Erez Crossing, and are exposed to the risks of terrorism upon every opening thereof, and therefore it would be unfair and disproportionate of us to expose, by a stroke of the pen, the I.D.F. soldiers and the civilians at the crossing to the opening thereof over and above what is necessary, and this is the argument in this context.."

A copy of the judgment of the Honorable Court in HCJ 5429/07 is attached hereto and marked **R/1**.

25. Since any opening of the Erez crossing currently poses a severe risk to the safety of the soldiers and civilians who are present at the crossing, there is security justification to restrict passage through the crossing more severely than has been the practice in the past, and reduce, as much as possible, the number of times the crossing opens and the durations for which it remains open.
26. Due to the special security situation since the Hamas takeover of the Gaza Strip, the Erez crossing is currently only open to serve urgent, life-saving humanitarian cases, staff members of international organizations, Israeli spouses from "divided families" (where the other spouse lives in the Gaza Strip), a small number foreign members of the press and very few senior businessmen on whom Gaza's economy depends.
27. As argued in the petition, in this context, Israel has allowed a few residents of the Gaza Strip to travel to Jordan via Allenby Bridge. It should be noted that this was made possible only for Palestinians who have an additional foreign nationality, mostly on the basis of official requests made by foreign embassies in Israel. Additionally, after violence erupted in the Gaza Strip, Israel granted a request by the Palestinian Authority to allow about 100 Fatah members to travel to the West Bank. They later left the area to Jordan. The Respondents believe this fact illustrates that the issue is diplomatic in essence.

From the general to the particular

28. The Petitioner's request is for the Respondents to permit her to travel to Egypt. In light of the closure of the Rafah crossing, the Respondents are willing to let the Petitioner travel to Egypt via the Kerem Shalom crossing. However, **because Hamas objects** to the opening of Kerem Shalom, travel to Egypt via this route is not possible, and the Petitioner asks that she be allowed to enter Israel for the purpose of traveling to Jordan via Allenby Bridge.
29. However, the Petitioner's understandable desire to take the exam, given in Egypt, and complete her studies in that country is pitted against Israel's obligation not to put the safety of the soldiers and civilians at Erez Crossing at risk.
30. It is superfluous to note that there is no reason or cause to put the lives and safety of the civilians and soldiers in the Erez area at risk so that the Petitioner, a foreign national regarding whose education Israel currently bears no responsibility, could travel to Egypt to take the exam. As stated, inasmuch as the Petitioner has grievances with respect to harm to her education, the address for same are the entities in control of the Gaza Strip rather than the State of Israel.

31. As stated, the State of Israel has no obligation to allow the Petitioner to travel from the Gaza Strip to Egypt through its territory. Israel's readiness to let the Petitioner travel to Egypt via Kerem Shalom is extended *ex gratia* and cannot impose any further obligation upon the State.
32. Moreover, if the Petitioner's travel via Erez is approved, the principle of equality would compel the Respondents to greatly expand their current policy and significantly increase the number of cases for which the crossing is opened. In practice, considering the large number of Gaza residents wishing to exit and the large number of individuals stranded outside Gaza and wishing to enter, this would mean creating a permanent Palestinian transit route through Israeli territory.
33. As stated, for security reasons, in view of the circumstances of time and place, there is no room to allow an increase in the number of people traveling between Gaza and Israel. In fact, security reasons justify the exact opposite.
34. Moreover, there is no room, considering the security situation, to allow residents of Gaza to travel to Egypt through Israel, the West Bank and Jordan and the Petitioner is no different from many thousands of Gaza residents who, inasmuch as they have a grievance with respect to not being able to travel to Egypt, must address it to the entity currently in control of the Gaza Strip rather than to Israel.

In addition, there is clearly no intention to turn Allenby Bridge into an alternative to the Rafah crossing, such that thousands of Palestinians would travel to Egypt via Israel, the West Bank and Jordan.
35. In light of all the aforesaid, the Respondents will argue that the petition must be dismissed, absent any cause for the Honorable Court to intervene in the decision not to permit the Petitioner to enter Israel for the purpose of traveling to Egypt.

Today, 14 Av. 5767; July 29, 2007

[signed]
Danielle Marx
Assistant State Attorney

ⁱ The term Oleh means a Jewish immigrant, translator's comment.