HCJ 11120/05
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HCJ 11130/05

Petitioners in HCJ 11120/05:

1. Mr. Asama Mahmud Hamdan
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11121/05:

1. Riham Gamal Mezanan
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11122/05:

1. Hada Sliman Abu Ros
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11123/05:

1. Mohammed Musa Elrazi
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11124/05:

1. Ismail Mohammed Yihieh Adwan
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11125/05:

1. Sharf Ismail Fekawi
2. Gaza Community Mental Health Programme

3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11126/05:

1. Mohammed Kaid Abu Sif
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11128/05:

1. Mohammed Yusuf Azaiza
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11129/05:

1. Shima'a Shaban Naji
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

Petitioners in HCJ 11130/05:

1. Mohammad Ahmad Abu Riyala
2. Gaza Community Mental Health Programme
3. Bitona for Community Development
4. Gisha – The Center for Freedom of Movement

v.

1. GOC Southern Command
2. The Commander of IDF Forces in the West Bank
3. The Minister of Interior Affairs
4. The Director of the Population Registry

The Supreme Court
[July 25 2007]
Before Rubinstein, J., Hayut, J. & Y. Elon, J.

For Petitioners: Sari Bashi, Noam Peleg, Kenneth Mann

For Respondents: Gilad Shirman

Petition for an *order nisi*

JUDGMENT

Justice E. Rubinstein:

Background and Proceedings

1. This petition raises a legal and human question which, in the circumstances of the Palestinian-Israeli conflict whose solution unfortunately does not appear to be near, creates a gap between what is and what should be, the bridging of which is difficult at this time. Petitioners, who are aided by Israeli and Palestinian public petitioners, and primarily the "Gisha" registered society, are ten Palestinian residents of the Gaza Strip. The petition regards their request for passage from the West Bank, through Israel or otherwise, for the purposes of studies in the field of occupational therapy, and their desire is for their requests be examined on an individual basis. The background of the petition is, however, actually wider. In other words, the background of an applicant's desire to have his request to pass from Gaza to the West Bank for studies be examined individually, is the fact that there is no differentiation, from the point of view of equality, between petitioners and others in a similar situation, as, due to security reasons related to the war on terrorism, there is today no arrangement for passage of 16-35 year olds from Gaza, except in humanitarian circumstances, and students are considered a special "risk group" among them. *Prima facie*, the petition appears to present a simple human wish, and with it a legal question of the reasonability of the policy determining general restrictions in this area. However, the background subject, with which there is no avoiding dealing, is the conditions between Israel and the Gaza Strip (at least) which are difficult, abnormal and rife with terrorism, and the difficulty in solving dilemmas which stem from the situation in a way that will be acceptable to Israel, which is combating terrorism, and will also solve personal and human problems on a wide scale. It seems to be a no win situation.

2. In the petition – which was filed on December 1 2005 – it was argued that due to the need for occupational therapists in Gaza, scholarships were raised in 2003 for ten students to study in the Judea and Samaria area, but that the authorities did not permit their passage for security reasons. In August 2004 the same petitioners petitioned this Court in HCJ 7960/04 *Elrazi v. The IDF Forces Headquarters – The Gaza Strip* (unpublished) regarding their entry into Bethlehem, and their petition was rejected (by *Mazza, V.P., Levi, J. & Jubran, J.*), but it was stated that they may renew their requests in the future. We will yet discuss that judgment, of September 29 2004. Starting in August 2005, they indeed renewed their requests, but were informed that the policy which does not permit passage of students from the Gaza Strip to the West Bank remains effective. It was argued that there is no possibility for them to study without being present in the Judea and Samaria area (excepting certain courses which were organized in Gaza, regarding which it was argued that there is a lack of funds), and that the result is a lack of a solution for occupational therapy training, which is a nursing profession which is most needed in Gaza. On the legal plane it was argued

that the authorities' refusal to examine petitioners individually does not withstand the reasonability test, is not proportional, and violates the freedom of movement, the freedom of occupation, the right to education, and the status of Gaza and the Judea and Samaria area as one territorial unit according to the agreements between Israel and the Palestinians.

3. In respondents' preliminary response of January 19 2006, they argued *res judicata* regarding the aforementioned HCJ 7960/04. It was further argued that since the time of the annulment of the military government in Gaza, there is no vested right to passage, and that it is a foreign policy issue; finally, respondents argued security considerations and the risks of terrorism, which had increased since the previous petition.

4. Petitioners responded on March 5 2006 that the discretion of the Israeli authorities regarding passage from Gaza to the West Bank is more limited than that regarding passage to Israel, *inter alia* because Israel still has authority and responsibility toward Gaza; that it is a legal, and not just a foreign policy question; and that there is no *res judicata*, since a year and a half had gone by since the judgment in HCJ 7960/04.

5. In respondents' statement of October 29 2006, they announced that the Minister of Defense at the time had decided to continue the existing policy on this issue. It was further argued that the effective control of the area of Gaza is not in the hands of Israel, and that pinpoint and temporary operational military activity directed toward Gaza is not a sufficient basis for effective control according to international law. Furthermore, the control of the Rafah crossing is not in Israel's hands, nor does Israel control the entrance by foreigners into the Gaza Strip. The passage of time, it was argued, has only made the security risk more acute, and there is no justification to reexamine the issue.

6. Petitioners responded on October 30 2006, and presented arguments related, *inter alia*, to IDF control of the border crossings.

7. On October 31 2006, an *order nisi* was issued (by *Grunis, J., Arbel, J. & Jubran, J.*).

8. A response to the *order nisi* was submitted on March 20 2007, accompanied by the affidavits of GOC Central Command and the Head of the Operations and Liaison Division in the Unit of Coordination of Government Activities in the Territories. The *res judicata* argument was made again, and it was also argued that to the extent that there had been a change in circumstances since the judgment, it is a change that strengthens respondents' position, in light of the rise of Hamas and its takeover of Gaza. Respondents further argued the absence of a cause of action, due to the termination of the military government of Gaza since September 12 2005 (after the disengagement), and that after the disengagement plan, terrorism increased. The passage from Gaza to the Judea and Samaria area is allowed for high ranking officials in the Palestinian Authority who are not associated with Hamas, leading businesspeople and high ranking employees of international organizations, residents of the Judea and Samaria area who wish to return home, and humanitarian and exceptional medical cases – but not for 16-35 year olds, including students as a

special "risk group". Regarding the "risk profile", it was argued, based upon intelligence information, that most of the roles in terrorist activity are taken on by 16-35 year olds – especially students; and that the universities in Judea and Samaria serve as "hothouses" for growing terrorists, and that even if a person comes to study with no such intention, he his liable to be affected by his surroundings. Regarding the legal plane, the Gaza Strip – so it was argued – is not in a state of belligerent occupation, and is not in Israeli military control, whereas the territory of the Judea and Samaria area is in a state of belligerent occupation, and the responsibility for its general security, and for its surroundings and border crossings, including the Israelis in it and the effect upon the security of Israel, is Israeli responsibility. In HCJ 7052/03 *Adalah v. The Minister of Interior Affairs* (yet unpublished), *M. Cheshin, V.P.* noted the difficulty of individual examination, stating that it is as a task that cannot be implemented and may be impossible. Regarding the judgment in HCJ 7015/02 *Ajuri v. The Commander of IDF Forces in the West Bank*, 56(6) PD 352, to which petitioners referred in their argument according to which Gaza and the Judea and Samaria area should be seen as one, respondents argued that it was for the purposes of Article 78 of the Fourth Geneva Convention that the statement had been made that the Judea and Samaria area and Gaza are not "two areas foreign to each other, and rather are to be seen as one area" (*Barak, P.* at p. 370); but that it cannot be said that there is free passage between them.

9. On July 19 2007, before the hearing before us, a supplementary response was submitted, which emphasized the violent takeover of Gaza by Hamas in June 2007, a development which, as argued, deteriorated the situation. Respondents mentioned the Government Decision of June 24 2007, according to which Israel continues to work through the Chairman of the Palestinian Authority and to transfer funds and humanitarian aid, but to have no contacts with representatives of Hamas.

10. In petitioners' summary briefs of July 22 2007 it was stated that their desire now is to be allowed two months of clinical experience in the West Bank from August until October 2007, in order to complete their training as occupational therapists, so that they can assist Gazans; an objective for which there is no alternative program. It was stated that it had become more difficult to use foreign lecturers, due to the difficulty in crossing over to Egypt (in which, it was stated, five of petitioners, who left at the end of May 2007 for a seminar, are stuck). It was further argued that the very profession of occupational therapy fulfills the criteria of exceptional humanitarian cases. Petitioners once again refer the freedom of movement, the status of the Judea and Samaria area and Gaza as one territorial unit, the freedom of occupation, and the duties which Israel has, according to their argument, toward Gaza. It was further argued that it is inappropriate to demonize every Palestinian student.

11. (A) In the hearing before us, respondents' counsel noted that both sides see this case as having general implications beyond the case itself. According to respondents, there is no justification to discriminate by granting preferential treatment to petitioners, by granting their request for individual examination which is not granted to others. The situation today, and the request in the petition, are like polar opposites, due to the takeover by Hamas, and therefore, what was written in the judgment in petitioners' petition of three years ago is applicable today *a fortiori*; the security assessment is that Hamas will do all in its power to make the Judea and Samaria area a combat zone like Gaza. It was argued that petitioners belong to a risk

group of those wishing to destroy Israel, whose age range characterizes a great percentage of terrorists, and it was again stated that many of the universities serve as hothouses for terrorist organizations. Individual examination is performed in urgent medical humanitarian cases, but the period after the takeover by Hamas makes the individual examinations which were performed in the past difficult. It is also easier to enter Israel from the Judea and Samaria area than from Gaza, and that also involves a risk.

(B) Petitioners' counsel argued before us that the passage of time intensifies the problematic nature of the restrictions, in addition to the fact that there is no possibility of training occupational therapists in Gaza, nor – to our surprise – in Egypt or Jordan. It was argued that the possibility of passage from the Judea and Samaria is not only through Israel – five of petitioners request passage [from Jordan] through the Allenby Bridge.

Decision

12. The issue before us is difficult, as stated in the opening of this judgment. There is no doubt that for the sake of hope for the future and of nurturing peace, and out of respect for a para-medical nursing occupation and the possibility that occupational therapists will provide humanitarian assistance in Gaza, it is worthwhile to seek out any opening or crack which would make that possible. Ultimately, the Palestinians and Israel must live side by side. In addition, we believe in the sincerity of Petitioner no. 4 and the true public interest it represents, in the framework of which it devotes time and effort. However, despite all that, it seems that we cannot accept the petitions; the bottom line is that the situation between Israel and Gaza has deteriorated, at this time, to rock bottom, and granting an order absolute setting petitioners apart would not fit into the present difficult reality, and therefore – subject to a number of statements – we cannot accept the petitions. The Court is not detached from reality, and as *Barak, P.* stated in HCJ 2056/04 *The Beit Sourik Village Council v. The Government of Israel*, 58(5) PD 807, 861, "although we are at times in an ivory tower, that tower is located in the heart of Jerusalem, which is struck time after time by ruthless terrorism. We are aware of the killing and the destruction which the terrorism against the State and its citizens brings on its heels. As any other Israeli, we too recognize the need to defend the State and its citizens from terrorism's severe blow." The period of almost three years since the judgment in HCJ 7960/04, regarding these same petitioners, has not improved the chances of their request or the hope for peace. The rise of Hamas, and then its complete takeover of Gaza, and the apparently unexpected situation which has come about after the disengagement which is, in an understatement, complex, have not brought Gaza and the Judea and Samaria area closer together in the practical sense, nor have they brought Gaza closer to Israel, as far as relations between them are concerned, despite the fact that the geographical proximity in the past, the present and the future, is a constant. Thus, we cannot ignore that, and say to the security authorities that all is well in the world and please allow petitioners their request, when in reality, the world is very harsh. Such an approach would not be in line with the law, including the context of equality, as will be explained briefly below; nor with common sense. Nor do we see a need to hold an ex parte hearing and view classified material, as the facts are, in their entirety, familiar and known by all.

13. Petitioners and respondents expanded in their briefs regarding the legal situation today regarding the Gaza Strip and the Israeli link to it. Their positions are most polar, in other words, petitioners argue that Israel continues to be responsible despite the disengagement and the termination of the military government, and respondents argue that the disengagement was also a disengagement of legal responsibility for the territory. We shall not discuss that in detail in this judgment. It is clear that the law is not the focus of the circumstances, which are unique – *sui generis* in the full sense of the term – and thus they also call for solutions which are more practical and creative than a legal hearing in shifting sands. Even if one can deal with the serious questions of international law in such exceptional conditions, there is no need to do so at this point, and even if we were to decide those questions, it is doubtful that we would go all the way down the path upon which petitioners wish to lead us. However, in our opinion, "full" legal decision regarding the legal situation of Israel vis-à-vis Gaza at this time would be a mistake, in light of the fluidity of the situation – disengagement on the one hand, yet unavoidable military activity on the other hand, a situation of increasing and decreasing terrorism, and increasing and decreasing responses accordingly; and, of course, the internal developments among the Palestinians, between the PA and Hamas. Al these lead to a preference of the lowest common denominator of finding open doors to assist in the humanitarian area, with a pragmatic approach, not a formal and strict one. So it is in the area of health, in which, naturally, the cases are exceptional and relatively few, in which an individual examination is performed. However, when dealing with young people in large numbers, students or others, and when the data regarding terrorist activity are focused upon the young, it is difficult to sketch out an equalitarian standard regarding individual examination, yet still explain why one was singled out instead of another; that does not create "demonization" of students as proposed by petitioners.

14. We should add that we are assuming that the view of unity of Gaza and the Judea and Samaria area, in the comprehensive Palestinian context (*see* the aforementioned HCJ 7015/02 *Ajuri v. The Commander of IDF Forces in the West Bank*), still stands in principle, but is not manifest in reality, on the ground, in terms of effective, true control by the Palestinian Authority in both areas. That is not the situation at present, and thus, even if that view should be given consideration as a comprehensive world view, facing it are the security considerations raised by respondents, which are real, and make allowing passage difficult. That would be the case even were we to ignore the passage through Israel, which we cannot do in light of the ease of "reverse" passage from the Judea and Samaria area back to Israel; and indeed, it is reasonable to assume that a person who has passed from Gaza to the Judea and Samaria area and wishes to enter Israel will not run into too much difficulty.

15. We note that we do not see eye to eye with respondents regarding the claim of *res judicata* as a result of HCJ 7960/04. The "liquidity" of the issues works in both directions; that is, just as we must accept respondents' stance that the security situation has not improved and has in fact worsened as of now – and that is indeed the case – there is nothing preventing accepting petitioners' request to hear their cases once again, in the framework of the present situation. In the judgment in HCJ 7960/04 (*Mazza, V.P., Levi, J. & Jubran, J.*) it was written that:

> "We have reached the conclusion that in the difficult circumstances at present, there should be no intervention in respondent's decision. We

> are willing to assume that at least some of petitioners requested to exit to Bethlehem in order to study there, and for no other reason. However, we have been persuaded that allowing their exit from the area of the Gaza Strip involves a substantial risk to the security of the public in Israel and in the *area*. For the sake of complete discussion we note that the State's counsel clarified, in answering our question, that subject to individual examination and determining the conditions for it, respondent has no principled objection to exit by petitioners, or any of them who should desire to exit, for academic study abroad, including in Jordan or Egypt. To the extent that any of petitioners are interested in that possibility, they may contact respondent again, with the appropriate application. Hopefully, with the passage of time, those of petitioners whose sole objective is indeed to study the profession of occupational therapy may renew their application also regarding the study programs at Bethlehem University."

Prima facie, there was nothing preventing an attempt to reexamine petitioners' case again in December 2005, when this petition was filed, after the disengagement and prior to the rise of Hamas. It is not appropriate to stick close to a "strict" rule of *res judicata* in such circumstances, and the essence of the cases should be examined on the merits.

16. However, in retrospect it became apparent that on the merits, the change of circumstances which petitioners (and not only they) hoped for, actually took place, at least for the present time, in the opposite direction, and thus hearing the case is appropriate (and therefore an *order nisi* was issued) – but the result is not in favor of petitioners regarding change in circumstances. Thus, the view that stood at the foundation of the judgment in aforementioned HCJ 7052/03 *Adalah*, which indicated the difficulty of individual examination, remains standing. As mentioned, according to respondents' approach, analysis of the existing information indicates that the 16-35 age range is central to terrorist activity, and that within that age range, students take a conspicuous part in it. It seems that the strong disagreement is not on that point, but rather regards the question whether it is possible to locate those not involved in terrorism through individual examination. We do not deny that in the framework of wishes in a better world, and even without delving into the finer points of the question of said comprehensive legal responsibility, individual examination is the mechanism that reaches a more just result, as the just would not be put together with the evil. However, it raises many practical difficulties, and as mentioned by *M. Cheshin, V.P.* in the *Adalah* case (albeit on the issue of status in Israel), an arrangement of individual examination "is liable to lead to statistical chances, which are not low, of increase in acts of terrorism in Israel…". Thus, at this time, we have not found – with all good intentions – that respondents' considerations opposing such a policy suffer from extreme unreasonableness.

18. In conclusion: as mentioned, respondents determined a comprehensive security policy regarding the age range of 16-35 and regarding students. This policy, which is based upon experience and risk analysis, undergoes – so we hope – constant examination, at all times, without pause. Ultimately, considering that it is difficult to find a line differentiating between individual examination in this case and in the cases of many other young people, including students, we find no legal cause for the relief

requested by petitioners. However, we do not deny that in our opinion, to the extent that it is possible to find a way to perform individual examination, that would be appropriate and helpful (even if the situation is not identical to HCJ 5627/02 *Saif v. The Governmental Press Bureau*, 58(5) 70, 77, discussing individual examination of journalists (*see* the opinion of *Dorner, J.*)). Among the questions which, in our opinion, are worth examination at the appropriate governmental level, is the question whether there is indeed no way – as a search for balances – to establish an "exceptions committee" or another similar mechanism, that would deal individually with cases whose solution is likely to lead to positive human implications, in addition to cases, which are indubitably humanitarian, of people in need of very urgent medical care.

18. I propose to my colleagues that subject to that, we not accept the petition, and the *order nisi* be annulled. I propose that costs not be awarded.

Justice E. Hayut

I concur.

Justice Y. Elon

I concur in the conclusion reached by *Rubinstein, J.* that the petition should be rejected.

In my opinion, the reasons for rejecting the present petition are the same ones according to which this Court rejected the identical petition of these petitioners in HCJ 7960/04 on September 29 2004: that "allowing their exit from the Gaza Strip area involves a substantial risk to the security of the public in Israel and the *area*."

Albeit, at the end of the judgment of their previous petition this Court noted:

> "Hopefully, with the passage of time, those of petitioners whose sole objective is indeed to study the profession of occupational therapy may renew their application also regarding the study programs at Bethlehem University."

However, since then, and until now, the times have only changed for the worse regarding the "risk profile" discussed in that petition, intensifying "the substantial risk to the security of the public in Israel and the *area*," and especially in the area of the Gaza strip. Petitioners made no attempt whatsoever to argue before us that since the judgment the "times" had changed for the better.

The opposite is the case: all concede that the substantial risk created recently in the tumultuous Gaza Strip has significantly strengthened in recent times.

In these circumstances, I accept the essence of respondents' argument that the judgment in HCJ 7960/04 still stands, *a fortiori*, regarding the renewed petition before us now, which is on the same issue, by the same petitioners, and for the same relief.

Thus, it becomes unnecessary in my opinion to decide at this time regarding the additional examination proposed in the judgment of *Rubinstein, J.*

Decided, per the judgment of *Rubinstein, J.*

Given today, 23 Ab 5767 (August 7 2007).