HCJ 4554/14

At the Supreme Court
Sitting as the High Court of Justice

In the matter of:

1. **_____ Alawawdeh, ID No. _____**
Resident of the Occupied Palestinian Territories

2. **_____ Alawawdeh, ID No. _____**
Resident of the Occupied Palestinian Territories

3. **_____ Alawawdeh, ID No. _____**
Resident of the Occupied Palestinian Territories

4. **_____ Alawawdeh, ID No. _____**
Minor, by her parents, petitioners 3-4 *[sic]*

5. **_____ Alawawdeh, ID No. _____**
Minor, by her parents, petitioners 3-4 *[sic]*

6. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger - RA**

all represented by counsel, Adv. Tal Steiner (Lic. No. 62448) and/or Bilal Sbihat (Lic. No. 49838) and/or Hava Matras-Irron (Lic. No. 35174) and/or Sigi Ben Ari (Lic. No. 37566) and/or Anat Gonen (Lic. No. 28359) and/or Daniel Shenhar (Lic. No. 41065) and/or Noa Diamond (Lic. No. 54665) and/or Benjamin Agsteribbe (Lic. No. 58088) and/or Abir Jubran-Dakawar (Lic. No. 44346);

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.

Military Commander of the West Bank Area

By the State Attorney's Office, Ministry of Justice
29 Salah al-Din Street, Jerusalem
Telephone: 02-6466590; Fax: 02-6467011

The Respondent

Petition for *Order Nisi*

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

a. Why he should not respond to petitioners' requests, in view of the urgent circumstances of the matter;

b. Why he should not allow petitioners 1-5 to travel from the West Bank to Jordan, through Allenby Bridge, so as to enable them to return to their homes and work places in Jordan and Yemen;

c. Why he should not immediately remove the sweeping prohibition imposed on all Palestinians, residents of the Hebron district under the age of fifty, which prevents them from travelling from their country abroad;

d. Why he should not establish a mechanism which would provide a solution for cases in which a resident is required to travel abroad due to urgent humanitarian reasons;

e. Why he should not publish the order, warrant or directive pursuant to which such restrictions are imposed.

Request for Urgent Hearing

The honorable court is requested to schedule an urgent hearing in the petition. Petitioner 1 is employed as an engineer by "Arab Tech Jordanian", a company located in Yemen. Petitioner 2, the brother of petitioner 1, is employed by "Darwish-Basiso Contractors", a company located in Jordan and petitioners 3-5 are his wife and daughters. The petitioners came to the West Bank for a family vacation, but their vacation ended and now **petitioners 1-2 must return to their work places as soon as possible and without delay**. Their travel abroad is not allowed due to the general directive imposed by the respondent, according to which all residents of Hebron under the age of fifty are prohibited from travelling abroad until further notice. Therefore, the honorable court is requested to schedule a hearing as soon as possible, and, at least, order the respondent to submit his preliminary response to the petition without delay, as said response may render the hearing in the petition redundant.

The factual infrastructure

Background

1. According to publications in the Israeli media, on Thursday, June 12, 2014, three yeshiva students were abducted in the Gush Etzion area. From June 13, 2014 the security forces have been looking for them, and it is assumed that they are held in the Hebron area.

2. In retaliation for said incident, the security forces imposed a host of severe movement limitations on the Palestinian population in the Occupied Palestinian Territories (OPT), and particularly on the residents of the Hebron district. The measures which were taken include: general closure on the Hebron district; general prohibition on the travel abroad through Allenby Bridge of all residents of the Hebron district over the age of 20 and under the age of 50; closing the Erez crossing for the passage of Israelis into the Gaza Strip; freezing all visits of prisoners incarcerated in Israel, etc.

3. It should be noted that said measures were taken without the publication of any military order, warrant or directive which supports them. The only sources from which the Palestinian population, like the petitioners in the petition at hand, obtain information are the media, rumors and reports from the site, to understand what limitations were imposed, and towards whom.

The parties

4. Petitioner 1, originally a Hebron resident, was born in 1985 and is not married. Petitioner 1, who is an engineer, is employed, since 2012, by "Arab Tech Jordanian", a company located in Yemen, and lives there on a permanent basis. From 2008, petitioner 1 has been entering the West Bank on a regular basis for visitation purposes. He has last visited the West Bank in October 2013. He has never been detained or interrogated.

5. It should be noted that in 2011, when petitioner 1 was in the midst of his studies towards a bachelor's degree in civil engineering in the "Queen Arwa" university in Yemen, he was prevented by respondent's representatives from travelling abroad, based on the argument that he was "security precluded". After a petition was filed in his matter, the preclusion was lifted and the petitioner exited his country and travelled abroad with no limitation (HCJ 9301/11 **Alawawdeh et al. v. Military Commander of the West Bank Area**).

6. Petitioner 2, the brother of petitioner 1 (hereinafter collectively: the **petitioners**), also originally a Hebron resident, was born in 1980. Petitioner 2, who resides in Jordan on a permanent basis, has been employed, from 2004, as an engineer by "Darwish-Basiso Contractors", a company located in Jordan. The last time petitioner 2 has arrived to the West Bank for a family visit was in June, 2010. He has never been detained or interrogated.

7. Petitioner 3 is the wife of petitioner 2, and petitioners 4-5 are his minor daughters, who are seven years old and three years old. They live together with petitioner 2 in Jordan, and are currently staying with him in Hebron. They wish to return together with him to their home in Jordan.

8. On June 6, 2014 petitioner 1 arrived to the West Bank, and on June 9, 2014 petitioner 2 has also arrived, together with his wife and daughters, to visit their family members in Hebron. For this purpose, petitioners 1 and 2 took a vacation from their work places. Petitioner 1's vacation is about to terminate on June 26, 2014, whereas petitioner 2's vacation should have terminated on June 17, 2014, but at his request, and due to the ban which was imposed by the military on the travel of Hebron residents abroad, it was extended by a few additional days, until June 23, 2014, and has already expired.

   A copy of a confirmation of petitioner 1's vacation dates is attached and marked **P/1**.

   A copy of a confirmation of petitioner 2's vacation dates is attached and marked **P/2**.

9. Petitioner 6 (hereinafter: **HaMoked**) is a registered association situated in Jerusalem, which promotes human rights of Palestinians in the OPT.

10. The respondent is the military commander, who is in charge of the West Bank Area on behalf of the State of Israel, which has held the West Bank under belligerent occupation for forty seven years.

Ban on travel abroad in the OPT in general and recently

11. As is known, every person has the right to leave his country. It should be pointed out that the decisions of the military commander to infringe on this right in the OPT, are governed by international law, which is the sole source from which the powers of the military commander are

derived. Under this law, the military commander is obligated to protect the residents of the OPT and in particular, their right to leave the country. The limited authority of the military commander under international law to ban travelling abroad from the OPT, is subject to the existence of an imperative security reason properly balanced against the infringed rights.

12. It should be mentioned, that the military legislation in the OPT does not require any permit to travel to Jordan, and under the interim agreement as well, the ban on exit is subject to the issuance of a specific warrant by the military commander, all as will be described below.

13. Notwithstanding the above, the respondent prevents many people from leaving the OPT every year, without a signed warrant, without any time limit and without giving the person concerned a prior notice. It should be noted that only after a general petition was filed with the Supreme Court sitting as a High Court of Justice (HCJ 8155/06 **The Association for Civil Rights in Israel v. Commander of IDF Forces in Judea and Samaria**), procedures were established by the respondent which enable to check ahead of time whether a decision was made to prevent any person from going abroad, and to file an appeal against such decision.

14. As aforesaid, over the last few days the media reported of a new order of the military commander (hereinafter: the **order/directive**) completely banning the travelling abroad of Palestinians, over the age of twenty and under the age of fifty, who live in Hebron.

15. As aforesaid, the above directive has never been officially published; but an indication of its existence arose when HaMoked handled the matter of Mr. Ismail 'Arar, a researcher in "Ha'arava Institute" and a Hebron resident, who had to go abroad for studying purposes. Respondent's representatives at Allenby Bridge prevented Mr. 'Arar from going abroad based on the argument that Hebron residents were precluded from going abroad. On June 17, 2014, a letter in his matter was sent to the Coordinator of Government Activities in the Territories, in which it was requested to allow Mr. 'Arar to go abroad. In a response dated June 23, 2014, the Coordinator's public liaison officer argued that the request was denied "taking into consideration the circumstances of your client and in view of the security situation at this time". It should be noted that notwithstanding said response, the exit of the petitioner *[sic]* abroad through Allenby Bridge was eventually permitted, following the intervention of the USAID organization.

    A copy of the letter of the public liaison officer of the Coordinator of Government Activities in the Territories dated June 23, 2014, is attached and marked **P/3**.

Exhaustion of Remedies

16. On June 15, 2014, HaMoked wrote to the Prime Minister of Israel, to the Minister of Defence, to the Coordinator of Government Activities in the Territories and to the Head of the Civil Administration, and demanded to immediately remove the ban on the travel abroad which was imposed on the residents of Hebron. In addition, HaMoked protested against the fact that the directive was applied without the publication of any official warrant in that regard, and without the establishment of a mechanism which would facilitate the exit of residents abroad in urgent humanitarian cases. No response has been received to said letter until the filing date of this petition.

    A copy of HaMoked's letter dated June 15, 2014 is attached and marked **P/4**.

17. On June 23, 2014, HaMoked sent the respondent an urgent letter and requested him to immediately allow petitioners' exit abroad, in view of the fact that they should return to their work places as soon as possible. HaMoked emphasized that petitioner 1 had to return to his work place until June 28, 2014, whereas petitioner 2 should have already returned to his work place on June 23, 2014.

A copy of HaMoked's letter dated June 23, 2014 is attached and marked **P/5**.

18. As no response was received, HaMoked sent another letter to the respondent on the following day, June 24, 2014, in which it reiterated the urgency of petitioners' request, and attached documents which attested to petitioners' vacation days (the documents which are mentioned above and marked P/1, P/2). HaMoked emphasized that if no response is received by June 25, 2014, it would have to initiate legal proceedings to arrange the matter.

    A copy of HaMoked's letter dated June 24, 2014 is attached and marked **P/6**.

19. It should be noted that during said days, the 23rd and 24th of August, HaMoked's representative tried to speak with the Civil Administration public liaison officer by phone, to expedite the handling of the request – but despite her repeated attempts, she was unable to reach him by phone.

20. To date, no response was received from the respondent. In view of the fact that petitioner 2's return date to his work place has already passed, and in view of the fact that petitioner 1's return date to his work place is upcoming, and in the absence of any response on behalf of the respondent despite the urgent letters which were sent to him, the petitioners have no alternative but to turn to court.

The legal argument

A. The obligation to respond expeditiously

21. The respondent is obligated to respond to the 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:

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

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

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

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

22. It has already been ruled that when human rights were concerned, the concept of a "reasonable time frame" obtained a special meaning (HCJ 1999/07 **Gal-On v. The Governmental Commission for the Enquiry of the Events of the Lebanon Campaign 2006**, TakSC 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.
    >
    > (HCJ 8060/03 **Q'adan v. Israel Land Administration**, TakSC 2006(2) 775, 780 (2006)).

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

23. In our case, despite the great urgency of their matter, the respondent procrastinates and fails to respond to petitioners' requests.

B. The scope of the military commander's authority to ban exit from the OPT

24. As is known, on November 29, 2012 the general assembly of the United Nations decided to grant Palestine a non member observer state status in the United Nations (resolution No. A/RES/67/19).

It is clear that also after the resolution of the general assembly, the military commander continues to bear all responsibilities conferred upon him under international law, as the occupying force which controls the area.

25. Being the commander of the occupied territory, the respondent is obligated to actively protect the rights of the residents, to ensure public order and 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; T.S.).

26. 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; T.S.).

And in another matter it was held that:

> In the framework of the internalization of humanitarian laws, we emphasize that it is the duty of the military commander not only to prevent the army from harming the lives and dignity of the local residents… He also has a "positive" duty… He must protect the lives and dignity of the local residents, all subject to limitations of time and place.
>
> (HCJ 4764/04 **Physicians for Human Rights v. IDF Commander in Gaza**, IsrSC 58(5) 385, 407).

27. As has been held more than once, the respondent is the trustee of the OPT and is not the sovereign thereof. All of his authorities in the occupied territory derive from international law and are subject thereto. The respondent is obligated to act, *inter alia*, in accordance with the provisions of the international customary and humanitarian law as established in the Regulations Respecting the Laws and Customs of War on Land, annexed to the fourth Hague Convention of 1907, and in the Geneva Convention relative to the Protection of Civilian Persons in Time of War; and human rights law.

28. Clearly, the respondent does not derive his authority from the military legislation that he himself promulgates, but rather from the entire body of international law, which constitutes the sole normative basis for the exercise of his authority (HCJ 2150/07 **Abu Safiyeh v. Minister of Defense** (not reported, December 19, 2009)).

29. Therefore, the authority of the military commander to ban the exit of a protected resident from the OPT, its scope and the conditions for the exercise thereof, should be examined in view of the authorities conferred upon him under **international law**.

30. Under international law, the normative premise is that the respondent is obligated to allow residents of the OPT to leave their country. As described by the scholar Zilbershats:

> The joint application of the general laws concerning human rights and humanitarian law established by the Hague and Geneva Conventions to territories held under belligerent occupation lead to the conclusion that the right to leave the country, afforded to any person under international conventions, are also afforded to the residents of territories held under belligerent occupation, whether they are citizens of the state from which the territory was taken or not.
>
> The right to exit the country is also recognized as a customary norm under international law and therefore it becomes part of the internal law of the State of Israel. The military administration in the OPT, which is subject to the provisions of Israeli administrative law and to the provisions of international customary law, is obligated to allow the residents of the OPT to exercise this important fundamental right.
>
> (Y. Zilbershats "The Right to Leave the Country" **Mishpatim** 23 69, 86 (5744)).

31. Article 12 of the International Covenant on Civil and Political Rights, 1966 provides:

> Everyone shall be free to leave any country, including his own.

32. The authority of the military commander to limit the right of OPT residents to leave their country is premised on the Fourth Geneva Convention. Article 27 thereof, which specifies the obligations of the military commander towards protected persons in an occupied territory, provides in its final clause as follows:

> The Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

33. The interpretation given by the Red Cross to said final clause of the Article provides as follows:

> The various security measures which States might take are not specified; the Article merely lays down a general provision…
>
> What is essential is that the measures of constraint they [the States; N.A.] adopt should not affect the fundamental rights of the persons concerned. As has been seen, those rights must be respected even when measures of constraint are justified.
>
> See: http://www.icrc.org/ihl.nsf/COM/380-00032?OpenDocument

34. Article 78 of the convention defines and limits the scope of the military commander's discretion when taking security measures against protected persons.

> If the Occupying Power considers it necessary, **for imperative reasons of security**, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> (emphasis added; T.S.).

35. The right of protected persons to leave the territory is also entrenched in Article 35 of the fourth Geneva Convention (1949):

> **All protected persons who may desire to leave the territory… may be entitled to do so… The applications of such persons to leave shall be decided in accordance with regularly determined procedures and the decision shall be taken as rapidly as possible**… if any such person is refused to leave the territory he shall be entitled to have such refusal reconsidered…
>
> (emphasis added; T.S.).

36. The scholar Pictet clarifies in his interpretation that:

> It should be noted that the right to leave the territory is not in any way conditional, so that no one can be prevented from leaving as a measure of reprisals… It is therefore essential for States to safeguard the basic principle by showing moderation and only invoking these reservations when reasons of the utmost urgency so demand.
>
> (Pictet J.S. Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War. P. 235-236 (Geneva, 1958)).

37. This means that the convention authorizes the military commander to limit the freedom of the individual **only if it is required for imperative security reasons**, when properly balanced and provided that it does not infringe on his fundamental rights.

38. It should be noted that the military legislation established by the military commander **does not** regulate the authority to ban exit from the West Bank.

According to the military legislation (section 318(b) of the Order concerning Security Provisions [consolidated version](Judea and Samaria) (No. 1651), 5770-2009), if the military commander wishes to ban the exit from a certain area, he must make a general declaration of a "closed military zone" and **in addition** he must issue specific provisions consisting of a specific ban to **leave** the closed area. This means that the mere declaration of an area as a closed military zone has no meaning in and of itself, unless coupled by ancillary provisions, which specify the limitations relevant to each case. However, the military commander **did not act accordingly and did not issue a provision which bans exit from the West Bank**. As specified above, the mere general declaration of the West Bank as a "closed military zone" has no relevance whatsoever to the issue at hand.

39. The Oslo Accords either do not include provisions which authorize the military commander to ban exit from the West Bank based on a general "security" preclusion, but only under very specific circumstances, such as preclusion due to a person's arrest.

40. The new directive, which prevents the exit abroad of residents of the Hebron district who are under the age of fifty, and all other movement limitations which were recently imposed on the residents of the OPT, were not officially published, and the warrant by virtue of which they were applied was not presented.

C. <u>The obligation to publish warrants which impose movement limitations and to provide a solution for urgent humanitarian cases</u>

41. As specified above, the information concerning all of the limitations mentioned in this petition, which was obtained by the residents of the OPT, including the petitioners, as well as by HaMoked, derived from reports which were published on the media, rumors and reports from the site. The respondent did not publish any official instruction, warrant, order or directive pursuant to which said movement limitations are applied. Respondent's responsibility is to implement the policy of the state of Israel in the OPT, and the direct obligation to ensure the daily life of OPT residents is imposed on him.

42. The situation at hand is unreasonable, in view of the fact that the imposition of duties, limitations and sanctions on civilians, by virtue of unknown and secret directives, directly collides with the superior legal principle which provides that **no secret legislation should exist**, and that "secret legislation violates the fundamental principles of the rule of law and the most precious values of democracy" (as stated by Justice Barak (as then titled) in HCJ 4950/90 **Parnas v. Minister of Defence**, IsrSC 47(3) 36, 42 (1993)).

43. And relevant to our case are the words of Justice Sharshevsky which were written over fifty years ago:

> There is no law unless it was brought to the attention of the public in the manner which was established by the law itself, otherwise, chaos will be created and no one will be able to know what is permitted and what is prohibited, and accordingly, no one may be required to be a law abiding citizen and to refrain from acting contrary to the law.
>
> (HCJ 220/51 **'Aslan v. Galilee Military Commander**, IsrSC 5(2), 148 (1951)).

44. Similar comments were made by Justice H. Cohen as follows:

> Any act of legislation, and for this purpose it makes no difference whether it is primary or secondary legislation must be published in public… even if the law explicitly exempts the publication of said specific act of legislation in the official gazette. There are no secret laws in the state of Israel. When the law explicitly exempts the publication of a specific act of legislation in the official gazette, it need not be published in the official gazette, but it does not mean that it should not be published at all. Legislation which is enacted secretly and which is kept away from the public eye, is one of the identifying marks of a totalitarian regime, and does not reconcile with the rule of law.
>
> (CA 421/61 **State of Israel v. Haz**, IsrSC 16 2193, 2204 (1961)).

45. Another problem which derives from respondent's failure to publish the new movement limitations in a customary manner, is the obscurity of the situation, particularly when **urgent humanitarian cases are concerned, which require an immediate exit from the West Bank abroad**, such as exit for the purpose of urgent medical treatments; exit for the purpose of visiting infirmed family members, participation in funerals or weddings; **and exit abroad for work or studying purposes for which a strict arrival date was scheduled, like in the case at hand**. As the respondent knows, HaMoked handles dozens of cases of this kind every year, and the imposition of a sweeping movement limitation, with no time limit, renders the population helpless, having no ability to apply for the removal of the limitation at least in specific, humanitarian and urgent cases, which require the exit of OPT residents abroad.

D. An extreme and disproportionate infringement; A sweeping ban to exit without a known timeframe

46. It should be remembered that the denial of the right of an OPT resident to travel abroad, while severely infringing on his liberty and dignity as a human being, results in the petitioner being in fact imprisoned within the West Bank area for an unknown period of time. **In the case at hand, no time limit was established for the order prohibiting the exit of Hebron residents under the age of fifty from the West Bank, and its application is "from now – until further notice." To date, this directive has been in force for about two weeks**.

47. For this purpose it should be emphasized that the duration of the restriction period has a weighty significance in exercising the right to leave the country, in the sense that the right to leave is afforded to any person at any time he may wish to do so, and therefore, when the right to exit is restricted, **its legitimacy is diminished as the duration of the restriction lingers on. A restriction on the right to leave the country which is imposed for several days is not the same as a restriction which is imposed for months, years or forever**.

> As the geographic area which the restriction encompasses is larger, and the more stringent its other terms are, **and its duration is longer**, the greater the severity of the infringement becomes and weighing it against the opposing value becomes more difficult and complex (the emphases do not appear in the original).
>
> (HCJ 6358/05 **Vaanunu v. GOC Home Front Command**, TakSC 2006(1) 320, Para. 15 (2006)).

See also the comments of the scholar Yaffa Zilbershats, in her article "The Right to Leave the Country":

> The restriction imposed on the right to exit should be time-limited; since a restriction imposed on the right to leave the country for several days is not like a restriction which is imposed for months or years. How should the duration of the restriction to leave the country be determined? Firstly, **the rule that as soon as the interest no longer exists, the person should be allowed to exercise his right to leave the country should be strictly adhered to […]**
>
> In addition, **a maximum period of time should be set** beyond which one may not argue that the circumstances which justify the restriction of the right still exist. […]
>
> The limitation of the duration of the restriction imposed on the right to exit complies with the requirement of section 8 of the Basic Law: Human Dignity and Liberty, that a limitation shall not be imposed on a right to a greater extent than is required (the emphases do not appear in the original).
>
> Yaffa Zilbershats "The Right to Leave the Country" **Mishpatim** 23 69, 5754).

48. Various statutory provisions confer upon governmental officials the authority to restrict the right to leave the country. However, a time limit for such restriction runs like a golden thread through the vast majority of these statutes. Thus, regulation 348 of the Civil Procedure Regulations and Section 22(d) of the Execution Regulations, 5740-1979, provide that a stay of exit order will expire within one year from the date of its issuance.

The same rule applies when the right to leave the country is restricted for security reasons, by a stay of exit order for security reasons pursuant to regulation 6 of the Emergency Regulations (Exit from the Country), 5708-1948. While exercising judicial scrutiny over stay of exit orders pursuant to said regulation 6, the court has explicitly referred to the **time limit** set forth therein and to the period which was set for their validity, in determining whether or not the decision was proportionate (HCJ 4706/02 **Salah v. Minister of Interior**, IsrSC 56(5) 695, paragraph 11 to the judgment); HCJ 5211/04 **Vaanunu v. GOC Home Front Command**, dated July 26, 2004, paragraph 13 to the judgment).

In her article "Stay of Exit from the Country according to a Court Order", the scholar Zilbershats reviews the provisions of the law which authorize judicial instances to restrict the right to exit the country, with a special emphasis on the time limit set forth therein and the importance thereof:

> If an order is nevertheless issued, **it should be time-limited** and the necessity thereof must be re-examined by the court at reasonable intervals, or at the request of either one of the parties to the hearing at any time. The time aspect is an important factor in the exercise of the right to exit. The longer the duration of the restriction imposed on the exit is, the greater the infringement on the right becomes, and therefore, *a-priori*, the stay of exit order must be time-limited. The court which decides to extend the order at plaintiff's request, must examine whether its re-issuance complies with the standards of the proper purpose to limit the right to exit.

(Yaffa Zilbershats "Stay of Exit from the Country according to a Court Order" 12 **Mechkarey Mishpat**, 5755).

The proportionality principle, according to which any infringement of a protected right must be proportionate, is well rooted in international law, administrative law and in the Basic Law: Human Dignity and Liberty. The proportionality principle governs all statutory provisions which confer upon the authority the power to limit the right to exit, even if the specific law does not consist of an explicit provision concerning a time limitation.

> Nobody disputes the importance of the right afforded to any person to leave Israel. More than five decades ago this court held that "The freedom of movement of a citizen to and from the country is a natural right" (Justice Silberg in HCJ 111/53 **Kaufman v. Minister of Interior**, IsrSC 7 534, 536). And meanwhile – does it need mentioning? – said freedom was entrenched in the Basic Law: Human Dignity and Liberty, which provides (Section 6(a)), that "All persons are free to leave Israel". However, the Basic Law did not derogate from the authority of the Minister under said regulation 6, since the regulation was "in force prior to the commencement of the Basic Law" as provided in Section 10 of the Basic Law. However, as specified above, although the Basic Law does not affect the validity of regulation 6, it affects the interpretation thereof, and consequently – the special diligence that should be employed in connection with the exercise of such authority by the Minister of Interior, in view of the considerable weight that should be given to the right of the person who is injured by the exercise thereof (compare: the comments of my colleague, the President, which were said in a different context, in CrimApp 6654/94 **Binkin v. The State of Israel**, IsrSC 48(1) 290, 293). **The required examination is twofold: the objective of the order and its proportionality**.
>
> […]
>
> The Minister banned petitioner's exit from Israel for a limited period of twelve months. This does not mean that by the end of said period the Minister will not be able to issue against the petitioner an order which will ban his exit from Israel for an additional period. It means, that the Minister undertook to reconsider, upon the termination of the current restraining order, whether the severity of the concern that petitioner's exit from Israel may injure state security still justifies the issuance of a new restraining order.
>
> (HCJ 5211/04 **Mordechai Vaanunu et al. v. GOC Home Front Command et al**., judgment dated July 26, 2004, reported in the court's website).

49. The proportionality principle in international law provides that when international law enables a state to restrict protected rights due to an imperative need to do so, such restriction must be proportionate. This principle also applies when the state restricts the right to exit the state.

> Restrictions on the right to leave must be 'provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant'. In addition to these limitations, General Comment No. 27 requires restrictions on the right to leave to be proportionate, appropriate under the circumstances, and the 'least intrusive instrument amongst those which might achieve the desired result […] The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality.
>
> (Harvey and Barnidge "Human Rights, Free Movement, and the Right to Leave in International Law" *International Journal of Refugee Law*, Vol. 19, Issue 1, pp. 1-21, 2007).

For further reading on the proportionality principle in international law see Yuval Shani **The Principle of Proportionality under International Law** (2009), published in the website of the Israel Democracy Institute www.idi.org.il.

E. Collective punishment is prohibited

50. Ostensibly, the purpose of the new directive was to cause the location and return of three Israeli citizens who were abducted. However, it is not at all clear how this directive assists to attain this purpose: all passengers who cross Allenby Bridge are identified by travel documents, they undergo a comprehensive security check and their luggage is also inspected. It is clear that no passenger can transfer with him any of the individuals who were abducted, and therefore the directive does not serve the purpose of returning the abducted individuals. In addition, the limitation on the age of the passengers – only above fifty years of age – also seems random and arbitrary. What is the difference between a fifty one years old individual and a forty nine years old individual in this respect? Finally, it should be mentioned that the petitioners have never been detained or interrogated, and no argument was raised to the effect that their exit abroad was prevented due to any security reasons which pertained to them, but rather only due to the sweeping directive which applied to all residents of the Hebron district.

51. The sweeping limitation imposed on such a large population group, which consists of tens of thousands of individuals, the vast majority of whom probably have no connection whatsoever with the abduction, constitutes **inappropriate collective punishment**.

52. Collective punishment is prohibited by international law within the context of the laws of war as well as by international human rights law. The superior principle which prohibits the use of sweeping and arbitrary penalties which injure entire communities also constitutes an important part of international customary law.

53. In this context, Article 50 of the Hague Regulations provides as follows:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible

And Article 33 of the fourth Geneva Convention provides:

> No protected person may be punished for an offence he or she has not personally committed. **Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.** Pillage is prohibited.

54. The commentary of the Red Cross clarifies the difference between the provisions of the Hague Convention and the provisions of the fourth Geneva Convention, *inter alia*, as follows:

> The Provision is very clear. If it is compared with Article 50 of the Hague Regulations, it will be noted that that Article could be interpreted as not expressly ruling out the idea that the community might bear at least a passive responsibility.
>
> Thus, a great step forward has been taken. **Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of**.
>
> J.S. Pictet, Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War, p. 225 (Geneva, 1958).

55. It is interesting to see how Pictet explains the reason for the prohibition to use 'measures of intimidation or of terrorism', not only as a measure which is intended to protect the protected persons under belligerent occupation, but also as a prohibition which complies with the interests of the occupying power:

> During past conflicts, the infliction of collective penalties has been intended to forestall breaches of the law rather than to repress them; in resorting to intimidatory measures to terrorize the population, the belligerents hoped to prevent hostile acts. **Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be.**
>
> (Pictet, Commentary, p. 225-226).

56. Article 75(2)(d) of the First Additional Protocol of the Geneva Conventions provides that:

> (2) The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents…
>
> **(d) collective punishments.**

57. The commentary of the Red Cross on this Article clarifies that:

> 3055. **The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions**

and harassment of any sort, administrative, by police action or otherwise.

(Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. p. 874 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, Eds. ICRC, Geneva, 1987).

58. In conclusion, the limitation of the freedom of movement of hundreds of thousands of individuals, including the petitioners, whose only sin is that they are Palestinians, residents of the Hebron district under the age of fifty, constitutes collective punishment, and is therefore inappropriate.

F. The infringement on petitioner's rights

(i) The right to freedom of movement

59. The respondent prevents all Hebron residents under the age of fifty from travelling abroad. In so doing, he infringes on their basic rights to dignity and autonomy, freedom of movement and all such rights which derive from the right to freedom of movement.

60. 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 freedom of movement is limited, that "engine" is damaged, as a result of which some of the choices and rights of the person are curtailed and even cease to exist. Hence, the great importance attributed to the freedom of movement.

61. The right to free movement constitutes one of the norms of international customary law and is well rooted in Israeli jurisprudence.

On this matter see:

Article 12 of the International Covenant on Civil and Political Rights 1966;
Article 2 of Protocol 4 of the European Convention on Human Rights 1950;
Article 13 of the Universal Declaration of Human Rights 1948;
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 5016/96 **Horev v. Minister of Transportation**, IsrSC 51(4) 1 (1997).

62. A main part of the freedom of movement is a person's right to leave his country**:**

> A person's right to leave his place of residence and to return thereto is a "natural right". It is one of the fundamental rights of the individual. Restricting this right severely violates his rights.
>
> (HCJ 4706/02 **Salah v. Minister of Interior**, IsrSC 56(5) 695, 704 (2002)).

63. The remarks of the Honorable Justice Bach in **Daher** are also relevant to our case:

> Restricting the freedom of movement of a citizen, in the sense that he is prevented from leaving the country and travel to other countries, is a severe violation of the rights of the individual, and the Israeli public in

particular, for obvious and known reasons, should be sensitive to this issue.

Justice Silberg expressed this feeling by holding in HCJ 111/53 **Kaufman v. Minister of Interior et al**., IsrSC 7 534, on which my colleague, the vice president, also relied, as follows:

"A citizen's freedom to travel in and out of the country is a natural right, recognized as self-evident …"

(HCJ 448/85 **Daher v. Minister of Interior**, IsrSC 40(2) 701, 712 (1986)).

64. This right also exists in wartime, as established in Article 35 of the fourth Geneva Convention (1949):

> All **protected persons who may desire to leave the territory… may be entitled to do so… The applications of such persons to leave shall be decided in accordance with regularly determined procedures** and the decision shall be taken **as rapidly as possible**… if any such person is refused to leave the territory he shall be entitled to have such refusal reconsidered…[emphasis added]

The scholar Pictet clarified in his commentary that:

> It should be noted that the **right to leave the territory is not in any way conditional, so that no one can be prevented from leaving** as a measure of reprisals… It is therefore essential for States to safeguard the basic principal by showing moderation and **only invoking these reservations when reasons of the utmost urgency so demand** [emphasis added]
>
> (Pictet J.S. Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War, P.235-236 (Geneva,1958)).

65. The right to leave the country of residence was also recognized as a fundamental right in a considerable number of conventions and international declarations. The Universal Declaration of Human Rights (1948) in Article 13 and the Covenant on Civil and Political Rights (1966) in Article 12(2) provide that every person has the right to leave his country:

> Everyone shall be free to leave any country, including his own.

(ii) <u>The right to freedom of occupation and dignified livelihood</u>

66. As aforesaid, the petitioners request to return to their work places in Yemen and Jordan. The respondent, who prevents the petitioners from leaving their country, violates their right to freedom of occupation and dignified livelihood.

> The right to freedom of occupation enables a person to choose where to invest his human resources. This choice is affected by diverse considerations… the freedom of occupation is violated, not only when the employee is completely deprived of the right

> to chose his employer, but also when his right to chose is impinged on, even indirectly. It was so held in HCJ 5936/97 Dr. Lam v. Ministry of Education, Culture and Sports, IsrSC 43(4) 673:
>
> "… Indeed, the freedom of occupation is the freedom of the individual for self realization and for making his contribution to society by investing his efforts in an occupation, trade or profession. This freedom is violated if (normative or physical) arrangements prevent him – directly or indirectly – from exercising his wishes and capabilities."
>
> (HCJ 8111/96 **New Federation of Workers v. Israel Aerospace Industries Ltd**., IsrSC 58(6) 481, 540-541 (2004)).

67. With respect of the violation of the freedom of occupation it has been held that preventing a person from engaging in his profession should not be separated from an impingement on the manner by which an occupation is exercised:

> It should be noted that notwithstanding the ostensible existence of a conceptual distinction between the types of impingement on the freedom of occupation, in fact, the differentiation between the deprivation of occupation or an impingement on the possibility to choose an occupation and an impingement on the manner by which an occupation is exercised, is not always clear cut. Thus, for instance, it is possible that under the circumstances of a specific case the restriction imposed on the exercise of an occupation will be so broad and extensive, to the extent that its severity would be comparable to a deprivation of an occupation or the prevention of the possibility to choose an occupation. In such cases, the impingement will be examined according to a stricter standard of examination, as specified above.
>
> (HCJ 4769/95 **Menachem v. Minister of Transport**, IsrSC 57(1), 235, 259-260 (2002)).

68. Petitioner's right to make a living is well rooted in international human rights law; Article 6 of the International Covenant on Economic, Social and Cultural Rights of (1966), provides as follows:

> The right to work… includes the right of everyone to the opportunity to gain his living by work which he freely chooses and accepts… The steps to be taken by a State Party… to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

The above provisions are clarified by the commentary of the UN committee for human rights of this Article as follows:

> **The right to work contributes at the same time to the survival of the individual and to that of his/her family**, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community… The right to work, as guaranteed in the ICESCR, affirms **the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.** This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion.
>
> **(**CESCR General Comment No. 18 (2005), The Right to Work. UN Doc. E/C.12/GC/18 (Adopted on 24 November 2005)).
>
> (emphases added; T.S.)

69. The right to realize the freedom of occupation stems from the recognition that a person's work is not only a source of livelihood for the satisfaction of his basic needs of life. A person's work also satisfies the social, intellectual and personal needs of every person, and therefore constitutes an integral part of the conditions which are required for the realization of human dignity and liberty. The right to make a living is of a substantial importance, since it enables a person to realize other rights; among which notable are the right for housing, the right to education, the right to cultural life, the right to a proper quality of life, the right of association, etc.

On this issue see:

Articles 6 to 8 of the International Covenant on Economic, Social and Cultural Rights (1966);
Article 8(3)(a) of the International Covenant on Civil and Political Rights (1966);
Articles 20, 23, and 25 of the Universal Declaration of Human Rights (1948);
Article 11 of the Covenant on the Elimination of All Forms of Discrimination against Women (1979);
Article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965);
Articles 15 and 27 of the Convention on the Rights of the Child (1989);
Articles 2 and 3 of the Discrimination (Employment and Occupation) Discrimination (No. 111) of the International Labor Organization (1960);
The Convention concerning Employment Promotion and Protection against Unemployment of the International Labor Organization (No. 168) (1991);
Philadelphia Declaration of the International Labor Organization (1944);
Copenhagen Declaration and Programme of Action Adopted by the World Summit for Social Development (1995);

On the applicability of human rights law and the active duties of the occupying power in connection with the above rights issue see:

Elisabeth Mottershaw, *Economic, Social and Cultural rights in Armed Conflict: International Human Rights law and International Humanitarian law*, 12 International Journal of Human Rights 449 (2008);

Noam Lubell, Challenges in Applying Human Rights law to Armed Conflict 87 International Review of the Red Cross. 761, 761-763 (2005).

Conclusion

70. The petitioners, who live and work on a permanent basis abroad, must return to their work places and homes in Yemen and Jordan. Respondent's directive, which prevents them from leaving the West Bank, severely violates their right to freedom of movement and freedom of occupation.

71. By disregarding petitioners' urgent requests, the respondent prevents them from leaving their country in an absolute and sweeping manner. In so doing the respondent causes the petitioners to be imprisoned in their own country. Respondent's directive has no time limits, which puts the petitioners in a state of complete uncertainty.

72. The imposition of the sweeping prohibition on all residents of the Hebron district under the age of fifty, severely and disproportionately violates the right of these residents to freedom of movement, which is a fundamental protected right under Israeli law and international law. The sweeping restriction constitutes a collective punishment, and the manner by which it was brought to the attention of the OPT residents, without any official publication with respect thereto, does not satisfy the rules of administrative law.

73. HaMoked reiterates its demand to immediately remove the above described restriction; at least, HaMoked demands to publish the warrant, order or directive pursuant to which it is applied, and to find a solution for urgent humanitarian cases, which compel residents to travel from the West Bank abroad, including matters such as petitioners' matter.

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

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 powers of attorney which were also sent by fax, taking into consideration the objective difficulties involved in a meeting between the petitioners and their legal counsels.

June 26, 2014

_____
Tal Steiner, Advocate
Counsel to the petitioners

[File No. 83253]