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At the Supreme Court
Sitting as the High Court of Justice

HCJ 1838/09

_____ **Abu Rokaya et al.**
by counsel, Att. Ido Bloom et al.
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

GOC Southern Command
by the State Attorney's Office
Ministry of Justice Jerusalem
Tel: 02-6466513; Fax: 02-6467011

The Respondent

Response on behalf of the Respondent

In accordance with the decision of the Honorable Justice E. Hayut dated 26 February 2008 [*sic*], and in accordance with the request for an extension, the Respondent hereby respectfully submits his preliminary response to the petition.

1. The petition concerns the request of Petitioners 1-3, citizens and residents of Israel, who, according to the petition are representatives of human rights organizations, residents of the State of Israel, that the Honorable Court order the Respondent to appear and show cause why he will not permit them to enter the Gaza Strip. According to the petition, this entry is sought in order to "document and closely examine the humanitarian circumstances and the state of human rights in the Gaza Strip following the fighting (operation "Cast Lead"), as well as in order to urgently train field researchers on their behalf in Gaza".
2. The Respondent will argue that the petition must be rejected for reasons of lack of cause to intervene in the decision not to allow the Petitioners' entry into the Gaza Strip.

The premise, established in the Disengagement Plan Implementation Law, 5765-2005 (hereinafter - **the Disengagement Plan Implementation Law**), is that Israelis are prohibited from entering the Gaza Strip unless a permit has been granted. The Petitioners, as Israeli citizens, have no vested right

to enter the Gaza Strip. Noting the security situation in effect in the Gaza Strip, which has deteriorated in recent months, the Respondent's policy regarding entry of Israelis into the Gaza Strip is, at the present time, that Israelis be granted permits to enter the Gaza Strip only in exceptional, urgent humanitarian cases.

The Respondent is of the opinion that in the case at hand, the balance of interests between the Petitioners' desire to enter Gaza and the security consideration does not justify, at the present time, allowing their entry into the Gaza Strip. The Respondent periodically evaluates his policy in accordance with the circumstances and it is clear that if and when the circumstances change such that the aforesaid balance shifts, a change of policy will be considered.

The Respondent wishes to refer to the judgments of this Honorable Court in similar petitions concerning requests to allow Israelis to enter the Gaza Strip, in which petitions were rejected or deleted at the recommendation of the Court and noting the security situation in effect in Gaza: HCJ 10366/06 **Abu Husa v. GOC Southern Command**, *Takdin Elyon* 2006(4) 5086 (2006); HCJ 6399/07 **Ghazawi v. GOC Southern Command**, *Takdin Elyon* 2007(3) 2330 (2007) (hereinafter – **the Ghazawi case**); HCJ 8250/07 **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. GOC Southern Command** (unpublished, rendered on 10 October 2007); HCJ 9352/08 **Subiha Mqaded v. GOC Southern Command** (unpublished, rendered on 25 February 2009).

The main relevant facts

3. As stated, according to the petition, Petitioners 1-3 are representatives of Petitioner 4, B'Tselem. An inquiry with the Ministry of the Interior indicated that Petitioners 1-2 are citizens of the State of Israel and Petitioner 3 is a permanent resident of Israel.
4. As indicated in the petition, on 20 January 2009, HaMoked: Center for the Defence of the Individual contacted the Israeli Desk at the Gaza DCO requesting approval for the entry of Petitioner 1 to the Gaza Strip. This, for the purposes of "meeting with and training a field researcher for the organization". On 27 January 2009, the Petitioner's request was denied on the grounds that, at the present time, it did not meet criteria.
5. Petitioner 4, B'Tselem, contacted Minister Herzog, the minister in charge of coordinating humanitarian aid to the civilian population in the Gaza Strip, along with other organizations requesting to permit "a delegation of representatives from human rights organizations to enter ... for the purpose of collecting information...". **In this letter, which was attached as Exhibit P/2 to the petition, the organizations emphasized that "this is not a delegation of medical staff, in regards to which the executive director of PHR [Physicians for Human Rights] contacted you separately."**
6. As of 19 February 2009, a senior advisor to the minister of welfare responded to the organizations in a letter attached as an exhibit (P/5) to the petition, which stated:

"... following Minister Herzog's meeting [as should read, R.S.] with the organizations which are signatories to your letter, it has been clarified that the issue of the entry of delegations from human rights organizations is not included under the umbrella of humanitarian aid which Minister Herzog oversees.

It has also been concluded that in order to obtain permits to enter the Gaza Strip, you must contact the Defense Ministry which is entrusted

with the matter. An inquiry conducted by the Ministry with the Defense Ministry clarified that according to the directives of the GOC Southern Command, who is responsible for Gaza in terms of security, there is a strict ban on entry of organizations for reasons of personal safety.”

7. On 26 March 2009 the present petition seeking to permit Petitioners 1-3 to enter the Gaza Strip was filed.

The Respondent's Position

The Legal Foundation

8. The legal premise is that **no Israeli has a right to enter the territory of the Gaza Strip**, and that the entry of Israelis into the territory of the Gaza Strip is **prohibited** unless they receive a special permit to do so.
9. Upon the entry of the IDF into the Judea and Samaria Area and the Gaza Strip in 1967, these territories were proclaimed closed military zones. Entry into and exit out of the same required a permit from the commander of the IDF forces in the Area or a person authorized by him. Beginning in the Six Day War and until October 2000, a general entry permit allowing Israelis to enter the Gaza Strip was in force.
10. In October 2000, following the outbreak of the “Ebb and Tide” events, the commander of the IDF forces in the Gaza Strip Area proclaimed the territories of the Palestinian Council in the Gaza Strip off limits to Israelis unless they received a special permit to enter.
11. The military administration in the Gaza Strip terminated on 12 September 2005 and the Respondents no longer exercise powers under security legislation in the Gaza Strip. Today, the entry of Israelis into the territory of the Gaza Strip is prohibited pursuant to the provision of Article 24(A) of the Disengagement Plan Implementation Law which stipulates the following:

“As of the day of the evacuation of an evacuated area, no Israeli shall enter that area or remain in it except pursuant to a permit granted to him by the commander and in accordance with the terms thereof”.

Article 2 of the Disengagement Plan Implementation Law stipulates that, relevant to the Gaza Area, the “**commander**” is the GOC Southern Command (whose office today is “commander of the Southern Command”) and persons delegated by him and that an “**Israeli**”, is a person registered in the population registry in accordance with the Population Registry Act, 5725-1965. According to Article 23(e) of the Law, for the purpose of the prohibition on entering and remaining in the Gaza Strip, an “Israeli” is also anyone granted a permit to reside in Israel under the Entry into Israel Law 5712-1952, i.e. the prohibition on the entry of Israelis to the Gaza Strip applies also to permanent residents of Israel.

It shall be noted that Article 1 of the Order Implementing the Disengagement Plan (Gaza Area) 5765-2005, issued pursuant to the provision of Article 22 of the Disengagement Plan Implementation Law determines that “**the evacuated area is the entire Gaza Strip**”, and Article 2 of the Order established that “**the day of the evacuation**” is 15 August 2005.

12. The aforementioned indicates that until the day of the evacuation, according to the Disengagement Plan Implementation Law, the entry of Israelis into the territories of the Palestinian Council in Gaza was restricted under security legislation, whereas today entry is prohibited unless a permit for this

purpose is issued by the GOC Southern Command.

The Honorable Court repeatedly ruled, prior to the termination of the military administration in the Gaza Strip, that Israelis do not have a right to enter the Gaza Strip as Israelis' freedom of movement does not include the right to enter a territory which has been proclaimed a "closed zone" pursuant to security legislation.

On this issue, see para. 12 of the opinion of the Honorable President Barak in HCJ 9293/01 **Barakeh v. Minister of Defense**, *Piskey Din* 56(2) 509 (2002) (hereinafter – **the Barakeh case**). These statements are all the more relevant when the prohibition on the entry of Israelis into the Gaza Strip stems from an express provision in law.

The Respondent's policy regarding entry of Israelis to the Gaza Strip

13. According to the consistent policy over recent years, the entry of Israelis into the territories of the Palestinian Council in the Gaza Strip is generally not permitted, this due to reasons strictly relating to security.

According to common law, the security consideration is a relevant and central consideration regarding permitting Israelis to enter the area of the Palestinian Council in the Gaza Strip. This was the case before the implementation of the disengagement plan (see **the Barakeh case**) and this was the case after its implementation (see **the Ghazawi case**).

14. According to the policy established after the beginning of the "Ebb and Tide" events in October 2000, in light of the desire to consider, to the extent possible, particularly important interests, the Respondent allowed, subject to the absence of an individual security preclusion, the entry of Israelis into Gaza due to the existence of special humanitarian grounds as specified above and subject to security considerations which change periodically.
15. Due to the special security situation currently in effect in the Gaza Strip and particularly since the Hamas takeover of Gaza (a takeover which has political aspects as well), **since the summer of 2007, there has been a substantial change in Israel's policy regarding movement of people between Israel and the Gaza Strip.**

Thus, for example, movement through the Erez Crossing, is usually limited, even today, as a general rule, to humanitarian cases including mostly urgent medical cases, life saving, passage of international organizations' staff, passage of Israelis whose spouse lives in the Gaza Strip ("split family" procedure), passage of foreign journalists in small numbers and passage of a few Palestinian merchants on whom Gaza's economy depends – **and this subject to the discretion of the State of Israel which is under no obligation in this matter.**

16. Since November 2008, given the deterioration of the security situation, there has been a further tightening of the policy regarding Israelis' entry into the Gaza Strip, this in view of the disturbances which were a common event at the time and the increase of incidents of indirect fire toward Israeli territory. Today, entry of Israelis into the Gaza Strip is granted **sparsely** and in humanitarian and urgent cases.
17. The position of security officials at the present time is that entry of Israelis into the Gaza Strip and passage of Israelis between the Gaza Strip and Israel produce substantial security risks in several aspects:

18. **First**, since the Hamas takeover of the Gaza Strip, the fear of abduction of Israelis for the purpose of holding them as bargaining chips has greatly increased. The soldier Gilad Shalit was abducted and taken to the Gaza Strip in June 2006 and has been held there until now, for over two and a half years, by terrorist organizations. Military officials state that in October 2006, an Israeli citizen who entered the Gaza Strip was abducted, held and interrogated by Hamas men.

Needless to say, the abduction of an Israeli in Gaza may have severe ramifications, both on the personal level and on the national security level. Abduction of an Israeli for the purpose of holding him as a bargaining chip may cause severe harm to national security in its wider sense, even beyond the danger to the abductees themselves. These matters are clear and have been expressed in the rulings of the Honorable Court in H CJ 4764/04 **Physicians for Human Rights v. Commander of IDF Forces in Gaza**, *Piskey Din* 58(5), 385.

19. **Second**, the security risk in the vicinity of the crossings between the Gaza Strip and Israel in general and the vicinity of the Erez Crossing in particular, is real and tangible, as crossing points between Israel and Gaza are subject to repeated terrorist attacks.

Experience shows that even after achieving the truce agreement regarding the Gaza Strip and even now, following the end of operation “Cast Lead”, indirect fire is aimed from the Gaza Strip at Israeli territories.

As for the risk entailed in every opening of the Erez Crossing at the present time, see for example statements made in H CJ 5429/07 **Physicians for Human Rights v. Minister of Defense**, *Takdin Elyon* 2007(2) 5055 (2007) as follows:

“... The Petitioners claim that one must remember – as aforesaid – that every opening of the Erez Crossing involves a risk to the life of Israeli soldiers and civilians, and recently, for instance, an incident occurred where pregnant Palestinian women who were supposed to cross on humanitarian grounds, were actually suicide bombers. Therefore, opening of the gate must be restricted to essential cases only to avoid a situation where a person who is ill attempts to ‘take [Israelis at the crossing] down with him’ ...”

However, on the other hand, neither we nor the Petitioners stand at the Erez Crossing exposed to the dangers of terrorism with every opening of it, and therefore, it will be inappropriate and disproportionate on our part to expose, with a stroke of a pen, IDF soldiers and civilians in the crossing to its opening beyond what is necessary, and this is the argument in this context.

Thus see: H CJ 4328/07 **Fatuh v. Commander of the Southern Area**, *Takdin Elyon* 2007(3) 1706 (2007); H CJ 6475/07 **Abu Laban v GOC Southern Command** *Takdin Elyon* 2007 (3) 2384 (2007);

See also H CJ 4258/08 Gisha: Legal Center for Freedom of Movement v. Minister of Defense, *Takdin Elyon* 2008(2) 3469 (2008) regarding the passage of goods and fuel to the Gaza Strip:

“However, in this context, one cannot ignore the security events – terrorist attacks and attempted terrorist attacks – which are frequently carried out and are intended to harm the crossings and the persons operating them. The heavy risk to the lives of soldiers and civilians

stationed at and operating the crossings sometimes necessitates the crossings' closure in a manner which interferes with the ability to send fuel and other goods into the Gaza Strip. In the context of the balance required as a result of the State's duty to allow passage of fuel through the crossings, as required in our judgment and its duty to protect the lives of its civilians and soldiers, the State must not be obligated to take upon itself to open the crossing and supply fuel in a situation that causes a real risk to human life".

As any opening of the Erez Crossing puts the safety of the soldiers and civilians present therein at risk even today, indeed there is a security justification to severely restricting movement through the crossing as compared to the practice in the past and limit, as much as possible, the times the crossing actually opens and actual opening times. Additionally, there are security alerts regarding strong motivation among terrorist organizations to abduct more soldiers, and it is clear that extensive opening of the crossings is dangerous from this aspect too.

20. **Third**, there is a real concern that attempts will be made to enlist Israeli citizens and residents to the various terrorist organizations, whether with the Israelis' knowledge or by fooling them. The aforementioned is doubly true considering the current security situation, after the Hamas takeover of Gaza, and the intelligence assessment regarding the existence of an extremely strong motivation on the part of Palestinian terrorist organizations in the Gaza Strip to perpetrate severe terrorist attacks in Israel.

The fact that the exit of Gaza residents in general and their exit to Israel in particular is very limited at this time, makes recruiting Israeli residents and citizens who enter Gaza particularly attractive to terrorists.

We shall emphasize that such use of Israeli citizens does not necessarily have to take place with the Israeli's knowledge. There are various ways to use Israeli citizens and residents for the purpose of terrorism without their knowledge and, it follows, without their consent.

21. The Respondent wishes to refer to the statements of Honorable Justice Levy in his judgment in HCJ 9352/08 **Mqaded v. GOC Southern Command** (unpublished, rendered on 25 February 2009), in which the petition was rejected inasmuch as permitting Israelis to enter the Gaza Strip. The judgment ruled as follows:

"... the Petitioners request that they be permitted to enter the Gaza Strip to visit their daughter and grandchildren as well as to try to reconcile between their daughter and her husband.
... we believe that the Petitioners' plight is real, however, **we cannot assist them in light of the current security situation in effect around the Gaza Strip. The opening of the crossings at such a time involves taking risks with many people's lives and therefore, we have been convinced that the refusal of military officials to allow the Petitioners' passage into the Gaza Strip is reasonable**".

R/1 attached is the judgment rendered by the Supreme Court in HCJ 9352/08 and marked **R/1**.

From the general to the particular

22. As indicated by the petition, Petitioners 1-3 seek a permit to enter the Gaza Strip in order to “document and closely examine the humanitarian circumstances and the state of human rights in the Gaza Strip following the fighting (operation “Cast Lead”).

However, as stated, facing the Petitioners’ desire to enter the Gaza Strip for this purpose is the State’s duty not to put the safety of the Petitioners themselves at risk, its duty not to put the safety and security of the soldiers and civilians at the Erez Crossing at risk, and its duty not to put national security in its wider sense at risk (compare, **the Barakeh case**).

The Respondent believes that in the circumstances of the matter, given the balance of interests, the Respondent’s decision not to allow the Petitioners’ entry into the Gaza Strip is a reasonable decision given the circumstances.

23. The Petitioners elaborated on the public’s right to know in their petition and even referred on this issue, to the judgment of the Honorable Court in HCJ 9910/09 [*sic*] **Foreign Press Association in Israel v. GOC Southern Command** (*Takdin Elyon* 2008(4) 4403 (2008) of 31 December 2008.

However, after this judgment was rendered, another petition by the same Petitioner was submitted – HCJ 643/09 **Foreign Press Association in Israel v. GOC Southern Command**. On 25 January 2009, this petition was decided in a judgment. The following was stated in the judgment expressly:

“Thus, the State pledged before the Court that inasmuch as passage of journalists through the Erez Crossing does not surpass the number which was the norm prior to November 2008 and if the large number of applications does not cause the crossing to impede the humanitarian needs for the purpose of which it operates, the number of journalists permitted to enter the Gaza Strip will not be restricted; **the State further emphasized that the consent was given to journalists who are foreign nationals employed as foreign correspondents in Israel and not to journalists who are citizens of the State of Israel, even if they hold an additional foreign citizenship.**

...

Given the clarifications provided and the State’s statement before us, we do not see fit to grant an *order nisi* as sought, and we instruct that the arrangement announced by the State shall remain in effect, unless the situation changes in a substantive and substantial manner necessitating the closure of the Erez Crossing for reasons of security, and we presume that these are extreme circumstances of concrete threats” (HCJ 643/09 **Foreign Press Association in Israel v. GOC Southern Command**, *Takdin Elyon* 2009(1) 946, 948 (2009)).

R/2 attached is the judgment rendered by the Supreme Court in HCJ 643/09 and marked **R/2**.

The aforementioned indicates that the State expressly informed the Court that it had no intention, at the time, to allow the entry of Israeli journalists into the Gaza Strip and the Honorable Court did not see fit to intervene in the Respondent’s decision.

It has been found that the rulings of the Honorable Court, freedom of expression, freedom of the press and the public’s right to know all referred to the Respondent’s decision regarding foreign correspondents and did not concern the balance relating to Israelis’ entry into the Gaza Strip at all. In any case, it is unclear how the Petitioners seek to rely on these findings by the Honorable Court for

the purpose of allowing their entry into Gaza in the petition at hand.

24. In any case, the Respondent's decision in the matter of the Petitioners is a result of the professional evaluation of all currently existing risks relating to Israelis' entry into the Gaza Strip, as detailed above. In the circumstances of the matter, the petition shows no cause for the Honorable Court's intervention in the Respondent's decision.

It should be emphasized again – the Petitioners have no vested right to enter the Gaza Strip. The opposite is true – the premise, which is now established in a legislative act enacted by the Knesset is that the entry of Israelis into the Gaza Strip is **prohibited**.

25. In light of the aforementioned, the Respondent shall claim that the petition must be rejected for lack of cause for the Honorable Court's intervention in the Respondent's decision not to allow the Petitioners to enter the Gaza Strip.

Today,
5 Nissan 5769
30 March 2009

[signed]
Ro'i Shweika
Assistant to the State Attorney