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At the Supreme Court **HCJ 5034/09**
Sitting as the High Court of Justice

In the matter of: _____ **Nababteh et al.**
represented by counsel, Att. Ido Bloom et al.
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.

GOC Southern Command

The Respondent

Application by Consent to Submit a Response on behalf of the Petitioners

The Honorable Court is requested to allow the Petitioners to submit a response on their behalf to the preliminary response on behalf of the Respondent dated 22 June 2009.

Counsel for the Respondent, Att. Shweika has cordially consented to the request.

The response is as follows:

1. This petition concerns the request of Petitioners 1-4 that the Respondent allow their entry into the Gaza Strip in order to participate in the weddings of the two sisters of Petitioner 1.

2. The petition was filed after the Petitioners' appeals to the Respondent were not answered for over six weeks, despite the urgency of the matter and in contravention of his legal duty.

3. In his preliminary response, the Respondent claimed that he opposed the Petitioners' entry into the Gaza Strip – this due to alleged security claims against **second degree relatives of the Petitioner**.

4. Namely, the Respondent seeks to severely infringe upon the Petitioner's dignity and liberty, restrict her right to exit Israel and enter the Gaza Strip while severely impeding her family life and her right to see her sisters and participate in their weddings, **despite an absence of any security risk emanating from the Petitioner herself – or even her immediate family!**

5. This position is disproportionate, unconstitutional and entirely incongruent with the fundamental principles of law.

The use of preventative measures which infringe on the dignity and liberty of a person who himself does not pose a risk to national security

6. When it comes to balancing the liberty and dignity of a person and security consideration, the premise is that the use of preventative measures and tools which infringe on the liberty and dignity of a person is permissible **only when he himself poses a risk to national security**.

7. The results of the balance will be different in different cases according to the extent and scope of the infringement on liberty caused by the specific preventative measure and the extent of the risk, but the basic balancing formula remains the same, and the fundamental principle remains the same. In the words of Justice Dorner:

> The military commander has broad discretion and he can choose, from among the preventive measures available to him, the most effective measure for the prevention of the risk to national security. Moreover, for the purpose of choosing this measure, the commander may also weigh considerations of general deterrence, **provided that the person himself poses a risk to national security**.
>
> (HCJ 9534/03 **Edriss v. Commander of IDF Forces in the West Bank**, *Takdin Elyon* 2003(3) 82 (2003); emphasis added).

8. In accordance with this principle, the Honorable Court has rejected outright the idea that family affiliation can constitute a presumption that a person poses a risk to national security and ruled that such a concept will create **an intolerable situation**:

> By including a family unit in the definition of the aforementioned presumption… we will find ourselves arriving at a result under which there is a presumption against all members of this family unit – children, women and toddlers – that they pose a risk to national security, by the mere fact of belonging to the family unit, an intolerable situation, all would agree.
>
> (AdmA 7750/08 **John Doe v. State of Israel** (unpublished, 23 November 2008)).

9. The Scholar Kenneth Mann has phrased the aforesaid principle as follows:

> Under the Court's jurisprudence, the essence of a preventive sanction is that it is addressed to a proven source of danger – an individual against whom evidence of dangerousness has been presented and a determination of actual dangerousness made…
>
> It must be shown that the particular person presents a risk, a risk that his or her own actions will endanger the security of the Area in the future.
>
> (K. Mann, Judicial Review Of Israeli Administrative Actions Against Terrorism: Temporary Deportation Of Palestinians From The West Bank To Gaza, Middle East Review of International Affairs, Vol. 8, No. 1

(March, 2004), p. 31)

10. The scholar, Professor Kremnitzer emphasized the central place this principle holds as a cornerstone of the rule of law and as the epicenter of human dignity:

> **The idea which rejects deliberate harm to uninvolved persons is one of the cornerstones of the rule of law in all progressive legal systems**. The idea may be phrased as follows: sanctions (whether punitive or otherwise) shall not be imposed on a person other than on the basis of his guilt or a risk emanating from him personally (this phrasing shall be referred to hereinafter as 'the personal responsibility' principle) […]
>
> In the language of the current law, this is no more and no less than the epicenter of human dignity, the very center the absence of which is impossible and therefore may not be violated.
>
> (Mordecahi Kremnitzer, "The (Il)legitimacy of Demolishing Terrorist's Homes – Comments on ruling following the judgment in Hisham Abu Dahim v. GOC Central Command", **the Israel Democracy Institute** (2009) (http://www.idi.org.il/BreakingNews/Pages/Breaking_the_News_94.aspx [in Hebrew]).

11. According to this principle, the infringement of the liberty of a person who does not personally pose a risk to national security is **necessarily disproportionate**, regardless of the degree of security risk. That is, it is not a question of a "quantitative" balance. As stated by (then) President Barak in the matter of violating a persons' liberty and dignity by way of administrative detention:

> Indeed, the transition from the administrative detention of a person from whom a danger is posed to national security to the administrative detention of a person from whom no danger is posed to national security is not a "quantitative" transition but a "qualitative" transition...
>
> The harm to liberty and dignity is so substantive and deep, that it is not to be tolerated in a liberty and dignity seeking state, even if the rationales of national security lead to undertaking such a step... My colleague, Justice Cheshin, has already discussed that as to regulation 19, of the Defence (Emergency) Regulations, 1945 the basic concept is that "every person bears the weight of his own offense and each person shall only be put to death for his own crime ... One is not to detain in administrative detention any other than one that himself poses a risk, with his own actions, to national security. This was the situation prior to the legislation of the Basic Law: Human Dignity and Liberty. This is certainly the case after this basic law was passed, and raised human dignity and liberty to a constitutional-supra-statutory level.

CrimFH 7048/97 **John Does v. Minister of Defense**, *Piskey Din* 54(1) 721, 743-744 (2000)).

12. In a similar issue, the Court ruled:

> The requirement of an individual threat for the purposes of placing someone in administrative detention **is an essential part of the protection of the constitutional right to dignity and personal liberty**...
>
> It should be noted that the individual threat to the security of the state represented by the detainee is also required by the **principles** of international humanitarian law. Thus, for example, in his interpretation of articles 42 and 78 of the Fourth Geneva Convention Pictet emphasizes... the supreme principle that **the threat is determined in accordance with the individual activity of that person**.
>
> CrimA 6659/06 John Doe v. State of Israel, (unpublished, 11 June 2008), sections 18-19 of the Honorable **President** Beinisch's opinion. Emphases added.)

13. The Court ruled that the same balancing formula applies also to infringement of a person's liberty by way of restricting his freedom of movement and right to leave the country:

> In special and exceptional circumstances, the State takes preventive measures which are intended to protect its existence, by placing barriers which make it difficult for the person to carry out his planned crime. These barriers are often expressed in the restriction of the person's liberty to **such** or other extent. Restriction of personal liberty is a weighty violation of the basic right of the individual. It is only tolerated when its necessity is proven to achieve an essential and weighty public interest.
>
> The need for a similar balance arises in our system in the context of administrative detentions… this balance assumes… that it is possible to allow – in a democratic, security and freedom-seeking state – the administrative detention of a person **who himself poses a risk to national security**… there are two reasons for this position: First, the harm of administrative detention to the liberty and dignity of a person who himself poses a threat to national security is severe… since it violates a person's liberty – which liberty is protected in Israel at the constitutional-supra-statutory level – without a trial and without a judgment.
>
> (HCJ 6358/05 **Vanunu v. GOC Home Front Command**, *Takdin Elyon* 2006(1) 320, 330 (2006). Emphases added).

14. This principle, according to which measures which restrict a person's liberty are not used other than due to a risk posed by him personally, is expressed in common law in various contexts. The rulings emphasize that this principle does not apply to punitive measures only (as in "each is to die for his own sin"), **but also to preventative measures**.

15. Thus, for example, has been stated regarding a Police Supervision Order of a person's movements and place of residence, which also restricts his right to leave the country:

> At this point it should be emphasized, to cast away any doubt, that the power, whose limits were outlined in Regulation 110, cannot be exercised in order to punish a person for his actions in the past or in order serve as a substitute for criminal proceedings. The power is preventive, i.e. prospective, and must not be used unless the same is required in order to prevent an anticipated risk…
>
> The power pursuant to Regulation 110 could not have been exercised **unless the totality of the evidence that was brought before the military commander indicated an <u>expected future risk from the petitioner</u>**, if no measures are taken to restrict his actions and prevent a considerable part of the damage expected from him…
>
> (HCJ 554/81 **Baransa v. GOC Central Command**, *Piskey Din* 36(4) 247, p. 249-250 (1982). Emphases added)

And thus regarding assigning a person's place of residence:

> It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger presented by a person whose place of residence is being assigned. The place of residence of an innocent person who does not himself present a danger may not be assigned... Likewise, one may not assign the place of residence of a person who is not innocent and did carry out acts that harmed security, when in the circumstances of the case he no longer presents any danger. Therefore, if someone carried out terrorist acts, and assigning his residence will reduce the danger that he presents, it is possible to assign his place of residence. One may not assign the place of residence of an innocent family member who did not collaborate with anyone, or of a family member who is not innocent but does not present a danger to the Area.
>
> [...]
>
> The character of the State of Israel as a democratic, freedom-seeking and liberty-seeking State implies that one may not assign the place of residence of a person unless that person himself, by his own deeds, constitutes a danger to the security of the State... It should be noted that the purpose of assigned residence is not penal. Its purpose is prevention. It is not designed to punish the person whose place of residence is assigned. It is designed to prevent him from continuing to constitute a security danger.
>
> (HCJ 7015/02 **Ajuri v. Commander** of **IDF Forces**, *td* 2002(3) 1021, 1030 (2002)).

16. The European Court of Human Rights also ruled that restricting a person's freedom of movement <u>must be carried out on the basis of evidence against this person and only due to a risk emanating from</u>

him personally – and that one may not impose restrictions and impediments on a person solely due to his familial ties:

> The Court fails to see how the mere fact that the applicant's wife was the sister of a Mafia boss, since deceased, could justify such severe measures being taken against him in the absence of any other concrete evidence to show that there was a real risk that he would offend…
>
> In conclusion, and without underestimating the threat posed by the Mafia, the Court concludes that the restrictions on the applicant's freedom of movement cannot be regarded as having been 'necessary in a democratic society.
>
> (*Labita v. Italy* (Application No. 26772/95), judgment of 6 April 2000, sect. 196-7).

17. The scholar Cole emphasized that taking various measures against a person not based in his own actions but rather on the basis of his ties and speculative concerns regarding the future (to which he refers as the "preventative paradigm"), results in a severe and fundamental breach of the principle of the rule of law and its foundations:

> Whether in the context of material support, interrogation, detention or war-making, the reventive paradigm puts tremendous pressure on the values we associate with the rule of law. Designed to place enforceable constraints on state power, the rule of law generally reserves detention, punishment and military force for those who have been shown, on the basis of sound evidence and fair procedures, to have committed some wrongful act in the past that warrants the government's response. The… 'preventive paradigm', by contrast, justifies coercive action… on the basis of speculation about future contingencies, without either the evidence or the fair processes that have generally been considered necessary before the state imposes coercive measures on human beings.
>
> When the state begins to direct highly coercive measures at individuals… based on necessarily speculative predictions about future behaviour, it inevitably leads to substantial compromises on the values associated with the rule of law – such as equality, transparency, individual culpability, fair procedures and checks and balances.
>
> David Cole, Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror', in COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 233, 249 (Bianchi & Keller eds., 2008)).

18. In fact, the only instance in which it has been legislated that one may consider a security risk emanating not only from the person himself but also from **a member of his immediate family** was with regards to the discretion of the Minister of the Interior to **grant status and citizenship in Israel**, as the issue does not concern the use of preventative measures restricting a person's liberty but the granting of special status which carries many and extensive implications.

(On the issue of the special status of the right to citizenship see for instance, HCJ 3648/97 **Stamka v. Minister of the Interior**, *Piskey Din* 53(2) 728, 790; HCJ 2597/99 **Rodriguez-Toschbeim v.**

Minister of the Interior, *Piskey Din* 59(6) 721, 756-757, HCJ 8093/03 **Artmayev v. Ministry of the Interior**, *Piskey Din* 59(4) 577, 584).

In this context, the Court noted the distinction between granting status in Israel and using a preventative measure:

> "One must bear in mind that we are concerned with the granting of legal status in Israel. This is not the use of sanctions or preventive measures against residents of the Area, such as administrative detentions and assigning place of residence… in view of their special nature, we have ruled more than once that they may be used only against a person who himself poses a security risk… not so in the case of not granting legal status in Israel to a resident of the Area.
>
> (HCJ 2028/05 **Amara v. Minister of the Interior**, *Takdin Elyon* 2006(3) 154, 159 (2006)).

It should be emphasized that in this field too, the same is done by virtue of primary and explicit legislation (Section 3d of the Citizenship and Entry into Israel Law (Temporary Order), 5763-2003), and that this legislation has been subjected to much criticism (see, for example: Guy Davidov, Yonatan Yuval, Ilan Saban and Amnon Reichman "State or Family? The Citizenship and Entry into Israel Law (Temporary Order), 5763-2003", **Mishpat Umimshal** 8 644, 686 (5765)).

However, even in this special and exceptional case it has been explicitly determined that the same applies to a risk emanating from members of the immediate family only!

19. Hence, the Respondent is not permitted to impose restrictions and impediments which infringe upon the Petitioner's liberty and dignity other than due to a risk she herself poses – all the more so when the risk is posed by second degree relatives.

20. Additionally, the Respondent seeks to uproot the principle of the presumption of innocence in claiming that the existence of a possibility that a person might be used for improper purposes without his knowledge or consent is enough to breach said person's dignity and liberty and to impose severe sanctions and restrictions.

    This definition opens a gaping window for imposing restrictions and impediments on any person. Indeed, one can say about almost anyone that he "may be used" without his knowledge or consent.

    How can such a claim be refuted?

Conclusion

21. Acceptance of the Respondent's position signifies a deliberate and extensive violation of the rights and liberty of many dozens of innocent people for no fault of their own, simply because of a distant relation.

22. The statements of Honorable Justice (as was his title at the time) Menahem Elon are relevant to this case:

> Come and see how cautious we are, and how fearful we are, not to violate, heaven forbid, any one of the various liberties… either in whole or in part, and we are strict with any person who wishes to violate the

> same, whether a certain or likely violation, and we thoroughly consider the balance of interests between these liberties-values and basic values of security, public safety and so **forth**. Indeed, human personal liberty is the father and procreator of all of these liberties. The great rule in our legal system and in the world of Judaism is that every person is innocent until convicted by law and that every person is presumed proper…
>
> A person's right to personal liberty is one of the cornerstones of Hebrew law, and a great rule thereof is that every person is presumed proper until the contrary is proven and the presumption rebutted.
>
> (Motion 15/86 **The State of Israel v. Tzur**, *Piskey Din* 40(1), 706, 713 (1986).

23. As stated in the petition, the Respondent may not cause such a severe infringement on the Petitioner's dignity and liberty and on her right to family life without any security risk emanating from her personally. Such an infringement violates the fundamental principles of law. It is disproportionate and unconstitutional.

In light of the aforesaid the Honorable Court is requested to issue an *order nisi* as sought in the petition.

25 June 2009

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Ido Bloom, Att.
Counsel for the Petitioners

[T.S. 14985]