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At the Supreme Court Sitting as the High Court of Justice

HCJ 8731/09

Before:

**Honorable Justice M. Naor
Honorable Justice E. Hayut
Honorable Justice N. Handle**

The Petitioners:

1. **Berlanti Jaris Boulous ‘Azam**
2. **Gisha - Legal Center for Freedom of Movement**

v.

The Respondent:

1. **Commander of the West Bank**
2. **Legal Advisor for the West Bank**
3. **Commander of the Gaza Strip**
4. **State of Israel**

Petition for *Order Nisi*

Session dates:

25 Cheshvan 5770 (12 November, 2009)
13 Kislev 5770 (30 November, 2009)

Representing the Petitioners:

Att. Yadin Eilam; Att. Sari Bashi; Att. Tamar Feldman

Representing the Respondents:

Att. Liora Weis-Bensky; Att. Hila Granot

Judgment

Jutsice E. Hayut

The petition at bar concerns the request of petitioner 1, who is currently in the Gaza Strip, to return to the West Bank in order to complete her academic studies at the Bethlehem University.

Background and parties' arguments

1. Petitioner 1 (hereinafter: **the petitioner**) was born in Kuwait in 1987 and entered the Gaza Strip with her family in 1990. On August 8, 2005, the petitioner left the Gaza Strip and shortly thereafter entered the West Bank and began B.A. studies in business administration and translation at the Bethlehem University. Some four years later, on October 28, 2010, in the early afternoon, the petitioner was detained (along with one other individual) for a routine inspection at the Wadi a-Nar checkpoint, near Bethlehem. The petitioner was requested by military officials to produce her ID card and an examination thereof revealed her registered address is in the Gaza Strip. As such, the petitioner was questioned in Arabic, in accordance to a form entitled "questioning of a Gaza resident who is illegally present in the West Bank and designated for return to his permanent place of residence." During the questioning, the petitioner requested to remain in the West Bank in order to complete her studies. The stay permit she presented to the military was taken from her, and, following questioning, the competent official (head of operations in the civil administration) decided to remove the petitioner to the Gaza Strip. At around 6:00PM, while the petitioner was being held at the checkpoint, a representative of petitioner 2 contacted respondent 2, the legal advisor for the West Bank, requesting to delay the transference of the petitioner to the Gaza Strip, so that he may meet with her and inquire whether she wishes to take legal action. In response, he was told on behalf of respondent 2, that the petitioner's transference to the Gaza Strip would be delayed and that she would be held in the interim at the Sharon prison, so that she is able to meet with him on the following day. Respondent 2 also instructed military officials not to remove the petitioner to the Gaza Strip. However, the instruction was not implemented and the petitioner was removed to the Gaza Strip late that night. The fact that respondent 2's instruction to delay the petitioner's transference to the Gaza Strip was not implemented became known to petitioner's counsel, as well as the representatives of petitioner 2, only on the following day, after her aforesaid transference had become a fait accompli.
2. On that same day (October 29, 2009), the petitioner and petitioner 2, Gisha - Legal Center for Freedom of Movement (hereinafter together: **the petitioners**) filed the petition at bar in conjunction with a motion for an interim order instructing the respondents to allow the petitioner to return to the West Bank. In the petition it was argued that the respondents had breached their administrative assurance given to the petitioner and her counsel to delay her transference to the Gaza Strip in order to be able to meet with counsel and examine the possibility of legal action. On the merits, the petitioners noted that the petitioner moved from the West Bank to the Gaza Strip in August 2005, through Israel pursuant to a permit (which was turned in to military officials by the petitioner) and that her presence in the West Bank over the years did not require procurement of a written permit from the respondents nor was it subject to conditions. In this context, the petitioners argued that the policy by which residents of the Gaza Strip are required to obtain a permit for remaining in the West Bank commenced only at the end of 2007 and does not apply to the petitioner who entered the West Bank in August 2005. The petitioners further argued that the respondents make no security or other allegations against the petitioner, other than the fact that her registered address is in the Gaza Strip. This alone does not justify her transference from the West Bank to the Gaza Strip. It was further argued that the petitioner is in the midst of the final semester of her studies, hence, her transference to the Gaza Strip will have made four years of academic effort come to nothing.
3. In the respondents' response to the petition and the motion for an interim order, it was argued that there is no cause for intervention in the decision to transfer the petitioner to the Gaza Strip. The respondents note that the petitioner entered the West Bank and remained there unlawfully whilst abusing the permit to enter Israel which was granted to her in August of 2005 for the purpose of a visit to Jerusalem for a few days. The respondents further noted that the presence of Gaza Strip residents in the West Bank has required and still requires the authorization of the military commander and that such permit was never granted to the petitioner. The respondents' response

also notes that in August 2005, Member of Knesset (MK) Hayim Oron submitted a request to allow the petitioner to enter the West Bank for the purpose of taking the Bethlehem University admission test. This request was denied in view of the policy practiced at the time with regards to this issue, whereby students who are residents of the Gaza Strip are not permitted to study in the West Bank. As for the petitioner's transference to the Gaza Strip before she was able to meet with counsel, the respondents argued that this was a result of an error in conveying the instruction of respondent 2 to military officials. In a supplementary notice submitted by them ahead of a hearing in the petition, the respondents further added that an inquiry into the petitioner's matter revealed that the instruction of petitioner 2 to delay her transference to the Gaza Strip was not understood by the relevant officials as binding and that in a meeting held at the office of the HCJ department head in the state attorney's office it was decided that a thorough inquiry into this matter should be performed by a high ranking military officer. The respondents also noted that in order to elucidate the relevant operational procedures a conference was held with officials from the military and civil administration, in which procedures respecting this issue were clarified. The respondents finally noted that they are troubled by the error that prevented delay of the transference, but stressed that on the merits, there is no cause for intervention in the decision to transfer.

4. Ahead of the hearing of the petition held on November 12, 2009, the petitioners submitted supplementary briefs and noted, *inter alia*, that the petitioner was transferred to the Gaza Strip without being given a proper hearing and that her right to due process had been severely compromised. In our decision of that day, we instructed, with respondents' consent, that the petitioner be given a further hearing at the Erez checkpoint which her counsel would be able to attend. Counsel would also be able to supply the respondents with written arguments. On November 24, 2009, the respondents notified that the petitioner was given a hearing on November 17, 2009 and that on November 18, 2009, her counsel provided them with written arguments. The respondents notified that the petitioner's case was reevaluated and that on November 24, 2009, a decision was made not to allow her to return to the West Bank for the following reasons: in August 2005, an application by MK Hayim Oron to allow the petitioner to enter the West Bank for the purpose of academic studies was denied; the petitioner's entry into the West Bank using a short-term permit (5 days) which allowed her entry to Jerusalem, and without an entry permit to the West Bank for the purpose of academic studies; the petitioner's illegal presence in the West Bank for four years; the fact that the petitioner has relatives in the Gaza Strip and the concern that the petitioner would settle in the West Bank at the conclusion of her studies. The respondents further noted that in the course of the hearing, the petitioner clarified that she attempted to change her address from the Gaza Strip to the West Bank during her presence therein, but that the Palestinian side informed her that the Israeli side refused to allow Palestinians to change their addresses. These statements made by the petitioner are incompatible with the arguments made by the petitioners that the petitioner's presence in the West Bank did not require obtaining a written permit from the respondents. The respondents' notice was supplemented by a public employee statement dated November 11, 2009 prepared by the civil administration in the West Bank which confirms that according to a comment entered in August 2005, MK Hayim Oron's request to allow the petitioner to arrive for the Bethlehem University admission test was refused due to the security prohibition on allowing students from Gaza to study in the West Bank.

In response to the respondents' notice, the petitioners repeated their arguments and added that during the hearing, the petitioner detailed the background for her departure from the Gaza Strip. She recounted that she contacted the Greek-Orthodox Patriarchy in August 2005 seeking assistance in obtaining a permit to enter Israel in order to go to the West Bank for the purpose of academic studies and that some time thereafter she was informed by the Patriarchy that such permit had been issued to her. The petitioner stated that she therefore believed that she had been granted a permit to enter the West Bank for the purpose of academic studies and so she did. The petitioners also noted

that the petitioner said during the hearing that she has no information regarding a request made by MK Hayim Oron on her behalf.

5. On November 30, 2009, we held a second hearing in the petition in which it was revealed that the respondents are unable to locate the petitioner's stay permit which was taken from her during the questioning at the checkpoint. Therefore, in our decision of that day, we instructed the respondents to attempt to locate the permit as well as the applications filed in the petitioner's case in 2005. On December 6, 2009, the respondents notified that the aforementioned documents had not been located but supplemented the notice with a "reprint" of the permit which indicates that the permit issued the petitioner in 2005 expressly stated that she was permitted to go to Jerusalem for "personal" purposes and for five days during August of 2005. The respondents therefore repeated their argument that the permit issued to the petitioner in 2005 did not permit her to enter the West Bank for the purpose of academic studies. The petitioners, on the other hand, noted in their response dated December 7, 2009, that the respondents' failure to locate the original permit raises doubt with respect to the factual background pertaining to the petitioner's entry into the West Bank and that this factual doubt must be interpreted in the petitioner's favor.
6. According to the policy practiced by the respondents for some time and prior to August 2005, entry of Gaza residents to the West Bank for the purpose of academic studies is not approved. This policy has been reviewed by this court in the past and no cause for intervention was found (HCJ 7960/04 **Al-Ghazi v. IDF Commander in the Gaza Strip** (unpublished, September 9, 2004) (hereinafter: **the Al-Ghazi case**); HCJ 11120/05 **Hamdan v. GOC Southern Command** (unpublished, August 7, 2007 (hereinafter: **the Hamdan case**). the petition at bar is to be reviewed in the context of this policy and the central question to be addressed is whether the special circumstances of the case at hand, i.e., the fact that the petitioner entered the West Bank four years ago for the purpose of academic studies, the fact that she is about to finish her studies and the fact that she was removed to the Gaza Strip despite an agreement to delay the removal in order for her to hold conference with her counsel necessitate a different conclusion than that reached by the court in the **Al-Ghazi** and **Hamdan** cases. I consider that the answer to this is negative.
7. Indeed, the petitioner remained in the West Bank for a long time and one should not ignore her arguments that she has only three courses left to complete her bachelor's degree. However, at the same time, one should not ignore the fact that the petitioner remained in the West Bank without a legal permit for some four years. Note well, the permit to enter Israel granted to the petitioner in August 2005 did not allow her to leave the Gaza Strip for the purpose of academic studies in the West Bank. Even if we assume, in the petitioner's favor, that the fact that the respondents failed to present us with the original permit but only a reprint thereof does create some factual haziness with respect to its content, and also if we assume that the petitioner indeed was unaware of Hayim Oron's denied request with respect to her studies in the West Bank, it does not benefit her, as the petitioner noted in the hearing held for her that the permit was granted to her for "a religious, Christian purpose" and that it was valid for five days only during August of 2005. Thus, at the time of the petitioner's departure for the West Bank in August 2005, she did not possess a permit to travel to the West Bank for the purpose of academic studies, yet she took the law into her own hands and in these circumstances there is no option but to find that the petitioner went to study in the West Bank unlawfully and that the fact of her aforesaid presence therein does not constitute sufficient grounds for allowing her to return to the West Bank now in order to complete her studies. Any other conclusion would amount to unjust preferential treatment of the petitioner as compared to other residents whose application to move to the West Bank for the purpose of academic studies was denied and who respected the decision and remained in the Gaza Strip as far as we are aware.

Indeed, the error made in the petitioner's matter due to which her transference to the Gaza Strip was not delayed despite the instruction of petitioner 2 should not have occurred, and one must not make

light of it. However, the respondents' arguments before us indicate that they are taking the issue seriously and are taking action to draw the necessary conclusions in order to prevent similar cases in future. However, as rightly argued by the respondents, this error alone cannot justify acceptance of the petition, particularly following the hearing held for the petitioner at the Erez checkpoint with counsel present and the subsequent reevaluation.

For all the above detailed reasons, I shall suggest to my colleagues to reject the petition without writ for costs.

Justice

Justice M. Naor

I concur.

Justice

Justice N. Handle

I concur.

Justice

Ordered as stated in the opinion of Justice E. Hayut.

Given today, 3 Kislev 5770 (9 December, 2009).

Justice

Justice

Justice

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