At the Supreme Court **HCJ 3546/13**
Sitting as the High Court of Justice

In the matter of:

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

2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – Registered Association**

represented by counsel, Advocate Tal Steiner (Lic. No. 62448) 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 Bilal Sbihat (Lic. No. 49838)

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 in the West Bank Area

represented by the State Attorney's Office
29 Salah a-Din St., Jerusalem
Tel: 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 allow petitioner 1 to travel from the West Bank to Jordan, via Allenby Bridge, so as to enable him to perform the rites of his religion;

b. Why he should not give notice of the exact expiration date of the prohibition which was imposed on petitioner 1's exit from the West Bank;

c. Why he should not specify the grounds for his refusal to allow petitioner 1's exit, and should not present the reasons for the refusal and the nature of the evidence supporting his refusal.

The honorable court is requested to order the respondent to respond to the petition expeditiously, in view of the infringement of petitioner 1's right, who is prevented from performing the rite of al-umrah (which may be performed until the beginning of July of this year) and in view of the significance of the time aspect, when a prohibition on travelling abroad is concerned and the manner by which the duration of the time affects the severity of the infringement of petitioner 1's rights. And as stated by the court:

> Regarding the severity of the infringement of a right - or the "proportionality" of the infringement - it is also necessary to weigh the duration of the restriction. The longer the duration of the restriction is, the greater the severity of the infringement. A restriction on the right to leave the country imposed for several days is not the same as a restriction imposed for several months or years.
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> (HCJ 4706/02 **Salah v. Minister of the Interior**, IsrSC 56(5) 695 (2002); and see also: HCJ 6358/05 **Vaanunu v. GOC Home Front Command**, TakSC 2006(1) 320, 331; and HCJ 1890/03 **Bethlehem Municipality v. The State of Israel**, TakSC 2005(1) 1114, 1127).

The Factual Background

The Parties

1. Petitioner 1 (hereinafter: the **petitioner**), resident of the Occupied Palestinian Territories (OPT), is 38 years old and resides in the village of Bal'a near Tulkarm, with his family. The petitioner is a journalist by profession, and over the last years he has been making a living from agricultural work in his village.

2. The petitioner wishes to leave his country in order to perform the rite of al-umrah. The pilgrimage to Mecca is one of the pillars of Islam. The most important rite is the pilgrimage during the Hajj period. Second to it is the al-umrah rite.

3. The al-umrah rite may be performed, religious wise, at any time of the year. However, the number of entry visas into Saudi Arabia for pilgrimage purposes is limited and restricted to certain dates. The registration for visas to Saudi Arabia will be closed this year in the beginning of July.

4. It should be noted that the last time that the petitioner has left his country was in 2007, when he also went to Mecca, to perform the Hajj.

5. It should be further noted, that the petitioner has never been arrested or interrogated by the respondent.

6. Petitioner 2 (hereinafter: **HaMoked: Center for the Defence of the Individual** or **Hamoked**) is a registered association situated in Jerusalem, which promotes human rights of Palestinians in the OPT.

7. 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 over forty five years.

Ban on travel abroad in the OPT

8. 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.

9. 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.

10. 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.

11. It should be emphasized, that respondent's procedures force OPT residents to undergo a very long, cumbersome and exhausting administrative proceeding, which does not enable the applicant to have his rights upheld, as will be explained below.

Making the decision and infringing on the rules of natural justice

12. Restricting the right of an Israeli to leave the country, for security reasons, is done in rare and extraordinary cases, by a warrant signed by the Minister of Interior, subject to a hearing, and in most cases for a period of up to six months. However, when the limitation of the right of Palestinians to leave their country is concerned, the decision is made in a totally different manner, which is inconsistent with the rules of administrative law.

13. The decision to prevent a Palestinian from leaving his country and the decision in the appeal submitted against respondent's decision to ban his exit abroad, are made secretly, by an unknown office holder, on an unknown date, without an orderly proceeding, without advising the person concerned that a decision was made in his matter, without a preliminary hearing or the right to a fair hearing.

14. According to respondent's procedures, a person who has already discovered that he was banned from leaving his country by the respondent, can submit, retroactively, a written appeal, which will be reviewed within a protracted period of **eight weeks**.

15. The procedure further provides that an additional appeal may be submitted to the respondent **only after the expiration of nine months** from the appeal submission date; a new application to travel abroad may be submitted, according to the procedure, only if a "special humanitarian need" exists.

16. One of the underlying principles of good governance is the provision of reasoned answers: in our case, the answers to appeals submitted by residents are mostly given without any reason. In the majority of cases the only answer is "banned", "ISA precluded", "precluded from exiting" etc. This and nothing more than this. It is obvious, that such answers make it impossible for a person to

contest in a serious and substantive manner respondent's decision to ban his exit from his country. As is known, "The allegations of the other party may be refuted only when they are known; a Sphinx may not be argued with" (HCJ 111/53 **Kaufman v. Minister of Interior**, IsrSC 7 534, 541 (1953)).

Lengthy processing and DCO's malfunctions

17. A person who has discovered that a decision was made to ban his exit abroad, is expected to embark on a rocky road if he wishes to appeal respondent's decision: Firstly, the records in the DCOs' computers are not updated and therefore a person who applies to the DCO must wait four days before he can check whether a decision banning his exist was indeed made. Secondly, the persons who apply to the DCOs encounter in many cases an outrageous behavior of DCO's soldiers and officers – commencing from soldiers who refuse to accept applications without any explanation or due to unfamiliarity with the procedures; shortage of forms; forms which are filled out by the soldiers, mostly in Hebrew, rather than by the OPT resident himself; refusal to accept forms filled out in Arabic; and ending with the absence of officials the presence of whom is required in order to submit applications and receive answers. Thirdly, according to respondent's procedures, he must deliver an answer in the appeals within a protracted period of time not exceeding eight weeks. In fact, in many cases, the DCOs do not meet these schedules and the applicants are forced to wait weeks and months before they receive an answer.

18. On January 10, 2012, the respondent notified that as of that date applications for information regarding the existence of an exit ban, and appeals, may be submitted by fax, through an attorney, and the answer shall be delivered to the attorney. However, in order to apply in this manner, an OPT resident must engage the services of an attorney for the purpose of sending a fax, since, absurdly, he himself is not entitled to send his own application by fax. In addition, also when the applications are made by fax, in many cases DCOs' answers are delayed for long periods of time, answers are not provided in writing, etc.

19. Another serious problem is the failure to respond to urgent cases, such as the case of an OPT resident who discovers that he is precluded from exiting only upon reaching Allenby Bridge, when he has to arrive to a certain place abroad by a certain date for a medical treatment or studying purposes.

20. Finally, it should be noted, that many Palestinians do not turn to the Israeli DCOs, since they do not know that they can check in advance whether they are precluded, or that they can appeal respondent's decision to ban their exit abroad. Some of them even prefer to waive in advance the cumbersome and exhausting proceeding which they are expected to undergo.

21. **In view of the above, one can easily imagine the built-in inferiority of an OPT resident who finds out one day, on the eve of his departure, that he cannot leave the country**. As specified above, the administrative proceeding that he must undergo is cumbersome, exhausting and very long, and hardly provides him any protection: he must cope with a decision which no one knows when it was made, by whom, why and when he will be able to leave his country.

Exhaustion of remedies

22. On February 20, 2013 the petitioner arrived at Allenby Bridge, to travel to Jordan and from there to Mecca to perform the rite of al-umrah. For this purpose the petitioner has even obtained in advance a visa to Saudi Arabia.

    A copy of the visa to Saudi Arabia which was obtained by the petitioner is attached and marked **P/1**.

23. The petitioner was detained on the Bridge for two hours and a half, until respondent's representative eventually came and informed him that he was precluded from exiting abroad. When the petitioner requested to check the reason for such preclusion, the representative told him that he should check it at the DCO nearest his place of residence.

24. It should be noted that contrary to respondent's procedures, respondent's representative did not inform the petitioner that he could appeal respondent's decision and has neither given him an appeal form nor enabled him to submit the appeal while still on the Bridge.

    A copy of the "Procedure concerning the processing of Palestinian residents' applications to examine whether a preclusion exists which prevents them from going abroad and the removal thereof", dated March 2011, is attached and marked **P/2**.

25. On February 2, 2013, HaMoked appealed respondent's decision to ban petitioner's exit abroad. In its letter, HaMoked emphasized that petitioner's visa was about to expire and therefore, the respondent was requested to handle the application urgently. A "Handling Form – Banning Exit Abroad" was attached to the application in accordance with respondent's procedures.

    A copy of HaMoked's letter dated February 21, 2013 is attached and marked **P/3**.

26. Since a week passed and no answer has been given to HaMoked's letter, and in view of the expiration date of the stay visa which was obtained by the petitioner, HaMoked wrote again to the respondent on February 28, 2013, and requested, for the second time, that the application be handled urgently.

    A copy of HaMoked's letter dated February 28, 2013 is attached and marked **P/4**.

27. HaMoked's letters remained unanswered, and petitioner's stay visa has meanwhile expired.

28. On April 18, 2013 eight weeks elapsed since the appeal in petitioner's case was submitted, but contrary to respondent's procedures no answer to the appeal has been received. Therefore, HaMoked wrote to the respondent on April 18, 2013, and requested that petitioner's appeal be answered without delay.

    A copy of HaMoked's letter dated April 18, 2013 is attached and marked **P/5**.

29. Two weeks later no answer has yet been given by the respondent. HaMoked wrote to the respondent again, for the fourth time, and requested that petitioner's application be handled without any further delay.

    A copy of HaMoked's letter dated May, 9, 2013 is attached and marked **P/6**.

30. Since then two additional weeks have elapsed, and in total more than twelve weeks since the appeal in petitioner's case was submitted – but no answer has yet been given by the respondent to the appeal, in sharp contrast to his own procedures. Under these circumstances the petitioners have no alternative but to turn to the court.

The legal argument

A. To obligation to respond expeditiously

31. 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).

32. 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 **Galon v. The Governmental Commission for the Enquiry of the Events of the Lebanon Campaign 2006**, TaSC 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).

33. As stated above, respondent's own procedures provide that appeals against his decision to ban residents' exit abroad should be answered within eight weeks – and in this case the petitioners have been waiting for **about twelve weeks** to receive an answer to their application. Respondent's procrastination in fact prevents the petitioner from travelling abroad and infringes on his right to freedom of movement and on his right to freedom of worship which is derived there-from, as will be specified below.

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

34. 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.

35. 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).

36. 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) 785,7977 (1983); emphasis added).

37. 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).

38. 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.

39. 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)).

40. 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**.

41. 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.
>
> (Yaffa Zilbershats The Right to Leave the Country **Mishpatim** 23 69, 86 (5744)).

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

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

43. 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.

44. 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

45. 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).

46. 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).

47. 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)).
>
> (emphasis added).

48. 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.

49. 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.

50. 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.

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

51. It should be remembered that the denial of petitioner's right to travel abroad, by delaying the response to his appeal, 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**.

52. 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).

53. Various statutory provisions confer upon governmental officials the authority to restrict the right to leave the country. However, the guiding principle according to which such restriction should be time limited appears in 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, para. 11 to the judgment); HCJ 5211/04 **Vaanunu v. GOC Home Front Command**, dated July 26, 2004, para. 13 to the judgment).

54. 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).

55. And to be precise: the rule according to which a restriction of liberty **must** be time-limited, is not limited to the right to leave the country. When a person's liberty is denied, **including for preventive reasons**, it must be done for a limited period of time the expiration of which is known in advance (which may be extended or renewed subject to the existence of circumstances which justify same). This rule applies, for instance, in the following cases:

A detention order under the Criminal Procedure (Enforcement powers – Detentions) Law, 5756-1996 must be time-limited (Section 18(a)(7) of the law), and the extension of the detention pursuant to the law must also be time-limited in accordance with the court's decision;

A detention order under the Emergency Powers (Detentions) Law, 5739-1979 must also be time-limited (section 2(a) of the law) and it may be extended up to a certain known date in accordance with the court's decision;

The same applies to orders for the supervision and assignment of a place of residence, pursuant to the Security Provisions [Consolidated Version] (Judea and Samaria) Order (No. 1651) which are time-limited (see for instance HCJ 7015/02 **Ajuri v. IDF Commander in the West Bank**, IsrSC 56(6), 352);

Also notable are orders imposing restrictions on residency or employment pursuant to the Limitations on the Return of a Sex Offender to the Surroundings of the Victim of the Offence Law, 5765-2004, which must also be time-limited (section 3(d)(1) of the law), and supervisory orders pursuant to the Protection of the Public from Sex Offenders Law, 5766-2006 (sections 12-14 to the law). And note: these cases concern limitations after conviction, **contrary to the case at hand**, which concerns limitations imposed based on privileged information which is not disclosed to the petitioners;

56. The proportionality principle, according to which any infringement of a protected right must be proportionate is well rooted in the international law, in the 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).

57. The proportionality principle in international law provides that when the 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.

58. Respondent's decision is within the realms of 'from now to eternity' and therefore, is not proportionate. Relevant to our case are the words of the honorable president Barak in CrimFH 7048/97 **Anonymous v. Minister of Defense**, IsrSC 54(1) 721), concerning the Emergency Powers (Detentions) Law, 5739-1979, which does not set a maximum time limit to administrative detention:

> An administrative detention can not last forever. The longer the actual detention period becomes, the greater are the considerations which may justify an additional extension of the detention. **With the passage of time the measure of the administrative detention becomes cumbersome to the extent that it ceases to be proportionate**. Indeed, even when authority is conferred to infringe on a liberty by a detention order, the exercise of such authority must be proportionate. The "breaking point" beyond which the administrative detention is no longer proportionate must not be crossed. The location of the "breaking point" varies in accordance with the circumstances. Everything depends on the importance of the purpose which is to be realized by the administrative detention; Everything is conditioned upon the probability of having the purpose realized by using detention and upon the compatibility of the administrative detention for the realization of such purpose; Everything depends on the existence of alternative measures with a lesser injurious effect on a person's liberty which may be used to realize the purpose; Everything derives from the severity of the infringement of a person's liberty against the backdrop of the proper purpose the realization of which is sought. (emphasis added).

59. The respondent wishes to turn the law upside down, and to disavow of his obligations as an administrative authority. His decision to ban petitioner's exit is not time-limited, and moreover – the respondent does not undertake to re-examine his decision within a certain defined period of time. In fact, by so doing the respondent shifts the burden of responsibility and imposes it on those whose rights were infringed by his decision. These individuals are forced, according to respondent's decision, to appeal respondent's decision time and again, and their right to do so is limited to once every nine months.

60. We should not forget that the respondent does not wait to obtain new information from the petitioner. Rather, his decision relies, in its entirety, on privileged information which is concealed from the petitioners, and without having conducted a hearing in petitioner's presence.

61. In view of the fact that the respondent did not set limitations to petitioner's injury, the court is authorized to minimize the injury, either by limiting the restriction or by ordering the respondent to re-examine his decision within a defined period of time. Hence, by way of inference, in HCJ 2320/98 **Abed al Fatah Mahmud Al-Amla v. IDF Commander in the Judea and Samaria Area**, IsrSC 52(3) 346, the court's authority to order the shortening of an administrative detention in order to obligate the military commander to re-consider his decision, was discussed:

> A judge may decide to shorten the detention period, not in order to obligate the military commander to release the detainee, but rather to obligate the military commander to re-consider the information against the detainee and decide *de-novo* whether this information justifies the continuation of the detention. The judge may make such a decision in a border-line case where there is doubt whether the information against the detainee justifies a lengthy detention, or where a change of circumstances is reasonably expected as a result of which the information which justified the detention in the past will no longer justify the continuation thereof. Under these circumstances the judge may take an interim solution: he can decide to shorten the detention period so that the military commander will re-consider, in view of the judge's decision, whether the continuation of the detention is justified. (page 363 of the judgment).

D. <u>Respondent's obligation to specify the grounds for his decision as an inherent part of petitioner's right to have a hearing</u>

62. The petitioner, whose rights were restricted following respondent's decision, is entitled that the decision in his case be made in a proper administrative manner and that the grounds for the decision to restrict his said right be disclosed by the respondent, and the rational is clear: if the reason for the refusal is not disclosed, the person who was injured by the decision will not be able to refute the allegations raised against him, and his protected rights may be restricted without any scrutiny or inspection. Even when the reasoning is limited in scope due to security considerations, it does not necessarily result in a complete nondisclosure of the reasons.

> An exemption from disclosure of reasons, facts or documents when the disclosure may infringe on state security or its foreign relations is acceptable to the legislator and the court in various contexts. And if a question arises, it does not relate to the exemption itself, but rather to the scope of the exemption. On the one hand, it is reasonable that a public servant will not have to disclose the grounds for his decision if it may infringe on state security or its foreign relations. However, on the other hand, **it does not necessarily result in a complete nondisclosure of the reasons**.
>
> (I. Zamir, **The Administrative Authority** (volume B, 5756), page 917; emphasis added).

And furthermore:

> Even when a standard decision is concerned, the authority does not fulfill its obligation by giving the reasons underlying its

> decision in a general and laconic manner, providing only the "caption" of its reasons with no specific and pertinent reference to the circumstances of the case at hand. **This means that a notice stating "your application is denied for security reasons" – is not sufficient**.
>
> (Y. Dotan, "The Duty to give Reasons in Administrative Law" 19 **Mechkarey Mishpat** (5762) 5, 37; emphasis added).

63. The duty to give reasons does not apply only by virtue of this procedure or another, and this is not a formal matter: this is a duty which governs the basic principles of administrative law as an inherent part of the right to a fair hearing and a person's right to be advised of the authority's allegations and present his position before the authority.

64. Relevant to this matter are the comments of the honorable Justice (as then titled) Barak:

> The case before us demonstrates the great importance that should be attributed to a strict adherence to the rules concerning the right to a fair hearing. Since the petitioner has not been given the opportunity to hear the complaints against him and to present his own position, he became convinced that the considerations of the authorities were inappropriate and discriminatory and his trust as a citizen in the government was undermined.
>
> The rules concerning the right to a fair hearing are aimed at preventing this state of affairs, since the purpose thereof is not only to ensure that in practice justice is made with the injured individual, but also to ensure that the trust of the public in good governance is maintained…
>
> This right is not only a formal procedure of invitation and hearing. The right to be heard means the right to a fair hearing (HCJ 598/77, page 168). The meaning of this right is to give a proper opportunity to respond to information which was obtained and which may affect a decision which concerns petitioner's matter (see: HCJ 361/76).
>
> Therefore, the right to be heard is not properly exercised, if the applicant is not advised of the information which was obtained in his matter and is not given the opportunity to properly respond thereto.
>
> (HCJ 656/80 **Saleb Abu Romi v. Minister of Health**, IsrSC 35(3) 185, 190).

65. This basic right, which imposes clear duties, is also entrenched in international law (see Articles 1, 2 and 7 of the Universal Declaration on Human Rights; Articles 27 and 147 of the fourth Geneva Convention; Articles 2, 4 and 14 of the International Covenant on Civil and Political Rights; Article 2 of the International Covenant on Economic, Social and Cultural Rights; Articles 6 and 13 of the European Convention on Human Rights; etc).

66. The importance of the duty to give reasons also arises from some several cases in which the respondent agreed to specify, to a certain extent, the reasons for the preclusion.

67. In some of these cases, the "precluded" succeeded to prove, relatively easily, that the allegations which were raised against them were unfounded, and to remove the preclusion:

This was the case, for instance, in HCJ 8857/08 **'Asfour v. Military Commander of the West Bank**; HCJ 25/09 **Ghanem v. Military Commander of the West Bank**; HCJ 4819/09 **Dr. al-Hor v. Military Commander of the West Bank; HCJ 10104/09 Abu Salameh v. Military Commander of the West Bank**.

68. It is obvious that the "privilege" of providing a person the opportunity to prove his innocence, is denied for as long as the respondent conceals the reasons for his decision to place limitations on that person.

E. The infringement on petitioner's rights

(i) The right to freedom of movement

69. The respondent prevents the petitioner from travelling abroad. In so doing, he infringes on petitioner's basic rights to dignity and autonomy, freedom of movement and all such rights which derive there-from.

70. 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.

71. The right to free movement constitutes one of the norms of customary international 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).

72. 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)).

73. The remarks of Honorable Justice Bach in **Daher** are also relevant for 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)).

74. 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)).

75. 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>Petitioner's right to freedom of religion and worship</u>

76. The respondent severely infringes on petitioner's right to freedom of religion and worship, by preventing him from leaving his country to perform the rite of al-umrah, an important rite of his religion.

77. Case law has emphasized that the freedom of religion is the social and cultural nucleus of every community, family and person. Case law has further emphasized that the freedom of movement and access to the holy sites had a special constitutional force, and a special collective as well as individual importance.

> The residents of the Area have a constitutional right to freedom of religion and worship… The residents of the Area are also entitled to freedom of movement, by which, *inter alia*, the right of access to holy sites may be exercised. The right of movement and access to holy sites has a great constitutional force (**Horev**, *ibid*, page 49; HCJ 448/85 **Daher v. Minister of Interior**, IsrSC 40(2) 701, 708; HCJ 2481/93 **Dayan v. Commissioner Yehuda Wilk**, IsrSC 48(2) 456, paragraph 17). **In the present case, the freedom of movement is closely related to and intertwined with the right to realize the freedom of religion and worship…**
>
> The freedom of worship as an expression of freedom of religion is one of the basic human rights. It extends to the freedom of the individual to believe and act according to his faith while practicing its commandments and customs… **This freedom is associated with the realization of the individual's own identity. Within the scope of said freedom, the desire of the believer to pray in a holy site is recognized. This recognition constitutes part of the broad constitutional protection afforded to the members of the various religions to access their holy sites and the prohibition to offend their feelings concerning these places** (Section 1 of the Protection of Holy Sites Law, 5727-1967). The freedom of religion is regarded as a branch of the freedom of expression in the sphere of religious belief… This freedom was recognized by case law as a basic constitutional human right.
>
> (HCJ 10356/02 **Haas v. IDF Commander in the West Bank**, IsrSC 58(3) 443,456 (2004); emphases added; T.S.).

And in another case it was emphasized that:

> Limiting the right to exit the country of a person whose exit is necessary and important is liable to increase the severity of the infringement… **banning the exit of a person <u>who seeks to make a pilgrimage to a holy site of his religion</u> infringes on his right to freedom of religion and worship, and as such is extremely grave**.
>
> HCJ 4706/02 **Salah v. Minister of Interior**, IsrSC 56(5) 695, 704 (2002); emphases added; T.S.).

78. The right to freedom of religion and worship is one of the norms of international law:

Article 18 of the Universal Declaration on Human Rights 1948;

Article 18 of the International Covenant on Civil and Political Rights 1966;

Article 13 of the International Covenant on Economic, Social and Cultural Rights 1966;

Articles 2 and 5 of the Convention on the Elimination of all Forms of Racial Discrimination 1965; and

Articles 1, 2 ,3 and 4 of the Declaration on the Elimination of all Forms of Religious Discrimination 1981.

79. Article 46 of the Hague Convention (1907) provides that:

> Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

80. Article 27 of the fourth Geneva Convention (1949) which was mentioned above, provides that:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs […]

81. The scholar Pictet, in his interpretation of Article 27, points out that:

> The right to respect for religious convictions is part of freedom of conscience and freedom of thought in general… Religious freedom is closely connected with the idea of freedom to practice religion through religious observances, services and rites. **Protected persons in the territory of a Party to the conflict or in occupied territory must be able to practice their religion freely, without any restrictions** other than those necessary for the maintenance of public law and morals… Article 27 reaffirms the provision in Article 46 of the Hague Regulations that occupying forces are bound to respect "religious convictions and practice"… The obligation to respect manners and customs is particularly important in the case of occupied countries. [emphasis added].
>
> (Pictet J.S. Commentary: IV Geneva Convention – Relative to the Protection of Civilian Persons in Time of War. (Geneva, 1958), pp. 203-204).

82. The United Nations' Human Rights Committee emphasized in its interpretation of Article 18 of the International Covenant on Civil and Political Rights (1966), that:

> **The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts**. The concept of worship extends to ritual and ceremonial acts given direct expression to belief, as well as various practices integral to such acts...

(ICCPR, General Comment 22, Freedom of Religion, Article 18. A/48/40, Part I, (1983), Annex VI (p. 208-211); CCPR/C/21/Rev.1/Add.4, para. 4).

Conclusion

83. The petitioner wishes to exit his country in order to make pilgrimage to Mecca, to perform the rite of al-umrah. By delaying his response to petitioner's application, the respondent, in practice, prevents his exit from the West Bank, and severely infringes on his right to freedom of movement and all ancillary rights thereof.

84. The respondent prevents the petitioner from leaving his country in an absolute and sweeping manner. Hence, the respondent causes the petitioner to be imprisoned in his own country. The respondent does not set time limits to the preclusion, and puts the petitioner in a state of complete uncertainty. Thus, he severely infringes his right to dignity and due process and his right to prove his innocence.

85. Furthermore – the respondent did not specify the reasons for his refusal to let the petitioner travel to Jordan, and by so doing he forces the petitioner to turn to this honorable court, without having a real opportunity to thoroughly consider his case.

In view of the above, the honorable court is hereby requested to issue an order nisi as requested and after receiving respondents' reply, 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 power of attorney which was also sent by fax, taking into consideration the objective difficulties involved in a meeting between the petitioner and his legal counsels.

May 19, 2013

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Tal Steiner, Advocate

Counsel to the petitioners

[File No. 76648]