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At the Supreme Court
Sitting as the High Court of Justice

HCJ 5504/03

1. **Kahlout**
I.D.
2. **HaMoked: Center for the Defence of the Individual,**
founded by Dr. Lotte Salzberger - RA

Both represented by counsel, Adv. Yossi Wolfson (Lic. No. 26174) and/or Manal Hazzan (Lic. No. 28878) and/or Leena Abu-Mukh Zuabi (Lic. No. 33775) and/or Adu Landau (Lic. No. 29189) and/or Shirin Batshon (Lic. No. 32737)

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.

1. **Commander of IDF Forces in the West Bank**
2. **Commander of IDF Forces in the Gaza Strip**

Represented by the State Attorney's Office
Ministry of Justice, Jerusalem

The Respondents

Petition for Order Nisi

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause, if they so wish, why they should not enable petitioner 1 (hereinafter: the **petitioner**) to return to his home in the West Bank, after his expulsion by respondent 1 or anyone on his behalf to the Gaza Strip in March 2002.

The grounds for the petition are as follows:

The parties and the facts:

1. The petitioner was born in Gaza in January 1973 and lived there. In 1991 he moved to Ramallah and as time passed by he settled down in the city. In the beginning he studied in BirZeit University, and later on he became employed as a computer engineer – firstly in Special Systems Palestine company and then in United Business Machines company. The petitioner rents a house in Ramallah.

Copies of confirmations concerning petitioner's employment are attached to this petition as Exhibits **P 1-2**.

2. In 2001 the petitioner married, in Ramallah, ____ Kahlout (formerly _____), a resident of the city who was born in Ramallah.

A copy of the marriage contract and a copy of the wife's identification card are attached to this petition as Exhibits **P 3-4**.

3. Throughout the period during which he resided in Ramallah the frequency of petitioner's visits in the Gaza Strip declined. On one occasion, in 1996 he was expelled to the Strip by IDF forces based on the claim that he was holding a Gazan identification card – but he was allowed to re-enter the West Bank through the Jordan bridges. The last time he visited the Gaza Strip was in 1998. After the visit he went abroad for professional training within the framework of his work, and when he came back (through the Ben Gurion airport), he returned to his home in Ramallah. At the airport he was requested to meet with Israel Security Agency (ISA) personnel in Jerusalem, but he refrained from doing so.

4. In 1998 the petitioner informed the Palestinian Authority of an address change to Ramallah, and his new address – Ramallah – was registered in the ledger of his identification card.

A copy of petitioner's identification card and a copy of a confirmation of the Palestinian Authority concerning his place of residence are attached to this petition as Exhibits **P 5-6**.

5. On March 3, 2002 the petitioner tried to travel from the West Bank to Jordan for business purposes through Allenby bridge. When he was on the bridge the petitioner was arrested by the Israeli authorities. The petitioner was transferred to the Ashkelon prison, interrogated, and after a detention of one day, he was transferred to the Gaza Strip and released over there on March 4, 2003. In prison he was told that with the Israelis he was registered as a Gaza Strip resident.

6. Since then the petitioner has been staying in the Gaza Strip and is prevented from going back to his home, wife and work place. His wife continues to live in their rented house in Ramallah. The Company which employs the petitioner does not have a branch in Gaza, but he succeeded to arrange for his continued employment by it, and he works through the telephone and the fax.

7. Petitioner 2 is a not-for-profit association which engages in the protection of human rights of Palestinians in the Occupied Territories (OPT).

8. Respondent 1 holds the West Bank areas under belligerent occupation, he is responsible for the forcible transfer of the petitioner to the Gaza Strip and he controls the entry into the West Bank, as a result of which petitioner's return to his home depends on his cooperation.

9. Respondent 2 holds the Gaza Strip areas under belligerent occupation which areas were declared by him as a closed military zone, as a result of which petitioner's return to his home in the West Bank requires his consent.
10. The petitioner needs respondent 1's or respondent 2's permit to travel through the territory of Israel on his way back to his home (in the absence of a safe passage, which was frozen by the respondents).

Exhaustion of remedies

11. Following his expulsion to Gaza the petitioner and his father in law turned to the offices of interior of the Palestinian Authority in Gaza and Ramallah, but they were unable to assist them.
12. On December 1, 2002, petitioners' legal representative wrote a detailed letter to respondent 1, through his assistant legal advisor, in which he requested that petitioner's return to Ramallah be regulated. In the request, which in retrospect seems to have been naïve, petitioners' legal representative requested to expedite the processing of the request, so as to enable the petitioner to be back home on the Muslim holiday which was then forthcoming.

The letter dated December 1, 2002 is attached to this petition as Exhibit **P 7**.

13. Five months passed. Four written reminders were sent to the assistant legal advisor. The issue was also raised time and again in telephone conversations. The request remained un-answered.

The reminder letters dated December 31, 2002, February 2, 2003, March 3, 2003 and March 25, 2003 are attached to the petition as Exhibits **P 8-11**.

The legal aspect

Forcible transfer

14. The petitioner's place of residence is in Ramallah. His home is there, his work place is there and the woman whom he married is there.

The fundamental premise is that the displacement of a person from his place of residence and his forcible assignment to another place seriously harms his dignity, his liberty and his property. A person's home is not merely a roof over his head, but it is also a means for the physical and social status of a person, his private life and his social relationships... Several basic human rights are harmed as a result of an involuntary displacement of a person from his home and his residence being assigned to another place, even if this assigned residence does not involve the crossing of an international border... These human rights derive in part from the internal law of the various countries, and are in part enshrined in the norms of international law.

(HCJ 7015/02 'Ajuri et al. v. Commander of IDF Forces in the West Bank, IsrSC 56(3) 352, 365. Hereinafter: 'Ajuri).

15. And indeed, the rights which are violated as a result of petitioner's deportation to Gaza are countless and the host of legal references which are intended to protect them are too many to specify. It would suffice to mention here the provisions of the Basic Law: Human Dignity and Liberty, the provisions of regulation 46 of the Hague Regulations, the provisions of Article 27 of the Fourth Geneva Convention and Article 12 of the United Nations International Covenant on Civil and Political Rights.
16. Petitioner's detention and his expulsion to the Gaza Strip may be therefore legitimized only if they were made under legal authority, which authority was exercised in a reasonable manner.

The letters of petitioners' legal representative remained unanswered. The petitioners had no alternative but to guess respondents' position. In Ashkelon prison the petitioner was told that he was still registered as a Gazan resident. This leads to the hypothesis that the respondents are of the opinion, that they have the right to deport to the Gaza Strip - anyone who is registered with them as a resident of the Strip.

In order to examine this presumed stance the relevant powers and authorities pertaining thereto should be reviewed.

The West Bank and the Gaza Strip constitute a single unit

17. "... In Article 11 of 'The Interim Israeli – Palestinian Agreement concerning the West Bank and the Gaza Strip' which was signed in Washington DC on September 28, 1995, the parties stipulated that they regarded the West Bank and the Gaza Strip as a single territorial unit."

As stated in the Article:

"The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which shall be preserved during the interim period."

This provision also appears in section 31(8) of the agreement based on which the 'safe passage' arrangements between the Judea and Samaria Area and the Gaza Strip were established.

It should also be pointed out, that not only does the Israeli side administer the two areas in a coordinated manner, but the Palestinian side also regards the two areas as a single unit, both of which have one unified leadership. The fact that Israel chose to appoint different major generals to administer the two areas, is an administrative decision, and in our case, is not very significant.

Petitioners' claim that the mere fact that two separate legal systems apply to the Judea and Samaria Area and the Gaza Strip areas, leads to the conclusion that these are two separate and distinct areas, has no merit. In a considerable number of states different and distinct legal systems apply to different regions (such as federations, or China and Hong Kong), however an argument that these are separate territorial units for the purpose of the relevant provisions of international law, will not be upheld."

These are not the words of petitioners' legal representative. These are the words of the respondents in the response submitted by them in H CJ 7015/02 '**Ajuri et al. v. Commander of IDF Forces in the West Bank et al.**', which is supported by the affidavit of respondent 1 (taken from paragraph 50 of the response).

18. The Supreme Court accepted respondents' position on this issue and held that the Judea and Samaria area and the Gaza Strip area should be regarded as a single unit in which two military

commanders act on behalf of the one and only occupying power. In view of the above, the honorable court held that the forcible transfer between the areas should be regarded as an "assigned residence" rather than as an expulsion out of the area ('Ajuri, page 370).

19. Petitioner's settlement in Ramallah should therefore be regarded as nothing more than a change of address within the area, and the petitioner indeed did the only thing which was required of him, i.e., informed the competent authority of a change of address.
20. The respondents cannot disavow their own arguments, which were accepted by nine justices in 'Ajuri and claim at this present time that the management of separate population registries in Gaza and in the West Bank or any other administrative separation exceeds an "administrative decision" and imposes material restrictions on petitioner's presence in the West Bank. One cannot have the cake and eat it too: if 'Ajuri concerned only an assignment of residence, our case concerns only a change of place of residence.

The Duties and Authorities concerning a change of place of residence

21. The Order on Identity Cards and Population Registry (Judea and Samaria) (No. 297), 5729-1969, specifies in section 11 thereof the details which will be registered in the population registry, concerning a resident. (A resident, pursuant to section 1 of the order, is "A person who lawfully stays in the area and whose permanent place of residence is in the area". Hence, this is the relevant order to petitioner's case rather than the parallel order concerning the Gaza Strip). One of the details (No. 13) is the address. Section 13 of the order provides that notice should be given of a change in the details of registration, which notice should be delivered to the "Population registry office in the jurisdiction in which his place of residence is located." Section 11B of the order provides that any certificate issued under the order will be *prima facie* evidence of the correctness of the registration details, including, *inter alia*, registration detail No. 13, i.e., the address.

To complete the picture it should be noted that the Order on Identity Cards and Population Registry (Gaza Strip) (No. 426), 5732-1972, overlaps to a large extent the above order, but does not include any reference to the address item. However, in practice, the identification cards issued in Gaza also include the address of the card holder.

22. The Proclamation regarding the Implementation of the Interim Agreement (Judea and Samaria) (No. 7), 5756-1995, provides in section 4(a) that:

The military commander of IDF forces in the region and the head of the Civil Administration will transfer to the [Palestinian – Y.W.] council and its agencies, powers and responsibilities exercised by them or those delegated or appointed by them, including legislative, judicial and administration powers, all in accordance with the provisions of the Interim Agreement and subject to its directives.

The proclamation is attached to this petition as Exhibit **P 12**.

23. Hence, the proclamation refers to the agreement and adopts the provisions thereof.

Section 28 of Exhibit III of the agreement (the protocol concerning civil affairs) provides that the powers and responsibilities concerning population registry and documentation will be transferred to the Palestinian Authority. Needless to say, that the transfer is made in one breath with respect to both the Gaza Strip and the West Bank, according to the approach which is enshrined in the entire agreement that this is a single area. In certain matters (such as the grant of a visit permit or a permanent status) the acts of the Palestinian Authority require an Israeli approval. This is not the case when a change of address is concerned. The last part of sub-section 10 of the above section 28 provides:

The Palestinian side shall inform Israel of every change in its population registry, including, *inter alia*, any change in the place of residence of any resident.

(emphasis added, Y.W.)

A copy of section 28 of the agreement is attached as Exhibit **P 13**.

On the issue of transfer of authorities according to the agreement see also H CJ 2151/97 **Shaqeir et al. v. Commander of IDF Forces in the West Bank et al.** (TakSC 97(3) 49).

24. All of the above indicate that the petitioner was obligated to inform the competent authority of the change of his address. The competent authority is – in view of the proclamation and the agreement – the Palestinian Authority. The Palestinian Authority had the authority to change the address item in the registry. The act of the Authority gave effect to the administrative act which changed the registry and no additional supplementary act was required. In addition, the Authority was obligated to give notice of the change to Israel, but this notice has no constitutive value, as these relationships exist on the international level and have no bearing whatsoever on petitioner's rights. When the administrative act of the change of address was completed, the registration in the population registry according to which petitioner's address is in Ramallah, constitutes a *prima facie* evidence of its contents.

The expulsion of the petitioner to Gaza: in excess of power and unreasonable

25. The expulsion of the petitioner to the Gaza Strip, constitutes (in the present situation in which the "safe passage" arrangement between the Strip and the West Bank is frozen), in fact, an assignment of his residence to the Gaza Strip. This act was taken with complete disregard of the required procedure, without legal cause and in complete excess of power.
26. The release of a person in a place which is distanced from the place of his detention or residence, in a manner which does not enable him to return to his place of residence, is a patently unreasonable act. The respondent himself acknowledged this fact, when he stated that:

According to the directives of the general command, detainees are released, to the extent possible, near their place of residence.

(Notice of the State Attorney's Office in H CJ 3278/02 dated April 24, 2002)

27. In our case there could have been no mistake as to petitioner's address. As specified above, the ledger of his identity card constitutes a *prima facie* evidence that his place of residence is Ramallah. This should be coupled with his own statements in his interrogation.

28. The petitioner has been living in the West Bank since his adulthood and he is currently 30 years old. His home is in the West Bank. His nuclear family, his wife, is in the West Bank. His work place is in the West bank. The center of his life is in the West Bank. His expulsion severely infringes on all of his rights – the house he built, the family he established, the livelihood and occupation he was engaged with and his liberty in and of itself. His deportation to the Gaza Strip, as the prevention of his return to the West Bank for over a year now, constitute, therefore, an act, which even if taken with authority, is extremely unreasonable by all standards of reasonableness.

Absence of reasoning

29. A situation whereby an application which was submitted by petitioner's legal representative has not been answered by the respondent for more than six months, is unacceptable. This is especially so as it pertains to a violation of petitioner's rights by respondent's decision, which extends for over a year now.
30. The respondent is obligated to handle petitioner's matter fairly, reasonably and promptly. These obligations are some of the basic principles of good governance.

CA 4809/91 **Local Planning and Building Committee, Jerusalem v. Kahati et al.**, IsrSC 48(2) 190, 219;

HCJ 6300/93 **The Institute for Training of Rabbinical Pleaders v. The Minister of Religion et al.**, IsrSC 48(4) 441, 451.

31. Respondent's obligation to handle the application promptly is also entrenched in section 5 of the Order regarding Interpretation (Judea and Samaria)(No. 130) 5727-1967, which provides:

An action for which no time is set or given in the security legislation for its performance should be done with all due speed and repeated whenever the circumstances stipulated for its performance arise.

32. Pursuant to the Administrative Procedure Amendment (Statement of Reasons) Law, 5719-1958, a public servant is obligated to respond to a request to exercise an authority granted by law within 45 days from the receipt of the request.
33. A delay in providing an answer, especially when it seems to be a camouflage for a *de facto* denial of the request, must have consequences. One of the possible consequences is to issue an *order nisi* and to shift the burden to the respondent to explain his conduct.

See: I. Zamir, **The Administrative Authority** (Volume B, Jerusalem, 5756-1996) page 716 and 726-727).

34. Due to the fact that it is impossible for the petitioner to meet his legal representative, petitioner's power of attorney and affidavit were authenticated by a Gazan attorney and were transmitted to petitioner 2 by fax, and they are attached to the petition in this form.

Based on all of the above reasons the honorable court is hereby requested to issue an *order nisi* as requested in the beginning of the petition, and after receiving respondents' response (if any) to make it absolute and to obligate the respondents to bear petitioners' costs of trial and legal fees.

Jerusalem, June 18 2003, 18 Sivan 5773

Yossi Wolfson, Advocate

Counsel to the Petitioners

Translation of Affidavit

I, the undersigned, Kahlout I.D. _____, having been warned to state the truth and that I will be subject to the punishments prescribed by law should I fail to do so, hereby declare in writing as follows:

1. I make this affidavit in support of my petition to the High Court of Justice to return to the West Bank.
2. The parts of the petition "The parties and the facts" and "Exhaustion of remedies" were translated for me into Arabic. Their content is true (with respect to the correspondence conducted by HaMoked for the Defence of the Individual, their content is true as I have been told by HaMoked for the Defence of the Individual).
3. I hereby declare that this is my name, this is my signature and the content of my affidavit above is true.

The Deponent

I hereby confirm that on June 15, 2003, appeared before advocate Muhammad Salem al-Kafarneh, in Gaza, the above person who identified himself by identification card No. (personally known to me), and having been warned by me to state the truth and that he would be subject to the punishments prescribed by law should he fail to do so, he confirmed the correctness of his above affidavit and signed it.

Advocate's signature