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At the Supreme Court
Sitting as the High Court of Justice

HCI 6475/07

In the matter of:

1. **Ms. _____ Abu a-Laban**
ID No. _____, resident of the Palestinian Authority
2. **HaMoked: Center for the Defence of the Individual,**
founded by Dr. Lotte Salzberger

all represented by counsel, Adv. Abeer Jubran (Lic. No. 44346) and/or Yossi Wolfson (Lic. No. 26174) and/or Ido Blum (Lic. No. 44538) and/or Yotam Ben Hillel (Lic. No. 35418) and/or Hava Matras-Irion (Lic. No. 35174) and/or Sigi Ben Ari (Lic. No. 37566) and/or Anat Kidron (Lic. No. 37665) and/or Yadin Eilam (Lic. No. 39475)
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. **OC Southern Command**
2. **Minister of Interior**
3. **Minister of Defense**
4. **Coordinator of Government Activities in the Territories**
5. **Government of Israel**
6. **State of Israel**

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 why they should not allow Petitioner 1 to travel to Egypt so that she may take the exam for membership in the British Royal College of Obstetricians and Gynaecologists. The exam will be held on August 3, 2007 in Egypt and thereafter, the Petitioner must continue with the second part of her academic program which began in June of this year.

The Petitioner is unable to travel to Egypt as the Rafah border crossing has been sealed since June this year. The Petitioner seeks to travel to Jordan via the Allenby Bridge border crossing and continue to Egypt.

Motion for Urgent Hearing

The Court is requested to schedule a **most urgent** hearing of the petition.

The Petitioner is a physician by trade. She has been studying for a Master's degree in obstetrics and gynecology at Ain Shams University in Egypt since 2005.

On August 3, 2007, the Petitioner must take the exam for membership in the British Royal College of Obstetricians and Gynaecologists which is of crucial importance for her future. She therefore must travel to Jordan via Allenby Bridge and from there to Egypt **no later than August 1, 2007**, otherwise she will miss the exam.

Additionally, the second part of the Petitioner's Master's program at Ain Shams University began in June 2007. If she fails to arrive at the university in early August, she may lose the entire academic year and her studies would be held over for a year.

The Factual Basis

The Parties

1. Petitioner 1 (hereinafter: **the Petitioner**) is a physician by trade. She works in the maternity ward of a-Shifaa Hospital in the Gaza Strip. She is studying for a Master's degree in obstetrics and gynecology at Ain Shams University in Egypt.
2. Petitioner 2 (hereinafter: **HaMoked**) is a registered association in Israel, located in Jerusalem, which works to promote human rights in the Occupied Palestinian Territories (hereinafter: **OPT**).
3. Respondent 1 has effective control over the land, sea and air crossings into and out of the Gaza Strip, acting on behalf of the State of Israel, Petitioner 6.
4. Respondents 1-2 are responsible for issuing permits to enter Israel. Petitioner 2 holds this power and has delegated it to Respondent 1.
5. Respondent 4 is responsible for determining military policy in the OPT and has been appointed by Respondent 3 to monitor the humanitarian situation in the Gaza Strip.
6. Respondent 5 (hereinafter: **the government**) is responsible for Israel's actions and policy with respect to freedom of movement in the Gaza Strip in general, and in particular, with respect to the arrangements pertaining to travel abroad from Gaza via sea, air and land.

The Facts

7. The Petitioner has completed the first part of the Master's program in obstetrics and gynecology at Ain Shams University in Egypt. The second part of the program began in June 2007. The Petitioner was unable to reach the university as the Rafah border crossing had been closed due to the incidents that erupted in the Gaza Strip.

A copy of the enrollment confirmation from Ain Shams University is attached hereto and marked **P/1**.

8. On August 3, 2007, the Petitioner must take an exam, in Egypt, for membership in the British Royal College of Obstetricians and Gynaecologists which of crucial importance for her future.

A copy of the confirmation of the date of the exam from the Royal College is attached hereto and marked **P/2**.

9. In the past two months, the Petitioner has not attended a large part of her Master's program and as a result, she may miss the entire second part of her program.

Israel's continued responsibility for travel abroad from the Gaza Strip after the implementation of the disengagement plan.

10. Hypothetically, travel abroad from the Gaza Strip is possible through sea, air and land.

Sea travel from the Gaza Strip, a historic port city, is blocked by Israel. Israeli battle ships patrol the Gaza coast and restrict even fishing boats owned by Gaza residents.

Travel by airplane out of Gaza is also blocked by Israel. Israel bombed the Gaza airport and its planes fly over Gaza, preventing any other vessel from using its airspace.

Travel on land from Gaza abroad is mostly done toward the south, Egypt, via the Rafah border crossing, and from there to the rest of the world. Travel to the north is done via Erez Crossing, and from there, using Israel as a transit country, to the rest of the world.

The Rafah crossing is currently closed and Israel opposes its opening. Erez Crossing continues to operate and is currently used as an access point for Israelis, foreign nationals and Palestinians who have received a travel permit. Under the current circumstances, there have been a few cases in which the Respondents allowed Palestinians to travel via Erez to the Allenby Bridge border crossing in order to travel abroad.

11. In 1994, Israel's land forces evacuated most of the Gaza Strip. Israel continued to control the Gaza Strip from the sea, air and land crossings, from land strongholds inside the Gaza Strip and by other means, such as controlling the supply of energy, the population registry and more. In 2005, Israel's permanent land settlements in the Gaza Strip were evacuated.

The issue of exiting Gaza to go abroad is not new. It was an issue before the Palestinian Authority entered Gaza and after that time. It continues to be an issue after "disengagement" as well.

12. **A similar situation, in which the Rafah crossing was closed, was brought before this Court back in 2004**, after land control over most of the Gaza Strip was already in Palestinian hands and before "disengagement". On December 12, 2004, suicide bombers attacked Rafah Crossing. At the time, HaMoked had many pending petitions to allow the exit of Gaza residents abroad. OC Southern Command, the respondent in those petitions, claimed that repairs at the crossing would take "a few long months". In that matter, as at present, Israel tried to force the Nitzana crossing solution on the Palestinians and then too, the OC announced that because of the Palestinians' refusal, the petitioners would not be able to travel abroad until the repairs at the crossings were completed.

The Court heard the petitions and rejected the position of the OC, ruling:

We adjourn the hearing of the petitions for seven days. The objective of this adjournment is to examine the possibilities for a solution (general or humanitarian) for the issues raised by the Petitioners. It must be duly noted

that the Respondent has an obligation (under international humanitarian law) to take every measure at his disposal to resolve the issue...

HCI 11714/04 Abu Yusef et al. v. Military Commander of the Gaza Strip, decision of President Barak, Justice Proccacia and Jusitce Adiel, dated December 30, 2004.

On January 6, 2005, the State Attorney's Office announced that the Rafah crossing could be partially opened within two weeks (as opposed to "a few long months"). The Respondent allowed travel in humanitarian cases via Allenby Bridge by way of secured shuttles, and special buses were organized to transport individuals going on the Hajj pilgrimage. On January 21, 2005, the Rafah crossing was opened partially. The solutions, it became clear, were found more swiftly than had been anticipated.

A copy of the State Attorney's notice dated December 29, 2004 is attached hereto and marked **P/3**;
A copy of the Decision dated December 30, 2004, is attached hereto and marked **P/4**;
A copy of the State Attorney's notice dated January 6, 2005, is attached hereto and marked **P/5**;
A copy of the State Attorney's notice dated January 25, 2005, is attached hereto and marked **P/6**.

13. After the evacuation of the permanent land outposts in the Gaza Strip and despite declarations about "the end of responsibility", Israel denied requests from the Palestinian Authority to open the Rafah crossing and forced the Palestinians to seal it. After this closure, HaMoked had some correspondence with the State Attorney's Office, demanding that the crossing be opened and that an interim solution be instituted until such time.

The director of the HCI department answered HaMoked's letter with a letter of her own on September 22, 2005, as follows:

With respect to travel abroad from the Gaza Strip via Rafah Crossing - it is noted that aside from the fact that after disengagement the crossing between the Gaza Strip and Egypt was effectively breached and anyone who wished to travel abroad via Rafah could have done so without difficulty, indeed, Israel's objection to opening the crossing stems from the desire to maintain minimum monitoring capacities over individuals traveling between the Gaza Strip and Egypt. As such, and as no arrangements have been made between Israel, the Palestinian Authority and Egypt on this issue, Israel suggested that those wishing to travel from Gaza to Egypt lawfully, could do so via the Nitzana crossing. However, the Palestinians have rejected this suggestion. (emphasis added).

A copy of the letter dated September 22, 2005 is attached hereto and marked **P/7**.

14. Indeed, in 2005, with American mediation, Israel reached an agreement which gave it indirect control of the Rafah crossing (see Agreed Principles for Rafah Crossing, November 15, 2005, available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Agreed+documents+on+movement+and+access+from+and+to+Gaza+15-Nov-2005.htm>).
15. Until the parties reached the agreement, the Rafah crossing was opened for short periods of time on a number of occasions. HaMoked has further knowledge that on at least one occasion, Israel organized a shuttle from Gaza to the Allenby Bridger border crossing which enabled travel abroad

from the Gaza Strip by way of direct travel from Erez Crossing to the Allenby Bridge in the West Bank and from there to Jordan.

16. Due to the control given to Israel under the agreement, the Rafah crossing has been open and shut from time to time according to decisions made by Respondent 3, the Minister of Defense.

A letter from Eyal Friedman of the Office of the Coordinator of Government Activities in the Territories, Ministry of Defense, to Adv. Sari Bashi from Gisha dated October 9, 2006, indicates that Israel claims that the decision whether or not to allow the opening of Rafah "is based on **security considerations and made according to the security policy in effect at the time**".

A copy of the letter is attached hereto and marked **P/8**.

The Respondents have permitted travel abroad from the Gaza Strip via Allenby Bridge both in the past and during the current crisis

17. As we have seen, the Rafah crossing is not the only way out of the Gaza Strip: Gaza's seaports and airports have been closed by Israel and the land crossing at Erez is operated by Israel and under its control. At present, Erez is primarily used for travel by non-Palestinians, mostly foreign nationals who arrive in Israel by air and land and continue to Gaza.

We have further seen that in crisis situations, Israel has allowed Palestinians to travel abroad via Erez and on to Allenby Bridge.

18. Israeli NGO Gisha has told the undersigned that even in the current crisis, arrangements have been made for several Palestinians to travel abroad via Allenby Bridge and vice versa.

Exhaustion of remedies

19. On July 17, 2007, the Petitioner contacted HaMoked: Center for the Defence of the Individual. On the same day, July 7, 2007, the Petitioner, via HaMoked, contacted the Coordinator of Government Activities in the Territories (COGAT), Major General Yosef Mishlav and the Erez DCO humanitarian desk, which belongs to Respondent 1, asking to coordinate her travel to Egypt via Allenby Bridge and Jordan.

HaMoked stressed the urgency of the matter in its letter and emphasized that the Petitioner had to arrive in Egypt no later than August 1, 2007. HaMoked requested an answer by July 24, 2007.

A copy of the letter to COGAT, Major General Yosef Mishlav is attached hereto and marked **P/9**. A copy of the letter to the Erez DCO humanitarian desk is attached hereto and marked **P/10**.

20. No response has yet been received with respect to the Petitioner's matter.

The Legal Argument

Non-response

21. One of the fundamental obligations imposed on an administrative authority is to process and respond to requests addressed to it within reasonable time and as required by the urgency of the matter (see Y. Zamir, **Administrative Power** (Vol. B, 5756) 717).
22. Respondent 1 has an obligation to process requests addressed to it fairly and as required by the circumstances of the case: "The competent authority must act reasonably. Reasonableness also means keeping to a reasonable schedule" (remarks of Justice Levin in HCJ 6900/93 **The Institute for Training Rabbinical Court Pleaders v. Minister for Religious Affairs**, IsrSC 48(4) 441,

451). "The obligation of due haste that is incumbent on an administrative authority is no more than the obligation to act reasonably" (HCJ 7198/93 **Mitral LTD. v. Minister of Industry and Trade**, IsrSC 48(2), 844, 853).

Discretion

23. As we have seen, Israel holds the key to Petitioner's travel abroad. The solution is realistic and has been implemented in similar cases both in the near and more distant past. The Respondents have the power to decide whether this solution will be made available to the Petitioner. This power gives rise to an obligation to use discretion and exercise it reasonably. On the one hand, offering the solution to the Petitioner does compromise any of Israel's security interests. On the other, denial will result in a severe violation of the Petitioner's rights.

Violation of the Petitioner's rights

24. Blocking the Petitioner's access abroad will not only impinge on her right to freedom of movement, itself a fundamental right upon which an individual builds her personal autonomy and paves her way in the world, but her right to education will also be violated as well as her efforts toward personal and professional advancement for her own sake and for the sake of the population she serves in her medical work.
25. Even after the disengagement plan was implemented, Israel continued to hold the Gaza Strip as a belligerent, occupying force, mainly as a result of its effective control over the Gaza Strip.

For more on this see a position paper by Gisha: **Disengaged Occupiers: The Legal Status of Gaza**, January 2007, available at:

http://www.gisha.org/UserFiles/File/publications_english/Publications_and_Reports_English/Disengaged_Occupiers_en.pdf.

26. Therefore, Israel has an obligation to ensure the welfare and safety of protected persons in the Gaza Strip. These obligations are enshrined in Articles 43 and 46 of the Hague Regulations and in Article 27 of the Fourth Geneva Convention.
27. This petition does not concern the status of the Gaza Strip. This is not the venue for clarifying this question of principle, a question which will be answered by the suitable international institutions. This petition concerns the Respondents' responsibility to provide a solution that gives the Petitioner and the Palestinian population in the Gaza Strip some way to exit the Gaza Strip.
28. In any event, there is no need for the law of belligerent occupation to establish the right to freedom of movement, the right to education, the right to dignity and the other important rights that depend on them.
29. Basic Law: Human Dignity and Liberty, which the Respondents must uphold with respect to any person suffices. Take away a person's right to travel, and you have violated her human dignity.
30. The Respondents carry Israeli constitutional law in their backpacks wherever they go - whether it is in an occupied territory or any other territory. Their obligation, under international humanitarian law, to prevent harm to civilians is not restricted to the unique situation of an occupied territory.
31. International human rights law is also relevant to the matter at hand, as Israel is a signatory to these instruments and has an obligation to uphold them.

On this issue see for example, Articles 12 and 13 of the Universal Declaration of Human Rights, 1948; Articles 12 and 17 of the International Covenant on Civil and Political Rights, 1966; Article

12 of the International Covenant on Economic, Social and Cultural Rights, 1966; Article 24 of the Convention on the Rights of the Child, 1989.

32. Freedom of movement is not a right like any other, as freedom of movement is the key to the fulfillment of fundamental human rights: the right to medical care, the right to family life, the right to education, the right to religious worship and more. The right to travel abroad is so essential and so significant that any restriction thereof must be made for individual, substantial reasons and there is no possibility of denying it entirely for a lengthy period of time.
33. There are about a million and a half people living in the Gaza Strip. The notion that it is possible to deny their travel abroad in any way, even in special cases, is entirely absurd. It does not only contradict the spirit of the Fourth Geneva Convention, it contradicts the entire concept of human rights.
34. Israel can and must find a temporary solution pending permanent arrangements to which the parties agree in future. Some of the solutions are already familiar from the above mentioned HCJ 11714/04. The Petitioners have mentioned the "shuttle" to the Allenby Bridge border crossing. A variety of other solutions can be considered, but the Respondents prefer to eschew their responsibility.

The nature of the right: travel abroad through Israel

35. This petition concerns the Petitioner's right to travel abroad, travel which is currently only possible on land and through the State of Israel. Aside from the fact that Israel's actions are the reason the Petitioner cannot travel abroad via other routes (such as sea or air); aside from the fact that the decision whether or not to give the Petitioner a way out must be made using proper administrative discretion; aside from the fact that Israel has a special obligation toward residents of the OPT - aside from all these, the matter herein concerns a right that is recognized in customary international law.
36. **The right of transfer, or the right of transit**, is recognized in international law. We shall elaborate on this right:
37. The approach that people are entitled to present a state with a legitimate demand to travel through it can be found in scripture:

Let me pass through thy land: we will not turn into the fields, or into the vineyards; we will not drink of the waters of the well: but we will go along by the king's high way, until we be past thy borders. (Numbers 21, 21 [sic]).

Denial of such a demand is considered as arbitrary and as justifying war.

38. **International law recognizes the existence of a right of transfer which limits the principle of sovereignty to some extent.** A state is obliged to allow passage through its territory to foreign subjects wishing to arrive at a different country. The right of transfer exists if passage is necessary (even if there are alternatives) and if it does not harm the state in whose territory it takes place. Transit may be subject to conditions whose purpose is to protect the legitimate interests of the country being traversed.
39. The right to transit naturally follows from the very existence of an enclave, as described by the scholar d'Oliveir Ffran (p. 43 in Winokurow's book):

The law would not recognize the right of state A to a detached piece of its territory enclaved in state B's unless it was possible for state A to use that right. The existence of a right implies its exercise: without a right of free communication the rights of a state to its exclaves would be incapable of exercise and therefore nugatory. Hence there is no need for an express treaty between the two states concerned to give such a right: it is implicit in the very existence of the enclave. If a treaty is made, it may well regulate the exercise of this international way of necessity: but in its absence the right of way will still exist, for the necessity is still in being.

(d'Olivier Farran, C. (1955), International Enclaves and the Question of State Servitudes, *The International and Comparative Law Quarterly*,⁴ (April) 297, pp. 304).

The right of transit also exists where there is no proximity. Classic cases, in the context of which the right of transit developed, are cases of **land locked states** (such as Switzerland and the Caucasus), **enclaves** surrounded by another state (such as West Berlin prior to the unification of Germany and Mount Scopus between 1948 and 1967) and **geographically split states** (such as the Palestinian Territories).

A copy of an extensive paper by the scholar Lauterpacht on this matter is attached hereto and marked **P/11**.

40. Lauterpacht describes the right of transit as follows:

On that view, there exists in customary international law a right to free or innocent passage for purposes of trade, travel and commerce over the territory of all States – a right which derives from the fact of the existence of international community and which is a direct consequence of the interdependence of States.

See **P/11**, p.320.

Lauterpacht bases the customary nature of the right of transit on manuscripts by scholars from the days of Grotius to the modern age as well as state practice. He proves that the fundamental principle of the right of transit is uniformly repeated in countless bi-lateral and multi-lateral treaties (the earliest treaties he mentions are from the eleventh century), which regulate the concrete implementation thereof in different contexts: passage on rivers, waterways and land passage through the territories of various countries. He demonstrates how the same logic was applied to sea routes.

Among the more modern and extensive treaties, as far as the number of parties, one may note the Convention on the High Seas (1958) (Article 3 regarding the right of access to the sea of states with no sea coast); the Convention on the Territorial Sea and Contiguous Zone (1958) Articles 14-24 regarding innocent passage through territorial waters); the UN Convention on the Law of the Sea (1982) (Article 125 regarding the right of access to the sea and freedom of passage and the GATT (Article V regarding the right of passage).

41. The right of transit is subject, as stated, to the absence of harm to the state being crossed. For this purpose, the right may be subject to payment for expenses involved in passage itself; requirements

such as quarantine in order to prevent the spread of disease etc. As for security considerations, Lauterpacht writes:

In terms of the problem of transit, there is room for the view that States are not entitled arbitrarily to determine that the enjoyment of a right of transit is excluded by considerations of security. What they may do is, by reference to the factor of security, to indicate one route of transit in preference to another or, possibly, to allow the use of the route subject only to certain conditions. But it must be doubted whether the discretion of the State stretches beyond this.

(P/11, p. 340)

42. This approach is also reflected in treaties which enshrined the general principle of the right of transit in concrete circumstances. The right of transit does not cease to exist in states of emergency, nor in times of war, but it may be proscribed in accordance with circumstances. The proscription has to be as minimal as possible – in terms of both scope and duration.

Relevant provisions may be found in the New York Convention on Transit Trade of Land-Locked States, 1965). The full text of the Convention is available at:

<http://www.austlii.edu.au/au/other/dfat/treaties/1972/4.html>

Article 12 - Exceptions in case of emergency

The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency endangering its political existence or its safety may, in **exceptional cases and for as short a period as possible**, involve a deviation from the provisions of this Convention on the understanding that **the principle of freedom of transit shall be observed to the utmost possible extent during such a period**.

Article 13 - Application of the Convention in time of war

This Convention does not prescribe the rights and duties of belligerents and neutrals in time of war. The **Convention shall, however, continue in force in time of war so far as such rights and duties permit**.

Conclusion

43. The current Rafah crossing crisis does not permit Israel to remain indifferent to the consequences of turning the Gaza Strip into a jail and its residents into prisoners. Israel may not remain indifferent to the Petitioner's requests to travel abroad using an alternative route in order to avoid shutting down her options for academic education and making the efforts she has put into her studies come to naught.
44. The Respondents must respond to the request addressed to them - and grant it. They must implement, at least in this case, the solution they have implemented more than once before, and allow the Petitioner to arrive to her exam and her studies in Egypt via the Erez and Allenby Bridge crossings.

This petition is supported by an affidavit and power of attorney signed before an advocate in the Gaza Strip and sent to the undersigned by fax, following coordination over the phone. The Honorable Court is

requested to accept this affidavit and the power of attorney, also sent via fax, considering the objective difficulties with respect to client-counsel meetings.

In light of all the above, the Honorable Court is requested to issue an *Order Nisi* as sought and after hearing the Respondents' response, render it absolute. The Honorable Court is also requested to order the Respondent to pay for Petitioners' costs and legal fees.

July 25, 2007

Abeer Jubran, Adv.
Counsel for the Petitioners

[Moked file 51308]