At the Jerusalem District Court Sitting as a Court for Administrative Affairs

AP 1747-01-14 A. et al. v. Ministry of the Interior

External file:

Before: **Honorable Judge Nava Ben Or**

The Petitioners:

1-6. Anonymous
7. HaMoked for the Defence of the Individual
Represented by counsel Adv. Noa Diamond and Adv. Sigi Ben Ari

v.

The Respondent:

Ministry of the Interior
Represented by Jerusalem District Attorney;s Office (Civil), Adv. Shani Yanai

Judgment

This petition concerns respondent's decision to deny petitioner 1's application to arrange the status in Israel of his wife, petitioner 2, due to indirect security preclusion.

The relevant Facts

1. Petitioner 1 (hereinafter: **petitioner 1**), born in 1971, is a permanent Israeli resident. In 1996 he married petitioner 2 (hereinafter: **petitioner 2**), resident of the Area, born in 1976. The petitioners have four children (petitioners 3-7 *[sic]*). The children are registered in the population registry in Israel and are permanent residents.

2. In 1996 petitioner 1 submitted a family unification application for petitioner 2. Neither the security agencies nor the Israel Police objected the application, and they have reiterated this position throughout the years during which the application was in process.

3. In 2001 the application was approved, and the petitioners were referred to respondent's offices in order to realize the decision. Petitioner 2 received a DCO permit valid for one year. The permit was extended from time to time. The last permit was issued to petitioner 2 towards the end of 2007, and should have been valid until October 30, 2008. However, on July 6, 2008 an opinion of the Israel Security Agency (ISA), concerning an indirect security preclusion regarding petitioner 2 was transferred to respondent's offices. The preclusion derived from the involvement of petitioner 2's sister and brother in law in activity in terror organizations. With respect to the sister, an open paraphrase which was given to the petitioners, for their review, stated that she "was mentioned in an interrogation of a Hamas detainee as having been involved in activity in the 'Al Kutla al-Islamia' organization when she was a student in Birzeit university". With respect to the brother in law it was stated that "there is ample negative security information about him", and the paraphrase continues to specify his involvement in terror activity in Hamas, including a statement concerning his willingness to act as a suicide bomber in a terror attack. The brother in law was even incarcerated as a Hamas activist from January 13, 1998 through April 17, 2001 (Exhibit 14/1 of the statement of response).

   In view of the above, on July 14, 2008 petitioner 2 was requested to leave Israel.

4. An appeal which was submitted by the petitioners against said decision was rejected. Hence, on November 19, 2008, the petitioners filed an administrative petition (AP 8951/08). On April 3, 2009 the petition was consensually deleted, after the respondent has transferred for the review of petitioners' counsel a copy of an administrative detention order which was issued against petitioner 2's brother in law and a copy of a decision of the military court, which affirmed the order.

5. On February 13, 2011 the petitioners wrote to the respondent and requested to have a hearing, following the judgment of the Supreme Court in AAA 1038/08 **State of Israel v. Ghabis** (dated August 11, 2009), which held that when the respondent intends to deny a family unification application for security or criminal reasons, he should hold a hearing for the applicants, prior to making a decision. The respondent rejected this request in a letter dated March 8, 2011, based on the argument that in the petition which was filed by the petitioners, their arguments were examined and respondent's position was specified in response to the petition. The respondent was of the opinion that there was no justification to give the petitioners another chance to present their arguments (Exhibit 15/2 to the statement of response).

6. On December 20, 2011 the petitioners submitted a new family unification application.

   The ISA reiterated its objection due to indirect security preclusion, because of the information regarding petitioner 2's sister which was specified above, as well as because of the information regarding the brother in law. With respect to the brother in law additional information was provided according to which he was put again under administrative detention in 2009 as well as between June 2011 and May 2012, against the backdrop of his activity in Hamas.

7. The respondent notified the petitioners that he intended to deny their application in view of the above security information. After petitioners' arguments were heard, the respondent notified, on October 28, 2012, that he has decided to deny the application and the appeal which was submitted with respect thereto (Exhibit 21 of the statement of response). In his decision the respondent writes that "**In view of the potential security risk posed by the family members of Mrs. Dawood we have decided, and it should be pointed out again, after the best interests of the state and its security were balanced against the right of Mr. and Mrs. Dawood to family life, to deny the application for security reasons**".

It should be added, that according to the statement of response, petitioner 2's brother in law is currently held, once again, in administrative detention, commencing from January 23, 2014. The order was approved by the military court on February 18, 2014. The military court held in its decision that the case concerned "**a senior Hamas activist, who has been recently, and even previously, involved in Hamas activity, the vast majority of which is organizational. The respondent acts vigorously to promote the objectives of the organization and its purposes, and by virtue of his senior position in the organization he has taken comprehensive and significant actions in this regard. In addition, the respondent has security relations with other conspicuous Hamas activists, which, on the one hand, attests to his senior position, and on the other, enables him to promote the activities and purposes which were assigned to him and which were undertaken by him within the framework of the organization…".**

8. On November 19, 2013 an appeal which was submitted by the petitioners against said decision was rejected, and hence the petition.

The decision of the Appellate Committee

9. The chair of the committee discusses in his decision the humanitarian rational underlying the willingness to grant status in Israel to a foreign spouse married to an Israeli citizen or permanent resident. On the other hand, section 3D of the Entry into Israel (Temporary Order) Law, 5763-2003 (hereinafter: the **Temporary Order Law**), provides that "A permit to stay in Israel shall not be granted to a resident of the region if the Minister of the Interior, or the region commander, as the case may be, has determined, pursuant to the opinion of authorized security agencies that the resident of the region or his family member are liable to constitute a security risk to the State of Israel".

Following his review of the privileged information the chair of the appellate committee found that the security information against petitioner 2's brother in law was particularly serious, and that over the years his activity in Hamas organization has increased. The case concerned significant administrative evidence, and the considerations which were considered by the respondent were relevant considerations only and nothing more. He has further held, that the decision was proportionate because there was a rational connection between said information and the decision not to enable petitioner 2 to stay in Israel, and because no other alternative would be effective. Thus, he has also held that the measure which was chosen, namely, the denial of petitioners' family unification application, was proportionate to the damage inflicted on them as a result thereof. Indeed, the damage is extensive, but on the other hand, a terror organization wishing to exercise its murderous activity, should not be allowed to cynically exploit family relations. The serious security information in the possession of the competent authority, particularly concerning the brother in law, poses a tangible and specific concern that petitioner 2 shall be used – even unwillingly – to promote the organization's objectives.

Petitioners' arguments

10. According to the petitioners, respondent's denial of the family unification application violates their right to live together as a family. In view of the fact that this is a constitutional right of the first degree, a greater weight should be given to it when balanced against conflicting interests of the authority. The petitioners also emphasize the principle of the child's best interest and the right of minor children to live with their parents.

The petitioners argue that the violation of the constitutional right for security reasons, imposes on the authority a particularly heavy burden of proof, and it must prove that the risk to public safety is

at a level of high probability almost reaching certainty, as held by the Supreme Court in HCJ 7444/03 **Dakah v. Minister of the Interior** (dated February 22, 2010). This applies even more forcefully when the case concerns a person whose application has been approved in the past and now wishes to extend the residency permit in his possession. The reason being, that under these circumstances, the interest of expectation for the realization of family life is very powerful. The petitioner s refer in this context to the above **Dakah**, according to which a person whose family unification application has already been approved and who resides in Israel by virtue of a permit which was granted to him, his application to extend the residency permit is subject to the first transitional provision in section 4(1) of the Temporary Order Law, pursuant to which the security preclusion consideration described in section 3D of the same law is only one of the host of the considerations that the Minister of the Interior should take into account for the purpose of deciding whether an existing residency permit in Israel should be extended.

The petitioners argue that the respondent has not properly weighed the fact that their family unification application was approved in the past. They also argue that the manner by which the security threat posed by petitioner 2's brother in law projects on the risk posed by petitioner 2 herself, has not been examined at all. The respondent failed to examine what was the probability that the brother in law would try to use petitioner 2 and what was the probability that the latter would cooperate with him. In this context it was argued, that the connection between petitioner 2 and her sister was relatively weak. They speak on the phone once every few weeks, and on the single times per year that petitioner 2 visits her mother's house, she occasionally meets her sister over there. Her connection with the brother in law is much weaker: petitioner 2 does not speak with him on the phone and hardly ever sees him in person.

Furthermore, petitioner 2 occasionally receives permits to visit Israel, and even has a magnetic card. These documents are given only to persons with respect of whom no security preclusion exists. The petitioners argue that this position is not coherent, and that it affects the reasonableness of respondent's position.

Finally, they argue that the respondent has not properly considered alternative means to achieve the security purpose underlying the preclusion.

11. The respondent sides with the decision of the chair of the appellate committee.

Discussion

12. With the consent of petitioner 2's counsel, I have reviewed the privileged information. With respect to petitioner 2's brother in law, there is significant, highly persuasive intelligence information concerning the senior position of the brother in law in Hamas organization. The brother in law has even expressed his willingness to act as a suicide bomber in a terror attack several times, despite the fact that in his interrogation he claimed that he was only bragging.

13. Indeed, as held by the Supreme Court in **Dakah**, the assessment of the risk posed by a person is a complex task. The concern that terror activists would try to use family members who obtained status in Israel in a family unification application, is a real concern. This concern is reflected in section 3D of the Temporary Order Law, according to which a security preclusion pertains not only to a direct security threat posed by the permit applicant himself, but also to an indirect security threat, posed by the family relations of the permit applicant with persons who put state security at risk. Nevertheless, the Supreme Court emphasized that the subject matter of the security preclusion is always the permit applicant himself. The purpose of the indirect security preclusion is not to

prevent the risk posed by the family member of the permit applicant, but rather to prevent the possible exploitation of the applicant by a family member who engages in terror activity for injurious purposes. Obviously, as stated in the judgment, the weight of the direct preclusion clearly exceeds the weight of the indirect preclusion, and this difference should be taken into consideration in the balancing between the security threat posed by the permit applicant and the extent of the violation of the right to a family.

Therefore, the Supreme Court continues to state, that when the security preclusion is indirect, the risk should be carefully assessed and attributed its relative proper weight, and not beyond that. A sweeping conclusion, according to which any permit applicant who is related to a person who is involved in terror activity is disqualified for family unification purposes, should not be made. The decision maker must examine what is the probability that the permit applicant himself will be subject to influence and pressure by his family members, and pose a direct security threat. This examination will be made – to the extent possible – based also on objective information including the existence or absence of information which ties the permit applicant himself to anti-Israel activity, the strength of the connection between the permit applicant and his family members to whom activity in a terror organization is attributed, etc. Furthermore, there is a difference in weight and strength between an injury caused to an existing family unit which has already been unified and the continued existence of which is currently applied for, and an injury caused to a family, the family unification application of which has not yet been approved. The injury in the first case is much greater, as it entails the dissolution of the family unit or the removal of the entire family from its home in Israel. In this case one should take into consideration, *inter alia*, the number of years during which the permit applicant resided in Israel, the extent of his integration, the size of his family, the entire implications of the separation of the spouses on the future of the family and the children etc.

14. From the privileged information I learnt that the respondent took into consideration the security concern, but I did not find that the gamut of balancing concerns were sufficiently weighed *vis-à-vis* said concern, namely, that the case concerns an indirect security preclusion of an applicant whose family unification application has already been approved in 2001 and who has been residing in Israel since 1996. I did not find that any weight was given to the passage of time, the extent of petitioner 2's integration in Israel, the impact of the decision on the family unit, the existence or absence of indications arising from the nature of her relations with the sister and brother in law, and her own conduct related to activity against Israel – if any. In other words, I am of the opinion that the guiding principles established in **Dakah** have not been thoroughly examined, and that a distinction has not been drawn between **Dakah** and its facts, and the case at bar. In that case the Supreme Court accepted the petition under the terms specified therein, and *prima facie* it seems that the indirect security threat posed by the petitioner there was much higher. The chair of the appellate committee followed the respondent, and therefore, his decision does not take into account the gamut of the considerations which should have been balanced either.

15. It should be noted that respondent's counsel referred to my judgment in AP 21501-12-12 **Atuan v. Ministry of the Interior** (dated January 27, 2013). However, a review thereof shows that said case concerned a permit applicant whose family unification application had not yet been approved; whose presence in Israel was not as long as the presence of the petitioner before us in Israel; and data which indicated - ostensibly - of a higher risk posed by her family members who engaged in terror activity which could have materially projected on the risk posed by her due to said family relations.

16. Under these circumstances, I came to the conclusion that the petition should be accepted in the sense that the competent authorities should re-visit petitioner 2's matter according to the standards

which were established in the leading judgment of the Supreme Court in **Dakah**, and examine whether a less severe result than that which underlies this petition may be reached at.

17. Until respondent's renewed decision, petitioner 2 shall not be expelled from Israel, and following his decision – to the extent the application is rejected once again - petitioner 2 shall be given 30 days from the date the decision is delivered to petitioner 2's legal counsel, to enable her to exhaust the legal remedies should she wish to do so.

In view of the circumstances of the matter, no order for costs is given.

The Secretariat will deliver a copy of the judgment to the legal counsels of the parties.

Given today, 27 Nisan 5774, April 27, 2014, in the absence of the parties.

(signed)

Nava Ben Or, Judge