At the Supreme Court **HCJ 8681/14**
Sitting as the High Court of Justice

In the matter of:

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

2. **_____ Gavril, ID No. _____**
Resident of the Occupied Palestinian Territories

3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517**

All represented by counsel, Adv. Nasser Odeh (Lic. No. 68398) and/or Bilal Sbihat (Lic. No. 49838) 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 Abir Jubran-Dakawar (Lic. No. 44346)

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 of the West Bank Area

represented by the State Attorney's Office, Ministry of Justice
29 Salah a-Din 7 Machal Street, Jerusalem
Tel: 02-5419555; Fax: 02-5419581

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 permit petitioners 1 and 2 to travel from the West Bank to Jordan, through Allenby Bridge, to visit their family members who reside in Jordan, and enable petitioner 1 to obtain medical treatment over there;

b. why he should not give notice of the exact expiration date of the prohibition imposed on petitioners 1 and 2 to exit the West Bank;

c. why he should not explain his refusal to permit the exit of petitioners 1 and 2, and why he should not disclose the grounds and reasons for the refusal and the nature of the evidence underlying his said refusal.

The honorable court is requested to order the respondent to respond to the petition without delay, in view of the violation of petitioner 1's right to health and accessibility to medical treatment, and the violation of petitioners 1-2's right to family life, taking into consideration the time aspect when a prohibition on travelling abroad is concerned, and the implication of the passage of the time on the severity of the violation of the rights of petitioners 1-2. As stated by the court:

> With respect to the severity of the violation of the right – or the "proportionality" of the violation – the duration of the restriction should also be considered. The longer the duration of the restriction imposed is, the greater the infringement on the right becomes. A restriction imposed on the right to exit the country for several days is not similar to a restriction for several months or even years.
>
> (HCJ 4706/02 **Salah v. Minister of Interior**, IsrSC 56(5) 695 (2002); and see also: HCJ 6358/05 **Vanunu v. GOC Home Front Command**, TalSC 2006(1) 320, 331; and HCJ 1890/03 **Bethlehem Municipality v. State of Israel**, IsrSC 2005(1) 1114, 1127).

On December 10, 2014, the respondent gave notice that there was no preclusion which prevented the petitioners from leaving their country. However, when petitioner1 arrived at Allenby bridge on December 14, 2014, he was prevented from going abroad by respondent's representatives, despite the fact that he was notified that the preclusion was removed, and despite his age and medical condition.

The Factual Background

1. Petitioners 1-2 (hereinafter collectively: the **petitioners**), born in 1941 and 1945 respectively, are spouses, residents of the Occupied Palestinian Territories (OPT) who live in the Qalqiliya district. The spouses have ten children.

2. Petitioner 1, a 73 years old man, suffers from an enlarged prostate gland as a result of a benign growth which does not respond to medication. Therefore, petitioner 1 needs surgery which he wishes to undergo in a hospital in Jordan.

3. In addition, the petitioners wish to exit their country to visit the two brothers of petitioner 1 and the five brother of petitioner 2, who live in Jordan. It should be noted that petitioners' family members do not hold Palestinian identification cards, and therefore, according to respondent's procedures, are unable to enter the West Bank.

4. The spouses may also wish to visit their son _____, who was removed to the Gaza Strip in the framework of the "Shalit Transaction". It should be noted that a son was born to petitioners' son a year and a half ago, petitioners' grandson, whom the petitioners have not yet met.

5. It should be noted that in the past the petitioners left their country without any restrictions to visit family members. Petitioner 1's last exit was about two years ago, and petitioner 2's last exit was about three years ago.

6. The petitioners have never been detained or interrogated.

7. Petitioner 3 (hereinafter: **HaMoked**) is a registered not-for-profit association located in Jerusalem, which acts to promote the human rights of Palestinians in the OPT.

8. The respondent is the military commander, in charge of the West Bank area on behalf of the State of Israel, which holds the West Bank under belligerent occupation for over forty seven years.

Ban on travel abroad in the OPT

9. 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.

10. 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.

11. 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.

12. 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

13. 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.

14. The decision to prevent a Palestinian from leaving his country and the decision in the objection 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 hearing and without giving the person concerned the right to raise his arguments.

15. 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 objection, which will be reviewed within a protracted period of **eight weeks**.

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

17. One of the underlying principles of good governance is the provision of reasoned answers: in our case, the answers to objections 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

18. 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 objections within a period of time not exceeding eight weeks at the utmost. 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.

19. On January 10, 2012, the respondent notified that as of that date applications for information regarding the existence of an exit ban, and objections, 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.

20. 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.

21. 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 submit an

objection to 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.

22. **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 abroad, that he cannot leave his 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

23. On March 4, 2013, when the petitioners reached Allenby bridge on their way to Jordan, they were prevented from leaving by respondent's representatives.

24. On March 6, 2013, HaMoked submitted to the Qalqiliya DCO, on petitioners' behalf, an objection against the ban imposed on their exit, and requested to allow the petitioners to travel to Jordan so that their right to family life would not be violated.

    A copy of HaMoked's letter dated March 6, 2013, is attached and marked **P/1**.

    Copies of the application processing forms are attached and marked **P/2 A-B**.

25. On May 26, 2013, a response was received from the Civil Administration Public Liaison Officer, in which the latter informed that the preclusion which prevented petitioners' exit abroad was removed without any condition.

    A copy of the letter of the Public Liaison Officer dated May 26, 2013, is attached and marked **P/3**.

26. It should be noted that from the date on which the ban which prohibited their exit abroad was removed, the petitioners did not manage to go abroad due to their difficult economic condition. On September 23, 2014, after they have managed to gather the required amount for their trip, the petitioners reached again Allenby bridge on their way to Jordan, so that petitioner 1 would receive the required medical treatment and so that the petitioners would be able to meet their family members. At the bridge they were approached by an officer who demanded, as a condition for their exit abroad, that the petitioners sign an undertaking not to meet their son Jibril who was removed to the Gaza Strip in the framework of the "Shalit Transaction".

27. Petitioner 1 signed the document, but after he understood its contents, he wanted to revoke it and requested to receive the signed document to his possession. After a long wait the petitioners were informed by respondent's representatives on the bridge that they were precluded from going abroad. Contrary to respondent's procedures, the petitioners were not informed that they could submit, while still on the bridge, an objection against the preclusion.

    A copy of the "Procedure concerning the processing of Palestinian residents' applications to examine whether preclusion exists which prevents them from going abroad and the removal thereof", dated March 2011, is attached and marked **P/4**.

28. On October 1, 2014, HaMoked submitted, on petitioners' behalf, an objection against the ban imposed on their exit to DCO Qalqiliya. In its letter HaMoked explained the circumstances of the matter, attached medical records attesting to petitioner 1's medical condition, and requested to allow the petitioners to travel to Jordan, so that their rights to freedom of movement, accessibility to medical treatment and family life would not be violated.

A copy of HaMoked's letter dated October 1, 2014, is attached and marked **P/5**.

Copies of the application processing forms are attached and marked **P/6 A-B**.

29. According to respondent's procedures, he must respond to objections submitted by residents against the ban imposed on their exit abroad, within a period of eight weeks. Nevertheless, eight weeks passed and the respondent did not respond to petitioners' objections. Hence, HaMoked wrote again, on November 27, 2014, to DCO Qalqiliya, and requested to receive a response without any additional delay, or else, the petitioners would consider turning to court.

    A copy of HaMoked's letter dated November 27, 2014, is attached and marked **P/7**.

30. Another week passed and yet – no response has been received. Therefore, HaMoked wrote on December 4, 2014, for the third time, to DCO Qalqiliya, requested to receive a response to petitioners' objections without any additional delay, and notified that if a response was not received until December 10, 2014, the petitioners would consider turning to court.

    A copy of HaMoked's letter dated December 4, 2014, is attached and marked **P/8**.

31. On December 9, 2014, a soldier from the Civil Administration Public Liaison Officer's office notified HaMoked's representative, by telephone, that the ban on petitioners' travel abroad had been **removed** and that a written notice in that regard would be forwarded later that day.

32. On December 10, 2014, the Civil Administration Public Liaison Officer, Captain Eliran Sasson, sent written notice that petitioners' request to remove the ban on travel abroad had been **approved**.

    A copy of the Public Liaison Officer's letter dated December 10, 2014, is attached and marked **P/9**.

33. Therefore, on December 14, 2014, petitioner 1, a 73 years old man, reached Allenby Bridge, on his way to Jordan. Upon his arrival, the petitioner was stalled for several hours, after which, to his astonishment, respondent's representatives on the Bridge refused to let him exit.

34. On that very same day HaMoked's representative spoke on the telephone with the Civil Administration Public Liaison Officer, to find out what happened. In their conversation, Captain Eliran Sasson said that there was a mistake, and that he sent a letter according to which the ban on petitioners' travel abroad had been removed while in fact the ban remained in force(!)

35. In view of respondent's outrageous conduct, the time that passed and obviously, in view of petitioner 1's medical condition, the petitioners had no alternative but to turn to the court.

The Legal Argument

36. 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.

A. <u>The normative framework</u>

37. 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)).

And the above is well entrenched in international law and the case law of this honorable court (see for instance: Article 12 of the International Covenant on Civil and Political Rights, 1966; Article 43 of the Hague Regulations; HCJ 393/82 **Jam'iat Iscan v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 37(4) 785, 797 (1983); 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. 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)).

39. 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 powers conferred upon him under **international law**. 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.

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

40. Article 78 of the convention defines and conditions the scope of the military commander's discretion when taking security measures against protected persons, on the existence of an **imperative security need** when properly balanced against the violated rights.

> 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; N.O.).

41. 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; N.O.).

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)).

42. 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.

43. It should be noted that despite the fact that the West Bank is a closed military zone, the declaration was not coupled by any provision which banned the exit there-from abroad; According to the military legislation in the West Bank, the mere declaration of a certain area as a closed military zone does not limit a person's right to exit or enter said area, and for that purpose the military commander must issue specific provisions for each and every zone (section 318(b) of the Order concerning Security Provisions [consolidated version](Judea and Samaria) (No. 1651), 5770-2009).

And indeed, the respondent himself declared in his response dated July 25, 2007, in the above HCJ 8155/06 that the military commander of the Area decided not to demand specific permits for travelling abroad.

44. In 1995, the military commander issued the proclamation concerning the Implementation of the Interim Agreement (Judea and Samaria) (No. 7), 5756-1995, which incorporated the Oslo Accords between Israel and the PLO into the military legislation in the West Bank, and made the provisions of the Accords part of the prevailing law of the OPT.

45. Annex V of the first addendum to the Accords established various provisions concerning travelling abroad from the OPT, and has, inter alia, regulated the power to prevent a person from going abroad Section 4(b)(3) of the 9th part of the Annex, provides that the exit of an individual from the OPT may be limited only by order (or in the course of detention or due to absence of documents).

B. <u>An extreme and disproportionate infringement; A sweeping ban to exit without a known timeframe</u>

46. It should be remembered that the denial of petitioners' right to travel abroad, while severely infringing on their liberty and dignity as human beings, results in the petitioners being **in fact imprisoned within the West Bank area for an unknown period of time**.

47. 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; N.O.).
>
> (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).

48. Various statutory provisions confer upon governmental officials the authority to restrict the right to leave the country. However, the vast majority of these statutes consist of the demand to time-limit such restriction. 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.

49. 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).

50. 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).

51. 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;

52. 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).

53. 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.

54. 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; N.O.).

55. The respondent wishes to turn the law upside down, and to disavow of his obligations as an administrative authority. His decision to ban petitioners' 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.

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

C. Respondent's obligation to specify the grounds for his decision as an inherent part of petitioners' right to have a hearing

57. The petitioners, whose rights were restricted following respondent's decision, are entitled that the decision in their case be made in a proper administrative manner and that the grounds for the decision to restrict their 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; N.O.).

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; N.O.).

58. The obligation to give reasons does not apply only by virtue of this procedure or another, and this is not a formal matter: this is an obligation 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.

59. 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).

60. This basic right, which imposes clear obligations, 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).

61. The importance of the obligation 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.

62. 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;** and HCJ 10104/09 **Abu Salameh v. Military Commander of the West Bank**.

63. 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.

D. The infringement on petitioners' rights

(i) The right to freedom of movement

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

65. 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.

66. 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).

67. 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)).

68. 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)).

69. 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)).

70. 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) Petitioners' right to family life

71. The petitioners wish to visit their family members who live in Jordan. This case concerns the basic realization of the very center of the right to family life.

72. The right to family life, which consists of a person's right to maintain his relations with his parents and siblings, is a recognized right by both Israeli and international law. Said right imposes on the respondent an absolute and clear obligation to respect and maintain petitioners' family unit.

73. Regulation 46 of the Hague Regulations, which constitutes international customary law, provides:

> Family honor and rights, a person's life, personal property as well as religious faiths and worship customs must be respected.

74. Customary international humanitarian law also emphasizes, in Rule 105 of the Red Cross (ICRC) study, as follows:

> Family life must be respected as far as possible
>
> (Henckaerts J.M. Doswald-Beck L. Customary International Humanitarian Law. Vol I: Rules. ICRC (2005). pp. 379-383).

And the honorable court has repeatedly held that:

> Israel is obligated to protect the family unit under international treaties.
>
> (HCJ 3648/97 **Stamka v. Minister of Interior**, IsrSC 53(2) 728, 787).

And see also:

Article 27 of the Fourth Geneva Convention 1949;
Article 10(1) of the International Covenant on Economic, Social and Cultural Rights 1966;
Articles 17 and 23 of the Convention on Civil and Political Rights 1966;
Article 12 and Article 16(3) of the Universal Declaration of Human Rights 1948;
Article 12 of the European Convention on Human Rights 1950.

75. The Supreme Court has emphasized time and again the great importance of the right to family life in many judgments, and especially in **Adalah** (HCJ 7052/03 Adalah v. Minister of Interior, TakSC 2006(2) 1754).

Thus, for instance, writes the honorable President Barak, in paragraph 25 of his judgment:

> It is our main and basic duty to preserve, nurture and protect the most basic and ancient family unit in the history of mankind, which was, is and will be the element that preserves and ensures the existence of the human race, namely the natural family…
>
> Family relations... underlie Israeli jurisprudence. The family has an essential and central role in the life of the individual and in the life of the society. Family relations, which are protected by the law and which the law seeks to develop, are of the strongest and most meaningful in a person's life.

76. The right to family life consists of the right of every person to take part in the life of his immediate family. The respondent severely violates the right of the petitioners and their family members to family life by separating them from each other and by preventing the petitioners from exercising their right to take part and share the life of their family members.

77. The House of Lords in Great Britain also emphasized in its judgments that the right to family life was a natural right, essential for the realization of the autonomy and liberty of any person, as such:

> Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives.
>
> (Huang v. Secretary of State for the Home Department [2007] UKHL 11, [2007] 2 AC 167, para.18).

(iii) Petitioner's right to health and accessibility to medical treatment

78. As aforesaid, petitioner 1, an elderly man, suffers from an enlarged prostate gland as a result of a benign growth which does not respond to medication. Therefore, petitioner 1 needs surgery which he wishes to undergo in a hospital in Jordan. The respondent prevents the petitioner from leaving to Jordan. In so doing he violates petitioner's fundamental right to health and medical care. Said conduct runs contrary to the rules of international law and human rights law and does not reconcile with the protection afforded to population under belligerent occupation.

See on this issue:

Article 25 of the Universal Declaration of Human Rights 1948;
Articles 7, 11 and 12 of the International Covenant on Economic, Social and Cultural Rights 1976;
Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination 1965;
Articles 10, 12 and 14 of the International Convention on the Elimination of All Forms of Discrimination against Women 1979; and
Article 24 of the Convention on the Rights of the Child 1989.

Many scholars clarified the great importance of said right, which derives from the right to life:

Jamar S.D. "The international human right to health" Southern University Law Review, Vol 22, No. 1, Fall, 1994;

Evans T. "A human right to health?" Third World Quarterly, Vol 23, No. 2, 2002, pp. 197-215; and

Kinney E. D. "The international human right to health: What does this mean for our nation and world?" Indiana Law Review, Vol 34, 2001, pp 1457-1474

79. The UN Committee for the Covenant on Economic, Social and Cultural Rights, explicitly emphasized the obligation of the party states to enable actual physical accessibility to the fundamental right to health:

> Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population… States should refrain… from limiting access to health services as a punitive measure, e.g., during armed conflicts in violation of international humanitarian law.
>
> (UN CESCR General Comment No. 14 (2000), The right to the highest attainable standard of health (August 2000)).

80. Said obligation also stems from Article 27 of the Fourth Geneva Convention, which establishes the basic obligation to treat protected residents humanely, and protect their dignity:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights… They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof…

81. The right to life as well as the right to receive medical treatment which is derived there-from, constitute part of international human rights law and appear in three covenants which were signed by the state of Israel. It should be emphasized that a state is obligated to act according to

international human rights law also in a time of war (see HCJ 3239/02 **Marab v. Military Commander in Judea and Samaria**, IsrSC 57(2) 349).

82. The right to life is also entrenched in section 2 of the **Basic Law: Human Dignity and Liberty** which provides as follows: "There shall be no violation of the life, body or dignity of any person as such." Section 4 of the Basic Law provides further that: "All persons are entitled to protection of their life, body and dignity."

83. The right to health is the infrastructure from which – according to human rights law - all other rights arise, civil and economic. Almost all other human rights are premised on the right to health, which enables a person to live full life with his family, to continue to provide for his family and take care of his children and parents. Hence, the obligation of the state arises to enable the active realization of said right and in any manner whatsoever.

84. **The right to bodily integrity, to health and life which consists of the right to receive medical treatment**, are fundamental rights granted to any person, as such. As stated by the honorable President (*emeritus*) Barak:

> As we have seen, embedded in human dignity is the protection of minimal human existence (HCJ 161/94 **Atari v. State of Israel** (not reported)… a person who has no access to elementary medical treatment is a person whose human dignity was violated.
>
> LCA 4905/98 **Gamzo v. Yeshayhu**, IsrSC 55(2) 360, 376).

85. A central aspect of the right to health **is the right of a person to choose the physician who will provide him with the medical treatment he needs**. As stated by the honorable Justice M. Elon:

> In the world of Jewish law, it is not only incumbent on a sick person to receive medical treatment, but it is his fundamental right to be treated by a physician who enjoys the patient's trust and who was chosen by the patient.
>
> (CA 506/88 **Shefer v. State of Israel**, IsrSC 48(1) 87, 113 (1993)). See also: LCA 7757/95 **Nordan v. Hatab**, TakSC 96(1) 643 (1996)).

In another case it was stated that:

> An established rule with us, by virtue of the principle of personal liberty of every human being, is that every person has a fundamental right not to suffer a bodily injury against his will and consent (HCJ 373, 370, 355/79, 391; CA 548/78, page 755). In said fundamental right is embedded the right of every person to choose and decide who, amongst the competent physicians, will provide him with the medical treatment he needs, since such choice and decision constitute an intrinsic part of his fundamental right for bodily and mental integrity and wellbeing, and not to suffer any "injury" without his consent.
>
> (CA 4/82 **State of Israel v. Tamir**, IsrSC 37(3) 201, 203 (1983)).

86. The committee for the examination of public health care and the status of the physician therein ("**Amorai Committee**") also discussed this issue, and in its report which was submitted in 2002, it was so written:

> The right to choose a physician is a derivative of the right to health, and for the full realization of the right to health, a person should be allowed to choose his physician. Moreover – the right to choose a physician may be regarded as the realization of the autonomy of the free will in the context of human dignity and liberty.
>
> (The report of the committee for the examination of public health care and the status of the physician therein, 159 (2002)
>
> http://www.health.gov.il/Download/pages/1-264.pdf

87. Relevant to this matter are the words of the Honorable Justice Rubinstein, in his position as Attorney General:

> Medical treatment is one of the most difficult and complex human obligations. It is unique, since it often involves a risk to the life of the patient, namely, it involves responsibility to a person's life. Therefore, a person who must undergo medical procedures – such as a difficult operation – which involve such a risk, as well as other procedures which may affect his body and quality of life, wishes to make inquiries about the professional skills of the treating physician, and have the ability to choose his physician according to his reputation.
>
> ("Private Medical Services (Sharap) or "Supplementary Medical Services (Sharam) in State Hospitals" (Attorney General Opinion February 14, 2002)).

Conclusion

88. The petitioners wish to exit their country and travel to Jordan, to visit their family members who live in Jordan, and so that petitioner 1 would be able to receive medical treatment over there. Respondent's refusal to enable them to exit the West Bank violates their right to free movement and all rights ancillary thereto.

89. By the outrageous conduct of the respondent, who failed to respond in a timely manner, and who notified that the preclusion had been removed but, in fact, prohibited petitioners' exit from their country, the respondent prevents the petitioners, sweepingly and absolutely, from leaving their country. Thus, the respondent turns the petitioners into prisoners in their own country. Respondent's decision which was delivered to the petitioners is not time limited, which puts them in a state of complete uncertainty. In so doing, the respondent critically violates their right to dignity and due process and their right to argue for their innocence.

90. Moreover – the respondent did not specify the grounds for his refusal to allow petitioners' exit to Jordan. Consequently, the petitioners had to turn to the honorable court, without having an actual opportunity to thoroughly consider their matter.

In view of all of the above, the honorable court is requested to issue an *order nisi* as requested, and after hearing respondent's response, to make it absolute. In addition, the court is requested to order the respondent to bear 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 petitioners and their legal counsels.

December 18, 2014.

_____
Nasser Odeh, Advocate
Counsel to the petitioners

[File No. 76862]