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At the Supreme Court
Sitting as the High Court of Justice

HCJ 3592/08

_____ **Hamidat et al.**
represented by Adv. Sigi Ben-Ari
Tel.: 02-6283555; Fax: 02-6276317

The Petitioners

- Versus -

Commander of the IDF Forces
in the West Bank et al.
represented by the State Attorney's Office
The Ministry of Justice Jerusalem
Tel.: 02-6466590; Fax: 02-6467011

The Respondents

Respondents' Preliminary Reply

1. In accordance with the Decision of the Hon. Justice Hayut of 17 April 2008, the respondents hereby respectfully submit their reply to the petition.
2. The petition concerns the petitioners' request of the Hon. Court to enable the transit of petitioners 1-3 from the Gaza Strip to the Judea and Samaria Region in order to enable them to participate in the wedding ceremony of petitioner 1 with petitioner 4, that is due to be held at Zurif village in the Judea and Samaria Region on 15 May 2008, **by issuing permits of entry into Israel.**
3. However, and although the petitioners do not explicitly so state in their petition, the explicit remedy sought by the petitioners at the top of their petition, namely permits for entry into Israel, is not the sole – or even the main – remedy that the petitioners, *de facto*, wish to gain. The careful reader of the petition discovers that although the respondents are being requested to allow **the bride and both her parents** (petitioners 1-3) to pass through Israel **in order to participate in the wedding ceremony**, arrangement of the return transit back to the Strip at the end of the ceremony is requested only for **the bride's two parents** (petitioners 2 and 3). The petitioners are not requesting to enable the return of the bride to the Gaza Strip at the end of the ceremony.

Hence, behind the declared remedy requested in the petition – the request to participate in the wedding ceremony – hides an additional pivotal intention of the petitioners, that is not specifically mentioned in their

petition for an order nisi as formulated at the top of the petition: This petition is in effect also aimed at allowing the bride to relocate – on a permanent basis – from the Gaza Strip to the Judea and Samaria Region.

4. This intention may also be inferred from the petitioners' arguments about the right to a family life and the right to choose one's place of residence, specified in sections 28-45 of their petition, even though, as aforesaid, the petitioners avoided in fact requesting the practical remedies necessary for the implementation of such request.
5. **With regard to the remedy sought in the petition, the respondents wish to emphasize that they will agree, *ex gratia*, to arrange the transit of petitioners 1-3 through Israel for the purpose of attending the wedding ceremony, but under the undertaking on their part, including on the part of petitioner 1, to return to the Strip upon the end of the ceremony, and subject to the deposit of a guarantee in the sum of NIS 20,000 to assure the return of petitioners 1-3 to the Strip.**
6. As elaborated further on, the respondents will request the Honorable Court to summarily dismiss the petition with prejudice, both for lack of clean hands, and due to the fact that the remedy requested in the petition, as it is formulated at the top of the petition, is not the full remedy that is in effect requested in the petition, **and because the remedy sought in the petition, as it is formulated at the top of the petition, is no longer relevant** in view of the respondents' agreement to allow the petitioners to enter Israel in order to participate in the wedding ceremony, as long as they return to the Gaza Strip at the end of the ceremony.

The respondents' position is presented below:

Dismissal of the petition with prejudice due to lack of clean hands and non-exhaustion of administrative remedies by the petitioners

7. We shall clarify that the respondents, of course, do not deny the petitioners' right to request of the respondents, and if need be also of the Hon. Court, to allow the petitioner to relocate from the Gaza Strip to the Judea and Samaria Region. Indeed, there is a legal controversy between the respondents and the petitioners on the issue of the legal framework applicable to a relocation from Gaza to the Judea and Samaria Region. All that is expected of the petitioners is that they expressly state – both in their application to the respondents and in the framework of the petition to this Honorable Court – that in fact a most pivotal remedy that they are seeking to achieve through the petition, is allowing the **permanent** residence of petitioner 1 in the Judea and Samaria Region.

The petitioners did not do so and the remedy petitioned for refers to transit for **the purpose of attending the ceremony**, and nothing more. This is how their petition for an order nisi is formulated. In these circumstances, the petition should be dismissed with prejudice for want of good faith. Insofar as the petitioners are interested in the respondents' allowing petitioner 1, a resident of Gaza, to permanently relocate to the Judea and Samaria region, they should

expressly so state in an orderly application to the respondents, through the Palestinian side, and in a petition to the High Court of Justice if necessary. As long as the petitioners do not do so, their petition is tainted by both non-exhaustion of administrative remedies (because they did not expressly state in their application to the respondents that one of their requests is to permit the petitioner's permanent residence in the Judea and Samaria region) and lack of clean hands (since, as aforesaid, the petition does not present to the Honorable Court all of the remedies sought, **as they truly are**).

In this context, we shall point out that in outstanding humanitarian cases, and in accordance with an application from the Palestinian side, the Military Commander may approve the relocation of a Palestinian resident from Gaza to the Judea and Samaria Region, despite the State of Israel's fundamental stand on this issue, as presented below. However, the military advocate general's office has communicated that no relocation application on behalf of the petitioners has been received from the Palestinian side – not even on special grounds. Therefore, the petition is tainted by non-exhaustion of administrative remedies with respect to the intention of petitioner 1 – which intention is, as aforesaid, not expressly formulated in the petition – to relocate to the Judea and Samaria Region.

8. On a side note, we shall point out that this petition is tainted by non-exhaustion of administrative remedies also with respect to the explicit remedy declared therein, despite the petitioners' arguments. The petitioners argue in their petition that when they approached the Civilian Committee in order to inquire about the reason for the delay in their request to coordinate the transit of petitioner 1 vis-à-vis the Israeli side, they were answered **that the Civilian Committee did not even approach the Israeli side in the petitioner's case**, because, as the Committee argued, the Israeli side had stopped taking requests from the Committee unless they involved cases of death. However, the military advocate general's office has communicated that Erez Coordination & Liaison Administration personnel, who are authorized to issue entrance permits from the Gaza Strip into Israel, are continuing to review each request forwarded to them from the Palestinian Civilian Committee, and have never informed the Civilian Committee that they are ceasing to handle its requests.

As no application to the Israeli side has been made in the petitioners' case by the authorized personnel on the Palestinian side, the petition is tainted by non-exhaustion of administrative remedies. In fact, the petitioners' correct opposing party is not the respondents at all but rather the Palestinian Civilian Committee. In this regard, it is inconsequential that the petitioners have independently approached the Israeli side with a request to grant an entrance permit into Israel since, as aforesaid, the entity authorized to make an application on this matter is the Palestinian Civilian Committee, as the petitioners were answered by the respondents.

Summary dismissal with prejudice of the "explicit" remedy sought in the petition, on grounds of irrelevance

9. Despite the aforesaid, the respondents, as stated above, do not oppose allowing the petitioners 1-3 to enter the Judea and Samaria Region through Israel, *ex*

gratia, as long as they undertake to return to the Gaza Strip at the end of the wedding ceremony, and subject to the deposit of a guarantee in the sum of NIS 20,000 on their behalf to assure their return to the Gaza Strip.

Therefore, the remedy requested in the petition should be summarily dismissed with prejudice on grounds of irrelevance.

Dismissal of the application to authorize the petitioner's relocation

10. Superfluously, we shall note that if the Honorable Court shall choose to hear the petition of petitioner 1 to permanently relocate to the Judea and Samaria Region, despite the fact that the petitioner did not explicitly make such a request to the respondents and to this Honorable Court, and despite the position of the respondents, who seek the summary dismissal of the petition with prejudice, also on its merits, this petition should be dismissed with prejudice.
11. Upon the IDF's entry to the Judea and Samaria Region and to the Gaza Strip in 1967, these areas were declared as closed zones, entry into and exit from which required permits from the Commander of the IDF forces in the Region, according to the Order Concerning the Closure of the Region (The Gaza Strip Region) (no. 144), 5728-1968, and the Order Concerning Closed Zones (The West Bank Region) (no. 34), 5727-1967.
12. Following the pronouncement of the Gaza and the Judea and Samaria Regions as closed, Gaza residents, who held an exit permit from the Gaza Territory, were given a general entry permit to the Judea and Samaria Region, by virtue of a General Entry Permit (Residents of Occupied Territories) (no. 5) (Judea and Samaria), 5732-1972. At the same time, a general exit permit from the Gaza Territory was issued, permitting residents of the Gaza Territory to exit it under certain conditions (General Exit Permit) (Gaza Strip) (no. 2), 5732-1972.
13. This general entry permit was suspended in the Instruction Concerning Suspension of the General Entry Permit (Residents of Occupied Territories) (no. 5) (Temporary Order) (Judea and Samaria), 5748-1988. **This suspending instruction, which forbids the residents of Gaza to enter the Judea and Samaria Region, and to stay there without a personal permit from the military commander or on his behalf, is still in force today.**
14. From the aforesaid it arises that in accordance with the security legislation in effect, the Judea and Samaria Region is a closed zone, entry into and exit from which are forbidden except by **a specific permit** by the Commander of the IDF forces in the Region or another authorized by him.
15. As for the Gaza Strip, as is known, in the months of August-September 2005 the State of Israel implemented the Plan for Disengagement from the Gaza Strip. Upon completion of the plan and after the last of the Israeli soldiers left the Strip, on 12 September 2005, a proclamation was issued by the Commander of the IDF forces in the Region, proclaiming the end of the military regime in the Region.

Relocation from Gaza to the Judea and Samaria Region

16. As described above, the Judea and Samaria Region has been declared a closed military zone. Therefore, anyone who is not a permanent resident of the Judea and Samaria Region is required to obtain a permit to enter and stay in the Region. Accordingly, also a permanent relocation from Gaza to the Judea and Samaria Region requires approval from the Commander of the IDF forces in the Judea and Samaria Region, pursuant to an application for a change of address that is forwarded by the Palestinian Authority on behalf of the resident.
17. Therefore, persons whose entry into the Judea and Samaria Region has been permitted, and who sought to **permanently** relocate to the Judea and Samaria Region, were required to obtain the respondents' approval therefore, and only after such approval was issued, was the relocation, in fact, effected and the permanent stay in the Judea and Samaria Region become legal.
18. The validity of a transit permit that is issued to persons who are not residents of the Judea and Samaria Region and **whose visit in the Judea and Samaria Region for such or another purpose** the military commander has decided to approve, expires upon the expiration of the permit, or when the purpose for which the permit was issued has been achieved, or when a closure is imposed. At such time the resident holding the permit is required to return to the region from which he came and his stay in the Judea and Samaria Region was no longer permitted. **Annulment of the transit permit obviously does not apply to a person whose relocation to the Judea and Samaria Region has been approved by the military commander, as such person then became a permanent resident of the Judea and Samaria Region, as also recorded in the Region's population registry.**
19. The Interim Agreement between Israel and the PLO did not change this state of affairs. The Interim Agreement was incorporated into the Region's legislation in a Proclamation Regarding the Implementation of the Interim Agreement (Judea and Samaria) (no. 7), 5756-1995.

Section 6 of the Proclamation stipulates that the Commander of the IDF forces in the Region shall continue to have powers and areas of responsibility, *inter alia*, within the areas of responsibility that were not transferred to the Council. **Section 6 of the Proclamation further stipulates that the determination by the Commander of the IDF forces that powers and areas of responsibility continue to be held by him, shall be decisive in this matter.**

20. The Interim Agreement does not directly address the issue of transit between the Regions for the purpose of settlement therein (it does address the technical aspect of the transit between Gaza and the Judea and Samaria Region, i.e. the safe transit). **The military commander's interpretation of the agreement was and is that the authority to approve permanent residence in the Judea and Samaria Region is held by him, as was the case before the Interim Agreement took effect.** This interpretation was presented to the Palestinian side immediately upon the implementation of the agreement and the parties so acted regularly until September 2000. Throughout those years

Israel used to approve relocation to and settlement in the Judea and Samaria Region, in accordance with applications passed on by the Palestinian Authority, and in the absence of a security impediment. In cases in which there was a security impediment, the State of Israel did not approve the relocation to and settlement in the Judea and Samaria Region.

In addition, in September 2000, in view of the outbreak of the security events, Israel stopped approving the transit of Palestinians from Gaza to the Judea and Samaria Region as well as relocation to the Judea and Samaria Region, other than in exceptional and humanitarian cases.

21. Therefore, the Respondents' requirement that a relocation from Gaza to the Judea and Samaria Region be made only with their approval is not a new requirement. This has been the respondents' practice for years, before the inception of the Interim Agreement and even following its inception, in coordination with the Palestinian Authority.
22. In view of the above, there is no flaw in the Respondents' position whereby their approval is needed for a relocation from Gaza to the Judea and Samaria Region, and that without such approval settlement in the Judea and Samaria Region is unlawful. The Respondents are authorized to approve or deny a relocation, and this authority has been exercised throughout the years prior to the Interim Agreement with the Palestinian Authority and throughout the years since the inception of the Interim Agreement in coordination with the Palestinian side, as specified above.

The Petitioners, as aforesaid, are not directly challenging this position of the Respondents by way of requesting a remedy in this matter, and may we remind again, that the "real" central remedy requested in the Petition is in fact the Petitioner's relocation to the Judea and Samaria Region.

23. On a side note, we would like to recall that the Petitioners' position states that the Judea and Samaria Region and the Gaza Strip are a single territorial unit and that therefore the two zones should be treated as a single territory. Therefore, according to the Petitioners' argumentation, a resident of Gaza does not need a permit at all for transit into or settlement in the Judea and Samaria Region. There was no room for these arguments even prior to the implementation of the Disengagement Plan, but now, as the legal situation has materially changed in the Gaza Strip, clearly these arguments by the Petitioners are certainly no longer valid.
24. It would not be superfluous to note that nowadays, following the IDF Forces' departure from the Gaza Strip, Israel no longer controls the border between the Gaza Strip and Egypt, and therefore it no longer controls, in practice, the entry of people and such and other means into Gaza. Accepting an argument whereby Israel is not allowed to prevent the passage of Gazans into the Judea and Samaria Region and their settling there, involves far-reaching risks from both the security and political aspects.

In these circumstances, **the Respondents believe that the Military Commander of the Judea and Samaria Region has vast discretion in**

deciding the permission of entry to those who are not registered Judea and Samaria residents, to the region. The same is true *a fortiori* in the case of a request to settle in the Judea and Samaria Region.

25. We will further point out that this matter of change of address from Gaza to the Judea and Samaria Region (unification of families in the region) is connected at its core **with the political relationship between Israel and the Palestinian Authority**. In other words, the manner of implementation of the Interim Agreement is a political issue, whilst individuals do not gain rights by virtue of the Interim Agreement in itself (compare: The judgment of the Hon. Justice Zamir in HCJ 2896/96 **Smahadna v. The State of Israel**, Takdin 96(2), 36; the decision of the Hon. Chief Justice Barak in FHH CJ 5744/96 **Karada v. Israel Prison Service**, Takdin 96(3), 1312; the judgment of the Hon. Justice Dorner in HCJ 8012/98 **Atar v. The Prime Minister of Israel**, Takdin 99(1), 494)
26. In any event, as mentioned above, following an inquiry conducted by the Respondents, and in accordance with automated data they have, **in the circumstances of the Petitioners' case, no request has ever been forwarded to the Respondents by the Palestinian Authority regarding the change of the Petitioner's address to the Judea and Samaria Region.** Furthermore, insofar as the Petitioners deem their case to be a special humanitarian one, no such request has been forwarded by the Palestinian side.

Therefore, and as this primary and preliminary condition has not been met, this Petition should be **summarily dismissed with prejudice** for this reason.

On this matter see, *mutatis mutandis*, the judgment of the Honorable Court in HCJ 4332/04 **Uda Nansi v. Commander of the IDF Forces** (unpublished), of 20 May 2004, which summarily dismissed, with prejudice, a petition concerning the issue of granting visit permits for the Judea and Samaria Region. The Court ruled there as follows:

"From the State's response to the Petition it appears that Petitioner 3 entered the region on 23 March 2000 based on a 3-month visit permit, and that since the permit expired he has been in the region without any permit. It further arises from the State's response that the Israeli liaison and coordination offices have received no request for the unification of families in the Petitioner's case up to the month of September 2000, at which time the State of Israel stopped accepting requests for the unification of families within the boundaries of the region, as had been arranged until that time in the Interim Agreement with the Palestinian Authority.

After having reviewed the petition and the State's response thereto, **we are convinced that the petition should be summarily dismissed with prejudice for lack of cause for the intervention of this Court in the respondent's decision.** Article 28(11) of Schedule I to

the Civil Annex to the Interim Agreement with the Palestinian Authority (Conventions 1071, Vol. 33, pp. 215) stipulates that the authority and discretion with regard to the forwarding of requests for the reunification of families within the boundaries of the region to the Israeli side, are vested in the Palestinian Authority, which is the one that decides whether to grant a permit for permanent residence, subject to the approval of the State of Israel. In view of the political-security situation in our region since September 2000, the operation of this mechanism that was stipulated in the article has been shut down and the Authority does not forward requests for the reunification of families in the region. In any case, **even if such a request was submitted to the Palestinian Authority before September 2000, as the Petitioners claim, no such request was submitted to the approval of the authorities in Israel, such that the Respondent was in any event unable to handle the Petitioners' case and no ground was laid for our intervention in the decision to expel the Petitioner 3 from the country.**"

(Emphases have been added, H.G)

See also, *mutatis mutandis*: H CJ 7607/05 **Jamal Mustafa Iusef Abdalla (Hussein) v. Commander of the IDF Forces in the West Bank, Takdin Elyon** 2005 (4), 2859, and H CJ 4332/04 **Uda Nansi v. Commander of the IDF Forces** (unpublished).

See also the judgment of the Hon. Justice Rubinstein in H CJ 8881/06 **Nagah v. The Civil Administration in Judea and Samaria** (unpublished – issued on 1 March 2007), as follows:

"We cannot grant the petition. As is well established it is not the practice of this Court to interfere with policy that has been adopted by government in accordance with the security situation and the development of relations between the Palestinian Authority and the State of Israel, with respect to the reinstatement of residence or applications for family reunification that pertain to the region (H CJ 2231/03 **Abed Rabu v. Commander of the Benjamin Division** (unpublished) (Justice Procaccia). This Court has emphasized more than once that "as long as the Palestinian Authority has not finished its handling of requests of the type submitted by the Petitioner and as long as the requests have not been submitted for the approval of Israel – the State of Israel is not the Petitioner's rival and any grievance in this matter should be directed at the Palestinian Authority" (H CJ 6788/02 **Kinana v. Commander of the IDF Forces** (unpublished) (Justice

Hayut). The Petitioner argues that the request that he submitted for the reinstatement of his residency has been handled by the Palestinian Authority and forwarded to the Israeli authorities, where the handling thereof has been frozen; but the Petitioner did not prove this argument; in his response, the Respondent emphasized that no request in the Petitioner's case has been forwarded by the Palestinian Authority, nor handled by the Joint Committee. **True, this is an ongoing situation of a relationship that is problematic – to say the least – between Israel and the Palestinian Authority, but there are minor channels that operate whenever necessary; and in any case, this state of affairs is not the responsibility of Israel and this Court is unable to intervene therein or change the same, apart from a dialogue with the authorities in particularly difficult humanitarian cases.**"

(Emphases have been added, H.G)

Conclusion

27. In conclusion, the respondents do not object to the "explicit" relief presented in the petition, namely: they do not object, *ex gratia*, to enable the transit of petitioners 1-3 from the Gaza Strip to the Judea and Samaria Region **for the purpose of attending the wedding ceremony of petitioner 1**, on condition that they undertake – all of them – to return to the Gaza Strip at the end of the ceremony and subject to the deposit of a guarantee in the sum of NIS 20,000 on their behalf, as a surety for said return.

The respondents object to the additional remedy that is derived from the request made in the petition, although it is not requested explicitly – to enable the petitioner to relocate from Gaza to the Judea and Samaria Region – both because of the lack of clean hands inherent in the failure to explicitly present this remedy in the petition, and because of non-exhaustion of administrative remedies regarding this relief, and on the merits.

In view of all of the above, the Honorable Court is moved to dismiss the petition with prejudice – summarily and on the merits.

Today, 30 Nissan 5768
 5 May 2008

(-) **Hila Gorni, Adv.**
The Office of the State Attorney